

# NLRB RULING MAKES IT MORE DIFFICULT FOR EMPLOYERS TO TAKE ACTION AGAINST EMPLOYEES FOR ABUSIVE CONDUCT

## INSIGHT

On May 1, 2023, the National Labor Relations Board (“NLRB” or the “Board”) issued a decision that makes it more difficult for employers to discipline or discharge employees for their offensive or abusive conduct while engaged in activity that is protected by the National Labor Relations Act (“NLRA” or the “Act”).

In *Lion Elastomers LLC*, 372 NLRB No. 83 (2023), the NLRB overruled *General Motors LLC*, 369 NLRB No. 127 (2020), and returned to the use of several “setting-specific” tests for evaluating the lawfulness of discipline resulting from employee misconduct occurring in connection with NLRA-protected activity. These tests evaluate whether an employee loses the Act’s protection due to the severity of his or her conduct.

The NLRB majority’s view, as expressed in the *Lion Elastomers LLC* decision, is that there is a “fundamental difference . . . between employee misconduct committed during Section 7 activity and misconduct during ordinary work,” and that employees should be permitted leeway for impulsive behavior when engaged in NLRA-protected activity.

## THE OVERRULED GENERAL MOTORS STANDARD

In the NLRB’s *General Motors LLC* decision, the board held that it would no longer apply certain setting-specific tests to determine whether employers unlawfully disciplined or discharged an employee who engaged in abusive conduct in connection with protected activity. The board instead applied the *Wright Line* test, which focuses on an employer’s motive for taking action against an employee. Employers could generally meet their burden under this test by showing they would have treated the employee in the same manner based on his or her misconduct regardless of whether the employee was engaging in protected activity.

## THE RETURN TO SETTING-SPECIFIC TESTS

In *Lion Elastomers LLC*, the NLRB reversed the *General Motors LLC* decision and returned to setting-specific tests for evaluating the lawfulness of an employer’s disciplinary action in response to abusive conduct occurring in connection with protected activity. The following tests will now be applied by the board to determine whether abusive conduct is severe enough for an employee to lose protection under the NLRA:

- **For employee outbursts towards management in the workplace:** the NLRB will apply a four-factor test, considering (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.<sup>[1]</sup>
- **For social-media posts and most cases involving conversations among employees in the workplace:** the NLRB will apply the totality-of-the-circumstances test.<sup>[2]</sup>
- **For picket-line conduct:** the NLRB will apply the *Clear Pine Mouldings* test, which considers whether, under all of the circumstances, non-strikers reasonably would have been coerced or intimidated by the abusive picket-line conduct.<sup>[3]</sup>

In light of the *Lion Elastomers LLC* decision, employers should be mindful that the NLRB will now likely give employees greater leeway for abusive conduct when engaged in NLRA-protected activity. The NLRB's setting-specific tests may result in unpredictable and inconsistent disciplinary decisions. Employers may also find themselves in a difficult situation when faced with a decision to either discipline an employee for abusive conduct occurring while the employee was engaged in NLRA-protected activity, or to instead ignore that conduct and leave unprofessional, harassing and intimidating conduct unchecked.

If you need assistance navigating through difficult situations that may involve one of setting-specific tests discussed above or related matters, please contact attorney [Roy R. Galewski](mailto:rgalewski@harrisbeach.com) at (585) 419-8661 and [rgalewski@harrisbeach.com](mailto:rgalewski@harrisbeach.com), attorney [Taylor C. Ventre](mailto:tventre@harrisbeach.com) at (585) 419-8656 and [tventre@harrisbeach.com](mailto:tventre@harrisbeach.com), or the Harris Beach attorney with whom you normally consult.

This alert does not purport to be a substitute for advice of counsel on specific matters.

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See below for more labor-related insights:

- [New York Department of Labor Releases Finalized Model Sexual Harassment Policy](#)
- [H-2A Alert: Department of Labor Final Rule on Adverse Effect Wage Rates](#)
- [Immigration Attorneys Discuss Employers' Labor Needs](#)

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<sup>[1]</sup> See *Atlantic Steel Co.*, 245 NLRB 814 (1979).

<sup>[2]</sup> See *Desert Springs Hospital Medical Center*, 363 NLRB 1824 (2016); *Pier Sixty, LLC*, 362 NLRB 505 (2015).

<sup>[3]</sup> See *Clear Pine Mouldings, Inc.*, 268 NLRB 1044 (1984).

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While non-compete usage remains intact — for now — businesses that seek to protect vital interests through employment agreements should consult with their employment counsel on best practices and options in the face of these changes.

Harris Beach's [New York Labor and Employment attorneys](#) are closely following this situation and related matters. Should you have questions about any of these developments or navigating these changes, please feel free to reach out to attorney [Daniel J. Moore](#) at (585) 419-8626 and [dmoore@harrisbeach.com](mailto:dmoore@harrisbeach.com), attorney [Roy R. Galewski](#) at (585) 419-8661 and [rgalewski@harrisbeach.com](mailto:rgalewski@harrisbeach.com), attorney [Ibrahim Tariq](#) at (585) 419-8556 and [itariq@harrisbeach.com](mailto:itariq@harrisbeach.com) or the Harris Beach attorney with whom you most frequently work.

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# I-9 COMPLIANCE IN A POST-PANDEMIC WORLD: WHAT EVERY EMPLOYER NEEDS TO KNOW

## INSIGHT

Effective July 31, 2023, the U.S. Department of Homeland Security (DHS) will terminate the Form I-9 flexibilities that have been in place since March 2020. Under these flexibilities, DHS exercised its discretion to defer the physical presence requirements associated with Employment Eligibility Verification (Form I-9) until the COVID-19 National Emergency was formally terminated. DHS has now lifted the national emergency and clarified employers have until August 30, 2023, to perform physical, in-person examination of any documents that were reviewed virtually since March 2020. Under the discretionary provisions, employers were allowed to inspect Section 2 documents remotely (e.g., over video link, fax or email, etc.) and obtain, inspect, and retain copies of the documents within three business days in order to complete Section 2.

## WHAT EMPLOYERS NEED TO DO

Employers operating under the I-9 flexibilities during the pandemic now must take the following actions:

- For any new I-9s completed or reverified after July 31, 2023, employers must perform physical, in-person document examination. Employers may no longer virtually inspect Section 2 documents.

Employers should be reminded that under the current regulations, employers may still designate an authorized representative to complete Section 2 or 3 of Form I-9 on behalf of the company. Not only does this include personnel officers, foremen, agents, or notaries public, but also may include friends and family of the employee. This has always been an option and has not changed. It is important to note, however, the employer remains liable for any violations in connection with the form or the verification process. If an employer uses an agent under this provision, we recommend the employer be virtually present via video conference to monitor the process and ensure all required steps are completed.

- By August 30, 2023, employers must perform a physical, in-person inspection of any I-9 documents that were reviewed virtually since March 20, 2020. This does NOT, however, include I-9s that were reviewed in-person by an agent designated by the employer. Employers participating in the E-Verify program are also subject to this requirement, as E-Verification is simply an additional step to be taken after the normal I-9 process is completed.

# HOW TO UPDATE YOUR VIRTUALLY INSPECTED I-9 FORMS

- If the same employer representative who initially virtually inspected the documents will also physically inspect the documents, the employer should add "COVID-19 documents physically examined" with the date of inspection and initials to the Section 2 additional information field on the Form I-9, or to section 3 as appropriate.
- If the employer has designated a different representative for in-person review from the individual who conducted the initial remote/virtual review of documents, the recommended practice is to execute a new Section 2 so the reviewer can sign the attestation in Section 2. This newly executed Section 2 should be attached to the original Form I-9. Employers should then update the Additional Information box on the original Form I-9 with the following annotation: "COVID-19 Documents physically examined on MM/DD/YYYY by [name]"

Our immigration team offers the following top 10 (plus a bonus!) best practices for how to stay compliant with I-9 regulations:

1. Complete an I-9 for all employees, including U.S. citizens, and keep them on file for all current employees
2. Have your employee complete Section 1 on his or her first day
3. Do not request more documentation than is required to show identity and employment authorization, or ask for a particular document to show identity or employment eligibility
4. You may complete the I-9 early (i.e. before the first day of employment), but not before offer and acceptance of employment
5. Promptly re-verify employment authorization 90 days prior to expiration
6. After employment ends, keep I-9s for at least three years from the date of employment or for one year after the employment ends, whichever is later
7. Conduct regular self-audits of I-9 files to find discrepancies or errors
8. Promptly destroy records that are not required to be maintained
9. Keep I-9 records separate from personnel files. This limits undue access by the government agencies with authority to inspect your I-9s
10. Keep copies of the documents presented by the employee with the I-9 form
11. Avoid "citizen-only" or "permanent resident-only" hiring policies unless required by law, regulation or government contract

Harris Beach has prepared summaries of [document retention in the immigration context](#) and [I-9 compliance](#) for your reference.

Remember: I-9s can be retained in paper or electronic formats. You may keep completed paper forms on-site or off-site, as long as you are able to produce the I-9 forms within three days of an inspection request. Harris Beach immigration attorneys perform I-9 and other audits of required employment records, advise on document retention and correction requirements, and offer training on completion and maintenance of I-9 records.

If you have questions about this subject or other related matters, please reach out to immigration attorney [L.J. D'Arrigo](#) at (518) 701-2770 and [ldarrigo@harrisbeach.com](mailto:ldarrigo@harrisbeach.com), or to the Harris Beach attorney with whom you most frequently work. For more insight into legal support for your immigration compliance, visit our [Immigration Practice Group page](#).

Because of the highly fluid and rapidly changing nature of the current immigration environment, we encourage you to regularly consult our website and [subscribe to our Immigration Blog](#) for more information about developing immigration issues.

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For more insights from our Immigration lawyers, see below:

[Dept. of Labor Migrates PERM Labor Certification Application to FLAG Web Portal](#)

[Attorneys L.J. D'Arrigo and Jarrod Sharp Discussion Immigration Ahead of 2024 Campaign Season](#)

[Retgression in Employment-Based Immigrant Visa Categories May Lead to Delays in Green Card Processing](#)

[Health Care Providers Turn to Immigration to Address Nursing Shortage](#)

[Updates to Immigration Adjustment of Status Filing in 2023](#)

[USCIS Updates Guidance on Demonstrating Ability to Pay Prospective Employees](#)

[Immigration Webinars Address Labor For Seasonal Businesses](#)

[USCIS Updates Child Status Protection Act Age Calculation for Adjustment of Status Applicants](#)

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