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Employers Beware: Worker Misclassification May Be Seen as Anticompetitive Conduct

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Speaking at the Global Competition Review: Law Leaders Global Summit last month, Commissioner Alvaro M. Bedoya of the Federal Trade Commission (FTC) argued that the FTC could — and should — combat worker misclassification under Section 5 of the FTC Act, as an unfair method of competition. Commissioner Bedoya advocated that worker misclassification — when an employer classifies a worker, who should be an employee, as an independent contractor — satisfies the criteria established by the FTC in its November 2022 policy statement, for when conduct constitutes an unfair method of competition. Specifically, the commissioner stated that worker misclassification distorts competitive conditions when it allows companies who improperly classify their employees as independent contractors to underbid those competitors that correctly classify employees. Additionally, worker misclassification may be coercive, exploitative, and abusive when workers who know they are being misclassified feel that they have no choice but to accept such treatment. Commissioner Bedoya also suggested that an employer's efforts to limit the independence of a worker classified as an independent contractor could constitute an illegal vertical restraint on trade.

According to Commissioner Bedoya, the FTC's role in combatting worker misclassification would complement — not duplicate — work by the Labor Department and the National Labor Relations Board (NLRB). That is because the FTC's focus is on the anticompetitive effects of contractor misclassification in the marketplace, and the FTC Act can reach incipient unfair practices, before they harm workers and markets. The Department of Labor published a final rule for determining independent contractor status, effective just a few weeks ago, that uses a six-factor "economic reality" test to determine whether a worker is economically dependent on the potential employer for work (and therefore an employer under the Fair Labor Standards Act) or is in business for themselves. In 2023, the NLRB issued an opinion in *The Atlanta Opera, Inc.,* which returned to an Obama-era standard for determining independent contractor status under the NLRA, using a common law multifactor test focusing on the degree of exercise and control by the company.

Although worker misclassification has historically been treated as a labor law or employment law issue, the commissioner's speech was not the antitrust enforcer's first foray into the issue of worker misclassification. In July 2022, the FTC and the NLRB entered into a Memorandum of Understanding (MOU) describing "labor market developments relating to the gig economy' and other alternative work arrangements" and the classification of workers as areas of common regulatory interest between the agencies. Likewise, in September 2022, the FTC announced its Policy Statement on Enforcement Related to Gig Work, highlighting misclassification as an issue that the FTC should combat. In August 2023, the FTC also entered into an MOU with the Department of Labor that stated that the agencies share an interest in protecting workers form unfair methods of competition, like "the use of business models designed to evade legal accountability, such as the misclassification of employees[.]"

The Antitrust Division, Department of Justice (DOJ) has expressed a similar view. In February 2022, DOJ filed a brief as *amicus curiae* in NLRB's *Atlanta Opera* matter in which it suggested that adoption by the NLRB of an ambiguous definition of "employee" could result in competitive harm if it encourages employers to misclassify workers. DOJ has also entered MOUs with the Department of Labor, in March 2022, and the NLRB, in July 2022, that referenced the misclassification of employees as an area of shared interest for the agencies.

The effects of the FTC's and DOJ's interest in worker misclassification remain to be seen. Commissioner Bedoya's speech, however, shows a commitment to expanding the FTC's Section 5 enforcement to conduct clearly addressed by other already existing laws (antitrust and nonantitrust) based on the argument that the agency must stop misclassification before harm to the worker(s) or the broader market materializes.

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