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LEGISLATIVE ACTION ALERT

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NLRB Modifies Standard for Addressing Offensive Outbursts in the Course of Protected Activity

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Washington D.C. – In a decision issued today in *General Motors LLC*, 14-CA-197985 369 NLRB No. 127 (2020), the National Labor Relations Board modified the standard for determining whether employees have been lawfully disciplined or discharged after making abusive or offensive statements—including profane, racist, and sexually unacceptable remarks—in the course of activity otherwise protected under the National Labor Relations Act (Act).

With today's decision, cases involving offensive or abusive conduct in the course of otherwise-protected activity will now be decided under the familiar *Wright Line* standard, which has long been used by the Board with court approval in mixed-motive cases. Under *Wright Line*, the General Counsel must first prove that the employee's protected activity was a motivating factor in the discipline. If that burden is met, the employer must then prove 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 abusive or offensive conduct.

The standard announced today replaces a variety of setting-specific standards—one for encounters with

management (*Atlantic Steel*), another for exchanges between employees and postings on social media (a "totality of the circumstances" test), and a third for offensive statements and conduct on the picket line (*Clear Pine Mouldings*). While these tests were based on the view that employees should be permitted some leeway for impulsive behavior when engaging in activities protected under the Act, they often resulted in reinstatement of employees discharged for deeply offensive conduct. These decisions were out of step with most workplace norms and were difficult to reconcile with antidiscrimination law.

"This is a long-overdue change in the NLRB's approach to profanity-laced tirades and other abusive conduct in the workplace," said Chairman John F. Ring. "For too long," he added, "the Board has protected employees who engage in obscene, racist, and sexually harassing speech not tolerated in almost any workplace today. Our decision in *General Motors* ends this unwarranted protection, eliminates the conflict between the NLRA and antidiscrimination laws, and acknowledges that the expectations for employee conduct in the workplace have changed."

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