



Employee Misclassification As Independent Contractor

September 12, 2016 | [Traditional Labor, Labor And Employment](#)



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As we have noted in prior [blog posts](#), the Department of Labor (DOL) has increasingly taken the position that employers more often than not are misclassifying statutory “employees” as independent contractors. Misclassifications such as this can result in back-pay, liquidated damages and attorney’s fees for individuals as well as potential civil penalties. This is in addition to the IRS penalties that may be imposed for failing to pay back payroll taxes for individuals who are actually employees and not independent contractors.

As noted on the [DOL webpage](#), the “Wage and Hour Division is working with the IRS and many states to combat employee misclassification.” Now the National Labor Relations Board (NLRB) has also weighed in with its view of employee misclassification in an [advice memorandum](#), stating that an employer’s misclassification of truck drivers as independent contractors rather than employees “interfered with and restrained the drivers in their exercise of Section 7 rights, in violation of Section 8(a)(1)” and therefore, Region 21 should issue a Section 8(a)(1) complaint (i.e., unfair labor practice complaint). Associate General Counsel Barry Kearney admits that while the “Board has never held that an employer’s misclassification of statutory employees as independent contractors in itself violates Section 8(a)(1), there are several lines of Board decisions that support such finding.” For more details regarding this memorandum see our [post in our sister blog BT Labor Relations](#).

Given the additional potential for liability from NLRB unfair labor practice

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charges, this is yet another reason, besides the obvious wage and hour and IRS issues, to review the proper classifications of independent contractors versus employees.