Press Release

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WLF Urges NLRB Not to Convert Mere Employee Misclassification into an Unfair Labor Practice

(In re Velox Express, Inc.)

"The ALJ's novel theory of liability—that an employer's mistaken employee classification is a per se unfair labor practice—represents an unwarranted expansion of the NLRB's jurisdiction over non-coercive conduct that Congress never intended the NLRA to reach."
—Cory Andrews, WLF Senior Litigation Counsel

WASHINGTON, DC—The Washington Legal Foundation (WLF) today urged the National Labor Relations Board (NLRB) to overturn an Administrative Law Judge's (ALJ) decision that, if allowed to stand, would automatically convert a company's mistaken classification of an employee as an independent contractor into a federal unfair labor practice. In a brief filed in *In re Velox Express, Inc.*, WLF argues that the NLRB's adoption of the ALJ's order would impose novel, unprecedented liability on vast numbers of American businesses to the detriment of the nation's economy.

As WLF's brief shows, for more than 70 years, federal court precedent and the NLRB's own decisions have consistently treated a worker's employment status as a threshold, jurisdictional question rather than a standalone basis for alleging a violation of the National Labor Relations Act (NLRA). WLF urges the Board to retain that jurisdictional approach to classification determinations and decline to expand NLRA liability any further.

WLF's brief also demonstrates that worker classification is inherently fact-intensive and often fraught with difficulty. Reasonable minds can differ in applying the relevant common-law agency factors, and they often do. Indeed, federal appeals courts have reversed the NLRB itself many times for the agency's initial, erroneous classification decisions. Given how easily good-faith worker misclassifications occur, WLF urges the Board not to make mere misclassification a new basis for federal liability.

Lastly, WLF argues that imposing such liability would undoubtedly abridge employers' constitutionally protected free speech in violation of § 8(c) of the NLRA. Congress enacted § 8(c) to "implement the First Amendment" by carefully balancing an employer's right to speak freely with its employees' § 7 rights. Under § 8(c), a company's "express[ion] of any views, argument, or opinion … shall not constitute or be evidence of an unfair labor practice." That categorically includes a company's considered legal opinion about whether its workers are independent contractors. Any fair reading of the federal case law applying that statutory provision confirms that the Board is strictly prohibited from treating uncoercive speech as an unfair labor practice.

Celebrating its 41st year, WLF is America's premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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