

NLRB Update: A Move to a More Common Sense Approach in Dealing with Abusive Workplace Behaviors and Company Policies

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Practice Area: Labor and Employment

Continuing a trend of adopting a more common sense approach to balancing the rights of employees to engage in protected concerted activity accorded under the National Labor Relations Act (“NLRA”) with the right of an employer to maintain order in the workplace, in *General Motors, LLC*, 369 NLRB No. 127 (July 21, 2020), the National Labor Relations Board (“NLRB”) overruled a series of earlier decisions which the Board concluded had tipped the scale too far in the direction of protecting abusive behaviors on the work floor, in social media, and on the picket line. In another recent decision, *Nicholson Terminal & Dock Co.*, 369 NLRB No. 147 (July 30, 2020), the NLRB similarly adopted a more common sense approach to determining whether or not work rules which prohibit “moonlighting” interfere with an employee’s rights under the NLRA. This *Legal Update* will provide an overview of these recent developments, as well as their significance for employers.

General Motors, LLC – Dealing with Abusive Conduct.

Prior to *General Motors*, the NLRB had utilized a series of different tests to determine if conduct, otherwise conceded to be abusive behavior, was nevertheless protected, rendering discipline for such behavior unlawful under the NLRA. Under the test that had been set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979), the NLRB had applied a four factor test consisting of:

(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.

Applying the *Atlantic Steel* standard, the NLRB had frequently found that profanity laced outbursts by employees, as well as direct personal verbal attacks on supervisors and co-workers, were generally protected as long as the outbursts and attacks pertained to or arose in the context of a dispute over wages, hours, or terms and conditions of employment.

In rejecting the continued use of the *Atlantic Steel* test, the NLRB found that the first and second factors (place and subject matter of the discussion) unreasonably tipped the scale in favor of the employee at the expense of allowing an employer to maintain order in the workplace. The NLRB also found that its prior practice of adopting slightly different standards based on the specific context of the abusive behavior, i.e., whether it was on the plant floor, in social media, or on a picket line, created an untenable position for employers to know how they were allowed to address such behaviors.

In rejecting this earlier line of analysis, the NLRB determined that the more proper standard to apply was the standard set forth in *Wright Line*, 251 NLRB 1083 (1980).

Under *Wright Line*, it must be shown that:

1. the employee engaged in protected activity;
2. the employer was aware of the activity; and
3. that the employer had an animus against the protected activity.

Even if such a showing is made, an employer will not be found to have violated the NLRA if the employer can show that it would have taken the same action even in the absence of the protected activity. In other words, if the employer would have disciplined an employee for using profanity in venting over something not involving wages, hours or conditions of employment, it may lawfully discipline an employee who uses profanity while complaining about not getting a pay raise or promotion or being disciplined for some earlier offense.

While *General Motors* represents a significant improvement in the law as it pertains to an employer's ability to address abusive speech and other behavior in the workplace, as well as on social media, it should not be read as relieving an employer's obligation to both clearly communicate workplace expectations as to appropriate behavior and to be consistent in enforcing such standards. Indeed, consistency in enforcing such standards will be essential to showing that the same disciplinary action would have been taken regardless of the subject matter or context of the outburst or other abusive behavior. In order to make such an assessment, it is recommended that you consult with experienced labor counsel as to the steps necessary to ensure a proper and thorough investigation and analysis of the situation before you decide to discharge or otherwise discipline someone.

Nicholson Terminal & Dock Co. – Moonlighting Prohibitions.

In *Nicholson Terminal*, the NLRB rejected the holding of an Administrative Law Judge ("ALJ") which found that the employer's policy prohibiting employees from "moonlighting" – i.e., holding another job – violated the NLRA because it could be construed to prevent an employee from working on behalf of a union, including activity as a "salt," i.e., a union member who is paid by the union to take a job with a non-union employer the union is seeking to organize. While finding that the employer's rule could have perhaps been "better tailored" to make it clear the moonlighting prohibition was not intended to in any way restrict employees from union organizing, the NLRB concluded that such a prohibition was not obvious or intended and that it was improper for the ALJ to read such a prohibition into a generic rule against employees competing with their employer or otherwise diverting work from the company.

The significance of *Nelson Terminal* is perhaps less in its application to moonlighting policies than in its affirmation of the NLRB's earlier decision in *Boeing Company*, 365 NLRB No. 154 (2017), which reversed a series of decisions which had imposed unreasonable criteria for evaluating workplace rules and policies, substituting instead, a general presumption of reasonableness for typical workplace policies designed to maintain order and protect a company's legitimate business interests. For a further discussion of the *Boeing Company* case, see our Legal Update.

While only a small fraction of today's workforce is unionized, the NLRA applies to virtually all employers engaged in interstate commerce and, as such, the NLRB's rulings apply to both union and non-union workforces alike. Although the NLRB's recent decisions return to employers more latitude in managing their workforce, there is still the potential to inadvertently cross the line and invite an unfair labor practice charge. Regularly consulting experienced labor counsel is a good investment in protecting your rights as an employer.

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