CLIENT ALERTS & INSIGHTS

Back To Wright Line: NLRB Resets Standards for Workplace Misconduct

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Key Takeaways

- The NLRB confirmed the validity of the employer friendly standard from *General Motors* regarding when an employee's abusive or offensive conduct does not qualify as protected under the NLRA, replacing the long-standing *Atlantic Steel* precedent.
- Under the implemented *General Motors* standard, the employee must show that the employer's adverse action against the employee was motivated by the employee's protected activity. At that point, the employer can show that it would have taken the action against the employee regardless of any protected Section 7 activity.
- Employers should ensure they consistently apply discipline and procedures, regardless of the context under which inappropriate, abusive, or offensive behavior arises.

Employers have regained greater flexibility to address offensive or abusive employee conduct that occurs during union activity or other activity protected by the National Labor Relations Act. On September 23, 2026, the National Labor Relations Board (the "Board") issued a significant decision in *Lion Elastomers LLC,* 375 NLRB No. 41, restoring the prior standard for evaluating discipline when employee misconduct occurs during protected concerted activity from *General Motors LLC,* 369 NLRB No. 127.

For decades, the Board used the four-factor test established in *Atlantic Steel Co., 245 NLRB 814 (1979*) to address such circumstances. Under *Atlantic Steel*,when an employee engaged in an abusive or offensive outburst while performing protected concerted or union activity under Section 7 of the National Labor Relations Act, the Board determined whether the conduct caused the employee to lose legal protection by evaluating: (1) the place of the discussion, (2) the subject matter, (3) the nature of the outburst, and (4) whether there was employer provocation.

In 2020, the Board under the Trump Administration in *General Motors* replaced *Atlantic Steel* with the *Wright Line* burden-shifting framework. Under the *Wright Line* mixed-motive framework, the Board treats misconduct as distinct from protected activity. *Wright Line* requires the NLRB General Counsel to make an initial showing: (1) that the disciplined employee was engaged in activity protected under the Act; (2) that the employer was aware of that activity; and (3) that the activity was a substantial or

motivating reason for the employer's action. Only after the General Counsel has made such a showing does the burden shift to the employer to prove it would have taken the same action even in the absence of the Section 7 activity.

However, in 2023, the Board under the Biden Administration sought to return to *Atlantic Steel*. The Fifth Circuit disagreed and directed the Board to apply *General Motors*, which culminated in the recent decision.

Practical Takeaways for Employers

The central question under the restored framework is: would the employer have imposed the same discipline if the employee had not engaged in protected activity? While this gives employers greater latitude to enforce workplace conduct standards when misconduct occurs during protected activity, it does not provide blanket authorization to discipline whenever protected activity becomes contentious. Employers should:

(1) carefully document the specific misconduct and distinguish it from the protected activity;

(2) show consistent treatment for similar misconduct occurring outside the protected activity context;

(3) review workplace conduct and anti-harassment policies to ensure expectations are clearly stated and applied consistently; and

(4) avoid disciplinary language suggesting frustration with union activity; instead, identify the specific misconduct and the neutral workplace rule violated.

The Benesch Labor & Employment Practice Group will continue to monitor developments and provide updates as appropriate. If you have any questions, please reach out to the team.