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Two Sides of the Same Coin: Examining the Misclassification of Workers as Independent Contractors

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TWO SIDES OF THE SAME COIN: EXAMINING THE MISCLASSIFICATION OF WORKERS AS INDEPENDENT CONTRACTORS

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Under current National Labor Relations Board interpretations of the National Labor Relations Act, employers may only be punished for misclassifying their employees as independent contractors if a separate violation of the NLRA is present. As the U.S. economy increasingly focuses on gig work, millions of workers are affected by misclassification, which results in lower pay and fewer employment protections. Misclassification also strips the government of billions of dollars in tax revenue.

The NLRB considered the issue of making the misclassification of employees a standalone violation of Section 8(a)(1) of the NLRA in the case Velox Express, Inc.*, yet it declined to do so. This decision is not in accord with the realities of the modern gig economy and the changing nature of the workplace. This Note argues that the NLRB should find that standalone violations of Section 8(a)(1) of the NLRA exist when employers misclassify workers as independent contractors rather than as employees. Misclassification benefits employers while substantially harming employees. Employers who misclassify their workers should face the repercussions of an NLRA violation each time they misclassify a worker. This standalone violation would further Congress's stated purposes for the NLRA and would provide gig workers with protections associated with the employment relationship.*

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I. INTRODUCTION

When was the last time you used a service like Uber, DoorDash, or Task Rabbit? Casual observers would likely be surprised by how many workers they interact with on a daily basis who are regularly deemed independent contractors,[1] including workers in "home care, janitorial, trucking, construction, hospitality and restaurants[,] and . . . the rapidly-growing app-based 'on-demand' economy."[2] The use of independent contractors is rampant in the modern business world,[3] also frequently referred to as the "gig economy," which continues to expand as "a natural consequence of technological advances that are expected to grow exponentially in the twenty-first century."[4] With the rise of the national gig economy,[5] more

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[1] *See* Daniel Wiessner, *Uber Drivers are Contractors, Not Employees, U.S. Labor Agency Says*, REUTERS (May 14, 2019, 4:04 PM), https://www.reuters.com/article/us-uber-contractors/uber-drivers-are-contractors-not-employees-us-labor-agency-says-idUSKCN1SK2FY (describing an advisory memo from a President Trump appointee to the National Labor Relations Board which concluded that Uber drivers are not considered employees under federal law); Daniel Wiessner, *GrubHub Case Could Be Barometer for New Rules on Independent Contractors*, REUTERS (May 6, 2018, 7:12 AM), https://www.reuters.com/article/idUSKBN1I70AM ("Gig economy companies such as GrubHub, Uber Technologies Inc . . . and TaskRabbit Inc rely heavily on the use of independent contractors to contain costs."); *see also* Erin Mulvaney, Robert Wilkens-Iafolla & Joel Rosenblatt, *Uber Won Its Prized Contractor Status for Drivers. Now What? (2)*, BLOOMBERG L. (Nov. 4, 2020, 11:45 AM), https://www.bloomberglaw.com/product/labor/document/XODAEA8000000 (describing the effects of the passage of California's Proposition 22 ballot initiative which requires companies like Uber to provide its workers with some modest benefits, but also noting that the passage "amounts to a hall pass" from employee-friendly California Supreme Court precedent by allowing companies to continue classifying gig workers as independent contractors rather than employees).

[2] NAT'L EMP. L. PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES 1 (2017), http://stage.nelp.org/wp-content/uploads/NELP-independent-contractors-cost-2017.pdf.

[3] *See id.* (noting the prevalence of employee misclassification in "many of our economy's growth industries"); *see also* TREASURY INSPECTOR GEN. FOR TAX ADMIN., OFFICE OF INSPECTIONS AND EVALUATIONS, 2018-IE-R002, ADDITIONAL ACTIONS ARE NEEDED TO MAKE THE WORKER MISCLASSIFICATION INITIATIVE WITH THE DEPARTMENT OF LABOR A SUCCESS 1 (2018), https://www.treasury.gov/tigta/iereports/2018reports/2018IER002fr.pdf (describing the financial impact of employee misclassification and noting its effects on millions of workers throughout the United States).

[4] Laurie E. Leader, *Whose Time Is It Anyway?: Evolving Notions of Work in the 21st Century*, 6 BELMONT L. REV. 96, 120 (2019).

[5] *See* Scott M. Prange, *Managing the Workforce in the Gig Economy*, HAW. B.J., June 2016, at 4, 4 ("After the Great Recession in 2009, the gig economy accelerated as companies such as

employers are categorizing their workers as independent contractors when they should be considered employees—a decision that comes with far-reaching effects.[6] Whether an intentional attempt by an employer to evade duties owed to an actual employee or a good faith error, the misclassification of workers as independent contractors can have substantial implications for federal, state, and local governments; taxpayers; and, importantly, the employees who are misclassified.[7] Unfortunately, the true scope of misclassification[8] is difficult to identify because employers are unlikely to report their own errors or deceit.[9] However, a report by the Treasury Inspector General for Tax Administration, which evaluated a joint initiative by the Internal Revenue Service (IRS) and the Department of Labor, estimated that millions of workers throughout the nation are misclassified as independent contractors instead of as employees.[10] What is known definitively is that "[m]isclassification is a frontline legal issue" in today's economy,[11] and as technological advancements and further changes in the market "driv[e] the growing prevalence of 'gig work,' . . . gig and

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Uber, Lyft, and SideCar (ride-sharing); Work Genius (staffing agency); Care (companion care, and elderly, child, and pet care); Handy (home cleaning services); Task Rabbit (home maintenance); Q (office cleaning); and Door Dash (food delivery) gave rise to technological platforms which enabled companies to more easily fissure jobs into directly contracted gigs."). Notably, the United Kingdom's Supreme Court recently held that "Uber drivers must be treated as workers rather than self-employed," which will have "wider implications for . . . other gig economy workers." Mary-Ann Russon, *Uber Drivers Are Workers Not Self-Employed, Supreme Court Rules*, BBC (Feb. 19, 2021), https://www.bbc.com/news/business-56123668.

[6] *See* TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 3, at 1–2 (explaining the tax ramifications and loss of workplace protections incurred as a result of employee misclassification).

[7] *See id.* at 1 (noting that "[w]orker misclassification can affect Federal, State, and municipal governments due to lost revenue" and that "[a]n employee misclassified as an independent contractor also loses critical workplace protections, like minimum wage and overtime protections, and the ability to receive unemployment payments").

[8] For the purposes of this Note, "misclassification" refers only to misclassification of an employee as an independent contractor.

[9] *See* TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 3, at 2 (explaining that "[t]here is no current estimate on the nationwide extent of employee misclassification . . . because employers do not voluntarily report misclassification").

[10] *See id.* at 1 (describing misclassification as "a nationwide problem which affects millions of workers").

[11] Robert Iafolla, *Misclassifying Workers Doesn't Violate Labor Law, NLRB Says (2)*, BLOOMBERG L. (Aug. 29, 2019, 7:04 PM), https://www.bloomberglaw.com/product/labor/document/XB4PSFH0000000.

other contingent workers are becoming increasingly marginalized in what is already a grossly inequitable bargaining relationship."[12]

The National Labor Relations Board (NLRB or Board) recently had a chance to end willful worker misclassification on the part of employers and failed to do so in *Velox Express, Inc.* (*Velox*); instead, the Board held that misclassifying workers as independent contractors is not a standalone violation of Section 8(a)(1) of the National Labor Relations Act (NLRA or Act).[13] This Note argues that the NLRB missed an opportunity to ensure that the NLRA applies to all employees and not just to those in traditional employment relationships.

This Note addresses some of the ramifications relating to the misclassification of workers as independent contractors with a predominate focus on *Velox*. Additionally, this Note argues that any time employers misclassify their workers as independent contractors, whether intentionally or not, such misclassification should be deemed a violation of Section 8(a)(1) of the NLRA. This change would further the underlying policy of the NLRA to protect employees and mitigate the inherent power imbalance between employers and employees.[14] Creating a standalone violation would be a step in the right direction towards recognizing the changes occurring in the modern economy and would compel Congress and the courts to "reconsider who is entitled to wage-hour and other protections" that come with an employer–employee relationship.[15]

Part II of this Note provides a brief history of the NLRA, the NLRB, and the statutory sections relevant to the misclassification of employees. Part II then gives a detailed look at the myriad issues that arise when workers are misclassified as independent contractors. Part III then evaluates *Velox* and analyzes why the Board should reevaluate its ultimate holding. Part IV reiterates the severity of this issue nationwide and explains how a change in the

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[12] Leader, *supra* note 4, at 99.

[13] Velox Express, Inc., 368 N.L.R.B. No. 61, at 2 (Aug. 29, 2019) (holding that "an employer's misclassification of its employees as independent contractors does not violate the Act").

[14] *See National Labor Relations Act*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act (last visited Feb. 28, 2021) ("Congress enacted the National Labor Relations Act . . . to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.").

[15] Leader, *supra* note 4, at 99.

Board's interpretation of the NLRA can ameliorate this problem to better reflect the realities of today's gig economy.

II. BACKGROUND

A. THE NLRA AND THE NLRB

Congress passed the NLRA in 1935 to protect workers' rights to self-organization and to level the playing field with employers, who typically possess far greater bargaining power.[16] Its passage came after years of employer–employee conflict over working conditions and congressional dispute over the proper remedy.[17] The NLRA created the NLRB[18] to serve as a quasi-judicial, independent body with the power to adjudicate labor disputes and with the goal of protecting "the rights of most private-sector employees to join together, with or without a union, to improve their wages and working conditions."[19] As originally passed, the Board consisted of three members who are nominated by the President and approved by the Senate.[20]

The Act was controversial and faced sustained criticism after its passage. Even after the U.S. Supreme Court upheld the

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[16] *See* 29 U.S.C. § 151 (2018) ("It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."); *see also 1935 Passage of the Wagner Act*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1935-passage-wagner-act (last visited Apr. 8, 2021) (explaining that the NLRA, originally known as the Wagner Act, "gave employees the right . . . to form and join unions, and it obligated employers to bargain collectively with unions selected by a majority of the employees in an appropriate bargaining unit").

[17] *See Pre-Wagner Act Labor Relations*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/pre-wagner-act-labor-relations (last visited Apr. 8, 2021) (detailing the hostility between employers and employees and the evolution of labor laws in the United States throughout the early twentieth century).

[18] *See 1935 Passage of the Wagner Act*, *supra* note 16 (explaining the Act's proposal for a new independent federal agency—the NLRB).

[19] *Rights We Protect*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/about-nlrb/rights-we-protect (last visited Apr. 8, 2021).

[20] *1935 Passage of the Wagner Act*, *supra* note 16.

constitutionality of the Act in 1937,[21] it faced continued criticism from both labor and management alike.[22] In its original form, the Act did not explicitly exclude independent contractors from coverage, which proved to be an area of contention.[23] In 1947, the Taft-Hartley Act (Taft-Hartley) amended the NLRA and significantly changed it by expressly excluding independent contractors from the NLRA's coverage.[24] Taft-Hartley was widely viewed as a legislative response to a pro-employee U.S. Supreme Court decision, *NLRB v. Hearst Publications, Inc.*,[25] as well as a total rejection of potentially broad interpretations of who is covered under the Act.[26] It was further seen as an attempt to "rebalance the powers between unions and employers"[27] through its application of unfair labor practices both to unions and employers.[28] Additionally,

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[21] *See 1937 Act Held Constitutional*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1937-act-held-constitutional (last visited Apr. 8, 2021) ("In the pivotal 1937 Jones and Laughlin case, the Supreme Court saved the Act in a 5-to-4 decision upholding its constitutionality."); *see also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937) ("Our conclusion is that the order of the Board was within its competency and that the Act is valid . . . .").

[22] *See 1935 Enforcement of the Wagner Act*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/enforcement-wagner-act (last visited Apr. 8, 2021) (noting the employer complaints about the Act as well as the unanticipated negative response from the American Federation of Labor).

[23] *See* Hiroshi Motomura, Comment, *Employees and Independent Contractors Under the National Labor Relations Act*, 2 INDUS. REL. L.J. 278, 279–80 (1977) (noting that independent contractors were not originally excluded from protection under the NLRA, which left the "scope of the Act's coverage" to the NLRB's discretion).

[24] *See id.* at 279 n.4 ("The Taft-Hartley Act added the exclusionary phrase 'any individual having the status of an independent contractor.'" (quoting 29 U.S.C. § 152(3) (2018))).

[25] *See* NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 129 (1944) ("[T]he broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as 'employee,' 'employer,' and 'labor dispute,' leaves no doubt that its applicability is to be determined broadly . . . by underlying economic facts rather than technically and exclusively by previously established legal classifications." (footnote omitted)).

[26] *See* Motomura, *supra* note 23, at 285 ("The legislative history [of Taft-Hartley] shows that the addition of an explicit 'independent contractor' exclusion to the definition of employee was intended to repudiate *Hearst*."); Hannah Esquenazi, Note, *Who Can "Seize the Day?": Analyzing Who is an "Employee" for Purposes of Unionization and Collective Bargaining Through the Lens of the "Newsie" Strike of 1899*, 59 B.C. L. REV. 2551, 2553 (2018) ("Congress was unhappy with [*Hearst*] and amended the statute to its current state, disqualifying independent contractors from the rights of employees.").

[27] Esquenazi, *supra* note 26, at 2571.

[28] *See 1947 Taft-Hartley Passage and NLRB Structural Changes*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1947-taft-hartley-passage-and-

Taft-Hartley created the position of the General Counsel to serve as the prosecutor in NLRB cases and increased the number of Board members from three to five.[29]

Labor victories dropped dramatically after the passage of Taft-Hartley, and Congress decided further modification was necessary, resulting in the passage of the Landrum-Griffin Act in 1959.[30] With one final addition to cover employees at nonprofit hospitals,[31] the NLRA has since remained unchanged. The NLRA provides a framework through which employer and employee actions and rights are protected, details the procedure for electing a collective bargaining representative, and establishes what behaviors constitute unfair labor practices.[32]

This Note discusses a type of worker misclassification which implicates Sections 2(3), 7, and 8(a)(1) of the NLRA. First, Section 2(3) provides the definition of an "employee," noting an important exclusion that "any individual having the status of an independent contractor" is not considered a statutory employee.[33] Next, Section 7 details the protected rights of employees.[34] Finally, Section 8(a)(1)

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nlrb-structural-changes (last visited Apr. 8, 2021) ("Under the Wagner Act, there were only employer unfair labor practices. . . . Taft introduced a complex bill that would make unions subject to the NLRB's unfair labor practice powers as well.").

[29] *See id.* ("The general counsel would act as a prosecutor separate from and independent of the Board and would supervise the agency's attorneys . . . .").

[30] *See 1959 Landrum-Griffin Act*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1959-landrum-griffin-act (last visited Apr. 8, 2021) (noting that "[a]fter passage of the Taft-Hartley Act, the number of union victories . . . declined" and describing the ways the Landrum-Griffin Act amended Taft-Hartley).

[31] *See 1974 Health Care Amendments*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1974-health-care-amendments (last visited Apr. 8, 2021) (explaining the 1974 amendment to the Act).

[32] *See generally* OFFICE OF THE GEN. COUNSEL, NLRB, BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT (1997), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf (detailing the contents of the NLRA and the meaning of each provision).

[33] 29 U.S.C. § 152(3) (2018); *see also* Labor Management Relations Act, 1947, Pub. L. No. 80-101, § 2(3), 61 Stat. 136, 137–38.

[34] *See* 29 U.S.C. § 157 (2018) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."); *see also* Labor Management Relations Act, 1947, § 7, 61 Stat. at 140.

states, "It shall be an unfair labor practice for an employer—to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7 of the Act]."[35]

The NLRB's standard test for determining a worker's classification is the common-law agency test.[36] It has long been recognized that this test can be difficult to apply, and reasonable minds often reach different conclusions when classifying the same worker.[37] The test states in relevant part:

> In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) 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; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.[38]

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[35] 29 U.S.C. § 158(a)(1) (2018); *see also* Labor Management Relations Act, 1947, § 8(a)(1), 61 Stat. at 140.

[36] Velox Express, Inc., 368 N.L.R.B. No. 61, at 2 (Aug. 29, 2019).

[37] *See id.* at 8 ("Board members regularly reach different conclusions when faced with questions concerning independent-contractor status, and reviewing courts often disagree with the Board's application of the common-law agency test and deny enforcement of Board decisions finding employee status." (footnote omitted)); Leader, *supra* note 4, at 102 ("The common law definition of 'employee' appears simplistic but produces varied results.").

[38] RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958); *see also Velox Express, Inc.*, 368 N.L.R.B. No. 61, at 2 & n.8 (citing the same Restatement provision to

This Note does not challenge either the use of this test or its application to any particular fact pattern; rather, this Note addresses the consequences for individuals who are misclassified under this test.

B. SCOPE OF THE ISSUES

Misclassifying workers as independent contractors instead of employees causes numerous problems with far-reaching effects.[39] The Treasury Inspector General for Tax Administration suggests that "[e]mployers who misclassify their employees as independent contractors are depriving Social Security, Medicare, unemployment insurance, and worker's compensation funds of billions of dollars and reducing Federal, State, and local tax revenues."[40] The Department of Labor estimates that these tax savings allow employers to save between twenty and forty percent on labor costs.[41] When an employer classifies a worker as an employee rather than an independent contractor:

> [T]he employer is responsible for paying Federal unemployment tax and the employer's portion of Social Security and Medicare taxes. The employer is also responsible for withholding from the employee's salary or wages the employee's portion of Social Security, Medicare, and Federal income taxes and paying it directly over to the IRS. An employer may also be responsible for State unemployment taxes, State worker's compensation and disability insurance, and the withholding of the employee's State and local

describe what "[t]he Board considers" when deciding "whether a worker is an employee or an independent contractor").

[39] *See* TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 3, at 1–2 (describing the detriments suffered by workers when misclassified as independent contractors).

[40] *Id.* at 2.

[41] *See* DEP'T FOR PROF'L EMPS., AFL-CIO, THE MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS 3 (2016), https://static1.squarespace.com/static/5d10ef48024ce300010f0f0c/t/5d1bb81a7c15100001d76dd8/1562097690744/Misclassification+of+Employees+2016+Format+Update.pdf ("The largest incentive for misclassifying workers is that employers are not required to pay Social Security and unemployment insurance (UI) taxes for independent contractors. These tax savings . . . results in employers saving between 20 to 40 percent on labor costs.").

> income tax that are payable to the appropriate State or local taxing authority.[42]

Thus, deeming a person an independent contractor instead of an employee has significant tax implications. For example, the independent contractor, rather than the employer, must cover both federal income tax and self-employment tax themselves.[43] Additionally, the government loses critical tax revenue used for federal services like Medicare and Social Security as well as state and local programs.[44]

Outside the tax realm, independent contractors also lose many "critical workplace protections."[45] The Americans with Disabilities Act, the Age Discrimination in Employment Act, and Title VII of the Civil Rights Act exclude independent contractors from protections.[46] Such exclusions, among others, take away independent contractors' rights to workers' compensation,[47] "minimum wage and overtime protections, and the ability to receive unemployment payments"[48] in addition to the loss of avenues to address issues like sexual harassment in the workplace.[49] Importantly, in the context of the NLRA, workers also lose the ability to join unions and bargain collectively to obtain better terms and conditions of employment.[50]

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[42] TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 3, at 1.

[43] *See id.* (noting workers' tax obligations when they are not considered employees).

[44] *See id.* at 2 (explaining that employee misclassification results in the loss of billions of dollars for government programs).

[45] *Id.* at 1.

[46] *See Coverage*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/employees/coverage.cfm (last visited Mar. 1, 2021) (noting that independent contractors are not covered by anti-discrimination laws enforced by the Equal Employment Opportunity Commission); DEP'T FOR PROF'L EMPS., *supra* note 41, at 3 (explaining that independent contractors lose out on protections, including "prohibitions of employment discrimination based on factors such as age, race, gender, or disability").

[47] *See* Leader, *supra* note 4, at 99–100 ("[C]lassification affects . . . coverage under federal, state, and local labor and employment laws, and state workers' compensation statutes.").

[48] TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 3, at 1.

[49] *See* Yuki Noguchi, *Unequal Rights: Contract Workers Have Few Workplace Protections*, NPR (Mar. 26, 2018, 2:18 PM), https://www.npr.org/2018/03/26/593102978/unequal-rights-contract-workers-have-few-workplace-protections ("Under federal law, a contract worker lacks the right to sue for sexual harassment or gender discrimination, for example, because workplace civil rights laws do not apply.").

[50] *See* NAT'L EMP'T LAW PROJECT, *supra* note 2 (explaining that if misclassification is "undetected, employees miss out on fair pay, health and safety, workers comp, unemployment insurance, and the right to collectively bargain for better jobs").

Another key issue is that employers may be held vicariously liable for any negligent actions taken by their employees while on the job or in the scope of their employment—the same cannot be said when the worker is instead an independent contractor.[51]

Additionally, those employers who intentionally misclassify their workers for economic gain put honest employers at a competitive disadvantage.[52] This scenario creates a perverse incentive to misclassify in order to compete with rivals in the market who are paying less in taxes. For example, in the construction industry, employers can obtain significant advantages through employee misclassification.[53] In an amicus brief filed in *Velox*, one union argued that "[m]isclassification of employees is commonplace and, frankly, advantageous in the construction industry for reasons that include the preemptive impact of misclassification on employees' rights under the NLRA."[54] The union noted that because employers typically cover workers' compensation and unemployment insurance for their employees—which can comprise more than fifteen percent of total labor costs—eliminating these payments "confers an immediate, more than [ten percent] total project cost advantage to an employer who misclassifies his employees."[55] Further, the more money unlawful employers are able to save, the more "lawful employers subsidize the freeloaders in the form of increased workers' compensation and health insurance premiums."[56] The rampant misclassification of workers without any

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[51] *See* RESTATEMENT (THIRD) OF AGENCY § 7.07(1) (AM. LAW INST. 2006) ("An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment."); Leader, *supra* note 4, at 100 ("[B]usinesses are liable for their employees' negligent acts committed during the course of and within the scope of employment.").

[52] *See* TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 3, at 1 (listing the requirements employers do not have to meet if their workers are misclassified as independent contractors); DEP'T FOR PROF'L EMPS., *supra* note 41, at 5 (explaining that, through misclassification, "lawful employers are underbid and lose business, [and] wages and labor standards are depressed across the board").

[53] *See* Brief of Amicus Curiae Signatory Wall and Ceiling Contractors Alliance at 3, Velox Express, Inc., 368 N.L.R.B. No. 61 (Aug. 29, 2019) (No. 15-CA-184006) (explaining that "rampant employee misclassification in the construction industry" creates a "significant disadvantage to employers unwilling to participate in the scheme").

[54] *Id.* at 1.

[55] *Id.* at 2. The union also observed that this statistic does not include the "additional cost advantage gained over employers whose properly classified employees exercised their rights under the NLRA to form a union and negotiate for contributions to benefit plans." *Id.* at 2–3.

[56] DEP'T FOR PROF'L EMPS., *supra* note 41, at 5.

major repercussions aids unscrupulous employers and leaves law-abiding employers with little practical choice but to misclassify their own workers.

Lastly, the issues described above are compounded by the fact that "the groups of workers most likely to engage in gig-work are also the most economically vulnerable."[57] Misclassified workers "typically have lower incomes and little economic security,"[58] and "[m]any low-wage workers have no practical choice" in the nature of the employment arrangement.[59] In fact, one suggestion for remedying the problems associated with the gig economy is simply to classify gig workers as employees "because the workers are low wage earners or marginalized."[60] It is important to keep in mind that the denial of the benefits associated with employment can be detrimental, and it cannot be ignored that workers lose out when they are not given access to these benefits.[61] Without the ability to negotiate for better contractual terms,[62] many workers classified as independent contractors will remain underpaid and unprotected unless misclassification becomes a standalone violation—i.e., a violation in and of itself—of Section 8(a)(1) of the NLRA.

Thus, aside from the rare, possible punishment an employer may receive for misclassification,[63] there are few consequences and many benefits for employers from classifying workers as independent

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[57] James de Haan, Comment, *The Über-Union: Re-thinking Collective Bargaining for the Gig Economy*, 12 CHARLESTON L. REV. 97, 101 (2017).

[58] DEP'T FOR PROF'L EMPS., *supra* note 41, at 5.

[59] THE DUNLOP COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, FINAL REPORT 62 (1994), https://ecommons.cornell.edu/bitstream/handle/1813/79039/DunlopCommissionFutureWorkerManagementFinalReport.pdf.

[60] Leader, *supra* note 4, at 118.

[61] *See* de Haan, *supra* note 57, at 101 (noting that "America's social safety nets—unemployment insurance, worker's compensation, minimum wage/maximum hour laws, and organized labor protection" frequently are not applicable to independent contractors); *see also* DEP'T FOR PROF'L EMPS., *supra* note 41, at 5 ("A 2008 report found that port truck drivers misclassified as independent contractors in New York and New Jersey earned a median annual wage of $28,000. This amounted to just under $10 per hour and because they were misclassified as independent contractors they did not receive employer sponsored health benefits or a pension.").

[62] *See supra* note 50 and accompanying text.

[63] *See infra* note 123 and accompanying text.

contractors rather than employees.[64] Given the realities of today's gig economy in which more and more employers base their business models on the use of independent contractors instead of employees,[65] the Board must reshape its thinking and decide that misclassification is always a violation of Section 8(a)(1).

III. *VELOX EXPRESS*

Velox demonstrates both the timeliness and relevance of the misclassification issue, as the decision came down on August 29, 2019.[66] The questions at issue in *Velox* were whether the workers involved were misclassified as independent contractors when they were actually employees, and whether misclassifying workers as independent contractors is a standalone violation of Section 8(a)(1) of the NLRA.[67] The parties included Velox Express, a company that provides drivers to third parties to transport medical specimens, and Jeannie Edge, a driver and purported independent contractor of Velox Express.[68] Edge and the company's other drivers were held to be employees by an Administrative Law Judge (ALJ),[69] and this holding was unchallenged by the Board.[70] The Board's central focus was instead on whether misclassification alone would violate Section 8(a)(1).[71]

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[64] *See* Leader, *supra* note 4, at 100 ("Under all of these circumstances, there is no question that businesses realize substantial cost-savings, estimated at twenty-five to thirty percent, by classifying their workers as independent contractors.").

[65] *See supra* notes 1–5 and accompanying text.

[66] Velox Express, Inc., 368 N.L.R.B. No. 61 (Aug. 29, 2019).

[67] *Id.* at 1.

[68] *Id.*

[69] The ALJ found that Velox's couriers were employees under the common-law agency test used by the NLRB. *See id.* at 4 (noting that, among other factors, because "[t]he drivers have very little control over their day-to-day work for Velox" and "perform a function . . . at 'the very core of [Velox's] business,'" the drivers are employees under Section 2(3) of the NLRA (quoting Slay Transp. Co., 331 N.L.R.B. 1292, 1294 (2000))).

[70] *See id.* ("[A]fter evaluating all of the common-law factors in the particular factual context of this case, we find that the many factors supporting employee status significantly outweigh the two factors supporting independent-contractor status . . . . Therefore, we affirm the judge's finding that Velox failed to establish that its drivers are independent contractors.").

[71] *See id.* at 4–5 (acknowledging "the absence of any Board precedent to support such a violation" and reversing the ALJ's finding of a violation).

Importantly, for labor cases such as these, the Board uses a two-step inquiry to find Section 8(a)(1) violations.[72] The Board first "determine[s] if the workers at issue are employees covered by the Act."[73] If the Board decides that the worker is an employee covered by the NLRA, "the Board then determines if the employer interfered with, restrained, or coerced them in the exercise of their Section 7 rights."[74] The Board in this case determined that the charging parties (Edge and the other drivers) were misclassified and were, in fact, statutory employees entitled to exercise Section 7 rights.[75]

The charging parties also asserted that this misclassification should be a standalone violation of Section 8(a)(1).[76] Edge and other workers argued that,

> by misclassifying employees as independent contractors, an employer, regardless of its motive or intent, inherently interferes with, restrains, and coerces those employees in the exercise of their Section 7 rights because the employer effectively conveys that the misclassified employees do not have any rights or protections under the Act when, in fact, they do.[77]

The drivers further alleged that "misclassification preemptively prevents the misclassified employees from engaging in Section 7 activity."[78] In Edge's view, through misclassification and misclassification alone, workers are told they are not employees, and any effort to exercise the rights possessed by employees is useless.[79]

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[72] *See id.* at 9 ("Determining whether an employer has violated Section 8(a)(1) of the Act involves a two-step inquiry.").

[73] *Id.* Recall that any worker labeled as an independent contractor is expressly excluded from the NLRA's coverage. *See* 29 U.S.C. § 152(3) (2018) (defining "employee" to "not include . . . any individual having the status of an independent contractor").

[74] *Velox Express, Inc.*, 368 N.L.R.B. No. 61, at 9.

[75] *See id.* at 4 (affirming the ALJ's determination that Edge and Velox's other drivers were "employees" under the Act).

[76] *See id.* at 5 (explaining Edge's argument that "an employer's misclassification of its employees as independent contractors, standing alone, violates Section 8(a)(1) in all circumstances").

[77] *Id.*

[78] *Id.*

[79] *See id.* (expressing the charging parties' belief that engaging in union activity would be "futile" if they were classified as independent contractors).

Velox Express countered, arguing that worker classification is nothing more than an expression of the employer's legal opinion on employment status, which the employer is entitled to have, even if it is mistaken under Section 8(c).[80] Velox Express further alleged that Congress did not intend to punish employers for making mistakes in worker classification.[81]

The Board ultimately found that the workers at issue were employees, not independent contractors, and that Velox Express erred in misclassifying them as such.[82] However, the Board believed the misclassification did not impact the employees in the exercise of their Section 7 rights because the misclassification did not interfere with, coerce, or restrain the exercise of those rights.[83] The Board thus agreed with Velox Express that this misclassification did not violate Section 8(a)(1).[84]

IV. ANALYSIS

The implications of the *Velox* decision are substantial. The holding "effectively removes the NLRB from future legal battles purely about misclassification, one of the most important issues in workplace law."[85] The Board should have decided that misclassifying workers as independent contractors is a standalone violation of the NLRA for the reasons this Part will outline.

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[80] *See* 29 U.S.C. § 158(c) (2018) ("The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."); *see also Velox Express, Inc.*, 368 N.L.R.B. No. 61, at 6 ("When an employer decides to classify its workers as independent contractors, it forms a legal opinion regarding the status of those workers, and its communication of that legal opinion to its workers is privileged by Section 8(c) of the Act . . . .").

[81] *See Velox Express, Inc.*, 368 N.L.R.B. No. 61, at 5 (arguing that it would "unduly restrict business formation" for worker misclassification to be a standalone violation of the NLRA because of the difficulty involved in making classifications).

[82] *See id.* at 4 ("[W]e affirm the judge's finding that Velox failed to establish that its drivers are independent contractors. The drivers are thus employees under Section 2(3) of the Act.").

[83] *See id.* at 11 ("In sum, we decline to hold that an employer's misclassification of its employees as independent contractors, standing alone, violates the Act. Further, we do not find that Velox's misclassification here violated the Act on the basis that . . . Velox actively used it to interfere with the drivers' Section 7 rights.").

[84] *See id.* at 6 (holding "an employer does not violate the Act by misclassifying its employees as independent contractors").

[85] Iafolla, *supra* note 11.

Congress's stated policy for the NLRA was to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[86] Allowing employers to misclassify workers without repercussion[87] is fundamentally contrary to the purpose of the NLRA. Whether the misclassification was intentional or not, the misclassified employees are harmed, and society at large bears the cost.[88] Ruling that misclassification is a standalone violation of Section 8(a)(1) of the NLRA would provide a powerful incentive for employers to get the classification right. Put frankly, "[p]rotecting employer power is certainly not a primary concern of the National Labor Relations Act—which was enacted because employers had too *much* power. . . . Taking the proper statutory perspective—by focusing on the rights Congress gave *employees*—reveals the defects in the majority's position" in *Velox*.[89]

The Board also chose to dismiss relevant case law which held that employers cannot preemptively act against employees to prevent the exercise of protected Section 7 rights.[90] The Board determined that this case was distinguishable and not relevant in *Velox*,[91] which was misguided given the changing nature of the gig economy. In an amicus brief filed with the Board in *Velox*, the union of the United Brotherhood of Carpenters and Joiners of America stated, "What better way to deny employees the opportunity to

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[86] 29 U.S.C. § 151 (2018).

[87] Note, employers may be punished for employee misclassification, but only if the employer has violated other provisions of the NLRA or if the employer intentionally misclassified employees to interfere with, coerce, or restrain their Section 7 rights. *See Velox Express, Inc.*, 368 N.L.R.B. No. 61, at 7 (explaining that the cases in which the Board found NLRA violations stemming from misclassification "involved statements that referred to Section 7 activity, either expressly or by clear implication, or classification decisions that were in retaliation for protected activity").

[88] *See supra* Section II.B.

[89] *Velox Express, Inc.*, 368 N.L.R.B. No. 61, at 16 (McFerran, Member, concurring in part and dissenting in part) (footnote omitted).

[90] *See* Parexel Int'l, LLC, 356 N.L.R.B. 516, 518 (2011) (explaining that discharging an employee to stifle the exercise of Section 7 rights was a preemptive strike and a violation of the NLRA).

[91] *See Velox Express, Inc.*, 368 N.L.R.B. No. 61, at 7 n.23 ("[I]f an employer's decision to classify its employees as independent contractors was intended to suppress union or other protected activity, the Board may find that the employer violated the Act. . . . Thus, *Parexel* does not support [the charging parties'] theory.").

exercise their Section 7 rights than to preemptively misclassify those employees as independent contractors?"[92]

This Part proceeds to address individually the specific issues brought up in *Velox* and to refute the Board's reasoning, explaining why each of the Board's assertions should be reevaluated in light of the modern gig economy. It also addresses both the relevant Board precedent in more depth and the important policy rationales for why the *Velox* decision was in error.

A. MISCLASSIFICATION IS NOT A LEGAL OPINION AND IS INHERENTLY COERCIVE

In *Velox*, the Board reasoned that because employers are merely expressing a legal opinion as to their workers' employment status, workers are free to disagree with their employer and act as if they are employees.[93] This is because the misclassification does not come with an inherent threat of reprisal; thus, there is no sufficient interference with the exercise of Section 7 rights to warrant a standalone Section 8(a)(1) violation.[94] According to the Board, without an explicit or inherent threat of adverse consequences, nothing stops the workers from engaging in Section 7 activities, even if they do not believe that they would be protected in doing such activities.[95]

It is difficult to imagine what type of workplace the Board was envisioning when arriving at this conclusion. Disobeying an employer typically comes with an inherent threat of disciplinary consequences in almost any work environment. Given this practical reality, workers likely will not dispute their classification as an independent contractor even if they disagree with it. It is also unlikely that workers will then contest their employer's opinion or

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[92] Amicus Brief of United Brotherhood of Carpenters and Joiners of America at 13, Velox Express, Inc., 368 N.L.R.B. No. 61 (Aug. 29, 2019) (No. 15-CA-184006).

[93] *See Velox Express, Inc.*, 368 N.L.R.B. No. 61, at 6 ("Employees may well disagree with their employer, take the position that they are employees, and engage in union or other protected concerted activities."); *see also supra* note 80 and accompanying text.

[94] *See id.* (explaining that "[e]rroneously communicating to workers that they are independent contractors does not, in and of itself, contain any 'threat of reprisal or force or promise of benefit'").

[95] *See id.* ("An employer's mere communication to its workers that they are classified as independent contractors does not expressly invoke the Act. It does not prohibit the workers from engaging in Section 7 activity.").

act adversely to this classification. The ALJ's reasoning on this point is persuasive:

> [b]y misclassifying its drivers, Velox restrained and interfered with their ability to engage in protected activity by effectively telling them that they are not protected by Section 7 and thus could be disciplined or discharged for trying to form, join or assist a union or act together with other employees for their benefit and protection.[96]

It is unreasonable for the Board to believe that workers will reject the supposed legal opinion of their employer in favor of their own because that opinion suggests that disagreement will cause employment-related consequences.[97] Workers are unlikely to engage in Section 7 protected behaviors when the threat of discharge looms large,[98] particularly when considering the fact that many independent contractors are economically vulnerable.[99]

Further, the classification of workers as independent contractors represents much more than an expression of a legal opinion because it affects how the parties involved act and deprives the workers of rights and benefits owed to employees.[100] Worker classification can hardly be considered an expression of a legal opinion because "it is employer conduct that directly affects statutory employees, the terms and conditions of their employment, and their exercise of statutory rights[, and s]uch conduct is not protected speech."[101] An employer deciding that a worker is an independent contractor

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[96] *Id.* at 5 (alteration in original).

[97] *See id.* at 17 (McFerran, Member, concurring in part and dissenting in part) ("The Respondent's unqualified statement to its drivers that they were independent contractors was enough. The Act explicitly excludes 'independent contractors' from coverage. . . . [T]he Board should assume that a reasonable employee who is aware of her rights under the Act is also aware of the independent-contractor exclusion." (footnote omitted)).

[98] *See id.* at 14 (explaining that because only employees are covered by the NLRA, "employers are free to discipline or dismiss independent contractors for engaging in [Section 7] activities"); *id.* at 17–18 ("Respondent's classification of its drivers as independent contractors effectively communicated to them that attempting to exercise their statutory rights would not only be futile, but also inconsistent with keeping their jobs.").

[99] *See supra* note 57 and accompanying text.

[100] *See supra* Section II.B.

[101] *Velox Express, Inc.*, 368 N.L.R.B. No. 61, at 18 (McFerran, Member, concurring in part and dissenting in part).

simply to evade tax obligations, to cut costs, or for any number of other reasons does not achieve these advantages through statements alone.[102] Being told you are an independent contractor will likely lead employees to be fearful of acting contrary to that statement;[103] the idea that this is merely the employer's legal opinion is unsound. Employers likely will act pursuant to that classification and will treat their workers as independent contractors by not providing statutorily required benefits for employees.[104] Thus, misclassification is far more than an expression of a legal opinion; it also encompasses how the employer treats the worker and affects the essence of the employer's relationship with the worker.

Additionally, one must examine the likelihood that an employer's actions or statements may impact workers. The U.S. Supreme Court has held, in the context of labor disputes, that "[a]ny assessment of the precise scope of employer expression . . . must be made in the context of its labor relations setting."[105] Further, this assessment "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."[106] Thus, a so-called expression of a legal opinion that workers are independent contractors can easily come with the intended implication of stifling any belief the workers may have about their rights to exercise protected Section 7 activities. Any examination of communications between employers and their workers should always consider the power dynamic of the employer–employee relationship and recognize that employers generally have the upper

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[102] *See* GABRIELLE WIRTH, PRACTICAL LAW LABOR & EMP'T, PRACTICE NOTE: INDEPENDENT CONTRACTOR CLASSIFICATION (database updated 2021), Westlaw ("Companies cannot rely on generalizations to determine employee or independent contractor status. Classification depends on the facts of each case[and] application of the appropriate independent contractor tests . . . .").

[103] *See Velox Express, Inc.*, 368 N.L.R.B. No. 61, at 5 (discussing how employee misclassification by employers may cause employees to think they may be disciplined or discharged for certain actions).

[104] *See supra* note 101 and accompanying text.

[105] *Velox Express, Inc.*, 368 N.L.R.B. No. 61, at 16 (McFerran, Member, concurring in part and dissenting in part) (quoting NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969)).

[106] *Id.* (internal quotation mark omitted) (quoting *Gissel Packing Co.*, 395 U.S. at 617).

hand.[107] Thus, an employer's misclassification of a worker as an independent contractor (rather than an employee) cannot be reduced to a mere legal opinion because it, in fact, inherently coerces the worker's behavior.

B. A STANDALONE VIOLATION WOULD NOT CHILL THE CREATION OF INDEPENDENT CONTRACTORS

The Board also claimed that making misclassification a standalone violation of the NLRA "would significantly chill the creation of independent-contractor relationships."[108] This argument has several flaws. First, this reasoning ignores the reality that many states are moving towards a presumption that workers are employees and are placing the burden on the employer to demonstrate that the worker really is an independent contractor.[109] The increasing prevalence of laws mandating presumptive employee status indicates that this Note's suggested reform would not chill the creation of independent-contractor relationships any more than these laws already do.

Second, the NLRA was designed to protect employees and moderate the power imbalance between employers and employees—not to grant employers more power.[110] This concern for the creation of independent contractors favors employers and is contrary to Congress's stated intent that "statutory employees not be denied the protections of the Act."[111] Further, the importance of ensuring employees are protected "far outweighs the risk that some employers might think twice before seeking to establish excluded relationships."[112] For a decision as crucial as employment status, it is imperative that the employer conduct the adequate research and make determinations regarding worker classification cautiously. If the creation of independent contractors ultimately is chilled because employers are no longer making these classifications without

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[107] *See supra* note 16 and accompanying text.

[108] *Velox Express, Inc.*, 368 N.L.R.B. No. 61, at 8–9.

[109] *See* DEP'T FOR PROF'L EMPS., *supra* note 41, at 7 (noting that twenty-seven states, as of 2016, have passed a version of a law that creates a presumption in favor of employee status).

[110] *See* 29 U.S.C. § 151 (2018) (noting that the protection of many employee rights can "restor[e] equality of bargaining power between employers and employees").

[111] *Velox Express, Inc.*, 368 N.L.R.B. No. 61, at 19 (McFerran, Member, concurring in part and dissenting in part).

[112] *Id.*

adequate analysis, or perhaps with bad intent, such a result would further the NLRA's purpose of protecting the rights of employees.[113]

Third, asking whether a standalone violation would chill employers from creating independent-contractor relationships frames the issue incorrectly at a fundamental level. The primary focus of Section 8(a)(1) is whether "misclassification itself chills the exercise of statutory rights."[114] As Member McFerran described, the proper issue under consideration "turns on whether the misclassification reasonably tends to chill employees from acting on their statutory rights—such a chilling effect occurs whenever employees reasonably would believe that exercising their rights would be futile or would lead to adverse employer action."[115] Rather than focus on the rights of workers, as dictated by the NLRA,[116] the Board "focuse[d] on protecting the power of employers to structure working relationships to their benefit, including by avoiding legal obligations to their workers."[117] Without proper punishment for this type of misclassification, employers are incentivized to misclassify for their own benefit as a means of avoiding substantial costs.[118] As with the issue of employee protection, there is no harm in requiring employers to be more cautious with their employment classifications. Member McFerran's partial dissent in *Velox* also notes, "The burden of any additional care employers may need to take in classifying employees is outweighed by the need to prevent the chilling of Section 7 rights where a purported independent-

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[113] *See id.* at 18–19 ("[T]he Act is intended to protect employees' exercise of certain rights, not to preserve employers' power to structure the workplace as they wish, even if it infringes on employees' rights.").

[114] *Id.* at 13.

[115] *Id.*

[116] *See supra* notes 16, 110 and accompanying text.

[117] *Velox Express, Inc.*, 368 N.L.R.B. No. 61, at 16 (McFerran, Member, concurring in part and dissenting in part).

[118] *See id.* at 14 ("[E]mployers are free to discipline or dismiss independent contractors for engaging in [Section 7] activities. It is tempting, then, for employers not only to create legitimate independent-contractor relationships, but also to deliberately misclassify employees as independent contractors."); Brief of Amicus Curiae, *supra* note 53, at 1 ("The widespread nature of [misclassifying workers as independent contractors] undermines law-abiding construction industry employers, making it difficult for legitimate construction employers to compete in the marketplace."); THE DUNLOP COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, *supra* note 59, at 62 ("[C]urrent tax, labor and employment law gives employers and employees incentives to create contingent relationships not for the sake of flexibility or efficiency but in order to evade their legal obligations.").

contractor relationship is actually an employment relationship."[119] Thus, focusing on the chilling of the creation of independent contractors is misguided; such a concern should be secondary to the concern over the chilling of statutory employees' ability to exercise their protected Section 7 rights.

C. A STANDALONE VIOLATION SHOULD NOT EXCUSE MISTAKES

The rationale that a standalone Section 8(a)(1) violation should not exist because it does not excuse mistakes is also unjustified. First, not even a good faith mistake negates the harmful consequences caused by misclassification. A simple mistake "can lead to serious violations of the Act, including unlawful discharges."[120] Ultimately, "[w]here misclassification has occurred, deliberately or not, the Act is being evaded and its purposes, frustrated."[121] To let an employer off the hook because of a mistake is not in accord with the purposes of the Act,[122] and mistakes should not be excused.

Second, although it may seem harsh to penalize an employer who made a good faith mistake in misclassifying their workers, the punishment is often a simple cease-and-desist order without a monetary penalty and a requirement to post a notice in the workplace detailing the employees' Section 7 rights.[123] These do not seem like egregious punishments to impose on an employer who made a mistake. Thus, the reasonableness or good faith nature of the mistake should not warrant an excuse for misclassification.

Third, whether the employer made a mistake is irrelevant because the traditional inquiry for Section 8(a)(1) violations does not require a showing of a specific motive.[124] Without an explicit motive requirement, misclassifications made in error should be violations of Section 8(a)(1). The Board has previously stated,

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[119] *Velox Express, Inc.*, 368 N.L.R.B. No. 61, at 19 (McFerran, Member, concurring in part and dissenting in part).

[120] *Id.* at 14.

[121] *Id.* at 19.

[122] *See supra* notes 16, 110 and accompanying text.

[123] *Velox Express, Inc.*, 368 N.L.R.B. No. 61, at 19 n.28 (McFerran, Member, concurring in part and dissenting in part) (noting that such penalties are "hardly draconian measures").

[124] *See id.* at 6 (majority opinion) (identifying "the well-settled principle that a Section 8(a)(1) violation may be found even without unlawful motive").

> [The test of i]nterference, restraint, and coercion under Sec[tion] 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.[125]

Thus, the employer's motive is irrelevant to this particular inquiry. As previously explained, misclassification can reasonably be said to interfere with the free exercise of employee rights because misclassification comes with the inherent warning that, as an independent contractor, the NLRA does not apply.[126] If the NLRA does not apply, the worker may be discharged for exercising any rights protected by the NLRA.

D. A STANDALONE VIOLATION DOES NOT IMPERMISSIBLY SHIFT THE BURDEN TO THE EMPLOYER

In a typical NLRB dispute, the burden of proof to demonstrate, by a preponderance of the evidence, that an unfair labor practice was committed rests with the General Counsel.[127] But in *Velox*, the Board argued that the burden would impermissibly shift to the employer to demonstrate they did not violate the Act should the Board have found a standalone violation.[128] The Board's argument is unjustified: it argued that the typical two-step procedure for finding Section 8(a)(1) violations[129] would be "condense[d]" into one single inquiry into employment status, and "the employer would be

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[125] *Id.* at 5 (quoting Am. Freightways Co., 124 N.L.R.B. 146, 147 (1959)).

[126] *See supra* note 98 and accompanying text.

[127] *See* 29 U.S.C. § 153(d) (2018) ("[The General Counsel] shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board."); *see also id.* § 160(c) ("If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice . . . .").

[128] *See Velox Express, Inc.*, 368 N.L.R.B. No. 61, at 9 ("[E]stablishing a stand-alone misclassification violation would improperly shift the burden of proof in unfair labor practice cases.").

[129] *See supra* notes 72–74 and accompanying text.

strictly liable" for misclassification.[130] The burden would then be on the employer to demonstrate that they did not violate the Act.[131] This is partly true in that the burden would be on the employer to demonstrate a worker labeled as an independent contractor is actually an independent contractor; however, this is the normal standard when an employer claims a worker is an independent contractor.[132] Thus, the employer is not demonstrating that they did not violate the Act, but rather that the worker really is an independent contractor. Therefore, there is no impermissible burden shift.

The Board also contends that "the General Counsel could simply *allege* employee status, . . . effectively plac[ing] on the employer the burden of proving that it did not violate the Act."[133] This assertion assumes that the General Counsel is willing to use their power frivolously. Further, to obtain review of an unfair labor practice complaint, a local Regional Director must investigate and determine if a claim has merit, thus requiring formal action.[134] If the Regional Director decides to proceed, they then issue a complaint and notice of hearing.[135] As the partial dissent notes, "it seems highly unlikely that the General Counsel would issue a complaint where his investigation failed to reveal substantial evidence that the relationship was *not* an independent-contractor relationship."[136] The formal process taken by the Board "significantly reduces the risk that employers with bona fide independent-contractor relationships will be called upon to defend those relationships" because no claim will proceed if it is wholly without merit.[137] Thus,

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[130] *Velox Express, Inc.*, 368 N.L.R.B. No. 61, at 9.

[131] *See id.* ("[T]his would also shift the burden from the General Counsel to prove that the employer violated Section 8(a)(1) to the employer to prove that it did not.").

[132] *See id.* ("As the party asserting independent-contractor status, the employer has the burden to establish that status.").

[133] *Id.*

[134] *See Investigate Charges*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/about-nlrb/what-we-do/investigate-charges (last visited Apr. 9, 2021) ("Each charge is investigated by Board agents who gather evidence and may take affidavits from parties and witnesses. Their findings are evaluated by the Regional Director . . . .").

[135] *See id.* ("When the NLRB investigation finds sufficient evidence to support the charge, every effort is made to facilitate a settlement between the parties. If no settlement is reached in a meritorious case, the agency issues a complaint.").

[136] *Velox Express, Inc.*, 368 N.L.R.B. No. 61, at 20 (McFerran, Member, concurring in part and dissenting in part).

[137] *Id.*

the Board's claim that employers will be strictly liable and responsible for proving that they did not violate the Act is unfounded and only serves to give employers more power—contrary to the Act's purpose.

E. *PAREXEL INTERNATIONAL* AND THE PREEMPTIVE STRIKE

The decision cited in *Velox* and in several amicus briefs to the Board, *Parexel International, LLC*, provides the correct approach to understanding why misclassification should be a Section 8(a)(1) violation.[138] In *Parexel*, the ALJ held that discharging a particular employee was "a pre-emptive strike to prevent her from engaging in activity protected" by the NLRA and was thus a violation of Section 8(a)(1).[139] Because it has long been recognized that an employer violates Section 8(a)(1) by threatening to terminate an employee for exercising their protected Section 7 rights, the Board determined that the same would be true if the employer terminates the employee in order to prevent the employee from exercising their Section 7 rights entirely.[140] The Board explained that it has "often held that an employer violates the Act when it acts to prevent future protected activity."[141] This line of reasoning should extend to the prevention of protected Section 7 activities that comes with misclassifying a worker as an independent contractor. The Board stated, "If an employer acts to prevent concerted protected activity—to 'nip it in the bud'—that action interferes with and restrains the exercise of Section 7 rights and is unlawful *without more*."[142]

The holding in *Parexel* is directly comparable to misclassifying workers as independent contractors. Misclassification, whether intentional or not, is a preemptive strike against workers who should be considered statutory employees. It should likewise follow that Section 8(a)(1) is violated when an employer essentially tells an employee that they do not have rights under the NLRA, thus

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[138] *See generally* Parexel Int'l, LLC, 356 N.L.R.B. 516 (2011).

[139] *Id.* at 518.

[140] *See id.* at 519 (noting that "[i]t is beyond dispute" that threats of termination are Section 8(a)(1) violations and that "[i]t follows that an employer similarly violates Section 8(a)(1) by simply terminating the employee in order to be certain that she does not exercise her Section 7 rights").

[141] *Id.*

[142] *Id.* (emphasis added).

preventing them from exercising those rights. In *Parexel*, the Board found that dismissing an employee to prevent her from discussing the terms and conditions of her employment was, in fact, a Section 8(a)(1) violation.[143] Misclassification means workers effectively do not have protection to discuss wages and discrimination in the workplace under Section 7[144] because the NLRA does not apply to them.[145] The consequences of an employer's inaccurate statements about an employee's employment status are the same as if the employer explicitly told the employee they are not protected by the NLRA: both statements communicate that the worker is unprotected.[146] Therefore, by misclassifying employees and depriving them of that Section 7 activity, that misclassification is a preemptive strike against protected activity. Thus, the Board's refusal to apply *Parexel*'s preemptive strike reasoning to the facts in *Velox* was misguided. Had it done so, the Board likely would have reached the conclusion that misclassification preemptively strikes against employees' ability to exercise their protected rights. Therefore, misclassification should be a standalone Section 8(a)(1) violation, which would be a better, more protective outcome for workers nationwide.

V. CONCLUSION

Given the dramatic changes rapidly occurring in today's economy and the shift away from the traditional workforce, it is becoming increasingly important to rectify the issue of employee misclassification. While the gig economy has come with increased flexibility, which many workers value,[147] it has also come with the

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[143] *See id.* at 516 (holding that the employer violated the NLRA by discharging an employee for discussing wages and conditions of employment with coworkers in the workplace).

[144] *See supra* note 34 and accompanying text.

[145] *See supra* note 24 and accompanying text.

[146] *See* Velox Express, Inc., 368 N.L.R.B. No. 61, at 16 (Aug. 29, 2019) (McFerran, Member, concurring in part and dissenting in part) ("If an employer *expressly* told statutory employees that they were not covered by the Act and therefore could not engage in protected activities, then that statement indisputably would be unlawful. . . . An employer-imposed independent-contractor agreement like the one here is no different as a practical or legal matter from such unlawful statements . . . because its likely consequences for employees are the same." (footnotes omitted)).

[147] *See* de Haan, *supra* note 57, at 103 ("The gig economy has re-defined work for millions of people, people who value the flexibility and freedom inherent in platform work.").

loss of critical benefits and workplace protections.[148] The Board had the opportunity to rectify this wrong by making the misclassification of workers as independent contractors a standalone violation of Section 8(a)(1) of the NLRA. By failing to remove some of the incentives employers may have to misclassify their workers, the Board missed an opportunity to better align the changing workplace with the NLRA's stated purpose to protect workers' rights and mitigate the power imbalance between workers and employers. Because of the ever-evolving technological advances in our world, the issue of misclassifying independent contractors is unlikely to go away. Without a Section 8(a)(1) violation for misclassification, it seems that dishonest employers will continue skirting their tax and employment obligations while so-called independent contractors continue to lose out. In the future, the Board must reevaluate this policy, recognize the importance of gig-workers to our economy, and decide that misclassifying employees as independent contractors is a standalone violation of Section 8(a)(1) of the NLRA.

[148] *See supra* notes 2–7 and accompanying text.