Misclassifying Workers No Longer Constitutes An Unfair Labor Practice

Insights
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Employers found to have misclassified employees as independent contractors will no longer face the prospect of unfair labor practice charges for such actions alone, according to a new ruling handed down yesterday by the National Labor Relations Board. Although the NLRB's previous General Counsel and several administrative law judges had previously concluded that hiring entities could face the one-two punch of misclassification litigation followed by a federal labor law violation, the current Board wiped this concern off the table with its August 29 ruling in *Velox Express, Inc.* What do businesses need to know about this positive development?

Background
In September 2017, NLRB Administrative Law Judge (ALJ) Arthur Amchan found that Arkansas logistics company Velox Express committed an unfair labor practice (ULP) by misinforming drivers that they were independent contractors and not employees. The National Labor Relations Act (NLRA) extends protection to employees but not independent contractors, rendering the distinction particularly important when it comes to organizing rights and other protected activities. By suggesting to the workers that they were contractors, the judge concluded Velox Express unlawfully insinuated that they could not band together to form a union or otherwise act in concert for their mutual aid or protection in violation of the NLRA.

Former NLRB General Counsel Richard Griffin had espoused the theory that misclassifying workers should constitute a ULP even in the absence of other NLRA violations. Several ALJs subsequently applied that analysis, including Judge Amchan in *Velox Express*.

But a newly constituted NLRB sought briefing on the issue in February 2018, asking the parties 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." After reviewing arguments advanced by the parties to the case and dozens of other stakeholders, the Board ruled in a 3-1 decision that misclassification alone should not trigger exposure to unfair labor practice charges.

The Ruling
The majority ruled that Velox Express did not interfere with workers' Section 7 rights by misclassifying them as independent contractors because it did not "inherently threaten" them with discipline if they were to act in concert for their mutual aid or protection. "Employees may well

disagree with their employer, take the position that they are employees, and engage in union or other protected concerted activities," the Board said. "If the employer responds with threats, promises, interrogations, and so forth, then it will have violated the NLRA, but not before."

In so holding, the Board agreed with Velox Express' position that it merely expressed a legal opinion when it informed workers that they were independent contractors. The Board reasoned that any such statement, "even if that opinion is ultimately mistaken," is actually protected by law so long as it "does not, in and of itself, contain any threat of reprisal or force or promise of benefit."

The Board concluded that to rule against Velox Express would "significantly chill the creation of independent contractor relationships," as businesses would then be reluctant to pursue any course of action that could land them in hot water despite good faith belief and intent. Reversing the ALJ's ruling and scrapping this theory of liability would, according to the majority, provide a small measure of certainty, which is important for parties forming business relationships.

What Does This Mean For Businesses?
Yesterday's decision means that employers utilizing a contractor workforce have one less headache to worry about when it comes to potential liability. There are already a host of concerns accompanying potential misclassification findings – wage and hour violations, benefits, unemployment, statutory rights, workers' compensation, and taxation – not to mention the integrity of an entity's entire business model. Any additional concerns over potential ULP liability have now been alleviated.

We will continue to assess the situation and provide necessary updates, so you should ensure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any member of our Labor Relations Practice Group or our Gig Economy Practice Group.

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