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Is Independent Contractor Misclassification a Violation of the National Labor Relations Act?

Labor & Employment Workforce Watch

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Last month, a Regional Director for the National Labor Relations Board ("NLRB") issued a Complaint and Notice of Hearing that could, if successful, dramatically change the landscape of independent contractor misclassification law in the U.S. The Complaint alleges that the mere act of misclassifying employees as independent contractors would violate the National Labor Relations Act ("NLRA"), regardless of whether the company had a good faith belief that the workers had been classified correctly. It is highly unlikely, however, that this game-changing effort will be successful because it was issued despite a time-honored statutory defense available to employers.

The General Counsel of the NLRB, Jennifer Abruzzo, who was appointed by President Biden, authorized the issuance of the Complaint by the Board's Los Angeles Region against Deco Logistics, Inc. d/b/a Container Connection and other affiliates of Deco, including Universal Intermodal. The Complaint claims that Deco, Universal and their affiliates violated Section 8(a)(1) of the NLRA by allegedly misclassifying drivers as independent contractors and engaging in other activities in violation of the workers' Section 7 rights to organize, such as interrogating a driver about his union activities and retaliating against drivers because they assisted the Teamsters Union in seeking to organize drivers. The relief sought includes an Order that Deco and Universal "Reclassify independent contractors as employees and make them whole including direct and foreseeable consequential harm they incurred as a result of the Respondents' misclassification and other unlawful conduct." *Deco Logistics, Inc. d/b/a Container Connection*, Case 21-CA-272323 (Mar. 17, 2022).

As more fully discussed below, it is unlikely the NLRB will succeed in its claim that the mere act of classifying workers as independent contractors will constitute a violation of the NLRA because of the "free speech" provisions of Section 8(c) of the Act.

Seeking to overturn the majority opinion in *Velox Express*

The Regional Director, on behalf of the General Counsel, seeks to overturn the NLRB's 2019 decision in *Velox Express, Inc.*, 368 NLRB No. 61 (2019), by issuing the Complaint in *Deco Logistics*. *Velox Express* was a decision issued by a Republican-appointed majority over the dissent of the current NLRB Chair, Lauren McFerran. It held that a courier company's act of misclassifying couriers as ICs was *not*, standing alone, a violation of the NLRA. The Board majority in *Velox* also rejected the argument that it should issue an order mandating that the courier company reclassify its drivers as employees and notify them that they are not independent contractors under the NLRA.

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Velox Express is somewhat of an anomaly. The Board majority concluded that the company (a) actually misclassified the workers in question under the Board's test for independent contractor status and (b) committed an unfair labor practice by terminating a worker for engaging in protected activity – *yet concluded that the company did not violate the law by its stand-alone act of misclassifying the workers and advising the workers that they are independent contractors*. A close review of the majority's opinion demonstrates that the Board's decision in *Velox Express* on the "stand-alone" issue was mandated by the "free-speech" provisions of the NLRA as well as public policy considerations.

The Board majority in *Velox Express* held that an employer's classification of workers as independent contractors and its "mere communication to its workers that they are classified as independent contractors" do not violate the NLRA. In reaching this holding, the Board majority in *Velox Express* relied in large measure on Section 8(c) of the Act, the so-called "free speech" section, which was added to the NLRA over 60 years ago in 1959. Section 8(c) states: "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 independent contractors 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."

Next, the Board majority in *Velox Express* considered a public policy basis for its holding, noting that "[i]ndependent-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.

The final issue addressed by the Board majority in *Velox Express* was the appropriate remedy for the unfair labor practice it found that Velox had committed. The majority opinion, in a lengthy footnote, declined to order Velox to reclassify the workers as employees, finding that such a remedy only should be considered where the posting of a notice – the standard NLRB remedy – is insufficient, and there was no reason to believe that a notice would not dissipate the unlawful discharge of the driver.

The Dissent in *Velox Express*

Then-Member (and now Chair) McFerran issued a dissent. It focused on what she referred to as the "chilling effect" of misclassification, arguing that the agreement that the workers signed, which declared each driver to be

an independent contractor, "*implied* that drivers had no rights under the Act," which she regarded as unlawful. She also viewed Section 8(c)'s free speech provisions as inapplicable because, in her view, the communication of independent contractor status to the drivers was not a "legal opinion" and itself restrained, coerced, and interfered with the drivers' rights under the NLRA. Finally, Member McFerran asserted that because Velox committed an unfair labor practice by terminating a driver for engaging in protected activities, it is necessary for Velox to inform the other drivers that they are not independent contractors but rather employees entitled to rights protected by the NLRA.

Analysis and Practical Suggestions

The issue of whether the mere act of misclassifying workers as independent contractors is itself an unfair labor practice is likely to be contested not only at the NLRB but also in the courts. If the current Democratic-appointed Board majority overrules *Velox Express* and finds that Section 8(c) does not serve as a statutory defense, that decision will be contested before a federal appellate court with possible review by the U.S. Supreme Court, particularly if Velox can show a good faith belief in its view that the workers qualify as independent contractors as a matter of law. Plainly, one issue the courts would address in that circumstance would be: has the NLRB administratively "amended" the NLRA by effectively eliminating Section 8(c)'s free-speech guarantee.

The current effort by the NLRB to create a stand-alone violation of the NLRA for misclassifying workers as independent contractors should send a message to businesses using an independent contractor business model. First, companies would be wise to document their good faith belief as to why they believe the workers classified as independent contractors have been properly classified. Prior to doing so, businesses should consider evaluating their current independent contractor relationships to determine if they can enhance their level of compliance by restructuring, re-documenting, and/or re-implementing such relationships in a customized and sustainable manner, as is done in a process such as IC Diagnostics™.

Other ways such businesses can seek to protect themselves is not to engage in the types of conduct that Velox Express was found to have engaged in – terminating or otherwise retaliating against workers classified as independent contractors where such workers have supported a union's effort to organize them and others performing similar services. Such action may be deemed to be independent unfair labor practices, as the NLRB found in *Velox Express*. Other types of actions that may constitute an unfair labor practice (and may cause a company to lose the protections of Section 8(c) of the NLRA) include threats of reprisal, promise of benefits for opposing union organizing, interrogating workers about their efforts to unionize, and similar conduct.

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