



National Labor Relations Board Assumes Worker Misclassification

Insights

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The Chicago regional office of the National Labor Relations Board (NLRB) has filed a complaint for unfair labor practices against Postmates, an on-demand delivery service that, according to its website, “connects customers with local couriers who can deliver anything from any store or restaurant in minutes.” The NLRB alleges that Postmates violated the National Labor Relations Act (NLRA) by prohibiting delivery workers from discussing the terms and conditions of their supposed “employment,” and by requiring the workers enter into arbitration agreements.

It is worth noting that all employers are subject to the NLRA, whether they are unionized or not. Therefore, this situation warrants the attention of all gig economy companies.

The NLRB’s case against Postmates is especially significant because the NLRB’s jurisdiction to enforce the NLRA does not extend to independent contractors. In fact, the NLRA specifically exempts independent contractors from its definition of “employee.” And just earlier this year, the Court of Appeals for the 11th Circuit overturned an NLRB decision that was predicated upon a finding that the workers at issue had been improperly classified as independent contractors, rather than as employees.

Not to be deterred, the NLRB has brought an unfair labor practices case against Postmates under the assumption that Postmates’ delivery personnel are employees, rather than independent contractors. Because the NLRB does not have jurisdiction over independent contractors, the classification of Postmates’ delivery personnel as independent contractors will necessarily be a threshold (and perhaps determinative) point of dispute in the case.

The NLRB’s action demonstrates its continued willingness to insert itself directly into the dispute over gig worker classification, giving little deference to a company’s classification of its workers. More such cases are likely to follow.

Postmates has until October 19 to respond to the NLRB’s complaint. Absent a resolution between Postmates and the NLRB, trial could proceed as early as the first quarter of 2017. Should the case go all the way through trial and result in an NLRB decision, it could serve to provide valuable guidance into the manner by which the NLRB will make independent contractor determinations for gig workers.

Related People



Philip J. Azzara
Partner
949.798.2167
Email