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NLRB Finds that Advocacy of Non-Employees is Protected Under the National Labor Relations Act

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As we have observed several times this year, the National Labor Relations Board (NLRB or the "Board"), under the majority appointed by President Biden, has taken a number of actions to widely expand workers' rights under federal labor law.

A recent Board decision in *American Federation for Children, Inc. and Sarah Raybon* serves as another important reminder that employee protections under the National Labor Relations Act (NLRA or the "Act") are being interpreted broadly by the current Board. And it highlights the fact that employers should be mindful that federal labor laws are not only reserved for union employees, but also provide protections for employees in non-unionized workforces.

To be sure, Section 7 of the Act protects employees who take action in the workplace for when they engage in "protected concerted activity," which normally implies the employee is acting on behalf of themselves **and** other employees.

However, in *American Federation for Children*, the NLRB went a step further and held that, in some circumstances, such protection also applies to actions by a company's workers that are taken in support of non-employees. This new ruling overturns prior precedent from 2019 and establishes that employers cannot punish employees for taking group or "concerted" action to improve working conditions of non-employees, such as applicants or interns.

Consistent with the Board's recent movement, the *American Federation for Children* decision overturns a Trump-era NLRB decision, *Amnesty International USA and Raed Jarrar*, in which the Board held that advocacy for non-employees — in that case, interns — was not protected by the Act. In a 3-1 majority decision, the current Board found that the Amnesty International case was "at odds with precedent and the policies of the [A]ct."

In the recent *American Federation for Children* case, the Board found that an employee, Sarah Raybon, engaged in protected activity when she advocated for her employer to rehire a former colleague, Gaby Ascencio, whose employment ended because her work authorization had lapsed (she was not a U.S. citizen or permanent resident), but who subsequently reapplied for a job with the company after regaining her work authorization. Raybon's zealous advocacy for Ascencio's rehiring included what her manager perceived to be "incendiary" accusations, and Raybon was ultimately

terminated “for creating a toxic atmosphere within the organization.”

In reviewing the matter, the Board first determined that Ascencio was an employee within the scope of the NLRA because the law covers applicants. Going one step further, the NLRB also found that, even if Ascencio were not an employee under the Act, Raybon’s advocacy for Ascencio’s rehiring was protected under the Act because Raybon stood to benefit from supporting Ascencio, given that Ascencio was a valuable colleague.

In light of the *American Federation for Children* decision, employers should exercise extreme caution when disciplining employees who have participated group advocacy, regardless of the employment status of the individual(s) who stand to benefit from such advocacy.

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