BARNES & THORNBURG LLP

The Dizzying World Of Worker Classification Just Got Slightly Less Harrowing

September 3, 2019 | Labor And Employment,National Labor Relations Board

Scott J. Witlin
Partner
Wage and Hour
Co-Chair

No issue is less understood and more consequential for employers than the proper classification of workers as employees or independent contractors. Even under traditional legal regimes, the multi-factor tests used by the IRS and the NLRB differ from one another while purporting to apply the same standard. Plus, various other agencies have created new "ABC" tests and more encompassing standards to determine who is an employee – all reaching to extend these agencies' protections of the laws they are charged with enforcing.

While the NLRB has done nothing to clarify how one should classify any particular worker, it has just pushed back against an attempt to increase the consequences. The NLRB's last pronouncement in that regard was addressed in *SuperShuttle DFW, Inc.* in January 2019.

A misclassification of workers as independent contractors rather than employees can lead to violations of the NLRA as well as other laws. This week, in *Velox Express*, the NLRB was asked to find that the misclassification was itself an independent violation of the NLRA.

By a 3-1 vote, the NLRB rejected the contention that mere misclassification violates the NLRA. The decision stated, "it is a bridge too far for us to conclude that an employer coerces its workers in violation of [the Act] whenever it informs them of its position that they are independent contractors

RELATED PRACTICE AREAS

Labor Relations

if the Board ultimately determines that the employer is mistaken."

In its decision, the majority noted the difficulty in making these classifications:

"Independent-contractor determinations are difficult and complicated enough when only considering the Act, but the Act is not the only relevant law. 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."

Because of the various, complicated and at times conflicting standards, it is always wise to consult with competent counsel before deciding upon a proper classification. Notwithstanding those difficulties, it may be some relief for employers to know that making a classification mistake in and of itself will not carry with it the additional burden of violating the NLRA.