

Unpaid Interns are Not Statutory Employees, NLRB Concludes

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The National Labor Relations Board recently [held](#) that a group of employees who were advocating on behalf of unpaid interns were not engaged in protected activity because the interns were not “employees” as that term is defined in Section 2(3) of the National Labor Relations Act. In so doing, the Board reaffirmed its longstanding precedent that individuals who do not receive or anticipate economic compensation are not statutory employees. The Board also rejected the application of a test for defining employees that has been adopted by numerous courts and the Department of Labor for determining whether unpaid interns are employees under the Fair Labor Standards Act (FLSA).

The Board also concluded that a management representative’s comments to its employees that she was disappointed that her employees provided her with a petition memorializing their thoughts concerning the pay status of unpaid interns rather than using the company’s “open doors” policy, among other similar commentary, did not rise to the level of a threat of reprisal in violation of Section 8(a)(1) of the Act.

Factual Background

The employer is a non-profit organization employing approximately 25 employees and 15 unpaid interns. The unpaid interns started a petition requesting compensation for their volunteering. Two paid, unionized employees provided feedback and support on the petition, and helped the interns solicit signatures. Eventually, the unpaid interns collected signatures from all but a few of the office’s paid employees—but the group of interns and employees had yet to provide the petition to the employer.

At a staff meeting a few months later, an employee asked the employer to consider paying the interns. The employer responded positively and discussed the organization’s upcoming plans for implementing a paid internship program, which would include a significant reduction in the number of interns at the office. At this point, the employer was still unaware of the petition.

That changed the next day, when the interns e-mailed the employer their signed petition, which included signatures of the paid employees. In response, the employer's director and the executive team decided to accelerate plans to switch to paid internships. To management's frustration, many employees reacted negatively to the paid internship plan, concerned that a sharp reduction in interns would constrain employees' ability to do their work. The employer's representative expressed disappointment that employees did not avail themselves of the organization's open-door policy to discuss this matter before using an "adversarial" petition.

The following month, an employee who had been a driving force behind the petition initiated a one-on-one meeting with the employer. The employer mentioned she perceived the petition to be "litigious," "adversarial" and "sort of levy[ing] a threat." She suggested that the employee could have told the interns to "give me a heads-up." She repeated later, "I'm not asking anybody to tell on somebody... if you let [me] know your intentions, what you are seeking."

This conversation resulted in charges being filed. The ALJ, applying the test of employees used by the Department of Labor concluded that the unpaid interns were employees. The ALJ also concluded that management's statement of being "disappointed" in employees who signed the petition violated Section 8(a)(1) as a coercive statement.

NLRB Reverses

In reversing the ALJ the Board reaffirmed a more than 20-year NLRA principle that unpaid workers are not "employees" who are protected by the Act because they do not "receive or anticipate any economic compensation" from the employer. Here, the employer's interns were unpaid and, therefore, were not protected by the Act. The Board declined to extend a multi-factor test for determining "employee" status of unpaid interns at for-profit institutions used by a majority of courts and the DOL. This test focuses on whether the unpaid intern or purported employer primarily benefitted from the relationship.

Under the Act, unpaid interns are not protected and do not have a right to unionize. The Board concluded that because the paid employees' actions in signing the petition did not concern "wages, hours or other terms and conditions of employment" of employees, then the paid employees were not engaged in protected activity.

The Board also concluded the employer's statements did not violate Section 8(a)(1) and instead were protected under Section 8(c) of the Act, as the statements did not constitute a threat of reprisal or force or promise or benefit. The Board found that in this context, the employer's statements merely evidenced a desire for better communication from her employees in the future. She did not threaten them, according to the Board majority.

Member McFerran's Concurrence

While Member McFerran concurred with the majority's result that the employer's statements did not violate the Act because they did not constitute unlawful threats, she sharply disagreed with the majority's conclusion that protected covered workers who joined together to help their coworkers who are not statutory employees did not constitute protected Section 7 activity. McFerran noted that the Supreme Court has interpreted for "other mutual aid or protection" broadly, and the employees' advocacy on behalf of the unpaid interns could improve or affect their own terms and conditions of employment directly. This, according to Member McFerran, constituted protected conduct.

Takeaways

This is a decision that follows longstanding Board precedent. Unpaid interns are not "employees" and so actions in support of these individuals by statutory employees was not covered by the Act. This case demonstrates that the NLRB is not willing to apply tests used under other statutes to administer the Act. The fact the Board members agreed that no violation of Section 8(a)(1) occurred because a member of management expressed "disappointment" in employees is a fairly commonsense conclusion. To hold that such a statement was actually coercive of employees would be to upend a good many discussions held between management and employees.

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