

UPDATE: Does Misclassifying Employees As Independent Contractors Violate Labor Law?

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Whether it be the Internal Revenue Service (IRS), the Department of Labor (DOL), or state unemployment or workers' compensation agencies, employee versus independent contractor status always is a hot issue. Missteps by employers in this area can result in back taxes, penalties, and more. The question has been looming, however, whether the National Labor Relations Board (NLRB) also would be throwing itself into the [misclassification analysis fray](#) with other agencies. Specifically, the board previously has signaled it may consider the misclassification of workers as independent contractors [a violation](#) of the National Labor Relations Act (NLRA) in some circumstances, such as in cases where an employer attempts to misclassify employees as contractors in an attempt to avoid union organizing (only employees can form unions under the NLRA; independent contractors cannot). It appears we may have a [definitive answer](#) from the NLRB soon as to whether misclassification by itself can violate the labor law.

[On Feb. 15, 2018, the agency announced](#) that it is inviting the public to file briefs with the agency by April 16 in connection with a pending case articulating whether misclassification of workers should violate the NLRA in any context. On April 12, the NLRB announced it was extending the time for filing briefs to April 30. This indicates we should have a ruling providing clarity in this area from the NLRB later this year. Until then, employers may not know where they stand with the board, but they do know they still have to account for the IRS, DOL, and state agencies on this front. Notably, the board gained a [Republican majority](#) this week, which may bode well for employers in terms of rulings on issues, including this one. Stay tuned to see if yet another layer of complication is added to this already complex issue.

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