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National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

S.A.M.

DATE: December 2, 2016

TO: Marlin Osthus, Regional Director
Region 18

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Menard, Inc.
Case 18-CA-181821

177-2414-0100-0000
177-2414-2200-0000
177-2484-5067-3500
512-5006-5031-0000
512-5006-5050-0000
512-5006-5067-0000
512-5006-5053-0000
512-5006-5096-0000
512-5006-6767-0000

The Region submitted this case for advice as to whether the Employer's misclassification of its statutory employees as independent contractors, in itself, violates Section 8(a)(1). We conclude that the Region should issue a Section 8(a)(1) complaint alleging that the Employer's misclassification of its employees as independent contractors interfered with and restrained employees in the exercise of their Section 7 rights. Initially, we conclude that the Employer's haulers are statutory employees and not independent contractors. We further conclude that, in the circumstances here, where neither the Employer's contracts with its haulers nor its day-to-day practices establish an independent contractor relationship, the Employer's misclassification of its haulers as independent contractors interfered with and restrained the haulers in their exercise of Section 7 rights, in violation of Section 8(a)(1).[1]

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[1] The Region has already determined that, assuming the haulers are employees, the contracts' mandatory arbitration/class action waiver provisions violate Section 8(a)(1) under *U-Haul Co. of California*, 347 NLRB 375, 377-78 (2006) (mandatory arbitration policy that covered "all disputes relating to or arising out of an employee's employment," and set forth a long list of examples that concluded with "any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations" violated Section 8(a)(1)), enforced, 255 F. App'x 527 (D.C. Cir. 2007); *2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 2 (Dec. 29, 2011) (policy mandating

FACTS

Menard, Inc. ("Employer") operates approximately 300 home improvement retail stores across fourteen states in the Midwestern United States, including Minnesota and Wisconsin. The Employer advertises the availability of home delivery for any products purchased from its retail store locations. Each of the Employer's stores typically contracts with one or two haulers who fulfill home delivery of the Employer's goods to its customers.[2] Each store has a hauler that operates at least one small box truck for smaller deliveries and one larger "Masterlift" truck for larger deliveries which require the use of a forklift at the delivery site.[3] The Employer is currently contracted with hundreds of haulers across its retail locations.

The Employer requires each of its haulers to execute a Delivery Service Agreement ("Agreement"). The Employer's store managers retrieve the latest version of the Agreement from the Employer's headquarters; the Agreement may not be changed without permission from headquarters personnel. The Agreement states that haulers are independent contractors and that "nothing in this Agreement[] shall be construed as creating an employer-employee relationship between [the Employer] and Hauler."

The Agreement contains several terms that govern the haulers' relationship with the Employer. Significantly, the Agreement requires haulers to "complete each delivery as soon as possible within [the Employer's stores'] normal business hours on the day that [the Employer] notified Hauler that a delivery job has been allocated to Hauler," and provide "all equipment necessary to protect the merchandise from being damaged." And "[m]erchandise damaged by Hauler will be paid for by the Hauler at the full retail price." The Agreement also requires haulers to "follow the unloading

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arbitration of "all [employment] disputes and claims" was unlawfully overbroad); and *D. R. Horton, Inc.*, 357 NLRB 2277, 2280 (2012) (applying *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004), to determine whether employer violated Section 8(a)(1) by requiring employees to sign mandatory arbitration agreement as a condition of employment), *enforcement denied on other grounds*, 737 F.3d 344 (5th Cir. 2013).

[2] The number of haulers contracted to work at each store is dependent on how much business each store does.

[3] Stores will sometimes loan out their haulers to other nearby stores if their hauler has specialized equipment (such as a crane arm for delivering items onto roof tops) or if the other store is short-handed on haulers.

direction dictated by the [customer] and noted on the delivery agreement [between the Employer and the customer]."

Haulers' compensation is computed on a per-mile basis. Haulers receive additional compensation for handling specific types of goods, such as shingles, sheet rock, and lumber; handling pallets; and providing in-home delivery. The Agreement also specifies that haulers receive a "delivery bonus" of one-half of one percent of the net selling price (sales less returns) of all the Employer merchandise that the hauler delivers to customers. In addition, haulers receive a yearly "retention bonus" for each full year (January 1 to December 31) in which they make deliveries for the particular store they are contracted with. The retention bonus is calculated as one-half of one percent of the net selling price of all Employer goods that the hauler delivers to customers during the calendar year. Retention bonuses are non-transferrable without the Employer's express written consent. If the hauler sells or transfers its contract with the Employer to a third party on or before the end of the calendar year, neither the hauler nor its successor in interest is eligible for the retention bonus for that year.

Haulers may either provide their own vehicles or purchase vehicles from the Employer. In either event, the Agreement requires haulers' vehicles to identify the hauler's business name and display several of the Employer's decals. Haulers are responsible for maintaining their vehicles. Haulers also must maintain the necessary insurance to protect the hauler and the Employer from "any claims, which may arise as a result of this Agreement."

The Agreement requires haulers to purchase a GPS location manager device from the Employer and keep that device in their vehicles.

Haulers are permitted to subcontract their deliveries to other parties subject to written authorization from the Employer. Additionally, haulers are permitted to hire employees, but must provide all information about its employees to the Employer prior to the employees commencing work for the hauler.

The Employer is permitted to terminate the Agreement unilaterally in the event of "default by Hauler of any of the terms or conditions of th[e] Agreement." However, the hauler may only terminate "upon a sixty (60) day written notice being sent to [the Employer] by registered or certified mail."

Finally, the Agreement contains a non-compete clause that prohibits haulers from "agree[ing] . . . to do contract hauling for any competitor of [the Employer] that is located within within 25 miles of any [Employer] store" that the hauler is contracted with during the life of the contract and for a period of one year after the termination of the Agreement.

The Agreement also contains the following mandatory arbitration/class action waiver provisions:

A. <u>Resolution of Dispute by Binding Arbitration.</u>

> [The Employer] and Hauler agree that all claims and disputes between them shall be resolved by binding arbitration by the America Arbitration Association ("AAA") under its Commercial Arbitration Rules. [The Employer] and Hauler further agree that any arbitration held pursuant to this Agreement will be held in the city, or within (10) miles, of where the work took place, unless otherwise agreed to by both parties to this Agreement. . . . This provision constitutes an express waiver of the right to court, jury, or administrative review. . . .

B. <u>Class Action Waiver.</u>

> Any claim must be brought in the respective party's individual capacity, and not as a plaintiff or class member in any purported class, collective, representative, multiple plaintiff, or similar proceeding ("Class Action"). The parties expressly waive any ability to maintain any Class Action in any forum. The arbitrator shall not have authority to combine or aggregate similar claims or conduct any Class Action nor make an award to any person or entity not a party to the arbitration. Any claim that all or part of this Class Action Waiver is unenforceable, unconscionable, void, or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator. **THE PARTIES UNDERSTAND THAT THEY WOULD HAVE HAD A RIGHT TO LITIGATE THROUGH A COURT, TO HAVE A JUDGE OR JURY DECIDE THEIR CASE AND TO BE PARTY TO A CLASS OR REPRESENTATIVE ACTION. HOWEVER, THEY UNDERSTAND AND CHOOSE TO HAVE ANY CLAIMS DECIDED INDIV[I]DUALLY, THROUGH ARBITRATION.**[4]

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[4] All emphasis in original. As mentioned *supra*, the Region has determined that these arbitration clauses violate Section 8(a)(1).

The Employer's day-to-day operations do not differ substantially from the purported terms set forth in the Agreement. The Employer maintains extensive control over the haulers' schedules. The Employer permits its customers who are selecting home delivery to select from two time slots: 12:00PM – 6:00PM or 6:00PM – 10:00PM. The haulers have some control over when to make deliveries during those time slots,[5] but they have no control over which deliveries are assigned to them. The Employer provides haulers with maps to each of their destinations generated by the Employer's proprietary GPS system. Although haulers are permitted to deviate from the Employer-produced maps, the rate of pay per delivery is determined by the maps the Employer produces for its haulers, not their actual mileage.

Haulers do not control which days they work. The Employer requires that the Haulers be available to work seven days a week during its stores' normal business hours (generally from 6:30AM – 10:00PM). The Employer does not guarantee work any particular day, and haulers are not informed of their scheduled deliveries until the night before. Haulers are not typically permitted to trade deliveries. However, if a hauler is unavailable on a particular day, it is incumbent on the hauler (with the Employer's permission) to find a replacement from the other haulers at their store or from one of the Employer's other stores.

The Employer does not have a formalized discipline policy for its haulers. But haulers are not permitted to reject deliveries, and the Employer has routinely threatened to punish haulers who do not follow its directives or resist completing all assigned deliveries in a given day. These punishments have included restricting haulers' scheduling times (such as requiring deliveries to be made in narrower time slots), requiring haulers to make deliveries well past the store's closing time, or threatening to withhold compensation for all deliveries from a given a day.

The Employer does not directly supervise the haulers during the work day. However, the Employer does monitor the position of each hauler using the GPS devices and displays the haulers' positions prominently in real-time within its stores. The Employer does not provide any training to its haulers; it merely requires drivers of larger trucks to have their commercial driver's licenses.

The haulers own their own trucks. Although the Employer does not require any particular makes or models of trucks, the Employer's stores will specify what type of truck (box, boom, or Masterlift) it is seeking for particular stores prior to signing an

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[5] The Employer offers its customers "first-out" and "second-out" options for deliveries and, in some instances, allows customers to pick a narrower time for delivery (e.g., 5:30PM – 6:00PM). These customer options limit the haulers' ability to control the order of their deliveries.

Agreement with a hauler. The Employer incentivizes the purchase of Masterlift trucks by offering to maintain and service both a Masterlift trailer and regular trailer while a hauler is using one or the other. The Employer also offers box trucks for sale to haulers. The box trucks have the Employer's logo and company information displayed prominently across the box section of the truck.

ACTION

We conclude that the Region should issue a Section 8(a)(1) complaint alleging that the Employer's misclassification of its haulers as independent contractors interfered with and restrained haulers in the exercise of their Section 7 rights. Initially, we conclude that the haulers are statutory employees and not independent contractors. We further conclude that, in the circumstances here, where neither the Employer's contracts with its haulers nor its day-to-day practices establish an independent contractor relationship, the Employer's misclassification of its haulers as independent contractors interfered with and restrained the haulers in their exercise of Section 7 rights, in violation of Section 8(a)(1).

A. The Employer's haulers are statutory employees

In *FedEx Home Delivery,* the Board recently reaffirmed that in determining whether a particular worker is an independent contractor or an employee under Section 2(3) of the Act, the Board will apply the traditional common-law factors enumerated in the Restatement (Second) of Agency § 220, with no single factor being determinative.[6] Thus, the following factors are relevant:

> [1] The extent of control which, by the agreement, the [employer] may exercise over the details of the work, [2] whether or not the one employed is engaged in a distinct occupation or business, [3] the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision, [4] the skill required in the particular occupation, [5] whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work, [6] the length of time for which the person is employed, [7] the method of payment, whether by the time or by the job, [8] whether or not the work is part of the regular business of the employer, [9] whether or not the parties

[6] 361 NLRB No. 55, slip op. at 2 (Sept. 30, 2014) (concluding that package delivery drivers were statutory employees rather than independent contractors).

> believe they are creating the relation of master and servant, and [10] whether the principal is or is not in the business.[7]

The Board also considers, along with the preceding factors, "whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*."[8] The "independent-business factor" includes consideration of whether the putative contractor has a significant entrepreneurial opportunity; has a realistic ability to work for others; has a proprietary or ownership interest in his or her work; and has control over important business decisions, such as scheduling of performance, hiring and assignment of employees, equipment purchases, and investment of capital.[9] The Board gives weight to actual, and not merely theoretical, entrepreneurial opportunity, and also evaluates the constraints imposed by a company on the individual's ability to pursue this opportunity.[10] The Board also considers whether the terms and conditions under which the individual operates are "promulgated and changed unilaterally" by the putative employer.[11]

The Board has also long held that the party asserting independent-contractor status bears the burden of proof on that issue.[12] When applying these common-law agency factors and determining employee status under Section 2(3), the Board will "construe the independent-contractor exclusion narrowly" so as to not "deny protection to workers the Act was designed to reach."[13]

In the instant case, the evidence overwhelmingly demonstrates that the Employer's haulers are statutory employees and not independent contractors. Indeed, the facts involving the haulers are arguably even more compelling than those relating

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[7] *Id.* (quoting Restatement (Second) of Agency § 220 (1958)).

[8] *Id.*, slip op. at 11 (emphasis in original).

[9] *Id.,* slip op. at 12.

[10] *Id.*, slip op. at 10.

[11] *Id.*, slip op. at 12.

[12] *Id.*, slip op. at 2 (citing *BKN, Inc.*, 333 NLRB 143, 144 (2001) and *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 710–12 (2001) (upholding Board's rule that party asserting supervisory status in representation cases has burden of proof)). *See also Central Transport, Inc.*, 247 NLRB 1482, 1483 n.1 (1980).

[13] *FedEx*, 361 NLRB No. 55, slip op. at 9–10.

to the *FedEx Home Delivery* drivers. First, the Employer exerts extensive control over its haulers on a day-to-day basis as a matter of contract and practice. The Employer unilaterally dictates to the haulers not only the deliveries they will make, but also the route they will use to make the deliveries. As the Agreement sets forth haulers compensation as a matter of miles driven, the haulers have no opportunity to negotiate for greater pay or work "smarter," rather than "harder."[14] Haulers are also not permitted to reject deliveries, and the Employer unilaterally determines with its customers what time the deliveries will be made by the haulers.[15] Second, although the haulers are not necessarily "fully integrated into [the Employer's] organization," many of the Employer's products are either too large or too impractical for its customers to arrange delivery on their own.[16] Moreover, although haulers are required to display their company name on their vehicles in addition to the Employer's name, the Agreement prohibits haulers from performing services for the Employer's competitors, and there is no evidence that haulers perform delivery services for any other business but the Employer.[17] Third, the Employer effectively supervises the performance of the haulers' work by constantly monitoring their positioning through the on-board GPS device that it requires its haulers to purchase. This ability to monitor, in conjunction with the detailed maps provided for each

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[14] *See Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002) (enforcing Board's order finding drivers to be statutory employees, noting that absence of opportunity to work "smarter, not harder" was strong indicia of statutory employee status).

[15] *See id.,* slip op. at 12–13 (FedEx controls the number of packages delivered, the stops to be made, and the time in which the deliveries were to be). *See also Time Auto Transportation,* 338 NLRB 626, 637 (2002) (fact that drivers were assigned one load at a time and were penalized for refusing a load found to be indicia of employee status), *affirmed,* 377 F.3d 496 (6th Cir. 2004).

[16] *FedEx Home Delivery,* 361 NLRB No. 55, slip op. at 13 (quoting *United Ins. Co. of Am.*, 390 U.S. 254, 259 (1968)).

[17] *Compare FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 13 (finding factor in favor of employee status where drivers' uniforms, logos, and colors on vehicles showed that drivers were in effect doing business in name of the employer where they were fully integrated into employer's business), *with Porter Drywall, Inc.*, 362 NLRB No. 6, slip op. at 3 (Jan. 29, 2015) (finding factor in favor of independent contractor status where crew leaders did not work exclusively for the employer and on occasion competed with employer for work). *See also Roadway Package Systems*, 326 NLRB 842, 851 (1998) (finding drivers to be employees in part where drivers doing business in name of employer).

delivery, operates as a functional equivalent to real-time tracking of the hauler's daily routes.[18]

Fourth, haulers are not required to have any special training or skills, other than a commercial driver's license.[19] Fifth, although haulers provide their own vehicles and the Employer does not strictly dictate vehicle specifications, the Employer incentivizes haulers to obtain vehicles optimized for its delivery, such as the Masterlift trucks, and offers its box trucks for sale to haulers.[20] Sixth, the haulers effectively "'have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.'"[21] The Agreements that haulers sign are for no fixed duration, and other factors, including the yearly retention bonus and the large capital investments made by haulers in purchasing their vehicles, encourage long-standing relationships with the Employer. Indeed, many haulers stay with the Employer for years.

Seventh, the Employer establishes and controls the haulers' rates of compensation, which are nonnegotiable, and also fixes the rates charged to customers.[22] Eighth, as stated above, although the haulers' work is arguably not at the core of the Employer's business of selling home improvement products, many of the Employer's products are too large or impracticable for its customers to leave the store with. Furthermore, the Employer prominently advertises to its customers that it provides delivery services for its products in-store.[23] Ninth, although the

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[18] *Cf. FedEx*, 361 NLRB No. 55, slip op. at 13 (FedEx essentially directs the drivers' performance via the enforcement of rules and tracking mechanisms and can impose disciplinary measures).

[19] *See id.* (drivers receive all necessary skills via two weeks of training provided by FedEx).

[20] *Id.*, slip op. at 13–14 (FedEx drivers own their own vehicles but FedEx plays a primary role in dictating vehicle specifications and facilitating the transfer of vehicles between drivers).

[21] *Id.,* slip op. at 14 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. at 259).

[22] *See id.* (FedEx establishes, regulates, and controls the rate of compensation and rates charged to customers).

[23] *Cf. id.* (drivers "perform functions that are not merely a 'regular' or even an 'essential' part of the Employer's normal operations, but are the very core of its business." (quoting *Roadway Package System, Inc.,* 326 NLRB 842, 851 (1998)).

Agreement purports to create an independent-contractor relationship, and the haulers acknowledge that characterization by signing the Agreement, "the [haulers] do not have an opportunity to negotiate over that term . . . [and] the intent factor is therefore inconclusive."[24] As for the tenth common-law factor, however, the Employer is in a distinct and separate business (retail home improvement sales) from its haulers (delivery), so this factor arguably weighs against employee status.[25]

Finally, the evidence strongly demonstrates that the haulers are not rendering services as part of an independent business. Both the terms of the Agreement and the Employer's day-to-day practices demonstrate that the haulers have no entrepreneurial opportunity. The Agreement prohibits haulers from providing their services to any business similar to the Employer's, both during the life of the Agreement and for one year after the Agreement's termination.[26] Furthermore, because the Employer does not issue assignments until the night before the delivery, the haulers have no realistic opportunity to work for others and do not do so. Third, haulers have no proprietary or ownership interest in their Agreements. Haulers are not able to transfer their Agreements to others or even hire employees without extensive supervision and approval from the Employer. Lastly, the haulers have no control over important business decisions. Instead, the Employer "has total command over its business strategy, customer base and recruitment, and the prices charged to customers," and "unilaterally drafts, promulgates, and changes the terms of its Agreement with drivers[.]"[27]

In sum, under *FedEx Home Delivery,* the Employer's haulers are employees within the meaning of Section 2(3).

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[24] *See id.* (noting as well, however, that a majority of the FedEx drivers had voted to be represented as employees in a collective-bargaining unit).

[25] *Id.,* slip op. at 15.

[26] *See Corporate Express Delivery Systems*, 332 NLRB 1522, 1522 (1999) (concluding that owner-operator/drivers who were prohibited from handling goods for entities other than the employer lacked sufficient entrepreneurial opportunity to truly be independent contractors), *enforced*, 292 F.3d 777 (D.C. Cir. 2002).

[27] *Id.*

B. The Employer violated Section 8(a)(1) by misclassifying its haulers as independent contractors

Section 8(a)(1) makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of" employees' Section 7 rights.[28] Although 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 a finding.

First, the Board has held that an employer violates Section 8(a)(1) when its actions operate to chill[29] or curtail future Section 7 activity of statutory employees.[30] In *Parexel International*, the Board made clear that an employer's "preemptive strike to prevent [an employee] from engaging in activity protected by the Act" violates Section 8(a)(1) because of its chilling effect on employees' future exercise of their Section 7 rights.[31] Even if an employee has no history of Section 7 activity, if the employer acts to prevent that employee from engaging in protected activity in the future, "that action interferes with and restrains the exercise of Section 7 rights and is unlawful without more."[32] In *Parexel,* the Board noted that it is the suppression or chilling of future protected activity that lies at the heart of unlawful employer retaliation against past protected activity.[33] Similarly, Board precedent holding

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[28] 29 U.S.C. § 158(a)(1). In contrast, an employer does not violate the Act if it interferes with, restrains, or coerces the exercise of what would otherwise constitute Section 7 rights by individuals who are not statutory employees. *See Wal-mart Stores, Inc.*, 340 NLRB 220, 223 (2003) (employer's instruction to group of twenty-two putative Section 2(11) supervisors that they could not engage in union activity only violated Section 8(a)(1) with respect to the four who were actually statutory employees).

[29] *Cf. Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (maintenance of rules that would reasonably tend to chill employees in the exercise of their Section 7 rights violates Section 8(a)(1)), *enforced mem.*, 203 F.3d 52 (1999).

[30] *See, e.g.*, *Parexel International, LLC*, 356 NLRB 516, 518–19 and cases cited at n.9 (2011) (employer violated Section 8(a)(1) by discharging an employee to prevent her from discussing wages with other employees).

[31] *Id.* at 517, 519.

[32] *Id.* at 519.

[33] *Id.*

unlawful an employer's adverse action taken on the mistaken belief that an employee engaged in protected concerted activity is premised on the notion that the chilling of future protected activity violates the Act.[34]

Second, employer statements to employees that engaging in Section 7 activity would be futile violate Section 8(a)(1).[35] Thus, in *Sisters' Camelot*, the Board found that the employer violated Section 8(a)(1) by indicating that union organizing would be futile when it informed its canvasser employees, who had been misclassified as independent contractors and were attempting to organize, that it would never accept an employer-employee relationship with its workers.[36]

Third, the Board has also found misstatements of law to constitute an unlawful interference with employees' Section 7 rights if the statement reasonably insinuates adverse consequences for engaging in Section 7 activity.[37] For example, employer

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[34] *See, e.g., United States Service Industries, Inc.*, 314 NLRB 30, 31 (1994) ("[A]ctions taken by an employer against an employee based on the employer's belief the employee engaged in or intended to engaged in protected concerted activity are unlawful even though the employee did not in fact engage in or intend to engage in such activity." (internal quotation marks omitted)), *enforced,* 80 F.3d 558 (D.C. Cir. 1996) (unpublished table decision); *Metropolitan Orthopedic Associates, P.C.*, 237 NLRB 427, 427 n.3 (1978) ("The discharge of 4 employees in a unit of 13 employees because of Respondent's belief, albeit mistaken, that the[y] had engaged in protected concerted activities is an unfair labor practice which goes to the very heart of the Act"). *See also Parexel International, LLC,* 356 NLRB at 519, relying also upon *Majestic Molded Prods. v. NLRB,* 330 F.2d 603, 606 (2d Cir. 1964), and cases cited therein (holding unlawful a mass discharge undertaken without concern for whether all of the individual employees were engaged in protected activity).

[35] *See, e.g.*, *M.D. Miller Trucking & Topsoil, Inc.*, 361 NLRB No. 141, slip op. 1 (Dec. 16, 2014) (concluding that employer's statement that employees' grievance would go nowhere constituted unlawful threat of futility); *North Star Steel Co.*, 347 NLRB 1364, 1365 (2006) (employer's statement that collective bargaining would not result in employees obtaining benefits other than what the employer chose to give them and unionization would lead employer to choose to give them less violated Section 8(a)(1), because employees "could reasonably infer futility of union representation.").

[36] 363 NLRB No. 13, slip op. at 6 (Sept. 25, 2015).

[37] *See, e.g.*, *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 617, 618 & n.22 (2007) (employer's flyer that misled employees by creating impression that employees would have to give up customary wage increases as a "lawful and ineluctable

statements that suggest that employees could "lose their jobs" as a consequence of engaging in an economic strike inaccurately describe employee rights under *The Laidlaw Corporation*[38] and therefore constitute unlawful threats of reprisal.[39]

In the instant case, the Employer's misclassification of its statutory employees as independent contractors operates as a restraint on and interference with its haulers' exercise of their Section 7 rights. In *Pacific 9 Transportation*, we concluded that an employer violated Section 8(a)(1) by misclassifying its drivers as independent contractors where it treated its drivers as employees on a daily basis, even though its agreement with the drivers, viewed in isolation, arguably would have created an independent contractor relationship.[40] Here, the Employer asserts in the language of its Agreement with its haulers that they are independent contractors, but, unlike in *Pacific 9 Transportation*, the Agreement itself would not arguably create an independent contractor relationship. Thus, neither the Employer's Agreement with its haulers nor the Employer's day-to-day practices arguably create an independent-contractor relationship. Accordingly, as in *Pacific 9*, the Employer's misclassification suppresses future Section 7 activity by imparting to its employees that they do not

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consequence" of bargaining violated Section 8(a)(1)); *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 799 n.2 (1980) (misstating law by implying that union would have right to demand that employees pay union fines and assessments and accede to contractual dues checkoff in order to retain their jobs, unlawful in context of other threats), *enforced*, 679 F.2d 900 (9th Cir. 1982) (table).

[38] In *The Laidlaw Corporation*, 171 NLRB 1366, 1368–70 (1968), *enforced,* 414 F.2d 99 (7th Cir. 1969), the Board delineated the rights accorded to economic strikers: they remain employees if they have been permanently replaced before they make unconditional offers of reinstatement, and must be placed on a preferential hiring list and reinstated when substantially equivalent positions become available.

[39] *See Fern Terrace Lodge,* 297 NLRB 8, 8–9 (1989) (statement that permanently "replaced striker is not automatically entitled to his job back just because the strike ends" unlawful, because economic strikers are automatically entitled to their jobs back, or, if their job is unavailable, preferential hiring to similar openings); *Larson Tool,* 296 NLRB 895, 895–96 (1989) ("you could lose your job to a permanent replacement," without further explanation, unlawful); *Hajoca Corp.,* 291 NLRB 104, 106 (1988) (informing employees they would be permanently replaced and would "no longer have jobs" if they went on an economic strike held unlawful), *enforced*, 872 F.2d 1169, 1177 (3d Cir. 1989).

[40] Case 21-CA-150875, Advice Memorandum dated Dec. 18, 2015.

possess Section 7 rights in the first place.[41] The Employer's misclassification works as a preemptive strike, to chill its employees from exercising their rights under the Act during a period of critical importance to its employees—the Union's organizing campaign.

Furthermore, in light of the Employer's extensive control over its haulers' day-to-day operations and the Employer's prohibition of its haulers' performing work for its competitors, the Employer's continued insistence that its haulers are independent contractors is akin to a misstatement of law that reasonably insinuates adverse consequences for employees' continued Section 7 activity. Because independent contractors may lawfully be terminated for engaging in Section 7 activity, the Employer's continued insistence to its employees during a union organizing campaign that they are independent contractors is tantamount to the Employer telling its employees that they engage in Section 7 activity at the risk of losing their jobs.

For these reasons, we conclude that, on these facts, the Employer's misclassification of its employees as independent contractors acts to interfere with and restrain its employees in the exercise of their Section 7 rights. The Region should seek a nationwide remedy in this case for all of the Employer's violations of Section 8(a)(1). As a remedy for the misclassification violation, the Region should seek an order requiring that the Employer cease and desist from interfering with, restraining, or otherwise coercing its employees in the exercise of their Section 7 rights by communicating to its drivers that they are independent contractors and not employees within the meaning of the Act. The order should also require that the Employer take affirmative action to rescind any portions of its Agreements with its haulers that purport to classify them as independent contractors and to post the appropriate notice.[42]

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[41] *Cf. Parexel International, LLC*, 356 NLRB at 519–20 (finding discharge violated Section 8(a)(1) because it was undertaken in order to be certain employee did not engage in future Section 7 activity).

[42] Finally, while the employee testimony in this case is limited to haulers at two of the Employer's locations, the evidence obtained by the Region from the Employer is sufficient to show that the Employer's haulers are employees. In this regard, an ALJ recently determined that the individuals performing work for a national app-based company are employees based on the testimony of one individual and documentary evidence. *See Arise Virtual Solutions, Inc.*, Case 12-CA-144223, JD-76-16 (NLRB Div. of Judges, Aug. 16, 2016). The Region can also argue, if necessary, that the question of whether individual haulers are employees for the purposes of applying the remedy is an issue for compliance. *See, e.g.*, *Boch Honda*, 362 NLRB No. 83, slip op. at 3 (Apr. 30, 2015) (leaving to compliance the question of what entities the respondent owned

Accordingly, the Region should issue a Section 8(a)(1) complaint, absent settlement, alleging that the Employer's misclassification of its employees as independent contractors violates Section 8(a)(1).

/s/
B.J.K.

H:ADV.18-CA-181821.Response.Menard [redacted]

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or operated with respect to the scope of the remedy for unlawful handbook policies), *enforced*, 826 F.3d 558 (1st Cir. 2016).