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NAVIGATING THE NEW TERRAIN: DOL'S FINAL RULE REDEFINES WORKER CLASSIFICATION

This week, the U.S. Department of Labor ("DOL") unveiled a pivotal final rule ("Final Rule") that redefines the criteria for classifying workers as either "employees" or "independent contractors" under the Fair Labor Standards Act ("FLSA"). This Final Rule, effective March 11, 2024, marks a significant shift in the labor landscape, impacting businesses across various industries.

The significance of this Final Rule lies in the legal distinctions between employees and independent contractors. Employees are entitled to certain workplace protections, such as minimum wage and overtime pay, which do not extend to independent contractors. Misclassification of workers can lead to costly lawsuits and penalties for employers, making accurate classification crucial. Historically, the FLSA has not explicitly defined "independent contractor," leading to reliance on case law and DOL guidance, which often proved ambiguous. This ambiguity has resulted in considerable litigation and confusion. The Final Rule aims to provide clearer guidance and reduce such confusion.

The Final Rule introduces a six-factor test to assess the "economic reality" of the worker-business relationship. These factors include the worker's opportunity for profit or loss, investments by the worker and potential employer, the permanence of the relationship, the degree of the employer's control over the work, the extent to which the work is integral to the employer's business, and the worker's skill or initiative. The overarching question is whether the worker is economically dependent on the business for employment. If so, the worker should be classified as an employee; if not, as an independent contractor. Notably, the DOL clarified that the Final Rule does not adopt the "ABC worker classification test" used in some states, like California. This test has a different approach to differentiating between employees and independent contractors.

The Final Rule represents a departure from the Trump administration's 2021 rule, which emphasized two core factors in the economic realities test, making it more employer-friendly. The new rule reverts to a more balanced consideration of all factors, potentially leading to more workers being classified as employees under the FLSA. This change is part of a broader focus on worker classification under the current administration. For instance, in June 2023, the National Labor Relations Board reverted to its previous multifactor test for determining employee status under the National Labor Relations Act ("NLRA").

The implications of the Final Rule are profound. Workers claiming misclassification as independent contractors could pursue claims for unpaid overtime and minimum wages, potentially as collective actions, posing significant liability risks for businesses. Employers, especially in the gig economy and traditional businesses using independent contractors, should review their practices in light of the new rule. The Final Rule follows a Notice of Proposed Rulemaking issued in October 2022, which received over 55,000

comments. The DOL maintained its stance to rescind the Trump Administration rule, emphasizing a totality-of-the-circumstances analysis without predetermined weight for each factor. This approach is seen as more consistent with federal appellate case law and the text and purpose of the FLSA.

In conclusion, the DOL's Final Rule is a game-changer in the classification of workers. It demands careful attention from businesses to ensure compliance and avoid potential legal challenges. As the landscape of labor law continues to evolve, staying informed and adaptable is key for businesses navigating these new regulatory terrains.

SPACEX LAUNCHES CONSTITUTIONAL ATTACK INTO NLRB'S HULL

On January 4, 2024, Elon Musk's Space Exploration Technologies Corp ("SpaceX") filed a moonshot lawsuit against the National Labor Relation Board ("Board" or "NLRB") alleging that its structure violates the United States Constitution. The case in the Southern District of Texas is *Space Exploration Technologies Corp. v. National Labor Relations Board et al*, Docket No. 1:24-cv-00001. Besides the Board itself, SpaceX included in the crew of defendants all of the Board's Members, the Board General Counsel, and the Administrative Law Judge ("ALJ") assigned to the underlying NLRB case. SpaceX's lawsuit comes on the heels of the Los Angeles-based NLRB, Region 31 issuing an administrative complaint alleging that the company illegally terminated eight employees after they sent an open letter to the whole company criticizing SpaceX and Musk.

SpaceX's Complaint alleges four counts: (1) the Board ALJs are unconstitutionally insulated from removal; (2) the Board Members are unconstitutionally insulated from removal; (3) the ALJ's adjudication without a jury trial violates the Seventh Amendment; and (4) the Board's exercise of executive, legislative and judicial authority violates the Separation of Powers and Due Process.

SpaceX argues that ALJs are "officers of the United States" and thus the Constitution requires that the President be able to exercise authority over their functions. ALJs can only be removed by the Board for good cause established and determined by the Merit Systems Protection Board ("MSPB"). MSPB members, in turn, are removable only for "inefficiency, neglect of duty, or malfeasance in office." NLRB Board members are removable "for neglect of duty or malfeasance in office, but for no other cause." SpaceX argues that the ALJ's two layers of removal protection prevents the President's exercise of authority and so violates the Constitution.

Similarly, SpaceX argues that Board Members themselves are unconstitutionally insulated from removal. SpaceX alleges that Board Members' removal protections are "unusually strict" as they can only be removed "for neglect of duty or malfeasance in

office." SpaceX also argues this removal protection and the Board's prosecutorial, rulemaking, policymaking and adjudicative authority violate the Constitution.

SpaceX also takes umbrage with NLRB ALJs potentially awarding compensatory damages to victims of unfair labor practice, such as damages for credit card debt, early withdrawals from retirement accounts and loans workers take because they were illegally fired. SpaceX argues that these remedies, unlike the equitable remedy of backpay, are compensatory and so the Seventh Amendment requires a jury trial.

The final count alleges that the Board's exercise of prosecutorial, legislative and adjudicatory authority in the same proceeding violates the separation of powers and due process. The Board's Region issues the complaint and requests the Board to approve injunctive relief under Section 10(j) of the National Labor Relations Act. The Board later presides in the proceeding involving the same alleged violations involved in the 10(j) action. According to SpaceX, Board Members act as a prosecutor in the 10(j) proceeding and then as the tribunal for the unfair labor practice proceeding, in violation of the Constitution.

By filing in the U.S. District Court for the Southern District of Texas, this lawsuit is in the orbit of the Fifth Circuit Court of Appeals which has a habit of not welcoming visitors from the administrative state and finding administrative agencies unconstitutional.

SECOND CIRCUIT MAKES FAST WORK REJECTING RESTAURANTS' CHALLENGE TO NYC FAST FOOD "JUST CAUSE" LAW

In *Restaurant Law Ctr. NY State Restaurant Ass'n v. City of NY*, No. 22-491-cv (Jan. 4, 2024) the United States Court of Appeals for the Second Circuit decisively upheld a New York City law protecting fast food workers from arbitrary discharges. The opinion firmly rejects arguments promoted by employer groups to challenge the growing wave of local laws on wages, benefits and other terms and conditions of employment. The decision also provides a roadmap for survival of local legislation in this labor area.

The New York City Council amended the City's Fair Workweek Law (the "Law") to largely prohibit discharges of fast-food workers employed by chains with 30 or more locations except for just cause, and to provide affected fast-food employees with an arbitration option, effective July 4,2021. The Restaurant Law Center and the NY State Restaurant Association ("Plaintiffs" or the "Restaurants") sued claiming that the Law was preempted by the National Labor Relations Act ("NLRA") under *Machinists v. Wisconsin Empl. Rel. Comm'n*, 42 U.S. 132 (1976) and that it violated the U.S. Constitution's "dormant Commerce Clause" that prohibits local law discrimination against interstate actors. The District Court granted the City summary judgment, and Restaurants

appealed. In an opinion marked by detailed, biting analysis and exhaustive citations, Judge Nathan joined by Judge Parker affirmed.[1]

Judge Nathan first rejected Restaurants' challenge based on *Machinist* preemption. Citing U.S. Supreme Court and Second Circuit precedent, Judge Nathan reasoned that "*Machinists* does not bar state and local governments from enacting laws that provide substantive employment protections" because "the NLRA leaves intact states' broad authority under their police powers to regulate substantive labor standards, which serves as the backdrop for the employment negotiations governed by federal law." That is because "the NLRA is concerned primarily with establishing an equitable *process* for determining terms and conditions of employment." Only where the local law puts "a thumb on the scale of either labor or management in the bargaining process," rather than establish uniform standards, does *Machinists* preemption apply, ruled the Court.

Applying this standard, the City Law easily survived Restaurants' *Machinists* challenge. On its face, Judge Nathan began, the Law does not regulate the *process* of collective bargaining, but provides specific minimum protections to individual workers. "The mere fact," she continued, that the Law "pertains to matters over which the parties are free to bargain cannot support a claim to pre-emption, for there is nothing in the NLRA which expressly forecloses all state regulatory power with respect to those issues that may be the subject of collective bargaining." Similarly, the fact that the law specifically targeted food employers with 30 or more locations nationwide did not foil its general application because "the City was entitled to craft targeted legislation" after its extensive legislative findings of abuse in that industry. The Court dismissed Restaurants' objection that the Law catered to union lobbying as irrelevant and its impact on stifling lockouts as speculative. Finally, the Court held that the Law's imposition of just cause and arbitration did not effectively impose a collective bargaining agreement contrary to NLRA preemption because "the mere fact that a labor protection gives employees something for which they might otherwise have to bargain" does not trigger *Machinists* preemption.

Restaurants also argued that the Law violated the federal constitutional "dormant Commerce Clause" prohibition of discriminating against interstate actors in favor of locals. Restaurants claimed such prohibited discrimination because only interstate chains had 30 or more locations while local businesses were much smaller. But, objected Judge Nathan, Restaurants failed to show that the Law "applies in a way that benefits in-state competitors at the expense of out-of-state competitors." Indeed, noted the Court, the Law does not impose direct costs on out-of-state entities, "only individuals operating in New York City." In that regard, "every restaurant to which the Law applies is an in-state

[1] Judge Pooler, originally on the panel, passed prior to decision. May her memory be a blessing.

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business, and at the chain level, the Law applies equally regardless of where a franchise is headquartered." Inasmuch as the Law did not directly discriminate, the City need only show that on balance the benefits outweighed the burdens. The City easily met that standard in the extensive legislative history documenting the hardships of fast food workers.

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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