

Commentary: NLRB Poised to Rule That Independent Contractor Misclassification Alone Violates the Law, but Ruling Not Likely to Survive Court Review?

Labor & Employment Workforce Watch

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A recent decision by the National Labor Relations Board in a case involving workers who were classified by a company as independent contractors has provided a clear signal that the NLRB is likely to reverse its current law that, standing alone, independent contractor (“IC”) misclassification is not a violation of the National Labor Relations Act.

The Decision

In *Atomic Fire Protection, LLC*, 373 N.L.R.B. No. 109, issued on September 30, 2024, a three-member panel of the NLRB adopted the recommended decision by an administrative law judge that under the NLRB’s 2023 decision in *The Atlanta Opera, Inc.*, 372 N.L.R.B. No. 95, which set forth the NLRB’s current 10-part test for IC status, the company had misclassified sprinkler protection installation workers as ICs instead of employees. See our [blog post](#) on that case. All three members of the NLRB panel further concluded that the company committed unfair labor practices in violation of the NLRA when it interrogated the workers about their union activities and sympathies, told them they could not work for the company if they were union members, and terminated two of those workers because of their union activities.

In her recommended decision, the ALJ in *Atomic Fire Protection* noted that in 2019, when the NLRB was governed by a Republican-appointed majority, the Board issued a decision in *Velox Express*, 368 N.L.R.B. No. 61, where it declined to find that an employer violated the NLRA simply by misclassifying workers as ICs or merely informing workers they are ICs and not employees. As we noted in a prior [blog post](#), the NLRB held in *Velox Express* that an employer *would* violate the NLRA if it *intentionally* misclassifies employees as ICs in an effort to prevent them from union organizing or erroneously tells employees that it would be futile for them to unionize or engage in union activity because they are ICs and not employees under the NLRA. In *Atomic Fire Protection*, the ALJ noted that the NLRB’s General Counsel argued that *Velox Express* be overruled to the extent it concluded that misclassification itself does not violate the NLRA. The ALJ stated that, because the evidence only showed that the workers were misclassified as ICs and did not show that the company misclassified them for engaging in union or protected activity or to prevent them from engaging in such activity, she has no authority to overrule prior decisions under the NLRA and, therefore, “I am unable to find that the misclassification violated ... the Act under existing Board precedent.”

In the NLRB’s decision in *Atomic Fire Protection*, the two panel members who are regarded as Democratic Party

appointees to the NLRB stated that while they too declined the General Counsel's request to overrule *Velox Express* and hold that IC misclassification alone violates the NLRA, they would be "open to reconsidering *Velox Express* in a future appropriate case where the record evidence establishes that the employees knew that their employer was classifying them as independent contractors." Thus, it appears that it is only a matter of time before the NLRB, with its current majority of Democratic Party appointees, overrules *Velox Express*. However, it is likely that any such effort by the NLRB will be rejected by the federal courts as being contrary to the "free speech" section of the NLRA.

***Velox Express* Is Based on a Statutory Provision Allowing Employers to Lawfully Express Their Opinions**

As we noted in our [blog post](#) when *Velox Express* was issued by a Board majority in 2019 and again in a [post](#) when the NLRB's General Counsel issued a complaint alleging that IC misclassification, standing alone, violates the NLRA, the holding in *Velox Express* is premised on Section 8(c) of the NLRA, which was added to the NLRA in 1959. It states as follows: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, 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 majority in *Velox Express* concluded that when an employer decides to classify its workers as independent contractors, it forms a legal opinion regarding the status of those workers and "its communication of that legal opinion to its workers is privileged by Section 8(c) of the Act..."

Notably, the NLRB majority in *Velox Express* concluded that even if a company is wrong in its view that certain workers are ICs and is later found to have misclassified the workers, "erroneously 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.'"

The majority opinion in *Velox Express* also supported its decision on public policy, noting that "independent-contractor determinations are difficult and complicated enough when only considering the Act, but the Act is not the only relevant law." It added: "An employer must consider numerous Federal, State, and local laws and regulations that apply a number of different standards for determining independent-contractor status. Unsurprisingly, employers struggle to navigate this legal maze. Further, in classifying its workers as independent contractors, an employer may be correct under certain other laws but wrong under the Act—which is all the more reason why it would be unfair to hold that merely communicating that classification is unlawful." As a purely legal issue, this public policy basis for the holding in *Velox Express* may not have the same force and effect as does the free speech defense, which is based on a specific section of the NLRA.

Conclusion and Takeaways

Once the current NLRB majority finds a "future appropriate case" in which to overrule *Velox Express*, the decision will be subject to review by a federal appellate court. The NLRB has not fared well in the past decade when its decisions of significance have been reviewed by the courts, particularly by the U.S. Court of Appeals for the D.C. Circuit, as we commented in a [post](#) discussing *The Atlanta Opera* decision.

Regardless of what the NLRB does, Board decisions only address the test for independent contractor status under one law – the NLRA. Such decisions have no application whatsoever to a worker's independent contractor status

under the federal Fair Labor Standards Act (FLSA), which governs minimum wage and overtime; the federal non-discrimination laws (such as Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act); the federal law governing pensions and employee benefits (ERISA), and the employee payroll tax laws under the Internal Revenue Code – each of which have their own tests for independent contractor status. Likewise, any decision by the NLRB has no application to any state laws, including those involving minimum wage and overtime, wage payments, unemployment benefits, workers' compensation, and employment taxes.

Perhaps the most meaningful takeaway for businesses is that companies using an independent contractor business model that wish to avoid a union drive, a regulatory proceeding initiated by a federal or state workforce or tax agency, or a class action under a federal or state law should enhance their level of compliance with the independent contractor tests under all of those laws. Many businesses have chosen to use a process such as [IC Diagnostics](#) (TM), which is designed to minimize independent misclassification exposure by restructuring, re-documenting, and re-implementing independent contractor relationships in a customized and sustainable manner consistent with all applicable laws. Utilizing this type of process will maximize the likelihood a business will be able to avoid an independent contractor misclassification challenge, or prevail if one is brought.

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