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The NLRB Targets Independent Contractor Misclassification

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After the Department of Labor withdrew its Obama-era guidance taking a restrictive view of the situations in which workers can legitimately qualify as independent contractors, as opposed to employees, many speculated that the Trump administration would be giving up its predecessor's campaign against contractor misclassification and that further developments would be driven by state and local government agencies and private plaintiffs. In the last few weeks, however, the National Labor Relations Board (NLRB) has entered the fray over worker misclassification with a recent enforcement action asserting that misclassifying employees as independent contractors is a standalone unfair labor practice under the theory that misclassification interferes with rights under the National Labor Relations Act (NLRA) (which applies only to employees, not contractors) by asserting that the workers in question do not have NLRA rights at all because they are not employees. The development of a new front in the battle over misclassification at the NLRB should be closely monitored by employers.

In the recent case of *Velox Express, Inc.*, the NLRB's General Counsel filed unfair labor practice charges against Velox Express, a delivery and logistics company that classified its driver corps as independent contractors. The charge asserted that the drivers were misclassified and that Velox had wrongfully terminated one driver's contract after she spoke out against the classification of herself and other drivers as contractors rather than employees. While the General Counsel's claim that Velox committed unfair labor practices in terminating the driver for speaking out about the misclassification is a straightforward application of the "concerted activity" right under the NLRA – which permits employees to take group action to improve their terms and conditions of employment – the charge broke new ground by also asserting that the misclassification as independent contractors was itself a standalone unfair labor practice under the NLRA. Previous NLRB cases regarding misclassification have instead focused on whether the claimant is an employee as a threshold question to decide whether the claimant has any NLRA rights at all.

An NLRB administrative law judge (ALJ), in what appears to be a decision of first impression, adopted the General Counsel's theory and ruled that "{b}y misclassifying its drivers, Velox restrained and interfered with their ability to engage in protected activity by effectively telling them that they are not protected by Section 7 [of the NLRA] and thus could be disciplined or discharged for trying to form, join or assist a union or act together with other employees for their benefit and protection." The ALJ notably cited no case law or prior NLRB precedent in support of this ruling. The ALJ then ordered Velox to "{t}ake whatever steps are necessary to reclassify" its drivers as employees and "to treat them as employees rather than as independent contractors." This relief is considerably broader than the award a misclassified employee would receive in court, which would typically be limited to monetary damages for the employee bringing the case or, in some cases, a class of similarly-situated employees.

Obtaining this type of ruling has been a priority of the current NLRB General Counsel since at least last year. On March 22, 2016, the General Counsel issued a directive to the NLRB's regional offices requiring that "cases involving the question of whether the misclassification of employees as independent contractors violates Section 8(a)(1) [of the NLRA]," the same issue presented in this case, be submitted to the General Counsel for further consideration. By obtaining the *Velox Express, Inc.* ruling, the General Counsel has achieved the first step towards his intended expansion of NLRA rights into the misclassification realm.

The wider status of *Velox Express, Inc.* and the General Counsel's drive to add worker misclassification as an NLRB priority is uncertain for several reasons. First, assuming that Velox pursues all of its available appeal options, the ALJ's decision will be reviewed by the NLRB's members and then, assuming the NLRB affirms the ALJ's ruling, by a federal appeals court. At either of these stages of review, misclassification could be rejected as a freestanding unfair labor practice. In addition, the current, Obama-

appointed General Counsel's term expires in November 2017. The Trump administration has proposed a veteran management-side attorney to be the next General Counsel, and it is unlikely that this or any other Trump-appointed General Counsel would share the prior administration's priorities.

The broader point, regardless of what happens at the NLRB, is that worker misclassification remains a hot button issue. The NLRB may or may not continue moving into misclassification enforcement, and state and local government agencies have already picked up the baton in anticipation of a potential drop off in federal activity. And, the plaintiff's employment bar will continue to target misclassification situations, particularly where the workers in question would have been eligible and entitled to overtime or other additional benefits or payments had they been classified as employees. Accordingly, employers should continue to be diligent about avoiding improper independent contractor classifications and monitoring their independent contractor workforces to ensure that past classifications remain valid and defensible in the event of future litigation or government audits.

