

# Electronic Alert

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## **The NLRB's New Standard for Addressing Employee Outbursts & Offensive Language in Connection With Protected Activity**

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After the National Labor Relations Board's (NLRB) recent decision in *General Motors LLC*, 369 NLRB No. 127 (2020), employees' outbursts or use of offensive language may no longer be protected by the National Labor Relations Act (NLRA).

### **The Old Way: Setting-Specific Standards**

The NLRA protects employees from being disciplined or terminated when they engage in "protected concerted activity," which commonly includes instances where employees openly discuss wages, hours, and other working conditions.

Under the old standard, the Board found employees who engaged in profane, racist, sexist, or abusive conduct towards management or non-picketing co-workers were engaged in protected activity because the NLRA must "take into account the realities of industrial life" and the fact that disputes over wages, hours, and working conditions are likely to "engender ill feelings and strong responses." The NLRB used "setting-specific standards" that weighed the employees' rights to engage in protected concerted activity against the employers' rights to "maintain order and respect."

### **Back to the *Wright Line* Standard**

But, last month the Board held that its patchwork of setting-specific standards "failed to yield predictable, equitable results." The Board also found that in light of other state and federal antidiscrimination laws, the setting-specific standards were "indifferent to employers' legal obligations to prevent a hostile work environment on the basis of protected traits." Now, rather than using various setting-specific standards, the appropriate test for determining whether an employer lawfully disciplined or discharged an employee who engaged in protected concerted activity comes from the Board's decision in *Wright Line*, 251 NLRB 1083 (1980).

Under the *Wright Line* burden-shifting standard, the Board determines if an employee's protected concerted activity is a "motivating factor" for the discipline or discharge. Then, the employer has the opportunity to show it would have disciplined or discharged the employee even if the employee was not engaging in protected activity. The Board believes this approach "promises more reliable, less arbitrary, and more equitable treatment of abusive conduct."

Employers should exercise caution when disciplining or discharging an employee due to an outburst or offensive language that involves wages, hours, or other working conditions.

*For questions about how to lawfully address employee misconduct, offensive language, or outbursts, contact Nicole Elgin at [nelgin@barran.com](mailto:nelgin@barran.com) or (503) 276-2109.*