NLRB REGIONAL DIRECTOR FILES A COMPLAINT ALLEGING THAT MISCLASSIFICATION OF WORKERS AS INDEPENDENT CONTRACTORS IS AN UNFAIR LABOR PRACTICE

Labor & Employment Alert
April 27, 2016

On April 18, the Regional Director for the National Labor Relations Board (the "NLRB")'s Los Angeles office issued an unfair labor practice complaint against a transportation company, alleging that the company had misclassified its drivers as independent contractors and, therefore, violated the National Labor Relations Act (the "NLRA"). The theory behind the Regional Director's complaint is that the NLRA provides employees with the right to unionize and engage in protected concerted activity, and that if an employer misclassifies a worker as an independent contractor, it unlawfully deprives the worker of rights accorded to employees under the NLRA. Depending on its outcome, this case could have far-reaching implications for businesses that utilize independent contractors.

The Regional Director's complaint stems from a charge that the International Brotherhood of Teamsters filed with the NLRB. Teamsters had been trying to organize truck drivers in various ports around the nation, including truck drivers who are engaged by Intermodal Bridge Transport ("Intermodal"). Drivers engaged by Intermodal, however, are classified as independent contractors and, thus, are not entitled to the protections of the NLRA, which include the right to unionize. Teamsters complained to the NLRB's Regional Office in Los Angeles. Upon a review of the Teamsters' charge, the Regional Director filed a complaint against Intermodal, alleging that Intermodal misclassified its "employee-drivers as independent contractors, thereby inhibiting them from engaging in Section 7 activity and depriving them of the protections of the Act." The complaint further alleges that Intermodal interrogated the drivers about their support for the union, promised more work to drivers who refrained from union organizational activities, and threatened drivers with job loss and reprisals if they continued supporting the Union – activities that would constitute an unfair labor practice had they been committed against employees.

The Regional Director's complaint against Intermodal comes less than one month after the NLRB's General Counsel issued a memo identifying the General Counsel's initiatives and priority cases. Critically, identified in the memo as top priorities are

Attorneys

Joseph Braccio
Ryan Everhart
Andrew Freedman
Peter Godfrey
John Godwin
Karl Kristoff
Elizabeth McPhail
Jeffrey Swiatek

Practices & Industries

Labor & Employment
Worker Classification & Employment Tax

"cases involving the employment status of workers in the on-demand economy," and "cases involving the question of whether the misclassification of employees as independent contractors."

While the outcome of the complaint against Intermodal is uncertain, the Regional Director's complaint and the General Counsel's memo highlight an ever-growing scrutiny on businesses' classification of workers as independent contractors under the NLRA. Other federal and state agencies, such as federal and state departments of labor and the IRS, have been aggressively targeting and auditing classification of workers as independent contractors for the past several years. The NLRB has now joined those enforcement efforts. Thus, in addition to wage and hour, benefits, and payroll tax considerations, companies that misclassify workers as independent contractors could, depending on the outcome of Intermodal, be liable for NLRA violations with respect to workers who were engaged as independent contractors, and those independent contractors may be allowed to organize and form a union in the company's workplace. Given these developments, businesses that utilize independent contractors should enhance their worker classification compliance efforts.

Please contact any one of our labor and employment attorneys if you have questions about this alert or worker misclassification.