Labor & Employment Issues
In Focus

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For Clients and Friends
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TRUMP NLRB RULES THAT NLRA PROTECTS EMPLOYER RIGHT TO MISCLASSIFY WORKERS AS INDEPENDENT CONTRACTORS

On August 29, 2019, the National Labor Relations Board ("NLRB" or "Board") issued a decision in *Velox Express, Inc*., holding that misclassification of statutory employees as independent contractors does not violate the National Labor Relations Act ("NLRA" or "Act"). 368 NLRB No. 61.

Velox provided medical courier services for a client that performed laboratory testing of specimens taken at medical facilities. Velox drivers collected and transported these specimens. Upon hire, drivers were required to sign an "Independent Contractor Agreement," which expressly declared their status as independent contractors. In July of 2016, Jeannie Edge, a driver, began complaining that Velox's treatment of drivers was inconsistent with their designation as independent contractors. In August, Velox demanded that drivers sign an agreement imposing additional restrictions on how drivers carried out their assignments. Edge temporarily refused to sign and Velox terminated her, accusing her of dropping a specimen in a parking lot. An NLRB administrative law judge ("ALJ") found Velox's termination justification to be pretext, concluding that the real reason for discharge was Edge's statutorily-protected complaints. The ALJ further held that Velox's drivers were employees under the Act and that Velox's misclassification of its drivers violated NLRA Section 8(a)(1).

On February 15, 2018, the NLRB issued a Notice and Invitation to File Briefs, asking the parties and interested amici to address: "Under what circumstances, if any, should the Board deem an employer's act of misclassifying statutory employees a violation of Section 8(a)(1) of the Act?"

Initially, the Board majority had little trouble finding Velox's drivers to be statutory employees, even under the new, strict standard set forth in *SuperShuttle DFW*. The Board also agreed that Velox violated the Act by terminating Edge for raising group complaints about the treatment of its drivers. The majority, however, was not persuaded that misclassification of employees alone is coercive. Instead, the Board determined that a classification decision is an employer's legal opinion, protected as employer speech under Section 8(c) of the Act. The Board reasoned that employees may still disagree and engage in union or other protected activities. The majority distinguished situations in which employers invoked classification in the context of union organizing activity or reclassified employees in order to interfere with union activity. While the Board recognized that interference should be discerned from the perspective of the employees, it concluded that misclassification alone would not reasonably tend to interfere with employee exercise of their right to organize a union or engage in concerted activity. Moreover, the Board listed several "legal and policy concerns" weighing against finding a violation for misclassification. Most notably, the majority asserted that independent contractor determinations are complex so finding a violation for misclassification would chill employers' use of the arrangement. The Board opined that preserving such relationships was a goal of

Congress, alleging that the NLRA was intended to "eliminate . . . obstructions to the free flow of commerce."

In dissent, Member McFerran began by recognizing "workplace realities," contending that employers deliberately impose independent contractor status not for the sake of flexibly or efficiency but to evade legal obligations like contributions to Social Security and to frustrate protected activities under the Act. Relying on the Board's decisions in unlawful work rule cases, Member McFerran argued that the Board only needed to find that Velox's application of its misclassification – here, Edge's termination – to be a violation that must be redressed. Member McFerran attacked the majority for going on to address the "pure misclassification issue as if Edge had never been discharged." Beyond this procedural flaw, Member McFerran contended that the fundamental issue with the majority's position is its failure to recognize the chilling effect of pure misclassification on employees' exercise of statutory rights. Member McFerran accused the majority of focusing on protecting the power of employers to structure working relationships to their benefit, which she argues is not a primary concern of the NLRA, "enacted because employers had too *much* power." Member McFerran contended that from the proper statutory perspective, Velox's Independent Contractor Agreement is no different from obvious violations of the Act like employers telling employees that they could not engage in protected activity because it would be illegal or making employees sign contracts promising not to engage in protected activity. Further, she concluded that Section 8(c) was inapplicable because the imposition of the Agreement was conduct directly affecting statutory employees, as opposed to speech. Finally, Member McFerran addressed the majority's policy contentions, arguing that the majority turned the NLRA on its head by focusing on the consequences to employers of misclassification rather than the infringement of employee rights.

While likely not the most consequential of the Republican majority's recent spate of decisions, the discussion highlights the competing visions the current Board members have of the NLRA. That an ostensibly worker friendly statute has been twisted to put employer rights first provides ample reason to supplement the NLRA with legislation like the Protecting the Right to Organize (PRO) Act, currently under consideration in Congress.

NYC ISSUES GUIDANCE TO PROTECT AGAINST DISCRIMINATION ON THE BASIS OF IMMIGRATION AND NATIONAL ORIGIN

On Wednesday, September 25, 2019, the New York City Commission on Human Rights ("Commission") released legal enforcement guidance regarding discrimination on the basis of immigration status and national origin. The full twenty-nine page guidance document may be accessed here. In a press release announcing the new guidance, the Commission noted a growing number of incidents of employers and landlords discriminating and retaliating against immigrant workers and tenants, including several ongoing investigations by the Commission of cases in which individuals were threatened with reporting to Immigration and Customs Enforcement ("ICE"). While discrimination on the basis of national origin and immigration status has been prohibited under New York City's Human Rights Law ("Human Rights Law") for decades, this new guidance is intended to reaffirm the protections and provide specific examples of prohibited conduct.

New York City's Human Rights Law prohibits discrimination on the basis of actual or perceived "alienage and citizenship status" and "national origin," among other protected

categories, in employment, housing, and places of public accommodation, and also prohibits discriminatory harassment and bias-based profiling by law enforcement. Individuals seeking to avail themselves of their protections under the Human Rights Law may either file a complaint with the Commission's Law Enforcement Bureau within one year of the discriminatory conduct (or within three years for gender-based claims) or commence legal action in court within three years of the discriminatory conduct. Penalties of up to $250,000 may be assessed for individual acts of willful discrimination; and complainants may awarded damages.

The guidance document details several types of discriminatory conduct that are prohibited under the Human Rights Law—disparate treatment, neutral policies with disparate impact, discriminatory harassment, bias-based profiling by law enforcement, retaliation, and associational discrimination—and provides examples of each.

Disparate Treatment

To prove disparate treatment under the Human Rights Law, a complainant must establish that he or she suffered an adverse action at least partly due to his or her protected class. In the employment context, it is unlawful to discriminate against a job applicant or employee because of the individual's actual or perceived immigration status or national origin. Employment discrimination can manifest itself in a number of different ways. Hiring practices that treat individuals differently based upon immigration status or national origin are one such way. While some federal and state laws do require different treatment of individuals based on immigration status, this is not a blanket exemption from the Human Rights Law's protections.

Employers must be consistent in questioning applicants about work authorization, regardless of their actual or perceived immigration status or national origin; and they may not demand specific documents beyond what is sufficient to demonstrate work authorization under federal law (so called "document abuse"). Although federal law prohibits an employer from knowingly hiring and employing individuals without work authorization, if an employer does hire or employ individuals without work authorization, they are still afforded the protections of the Human Rights Law. Under the Trump Administration, immigration worksite enforcement has become more common. Such enforcement can take the form of an ICE raid or an I-9 audit. In either case, it is not unlawful for employers to notify employees of such enforcement; however, employers cannot threaten ICE involvement to harass or intimidate employees. Additionally, the use of certain terms in the workplace, such as "illegal alien" and "illegals," when intended to demean, humiliate, or offend, rises to the level of unlawful discriminatory conduct. A single incident of such conduct, as well as a pattern of behavior, is unlawful.

Examples identified in the guidance document of disparate treatment in violation of the Human Rights Law include the following:

> A hotel prohibits its housekeeping staff from speaking Spanish while working because it would be offensive to guests.
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> An employer demands that a job applicant who speaks with an accent must produce a birth certificate, refusing to accept a Social Security card as sufficient documentation.

A general contractor gives its Polish-born employees first access to scheduling and vacation days to the detriment of U.S. citizen employees.

Neutral Policies with Disparate Impact

To establish a prima facie case of disparate impact under the Human Rights Law, a complainant must show that a facially neutral policy or practice disparately impacts a protected class. A respondent accused of discrimination may plead an affirmative defense that the policy or practice either: (1) "bears a significant relationship to a significant business objective," or (2) "does not contribute to the disparate impact." An affirmative defense may be overcome, however, if the complainant can show an available alternative that has less of a disparate impact, and the respondent cannot establish that the alternative does not serve its business objective as well as the contested policy or practice. As an example of a facially neutral policy with disparate impact, the guidance document identifies an employer's requirement that all employees must provide a passport.

Discriminatory Harassment

The Human Rights Law prohibits discriminatory harassment or violence that is motivated by animus for an individual's actual or perceived immigration status or national origin. The actual or threatened use of force against an individual or the damage or destruction of one's property because of immigration status or national origin is discriminatory harassment. This type of prohibited conduct does not require any special relationship, such as employer-employee or landlord-tenant, between the victim and wrongdoer.

Bias-based Profiling by Law Enforcement

Law enforcement action initiated against someone because of the individual's actual or perceived immigration status or national origin instead of the person's suspicious or unlawful behavior is prohibited under the Human Rights Law. The example provided in the guidance document of unlawful bias-based profiling is profiling drivers for traffic stops because they appear to be Middle Eastern or Central American.

DOL FINAL RULE RAISES OT EXEMPTION AND "HIGHLY COMPENSATED WORKER" THRESHOLDS

The U.S. Department of Labor recently released the final version of its overtime exemption rule. Effective January 1, 2020, workers will need to exceed a $35,568 per year, or approximately $684 per week, to qualify for the Fair Labor Standards Act's (FLSA) "white collar" exemption. However, note that nondiscretionary bonuses and incentive payments (including commissions) paid on at least an annual basis may be used to satisfy up to 10 percent (10%) of the standard salary level.

In order to be exempt from overtime under the federal FLSA, employees must be (1) paid a salary of at least the threshold amount, and (2) also meet certain work duties tests (i.e. Executive exemption, Administrative exemption or Professional exemption). If employees are paid less than the threshold or do not meet the duties tests for exemption, those employees must be paid 1.5 times their regular hourly rate for any hours worked in excess of 40 hours per workweek.

In addition to raising the salary threshold, the new rule raises the so-called "highly compensated worker" threshold from $100,000 to $107,432. The highly compensated employee exemption covers well-paid workers who perform some managerial duties. Employees designated as highly compensated face less stringent requirements for being exempt from overtime.

The new rule confronts Employers with a choice -- either reclassify previously exempt workers to nonexempt status or raise the salaries of such employees to the increased threshold. While the final rule does not include automatic salary threshold increases, the DOL did state that it intends to update the established salary thresholds more regularly in the future.

To Our Clients: If you have any questions regarding any of the matters addressed in this newsletter, or any other labor or employment related issues in general, please contact the Pitta LLP attorney with whom you usually work.

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