

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 30, 2017

TO: Claude T. Harrell, Jr. Regional Director
Region 10

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Proffitt & Sons, Inc. & 177-2414-0000-0000
JAC Jack Construction, LLC 177-2484-5000-0000
Case 10-CA-185899 177-2484-5033-0133
512-5006-5050-0000
512-5006-5053-0000
512-5006-5076-0000

The Region submitted this case for advice as to 1) the employment status of the Employers' drywall installers, and 2) whether the Employers have violated Section 8(a)(1) by misclassifying the drywall installers as independent contractors rather than employees. We conclude that the Employers did not violate Section 8(a)(1) because the Employers never communicated to the drywall installers that they were independent contractors. Accordingly, there is no need to determine their employment status.

FACTS

JAC Jack Construction, LLC supplied drywall installers to Proffitt & Sons, Inc. (collectively "Employers") for use on its projects. These workers were paid by JAC Jack in checks that did not have any tax withholdings. The workers did not sign contracts or receive employee manuals. At no point were the workers told by the Employers that they were independent contractors. There is no evidence that the Employers gave the workers any tax documents, either W-2 forms or 1099 forms.

In August and September 2016, the Department of Labor's Wage and Hour Division ("DOL") investigated JAC Jack Construction for potential violations of the Fair Labor Standards Act ("FLSA") and the Family Medical Leave Act. Determining that JAC Jack's workers were employees under the FLSA, DOL found that JAC Jack and Proffitt & Sons were joint employers of the employees. DOL also concluded that the Employers had not been paying the employees overtime wages as required by the FLSA. When confronted by DOL, JAC Jack admitted that the workers were probably employees, stating that it had been paying them as independent contractors on the advice of a friend in the industry. JAC Jack agreed to pay eleven workers a little over \$11,000 in back wages, and committed to pay overtime in the future.

On October 11, 2016, the Mid-South Carpenters Regional Council (“Union”) filed the instant charge, alleging that the Employers were joint employers, and had violated Section 8(a)(1) of the Act by misclassifying their employees as independent contractors.

ACTION

We conclude that, regardless of whether the drywall installers are employees under the Act, the Employers did not violate Section 8(a)(1) since they at no point communicated that the workers were being classified as independent contractors.

Section 8(a)(1) makes it unlawful for an employer “to interfere with, restrain, or coerce employees in the exercise of” employees’ Section 7 rights.¹ Although the Board has never held that an employer’s misclassification of statutory employees as independent contractors in itself violates Section 8(a)(1), several lines of Board decisions support such a finding.

First, the Board has held that an employer violates Section 8(a)(1) when its actions operate to chill or curtail future Section 7 activity of statutory employees.² In *Parexel International*, the Board made clear that an employer’s “preemptive strike to prevent [an employee] from engaging in activity protected by the Act” violates Section 8(a)(1) because of its chilling effect on employees’ future exercise of their Section 7 rights.³ Even if an employee has no history of Section 7 activity, employer action to prevent that employee from engaging in protected activity in the future “interferes with and restrains the exercise of Section 7 rights and is unlawful without more.”⁴

¹ 29 U.S.C. § 158(a)(1). In contrast, an employer does not violate the Act if it interferes with, restrains, or coerces the exercise of what would otherwise constitute Section 7 rights by individuals who are not statutory employees. *See Wal-Mart Stores, Inc.*, 340 NLRB 220, 223 (2003) (employer’s instruction to group of twenty-two putative statutory supervisors that they could not engage in union activity only violated Section 8(a)(1) with respect to the four who were actually statutory employees).

² *See, e.g., Parexel International, LLC*, 356 NLRB 516, 518–19 (2011) (employer violated Section 8(a)(1) by discharging an employee to prevent her from discussing wages with other employees); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (maintenance of rules that would reasonably tend to chill employees’ exercise of Section 7 rights violates Section 8(a)(1)), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

³ 356 NLRB at 517, 519.

⁴ *Id.* at 519.

The Board also noted that suppression or chilling of future protected activity lies at the heart of most unlawful employer retaliation against past protected activity.⁵ Similarly, Board precedent holding unlawful an employer's adverse action taken on the mistaken belief that an employee engaged in protected concerted activity is premised on the notion that the chilling of future protected activity violates the Act.⁶

Second, employer statements to employees that engaging in Section 7 activity would be futile violate Section 8(a)(1).⁷ Thus, in *Sisters' Camelot*, the Board found that the employer violated Section 8(a)(1) by indicating that union organizing would be futile when it informed its canvasser employees, who had been misclassified as independent contractors and were attempting to organize, that it would never accept an employer-employee relationship with its workers.⁸

Third, the Board has found misstatements of law to constitute unlawful interference with employees' Section 7 rights if the statement reasonably insinuates adverse consequences for engaging in Section 7 activity.⁹ For example, employer statements suggesting that employees could "lose their jobs" as a consequence of

⁵ *Id.*

⁶ See, e.g., *United States Service Industries, Inc.*, 314 NLRB 30, 31 (1994), *enforced mem.*, 80 F.3d 558 (D.C. Cir. 1996).

⁷ See, e.g., *M.D. Miller Trucking & Topsoil, Inc.*, 361 NLRB No. 141, slip op. at 1 (Dec. 16, 2014) (concluding that employer's statement that employees' grievance would go nowhere constituted unlawful threat of futility); *North Star Steel Co.*, 347 NLRB 1364, 1365 (2006) (employer's statement that collective bargaining would not result in employees obtaining benefits other than what employer chose to give them and unionization would lead employer to choose to give them less violated Section 8(a)(1) because employees "could reasonably infer futility of union representation").

⁸ 363 NLRB No. 13, slip op. at 6.

⁹ See, e.g., *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 617, 618 & n.22 (2007) (employer's flyer that misled employees by creating impression that employees would have to give up customary wage increases as a "lawful and ineluctable consequence" of bargaining violated Section 8(a)(1)); *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 799 n.2 (1980) (misstating law by implying that union would have right to demand that employees pay union fines and assessments and accede to contractual dues checkoff to retain their jobs was unlawful in context of other threats), *enforced mem.*, 679 F.2d 900 (9th Cir. 1982).

engaging in an economic strike inaccurately describe economic strikers' rights and therefore constitute unlawful threats of reprisal.¹⁰

Based on the foregoing principles, the Division of Advice concluded in *Pacific 9 Transportation*,¹¹ that employers violated Section 8(a)(1) by misclassifying their employees as independent contractors. As outlined above, this theory of violation is predicated on the future chilling effect on employees that the misclassification engenders, and more broadly, the misclassification's interference with Section 7 activity. However, in each of the above-cited cases, the employer explicitly communicated that it regarded its employees as independent contractors by requiring the employees to sign a document to that effect. If employees are unaware of a misclassification, they cannot be negatively affected by it; there can be no chilling effect without knowledge of the misclassification.

Here, the Employers never communicated to their employees that they were independent contractors. While JAC Jack admitted to DOL that they were paying their employees "as independent contractors" by ignoring overtime law, there is no evidence this statement was ever communicated to the Employers' employees. There is also no evidence that employees knew the reason for any underpayment was because the Employers were paying them as independent contractors. As for the failure to include withholdings in employees' paychecks, it also did not necessarily communicate that employees were independent contractors. There are many reasons for not making such withholdings, especially tax avoidance on the part of both employers and employees. We conclude that since the Employers never communicated to employees that they were independent contractors, they did not impede employees' Section 7 rights.

Because we conclude that the alleged misclassification did not violate Section 8(a)(1), there is no need to determine the employment status of the Employers' employees. Accordingly, the Region should dismiss the complaint, absent withdrawal.

/s/

B.J.K.

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¹⁰ See, e.g., *Fern Terrace Lodge*, 297 NLRB 8, 8–9 (1989) (statement that permanently "replaced striker is not automatically entitled to his job back just because the strike ends" unlawful, because economic strikers are automatically entitled to their jobs back, or, if their job is unavailable, preferential hiring to similar openings).

¹¹ Case 21-CA-150875, Advice Memorandum dated Dec. 18, 2015.