

LEGAL UPDATE

NLRB Changes Rules for Abusive Conduct by Employees

On July 21, 2020, the National Labor Relations Board (NLRB) issued a [decision](#) that eases the way for employers to discipline or discharge an employee based on abusive or offensive conduct—such as racist or profane remarks—committed while the employee was also engaged in activities that are protected under the National Labor Relations Act (NLRA).

Uniform Standard

The decision means that, in any NLRB case in which an employee who engaged in abusive or offensive conduct claims he or she was disciplined for NLRA-protected activity, the employer may show that its adverse employment action was lawful by proving that:

- The employee’s protected activity was not a motivating factor in the discipline or discharge; and
- It would have taken the same action even in the absence of the protected activity (for example, by showing consistent discipline of other employees who engaged in similar conduct).

Setting-Based Tests No Longer Apply

The new standard replaces several frameworks that previously allowed employees some leeway for impulsive behavior under certain circumstances. Among these were a four-factor test for encounters with management, a “totality of the circumstances” test for social media interactions, and a severity test for conduct on a picket line.

According to NLRB, these setting-specific standards often protected employees who engaged in obscene, racist or sexually harassing speech, thereby creating conflicts with local, state and federal antidiscrimination laws. The new standard is designed to eliminate those conflicts and to reflect modern expectations for workplace conduct.

Highlights

Reduced Protections

The NLRB has eliminated certain protections for employees who engage in abusive or offensive conduct.

Employer Defense

An existing test, known as the Wright Line standard, is now available to employers regardless of the setting of an employee’s misconduct.

Discrimination Concerns

The decision aims to help employers comply with antidiscrimination laws.

One standard now applies in all cases involving an employee’s abusive or offensive conduct during otherwise-protected activities.