CLIENT ALERTS & INSIGHTS

NLRB Makes it Simpler to Discipline Profane or Abusive Employee Conduct

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On July 21, 2020, the National Labor Relations Board ("NLRB" or "the Board") issued its decision in General Motors LLC, 369 NLRB No. 127, reviving the Wright Line test and making it easier for employers to discipline an employee's abusive conduct without running afoul of the National Labor Relations Act ("NLRA" or "the Act"). The test is used to determine whether an employer has violated the Act by disciplining an employee who, while participating in activities protected by Section 7 of the Act, engages in abusive conduct. Abusive conduct includes the use of profanities, personal attacks, and racially or sexually offensive language. Under the Wright Line test, the NLRB General Counsel must 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 NLRB 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.

Before this decision, employees benefitted from the Board's legal presumption that their abusive actions were protected unless the employer could prove otherwise. Under the revived Wright Line test, however, there is no presumption that employees' abusive conduct is protected, and indeed, counsel representing the employee's position now bears the burden of making an initial showing. Each of these results favors employers. The Board's decision to revive Wright Line could not be more timely, particularly in light of social justice movements such as the Black Lives Matter movement, the #MeToo movement, and other causes that have the potential to increase social discord and tension in the workplace. Under this renewed standard, employers will regain the liberty to discipline abusive employee conduct without suffering from the Board's prior presumption that an employee's abusive conduct was protected unless that protection was lost. In addition, the Board's decision in General Motors to revive the Wright Line test applies retroactively, and all cases currently pending before the Board will be analyzed under this revived standard.

If you have questions, we encourage you to reach out to your Benesch contact or one of the below to discuss.

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