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Don't Get Caught In A "Double Play"

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Although the temperatures are finally starting to cool off and fall is in the air, baseball season is heading into the playoffs and is still in full swing. What does that mean for employers? Don't get caught in a "double play." Last month, the National Labor Relations Board (NLRB) released an opinion indicating that an employer's misclassification of workers as independent contractors can result in an unfair labor practice charge under the National Labor Relations Act ("NLRA") if that misclassification is used to prevent workers from unionizing. The bottom line for employers-- in addition to penalties that employers may incur under the wage and hour laws for misclassification, employers may also be subject to possible penalties under the NLRA, in essence a penalty "double play."

The case that brought the issue up to bat concerned an employer, Pacific 9 Transportation, Inc., which informed its truck drivers that because they were independent contractors not employees of the company-they had no right to form a union. The threshold issue for the NLRB: were the workers were independent contractors or employees. To make that determination, the NLRB examined a number of factors, including:

- the extent of the employer's control over the work performed by the worker;
- whether the worker is engaged in a distinct business;
- whether the worker is supervised by the employer or works independently;
- how long the worker has worked for the employer;
- whether the worker is providing services as part of an independent business;
- whether the services that the worker is providing is part of the employer's regular business.

The more control and supervision that an employer provides over a worker, the more likely the NLRB will determine that the worker is an employee and not an independent contractor. Conversely, the less supervision and control over the worker, the less likely the NLRB is to determine that the worker is an employee. In the Pacific 9 Transportation matter the NLRB decided that the truckers were employees, not independent contractors.

Having made that determination the NLRB concluded: "the employer's misclassification of its employees as independent contractors acts to interfere and restrain its employees in the exercise of their [right to unionize]." The NLRB opinion emphasized that the employer specifically told its workers that since they were independent contractors, they could not unionize. This statement was untrue and misleading to the workers, who believed they could not form a union because of their classification status.

Employers always had to be careful not to misclassify their workers for many statutory and regulatory reasons . But now, the NLRB has come up with another: employers can be caught in a "double play" if the misclassification is used to prevent workers from unionizing. Employers should take the time to examine their worker classifications and make any necessary adjustments to prevent possible legal liability.

For any information or questions on the information provided above, please contact a member of the Wilentz Employment Law Team.

Attorney

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