NLRB Rules Misclassification of Employees as Independent Contractors Does Not Violate NLRA

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Last week, in *Velox Express, Inc.*, the National Labor Relations Board (NLRB) answered what had been a long-standing open question under federal labor law, ruling that the misclassification of employees as independent contractors is not a violation of the National Labor Relations Act (NLRA). As such, the decision to classify a worker as an independent contractor rather than an employee will not, by itself, subject an employer to liability under the NLRA.

The Board's decision stemmed from a complaint brought by a former worker for Velox, a medical courier business. Velox classified its workers as independent contractors. Independent contractors are not afforded the same protections granted by the NLRA to employees. One of Velox's workers complained that the workers were actually being treated as employees and, as such, were misclassified. She was later discharged, after which she filed a complaint against the company with the NLRB.

Upon review, the NLRB found that Velox's workers were, in fact, employees, under the test enunciated by the Board in *SuperShuttle DFW, Inc.* (Our prior alert on that case is here.) But the NLRB ruled that mere misclassification of employees as independent contractors did not "restrain or coerce" the employees in their exercise of their protected rights under the NLRA. As such, the misclassification, by itself, does not violate the NLRA. What did violate the NLRA, the NLRB found, was Velox's discharge of the worker who complained to Velox regarding the misclassification, as it had the effect of restraining or coercing the employee in the exercise of her protected rights.

After *Velox*, employers can rest easy knowing that they will not be liable under the NLRA for simply misclassifying their workers. However, employers may still be liable for violations of the NLRA that "stem from" a misclassification. Practically, this means that employers of independent contractors should be cautious about taking any steps that could be seen as interfering with protected rights under the NLRA lest their workers be subsequently classified as employees. Further, of course, employers still must take care and be aware of **all** relevant laws, including federal and state wage and hour laws, when making their classification determinations.

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