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Another One: The NLRB Revives Standard That Employees Are Protected When Advocating for Nonemployees

Labor Relations Update on **September 1, 2023**

A slew of decisions that were pending before the National Labor Relations Board ("NLRB" or the "Board") have been issued at the end of August, coming at the close of Member Wilcox's term. In *American Federation for Children, Inc.*, 372 NLRB No. 137, a 3-1 majority reversed recent precedent yet again, finding that employees are engaged in protected activity and acted for the purpose of mutual aid or protection when advocating for a former employee. The Board found that the employee's actions were protected regardless of whether the former employee on whose behalf the employee was voicing concerns was a statutory employee under the National Labor Relations Act ("NLRA" or the "Act").

In so doing, the Board returned to over half-century-old precedent that concerted activity by statutory employees on behalf of nonemployees is protected by the Act when it can benefit the statutory employees, reversing its recent decision in *Amnesty International*, 368 NLRB No. 112 (2019). In *Amnesty International,* the Board held that "[a]ctivity advocating only for non-employees is not for 'other mutual aid or protection' within the meaning of Section 7 and accordingly does not qualify for the Act's protection." (See our discussion here.)

Factual Background

This case centered around the efforts of an Arizona-based employee for a national school-choice advocacy organization to advocate for the reinstatement of a former employee that had become ineligible to work in the U.S. The employee met with a new manager about the former employee, but developed concerns the manager was not supportive of rehiring the former employee and not supportive of the organization's broader pro-immigration efforts.

The employee repeatedly raised concerns about the manager's management practices, concerns that the manager was "anti-immigrant," and going so far as to assert that the manager was racist. Investigations into the manager and the employee were conducted, concluding the employee's allegation of racial hostility by the manager was unsupported. Nevertheless, the employer planned to terminate the employee for creating a toxic atmosphere. As a result, the employee resigned.

Applying the Board's decision in *Amnesty International*, the ALJ found the employee's actions were not protected by Section 7 because they were for the benefit of a nonemployee (the former employee that had lost their work eligibility).

The Board's Decision

First, the Board found the employee's efforts constituted concerted activity. Having found the employee engaged in concerted activity, the Board then found the ALJ erred in applying *Amnesty International*, as the employee acted on behalf of another statutory employee, where the employee and those the employee solicited for support, stood to benefit by the reemployment of the former employee. The Board explained that under the "solidarity principle," employees can invoke Section 7 for the mutual aid and protection for issues affecting nonemployees, as long as those efforts also help statutory employees. The Board went on to explain the reasoning underlying the *Amnesty International* decision did not comport with work realities, where it is entirely reasonable for statutory employees to support nonemployees for mutual aid or protection of the statutory employees where the two groups work together for the same employer.

The Board made the alternative holding that "the mutual aid or protection" element had been satisfied even if the former employee was not a statutory employee, overruling *Amnesty International*. The Board also reaffirmed precedent that job applicants are statutory employees and worker immigration status is immaterial to their employee status under the Act.

Having overruled *Amnesty International* and finding that the employee had engaged in protected activity, which "effected a fundamental change to the legal backdrop of many of the other issues presented" in the case, the Board severed and remanded the remaining allegations to the ALJ for further consideration.

Member Kaplan's Dissent

Board Member Kaplan accused the majority of overreaching, improperly departing from precedent not applicable to the case before it. Member Kaplan indicated that the facts before the Board did not present an actual *Amnesty International* issue, because the employee was engaged in protected activity in advocating for another statutory employee. Member Kaplan accused the majority of reframing the issue before *Amnesty International* to overrule it.

Member Kaplan also took issue with the majority's remand of the remaining allegations, arguing the employee's protected activity played no role in her discharge, which was based on the unprotected accusations of racism against the manager.

Takeaways

Consistent with its flurry of recent pro-employee decisions, this decision serves as yet another warning to employers. It is clear that the majority took issue that *Amnesty International* could be interpreted as standing for the proposition that advocating for nonemployees is never for the mutual aid or protection of employees. This decision restores precedent of protections for employee advocacy on behalf of independent contractors, supervisors, interns, volunteers, and any other individual who may be excluded from the definition of employee in Section 2(3) of the Act.

With this ruling, employers now must carefully consider whether the employee's advocacy concerning a nonemployee benefits the employee. The likely result will be a series of challenges to individual advocacy on behalf of statutorily excluded individuals, where the operative question is whether the advocacy potentially could benefit the employees.

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