SEYFARTH SHAW

One Minute Memo®

NLRB Issues Advice Memorandum Claiming That Misclassification of Employees as Independent Contractors Violates Section 8(a)(1) of the National Labor Relations Act

By Jaclyn Hamlin and Ray Baldwin

Seyfarth Synopsis: *In an advice memorandum issued on December 18, 2015, but just released to the public at the end of August, 2016, an Associate General Counsel of the National Labor Relations Board opined that an employer's misclassification of truck drivers as independent contractors, rather than statutory employees, acted to chill the drivers' Section 7 rights and therefore recommended that the Region issue a complaint for a violation of Section 8(a)(1) of the National Labor Relations Act.*

The engagement and classification of independent contractors has been an issue of focus for managers, and for the government agencies who enforce various labor and employment laws, for many years. From management's perspective, independent contractors can be a valuable asset. Independent contractors are often retained because of their particular skills or expertise, their extensive experience in a particular area, and to suit companies' needs for specialized work. As it has become popular to retain independent contractors in addition to, and in some cases in place of, a traditional workforce, managers have had to contend with various consequences if they classify individuals as independent contractors and later discover that the government views those same individuals as traditional employees.

Many managers are familiar with the most common consequences of misclassifying employees as independent contractors: tax liability, IRS audits and potential wage and hour claims. As of this past week, however, employers are reminded of another concern when determining whether an individual is an employee or an independent contractor: the National Labor Relations Board.

The NLRB Advice Memorandum

In an advice memorandum issued on December 18, 2015, but just released to the public on August 26, 2016, the NLRB continued its recent trend of targeting companies that utilize independent contractors for scrutiny of their worker classifications. In the memorandum, issued in Pacific 9 Transportation, Inc., NLRB Case No. 21-CA-150875, the Assistant General Counsel advised a Regional Director to issue a complaint for a violation of Section 8(a)(1) where the employer, Pac9, had told its truck drivers that they were independent contractors, not employees, and therefore had no right to form a union.

The Assistant General Counsel determined that the employer's conduct had chilled the employees' Section 7 rights.

First, the Assistant General Counsel analyzed whether the drivers in question were, in fact, statutory employees - or whether the employer's classification of the drivers as independent contractors was correct. The Assistant General Counsel explained that, in reviewing a worker classification, the Board looks to a number of factors, none of which is independently determinative. As set forth in an earlier case, FedEx Home Delivery, 361 NLRB No. 55 (Sept. 30, 2014), the Board considers the common law factors set out in the Restatement (Second) of Agency, which include:

- Extent of the employer's control over the details of the work;
- Whether or not the individual is engaged in a distinct business;
- Whether the work in question is typically done independently or under employer supervision in the particular locality;
- The occupational skill required;
- The duration of employment;
- The method of payment;
- Whether the particular work is part of the employer's regular business;
- The parties' understanding as to whether they are creating a master-servant relationship; and
- Whether the principal (the employer) is in the same business as the individual (the employee or contractor).

The Board also considers "whether the evidence tends to show that the putative contractor is, in fact, rendering services as part of an independent business." After reviewing the factors as they pertained to Pac9's drivers, and considering the "independent business factor," the Assistant General Counsel concluded that the Pac9 drivers were statutory employees who had been misclassified as independent contractors.

The Assistant General Counsel went on to analyze whether the misclassification of the Pac9 drivers as independent contractors and the company's statements during their union organizing drive violated the National Labor Relations Act. The Assistant General Counsel concluded that Pac9's actions in classifying the drivers as independent contractors, and informing them that they were ineligible to form a union, chilled the drivers' exercise of their Section 7 rights and therefore constituted a violation of Section 8(a)(1).

Importantly, the Assistant General Counsel acknowledged that "the Board has never held that an employer's misclassification of statutory employees in itself violates Section 8(a)(1)," but went on to state that "there are several lines of Board decisions that support such a finding." He noted that the company'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 Assistant General Counsel further postured that the misclassification constituted a "preemptive strike" acting to chill the drivers' conduct during a union organizing campaign. In conclusion, the Assistant General Counsel advised the Regional Director to issue a complaint for a violation of Section 8(a)(1).

Implications for Management

The release of the Advice Memorandum in the Pac9 case is only the most recent act in a trend of NLRB actions on worker classification issues. In General Counsel Memorandum 16-01, issued on March 22, 2016, the General Counsel included worker misclassification and employment status as issues "of particular interest" to the Board. Shortly after GC Memorandum 16-01 was issued, on April 18, 2016, the Regional Director for the Board's Los Angeles office issued a complaint against another transportation employer, alleging that the company misclassified its drivers as independent contractors, "inhibiting them from engaging in Section 7 activity and depriving them of the protections of the Act." It is clear from the General Counsel's communications, including the most recently released Advice Memorandum, that the NLRB is extremely interested in worker classification issues and is targeting companies for unfair labor practice complaints when it believes that the company has misclassified statutory employees as independent contractors.

Proper classification of workers as either employees or independent contractors - as appropriate - has always been an important managerial priority. Misclassification of traditional employees as independent contractors carries tax liabilities, the risk of IRS audits, and the likelihood of wage claims. Employers are familiar with these potential consequences of misclassifying employees and should already be in compliance with worker classification requirements. As the NLRB continues to signal its intent to aggressively target employers cases involving classification of individuals as independent contractors, and perhaps even to expand the law to a new holding that misclassification of statutory employees as independent contractors is *in and of itself* a violation of Section 8(a)(1), employers have one more reason to be cautious and thorough in their employment classification compliance programs.

If you have further questions, please contact your Seyfarth attorney, Jaclyn Hamlin at jhamlin@seyfarth.com, or Raymond Baldwin at rbaldwin@seyfarth.com.