Labor Board Debates Whether To Add Insult To Injury In Misclassification Debate

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Imagine one of your worst corporate nightmares comes true: a government body has determined that you have misclassified your workers, and they should be considered employees and not contractors. The ramifications could be devastating for your organization. You could be on the hook for overtime or minimum wage payments in the tens (or hundreds) of thousands of dollars, you may have unemployment insurance consequences to face, you may have an obligation to provide a cache of benefits to your workers, and perhaps even workers' compensation insurance issues could arise. Your very business model may be threatened. But if certain administrative law judges had anything to say about it, your trouble could be just beginning: you could also be facing an automatic unfair labor practice (ULP) charge on top of your other worries.

Under a theory espoused by former General Counsel of the National Labor Relations Board (NLRB) Richard Griffin, this fact pattern should be a standard and common consequence to a misclassification finding. According to Bloomberg's Lawrence Dubé, Griffin convinced several lower-level administrative law judges (ALJs) last year that simply misclassifying workers should lead to an automatic ULP even if no other labor law violations are present. If Griffin and the current ALJs had their way, you could face a one-two punch that concludes with a negative finding from the Labor Board even if you tried your best to classify your workers correctly.

The debate is certain to continue in 2018 given the fact that the Labor Board recently invited interested parties to weigh in on the question in the context of an existing case. In a February 15 order from the *Velox Express, Inc.* case, the Board invited "the filing of briefs in order to allow parties and interested amici an opportunity to address…under what circumstances, if any, the Board should deem an employer's act of misclassifying statutory employees as independent contractors a violation of…the National Labor Relations Act." The case is reviewing a September 2017 ruling by an ALJ that found that an Arkansas logistics company committed a ULP by misinforming drivers that they were independent contractors and not employees. Doing so, the judge concluded, sent an illegal message to the workforce that they could not band together to form a union or otherwise join up to act for their mutual aid or protection, which is a no-no under labor law.

But this invitation for briefing could be good news. The current Labor Board is comprised of members who seem receptive to tilting the playing field back to even status between employees and employers, and righting the ship after several years of very pro-union rulings. Many Board observers believe that the current members have invited such briefing so they can arm themselves

observers believe that the current members have invited such briefing so they can arm themselves with ammunition that will allow them to shoot down Griffin's theory and conclusively state that no automatic ULP attaches to a standard misclassification problem.

Briefs are due by April 16, 2018. We'll monitor the situation and provide updates as the situation warrants.

[ED. NOTE: On April 12, the NLRB extended the due date for briefs to April 30.]

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