LEGAL UPDATES

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# Biden's NLRB Targeting Employee Misclassification as Independent ULP

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The National Labor Relations Act (Act) protects employees' right to unionize (and not unionize), and to engage in other "protected concerted activity." These are basic rights guaranteed to employees under Section 7 of the Act.

Critically, the Act's protections only extend to "employees"—not to "independent contractors."

The number of workers labeled "independent contractor" has steadily increased over the past decade. Similarly, the number of independent contractors who have been found to be improperly classified as contractors instead of employees has also increased. Such misclassification of employees as independent contractors creates significant issues for employers, including under state and federal wage and hour laws, as well as under state unemployment compensation and workers compensation laws. Now, it appears that misclassification will soon lead to consequences under the Act once again.

Over the past several presidential administrations, the National Labor Relations Board (Board) has grappled with the question of whether, aside from any overt conduct which itself may violate the Act, the misclassification of an employee as an "independent contractor" itself constitutes a *per se* violation of the Act.

President Biden's NLRB is expected to return to precedent set by President Obama's Board finding that such misclassifications violate the Act, and may have the opportunity to rule on the issue soon. If this reversal occurs, we will have yet another example of how Board decisions reflect the policies of the incumbent administration.

**Trump Board previously found no independent violation, overruling Obama Board**

President Obama's administration first targeted employee misclassifications as independent violations of the Act in a memorandum issued in December 2015, asking the Board's regional offices to pursue claims of employee misclassification as independent violations.

Consistent with that directive, in September 2017, an administrative law judge (ALJ) ruled in *Velox Express, Inc*. that, by misclassifying its employees as independent contractors, the employer "restrained and interfered with their ability to engage in protected activity by effectively telling them that they are not protected by Section 7 and thus could be disciplined or discharged" for engaging in protected concerted activity. Case 15-CA-184006 (NLRB ALJ Sept. 25, 2017).

Two months later, another ALJ agreed with *Velox*, holding that such a misclassification "rises to the level of a *per se* violation" of the Act. *Intermodal Bridge Transport*, Cases 21-CA-157647, 21-CA-177303 (NLRB ALJ Nov. 28, 2017).

When President Trump reestablished Republican control of the Board, it promptly reversed course.

On February 15, 2018, the Trump Board invited briefs on the misclassification issue.

On August 29, 2019, the NLRB reversed the ALJ's ruling in Velox and held that the misclassification of an employee as an independent contractor does not, itself, constitute a *per se* violation of the Act. 368 NLRB No. 61, *8 (2019).

The Trump Board maintained that position on misclassification in subsequent cases. *See Intermodal Bridge Transport*, 369 NLRB No. 37 (2020); *Care One at New Milford*, 369 NLRB No. 109 (2020).

**President Biden's Board seeks reversal of *Velox***

During his presidential campaign, Biden boasted a liberal agenda and promised to be the most union-friendly President in our memory.

Following his victory in the general election, President Biden swiftly ousted the NLRB's general counsel, replaced him with Jennifer Abruzzo, and filled the Board with a majority of union-friendly members.

Soon after her appointment, General Counsel Abruzzo released Memorandum GC 21-04 on August 12, 2021, outlining the types of cases she required to pass through her office for review and reconsideration, including cases involving "employee status," such as the Trump Board's *Velox* line of cases.

In a clear step towards pursing misclassification cases, Abruzzo then issued Memorandum GC 22-03 on February 10, 2022, agreeing to partner with the U.S. Department of Labor's Wage and Hour Division, among other federal agencies, to create "better avenues for joint investigations, [and] joint enforcement" of conduct "that undermine[s] workers' rights" including the "misclassification of employees" and similar actions "that may detrimentally affect organizing or bargaining efforts."

**NLRB's XPO logistics case provides avenue for *Velox* reversal**

It appears President Biden's Board has a chance to make good on its desire to reverse *Velox*: the Teamsters union in California reportedly filed an unfair labor practice charge with the NLRB on January 19, 2022, arguing the company, XPO Logistics, violated the Act by misclassifying drivers as independent contractors. The drivers have also demanded recognition, alternatively seeking a union election—a right not afforded to (properly classified) independent contractors.

**Beware of potential misclassifications**

If given the opportunity, the Board is expected to agree with the union, reverse *Volex*, and return to the Obama-era position finding the mere act of misclassifying an employee as an independent contractor constitutes its own violation of the Act.

In light of the increase in independent contractors as a percentage of the overall workforce, a ruling in favor of the Teamsters will bring a spotlight on the issue and could open a floodgate of ULPs, union election petitions and other claims from a wide variety of groups of workers across the country currently classified as independent contractors.

Companies that hire independent contractors should work closely with counsel to review their employee and independent contractor classifications to ensure their workers are properly classified.

**Contact us**

If you have questions about this update and how it might affect your business, contact Jon Anderson, Adam Doerr or your Husch Blackwell attorney. For the latest updates regarding traditional labor law matters, subscribe to Husch Blackwell's Labor Relations Law Insider blog.