BARNES & THORNBURG LLP

NLRB: Is Misclassification Of Independent Contractors An Unfair Labor Practice?

August 31, 2016 | | National Labor Relations Board,Labor And Employment

Gerald F. Lutkus
Of Counsel
(Retired)

The question: Is misclassification of independent contractors an unfair labor practice? The answer: Not yet. In an advice memorandum dated December 18, 2015, but just issued this week, the National Labor Relations Board (NLRB) tangled with the question of whether mere misclassification of truck drivers as independent contractors constituted an independent unfair labor practice charge. The NLRB Advice Memo does not quite get there. However, in circumstances where there is a misclassification supplemented with other conduct, there can be a violation of the National Labor Relations Act (NLRA). In the advice memorandum in the *Pacific 9 Transportation, Inc.*, case, Case 21-CA-150875, the Board's Office of General Counsel concluded that Section 8(a)(1) complaints should be issued "where the Employer told its drivers that they were independent contractors and had no right to form a union but treated them as employees in virtually every respect." The memo acknowledges that "[a]lthough the Board has never held that an employer's misclassification of statutory employees as independent contractors in itself violates Section 8(a)(1), there are several lines of Board decisions that support such a finding." According to the memorandum, Pacific 9 Transportation operates a drayage company servicing the ports of Los Angeles and Long Beach, California. The employer requires each of its drivers to execute a Lease and Transportation Agreement, which states that drivers are independent contractors and the "contractor will act solely in the capacity of an independent contractor and not as an employee, agent, joint venture or partner of carrier for any purpose whatsoever." The Board's memorandum, however, concludes that the drivers are in fact employees and that the job descriptions outlined in the agreement did not comply with the reality of the extent of employer control over the day-to-day activities of the drivers. In reaching its conclusion that the employer's actions violated the act, the Board stated that "the Employer's misclassification of its statutory employees as independent contractors operates as a restraint on and interference with its drivers' exercise of their Section 7 rights. The Employer asserts in the language of its Agreement with its drivers that they are independent contractors, but even assuming that the Agreement arguably creates an independent-contractor relationship, the Employer does not abide by its terms." The memo goes on to state that in this case, "the Employer continued to insist in its communications with drivers that they are independent contractors, even after the Region determined that the drivers are statutory employees. This conduct – treating the drivers as employees on a daily basis while continuing to insist that they are independent contractors – is without any legitimate business purpose other than to deny the drivers the protections that inure to them as statutory employees, and operates to chill its

RELATED PRACTICE AREAS

Labor and Employment
Labor Relations
National Labor Relations Board (NLRB)

RELATED TOPICS

Advice Memo
Unfair Labor Practices

drivers' exercise of their Section 7 rights. The employer's misclassification suppresses future Section 7 activity by imparting to its employees that they do not possess Section 7 rights in the first place. The Employer's misclassification works as a preemptive strike, to chill its employees from exercising their rights under the Act during a period of critical importance to its employees—the Union's organizing campaign." While the Board is giving clear signals as to where it would like to go with this issue, for now, there must be misclassification plus something extra to create an unfair labor practice.