NLRB Finds Violation for Independent Contractor Misclassification

Labor & Employment Law Update

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The National Labor Relations Board (NLRB) enforces the National Labor Relations Act, the law that allows private sector employees to address the terms and conditions of their employment (e.g., wages, hours, benefits) through collective action. Through a recently released Advice Memorandum, the NLRB expanded its role to include regulating independent contractor relationships. *Pac. 9 Transp., Inc.*, Advice Mem., No. 21-CA-150875 (NLRB 12/18/2015, released 8/26/2016).

In *Pac 9*, multiple unfair labor practice charges were filed, alleging violations of the Act as it related to the company's relationship with its independent contractor drivers. The NLRB Regional Director sought an opinion from the NLRB General Counsel as to whether the NLRB had jurisdiction and whether a complaint should issue. Recognizing that the NLRB "has never held that an employer's misclassification of statutory employees as independent contractors in itself violates" the Act's protection of an employee's rights, the General Counsel nonetheless recommended that, absent a settlement agreement, the company should be ordered to:

- cease and desist telling workers that they are independent contractors (rather than employees), and
- rescind portions of its independent contractor agreements that purport to classify the workers as "independent contractors."

The General Counsel confirmed that the traditional common law independent contractor test would apply. While no factor is determinative, control was the most important. Other factors include: a distinct occupation or business, direction of work, skill required, providing supplies & equipment, length of the relationship, method of payment, the company's and worker's regular businesses, the parties' belief as to whether they were employee/employer or independent. The General Counsel found it significant that the workers lacked: entrepreneurial opportunity, realistic ability to work for others, ownership or proprietary interest in their work, control over important business decisions, and real investment of capital. Therefore, these factors militated towards an employment relationship.

The Bottom Line:

In a year of NLRB-activism in the non-union workforces (*e.g.,* see our posts on employee handbooks), companies using independent contractors to supplement their workforce must now worry that the NLRB will come after them for a misclassification issue. This is in addition to complying with regulations and tests from the IRS, U.S. and state Departments of Labor, unemployment and worker's compensation boards, and other agencies regulating the employment relationship. *Pac 9* demonstrates that while independent contractor agreements are not the last word in defining the relationship.

Care must be used when engaging individual workers as "independent contractors." Multiple governmental agencies' independent contractor tests must be analyzed to confirm that the relationship is both structured and implemented correctly. This includes written contracts, proof of insurance policies, and following good corporate practices. Experienced employment counsel can assist with forming the relationship and ensuring compliance for best practices.

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