CLIENT ALERTS & INSIGHTS

Misclassifying Workers Does Not Violate National Labor Relations Act

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On August 29, 2019, the National Labor Relations Board (the "Board") refused to extend the National Labor Relations Act (the "Act") to create a new standalone violation under Section 8(a)(1). In *Velox Express, Inc.*, 368 NLRB No. 61 (2019), the Board found that an employer's misclassification of workers as independent contractors is not a violation of the Act. The Board cited to the "absence of any Board precedent" finding that an "employer's misclassification of its employees as independent contractors […] standing alone, is a per se violation of the Act." Without some coercion, threat, retaliation, or promise of benefits by the employer, the Board refused to find that the mere misclassification constituted a violation.

Independent contractors do not receive rights or protection under the Act that employees do. In explaining its decision, the Board stated that the argument that a standalone misclassification violates the Act improperly "assumes that a misclassification of employees as independent contractors is, in fact, coercive." The Board, instead, found that the mere act of misclassifying a worker does not prohibit the worker from engaging in Section 7 activity under the Act, does not threaten the worker with adverse consequences if the worker does engage in Section 7 activity, and does not promise benefits to the worker for refraining from engaging in Section 7 activity.

The Board continued that nothing prevents employees from nonetheless engaging in union or other protected activities despite the misclassification. An employer would only violate the Act if it responded to such action by workers with threats, promises, interrogations, or other retaliatory or coercive actions, but not before.

The Board relied on Section 8(c) of the Act for its decision. Section 8(c) states that the "expressing of any views, argument, or opinion, or the dissemination thereof, […] shall not constitute or be evidence of an unfair labor practice …, if such expression contains no threat of reprisal or force or promise of benefit." The Board relied on its own precedent to find that the communication of a legal opinion, such as the classification of a worker, is "no less protected by Section 8(c) if it proves to be erroneous." *North Star Steel Co.*, 347 NLRB 1364, 1367 fn. 13 (2006) ("Sec. 8(c) does not require fairness or accuracy."); *Children's Center for Behavioral Development*, 347 NLRB 35, 36 (2006) ("[T]here is nothing unlawful in stating a legal position, even if it is later rejected.") Thus, "[e]rroneously communicating to workers that they are independent contractors does not, in and of itself, contain any threat of reprisal or force or promise of benefit."

On the other hand, the Board opined that classification decisions made in response to a union organizing campaign violates the Act. Similarly, misclassifying workers as independent contractors and telling them that union organizing would be futile because it would not accept the

"boss/employee relationship" violates the Act. Generally, reclassifying workers as independent contractors to avoid or defuse union activities violates the Act. However, the Board stated that "it is a bridge too far […] to conclude that an employer coerces its workers in violation of Section 8(a)(1)" by simply informing them of its classification decision if that determination is ultimately found to be mistaken. The mere communication of classification status does not imply a threat or the futility of engaging in union or protected activities under Section 7.

Despite the Board's position that misclassification decisions do not violate the Act, it found that the employer in *Velox* nonetheless violated Section 8(a)(1) because it discharged the misclassified employee after she complained of the misclassification. The Board determined that the discharge was unlawful in that it would chill other drivers from engaging in protected activity, particularly regarding the misclassification. Within the context of the overall decision, the employer's violation did not stem from the original misclassification, which cannot be an unfair labor practice under Section 8(c), but rather the subsequent discharge of the misclassified employee in response to her protected activities.

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