

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

VELOX EXPRESS INC.

Employer

and

Case No. 15-CA-184006

JEANNIE EDGE,

An Individual

**BRIEF OF *AMICUS CURIAE*
NATIONAL EMPLOYMENT LAW PROJECT, INC.**

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I. STATEMENT OF INTEREST

The National Employment Law Project (NELP) is a non-profit organization with over 45 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP has litigated and participated as *amicus curiae* in numerous cases addressing independent contractor misclassification under federal and state labor and employment laws. NELP seeks to ensure that all employees receive the full protection of labor and employment laws and that employers are not rewarded for skirting those basic rights.

II. INTRODUCTION

NELP submits this *amicus curiae* brief in support of Administrative Law Judge Arthur Amchan's decision in *Velox Express, Inc.*, JD-76-18 (September 25, 2017), holding that misclassifying an employee as an independent contractor, standing alone, violates §8(a)(1), 29 U.S.C. §158(a)(1).

NELP writes first to illuminate the public policy concerns surrounding independent contractor misclassification and show why coverage under the National Labor Relations Act is important. Misclassification is a rampant and pernicious problem. As noted by various federal government reports, employers have a financial incentive to misclassify workers. By misclassifying workers, employers pocket as much as 30 percent of payroll expenses and instead externalize those costs to taxpayers and workers. Misclassification imposes significant costs to public coffers. The Government Accountability Office (GAO) estimates independent contractor misclassification cost federal revenues \$2.72 billion in 2006. Many state executives and legislatures across the political spectrum have also done studies on the costs of misclassification to state unemployment insurance, workers compensation, and tax funds. It is likely that

nationally millions of workers are misclassified, and as a result state and federal governments lose billions of dollars of revenue.

In addition to taxpayers, misclassifying employers also shift costs to workers. Misclassification depresses workers' income and deprives them of essential protections, including not only the National Labor Relations Act, but also wage and hour protections, workers' compensation if they are injured on the job, unemployment insurance, and protections against discrimination and sexual harassment. Occupations with high rates of misclassification are also among the jobs with the highest numbers of workplace violations. Employers in those sectors with high rates of independent contractor misclassification cannot compete against those that categorize their employees as independent businesses, especially in labor-intensive industries. This encourages a race to the bottom and further creates incentives to misclassify.

Finally, it is a practical reality that employers are required to comply with not only the National Labor Relations Act, but with various federal and state workplace and safety-net statutes relating to independent contractor status. Many of these statutes have broader definitions of employee status than the NLRA, including, for example, the unemployment insurance statutes of Arkansas and Tennessee, states where Velox operates. For this reason, deeming misclassification under the NLRA to be an unfair labor practice – without even modifying the NLRA's standard for finding independent contractor status – will not have any chilling effect on *bona fide* independent contractor engagement.

III. ARGUMENT

A. Independent contractor misclassification is a significant public policy problem, causing harm to taxpayers, law-abiding employers, and workers.

1. Misclassification is rampant and employers have economic incentives to misclassify employees.

Bad actor employers who misclassify workers are able to unlawfully lower their operating costs. By failing to pay the taxes and other payroll costs required for employees, law-breaking employers are able to pocket as much as 30 percent of payroll costs.¹ This robs unemployment insurance and workers' compensation funds of billions of much-needed dollars, and reduces federal, state, and local tax withholding and revenues. As the United States Government Accountability Office (GAO) concluded in its July 2006 report,

[E]mployers have *economic incentives* to misclassify employees as independent contractors because employers are not obligated to make certain financial expenditures for independent contractors that they make for employees, such as paying certain taxes (Social Security, Medicare, and unemployment taxes), providing workers' compensation insurance, paying minimum wage and overtime wages, or including independent contractors in employee benefit plans.² (emphasis added)

The U.S. Department of Labor's Commission on the Future of Worker-Management Relations (the "Dunlop Commission") similarly concluded, "[t]he law should not provide incentives for misclassification of employees as independent contractors, which costs federal and state treasuries large sums in uncollected Social Security, unemployment, personal income, and other taxes."³

¹ National Employment Law Project (NELP), *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, December 2017, <http://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-on-workers-and-federal-and-state-treasuries-update-2017/>.

² Government Accountability Office, GAO-06-656, *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification* (July 2006), at p. 25.

³ U.S. Dep't of Labor, *Commission on the Future of Worker- Management Relations*, (1995), available at <http://www.dol.gov/sec/media/reports/dunlop/dunlop.htm#Table>.

Given these incentives and the challenges of enforcement, independent contractor misclassification is a pernicious problem.⁴ The U.S. Department of Labor has found that as many as 30 percent of firms misclassify their employees as independent contractors,⁵ and studies commissioned by state governments often cite estimates that are even higher.⁶ These studies suggest that millions of workers nationally may be misclassified,⁷ and notably these studies likely underestimate the true scope of misclassification.⁸

2. Misclassification harms the public and imposes significant costs to public coffers.

Federal, state, and local governments suffer hefty loss of revenues due to independent contractor misclassification, in the form of unpaid and uncollectible income taxes, payroll taxes, and unemployment insurance and workers' compensation premiums.⁹ A 2009 report by the Government Accountability Office (GAO) estimates independent contractor misclassification

⁴ Employer's *amici* suggest that finding misclassification to be an unfair labor practice in itself could create a slippery slope problem regarding classification of supervisors or security guards. Brief of *amicus curiae* Coalition for a Democratic Workplace and Chamber of Commerce of the United States of America at p. 9-10. However, bad actor employers have unique incentives to misclassify workers as independent contractors, and those incentives do not exist when employers label a worker as a supervisor or a guard.

⁵ Lalith de Silva et al., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, i-iv, prepared for U.S. Department of Labor, Employment and Training Division by Planmatics, Inc. (Feb. 2000), available at <http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf>.

⁶ NELP, *supra* note 1.

⁷ National Employment Law Project (NELP), *Independent Contractor vs. Employee: Why independent contractor misclassification matters and what we can do to stop it*, May 2016, <http://www.nelp.org/publication/independent-contractor-vs-employee/>.

⁸ Many of the studies are based on unemployment insurance tax audits of employers registered with the state's UI program. The audits seek to identify employers who misclassify workers, workers who are misclassified, and the resulting shortfall to the UI program. Researchers extrapolate from UI audit data to estimate the incidence of misclassification in the workforce and its impact on other social insurance programs and taxes. These UI audits miss a large portion of the misclassified workforce, however, because they rarely identify employers who fail to report any worker payments to state authorities or workers paid completely off-the-books – the “underground economy” – where misclassification is generally understood to be even more prevalent. See NELP, *supra* note 1.

⁹ U.S. Dep't of Labor, Wage and Hour Division, “Misclassification of Employees as Independent Contractors.” <https://www.dol.gov/whd/workers/Misclassification/>.

cost federal revenues \$2.72 billion in 2006.¹⁰ According to a 2009 report by the Treasury Inspector General for Tax Administration, misclassification contributed to a \$54 billion underreporting of employment tax, and losses of \$15 billion in unpaid FICA taxes and UI taxes.¹¹

A growing number of states have been calling attention to independent contractor abuses by creating inter-agency task forces and committees to study the magnitude of the problem, and passing new legislation to combat misclassification. The USDOL has signed Memoranda of Understanding regarding misclassification in thirty-nine states, including Arkansas and Tennessee where Velox operates; some of these states have created inter-agency task forces or commissions to work on the problem.¹² Along with academic studies and other policy research, the reports document the prevalence of the problem and the attendant losses of millions of dollars to state workers' compensation, unemployment insurance, and income tax revenues. A 2017 review of the findings from the twenty state studies of independent contractor misclassification demonstrates the staggering scope of these abuses.¹³

For example, in California, audits conducted by California's Employment Development Department between 2005 and 2007 recovered a total of \$111,956,556 in payroll tax assessments, \$18,537,894 in labor code citations, and \$40,348,667 in assessments on

¹⁰ U.S. General Accounting Office, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* (August 2009), available at <http://www.gao.gov/new.items/d09717.pdf>.

¹¹ Treasury Inspector General for Tax Administration, *While Actions Have Been Taken to Address Worker Misclassification, Agency-Wide Employment Tax Program and Better Data Are Needed* (February 4, 2009) available at <http://www.treas.gov/tigta/auditreports/2009reports/200930035fr.pdf>.

¹² <https://www.dol.gov/whd/state/statecoordination.htm>;
<https://www.dol.gov/whd/workers/misclassification/stateinfo-nojs.htm>

¹³ See NELP, *supra* note 1.

employment tax fraud cases.¹⁴ In Tennessee, a 2013 task force report found that 37 percent of employers misclassified workers, causing a loss to the unemployment insurance system of \$8.4 to \$15 million dollars, a loss to the workers compensation system of \$52 to \$91.6 million dollars, a loss of \$15.2 to \$73.4 million in federal income taxes, and between \$7.8 million and \$42 million in lost Social Security and Medicare taxes.¹⁵ Ohio's 2009 task force found that 45 percent of employers misclassified workers, causing a loss of \$12 to \$100 million in unpaid taxes, \$60 to \$510 million in unpaid workers' compensation, and \$21 to \$248 million in unpaid state income taxes.¹⁶

Given the immense potential for cost to the public, independent contractor misclassification is an issue with uniquely bipartisan support. The US Department of Labor devotes resources to fighting misclassification throughout Republican and Democratic administrations¹⁷ and as many as 30 states, spanning Republican and Democratic controlled state legislatures, have instituted laws, task forces, or committees aimed at combatting independent contractor misclassification.¹⁸

¹⁴ California Employment Development Department, *Annual Report: Fraud Deterrence and Detection Activities, report to the California Legislature* (June 2008), available at http://www.edd.ca.gov/pdf_pub_ctr/report2008.pdf.

¹⁵ NELP, *supra* note 1. See also Tennessee Department of Labor and Workforce, "Employee Misclassification Education and Enforcement Fund (EMEEF)", <https://www.tn.gov/workforce/injuries-at-work/injured-workers/injured-workers/employee-misclassification.html>.

¹⁶ NELP, *supra* note 1 *citing* Report of the Ohio Attorney General on the Impact of Misclassified Workers for State and Local Governments in Ohio, February 18, 2009, http://www.faircontracting.org/PDFs/prevaling_wages/Ohio_on_Misclassification.pdf

¹⁷ U.S. Dep't of Labor, Wage and Hour Division, "Misclassification of Employees as Independent Contractors." <https://www.dol.gov/whd/workers/Misclassification/>.

¹⁸ NELP, *supra* note 1. See also, CT HB 5113 (Pub. Act 08-105), SB56 (2008); IL HB 1795 (Pub. Act 95-0026) (2008); IN SB 478 (P.L.164- 2009); IA Exec. Order No. 8 (2008); ME Exec. Order 23 FY 08/09; MD Workplace Fraud Act of 2009; MA HB 1835 (2008); MI Exec. Order 2008-1 (2008); MN Advisory Taskforce on Employee Misclassification: Report to the 2011-12 Biennium, 87th Legislature; NC Exec. Order 125 (2012); NH SB500 (2008), Exec. Order 2010-3; NJ Governor's Advisory Comm. on Construction Industry Independent Contractor Reform; NY Exec. Order 17 (2007); NV SCR 26 (BDR R-

3. Misclassification harms law-abiding employers.

Employers that correctly classify workers as W-2 employees are often unable to compete with lower-bidding companies that reap the benefits of artificially low labor costs. As stated by the Treasury Inspector General, “worker misclassification... plac[es] honest employers and businesses at a competitive disadvantage.”¹⁹ This is especially a problem in delivery services, construction, janitorial, home care, and other labor-intensive low-wage sectors, where employers can gain competitive advantage by driving down payroll costs. Misclassification, especially when pervasive in an industry, skews markets and can drive responsible employers out of business. Law-abiding employers also suffer from inflated unemployment insurance and workers’ compensation costs, as “free riding” employers that misclassify employees as independent contractors pass off costs to employers that play by the rules. A 2010 study estimated that misclassifying employers shifts \$831.4 million in unemployment insurance taxes and \$2.54 billion in workers’ compensation premiums to law-abiding businesses annually.²⁰

4. Misclassification harms workers, deprives them of essential workplace protections, and depresses their income.

When employers unlawfully misclassify employees, they deprive them of the core workplace protections that Congress and the states intended as baseline standards. Central to this case, misclassified workers are deprived of the right to form a union and collectively bargain. But workers are also denied the entire span of protections that most take for granted: workers’

1297) (2009); OR HB 2815 (2009); RI SB 3099, HB 7907B (2008); UT SB 189 (2008), amended by S11 (2011); VT S.345 (2008), Exec. Order 08-12 (2012); WA SB 5926 (2007).

¹⁹ Treasury Inspector General for Tax Administration, *Additional Actions Are Needed to Make the Worker Misclassification Initiative with the Department of Labor a Success*, February 20, 2018, available at <https://www.treasury.gov/tigta/iereports/2018reports/2018IER002fr.pdf>.

²⁰ NELP, *supra* note 7, citing Douglas McCarron, “Worker Misclassification in the Construction Industry,” BNA Construction Labor Report (April 7, 2011), https://web.carpenters.org/Libraries/PDFs/Misc/Construction_Labor_Report_-_McCarron_on_Misclassification_4-7-2011_sm.sflb.ashx.

compensation if they are injured on the job, unemployment insurance, minimum wage and overtime protections, and protections against discrimination and sexual harassment.²¹

An employer's insistence on labeling workers as contractors in itself deters workers from claiming rights under workplace laws that rely on individual complaints for enforcement, as workers tend to assume that their employer has classified them accurately.²² Occupations with high rates of misclassification are also among the jobs with the highest numbers of workplace violations.²³ Anecdotal studies of working conditions for workers misclassified as independent contractors by their employers show elevated rates of wage theft and workplace injury.²⁴ Many workers incorrectly believe that they do not have an employer and are unable to navigate the intricacies of companies' contracting relationships to ascertain who is responsible for workplace violations. When there is no clear line of accountability, work conditions are more likely to deteriorate: pay declines, wage theft increases, and workplace injuries rise. Real-life examples of

²¹ NELP, *supra* note 7. The federal Department of Labor notes on its website that misclassified employees "often are denied access to critical and protections they are entitled to by law, such as the minimum wage, overtime compensation, family and medical leave, unemployment insurance, and safe workplaces." U.S. Dep't of Labor, Wage and Hour Division, "Misclassification of Employees as Independent Contractors." <https://www.dol.gov/whd/workers/Misclassification/>.

²² Workers who believe they are not eligible for workplace protections will likely not go to an enforcement body. The vast majority of DOL's Wage & Hour Division's (WHD) enforcement actions are triggered by worker complaints. *See, e.g.* U.S. Gov't. Accountability Office, GAO-08-962T, *Better Use of Available Resources and Consistent Reporting Could Improve Compliance* 7 (July 15, 2008) (72 percent of WHD's enforcement actions from 1997-2007 were initiated in response to complaints from workers); David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 *Comp. Lab. L. & Pol'y J.* 59, 59-60 (2005) (finding that in 2004, complaint-derived inspections constituted about 78 percent of all inspections undertaken by WHD). Anecdotally, advocates report to NELP that misclassification is often used by employers in combination with non-compete and non-disclosure or confidentiality provisions to intimidate and discourage low-wage workers, who often speak little or no English, from complaining or joining together to improve wages and conditions.

²³ *See* National Employment Law Project, *Holding the Wage Floor*, October 1, 2005 <http://www.nelp.org/content/uploads/2015/03/Holding-the-Wage-Floor2.pdf>.

²⁴ NELP, *supra* note 7.

these problem abound, in industries as varied as trucking and delivery, construction, and home care.²⁵

Furthermore, misclassification depresses wages. While employers profit from misclassification, workers bear the cost: as a result of their outsized tax burden, unreimbursed businesses expenses, and the prevalence of wage and other violations, misclassified workers' net income is often significantly less than for similar workers paid as employees. The differences are striking: one government expert calculated that a construction worker earning \$31,200 a year before taxes would be left with an annual net compensation of \$10,660.80 if paid as an independent contractor, compared to \$21,885.20 if paid properly as an employee.²⁶ A study on port truck drivers found that annual median net earnings before taxes were \$28,783 for drivers paid as contractors as compared with \$35,000 for employees.²⁷

²⁵ The port trucking industry is a particularly stark example of the extensive worker exploitation that can occur when employers misclassify workers as independent contractors. Port trucking employers have engaged in extensive safety violations and wage theft, including truck-leasing schemes that can leave workers having lost money after months of work. *See, e.g.*, National Employment Law Project, "The Big Rig: Poverty, Pollution, and the Misclassification of Truck Drivers at America's Ports," <http://www.nelp.org/content/uploads/2015/03/PovertyPollutionandMisclassification.pdf>; Brett Murphy, "Rigged: Forced into debt. Worked Past exhaustion. Left with nothing." USA Today, June 16, 2017, <https://www.usatoday.com/pages/interactives/news/rigged-forced-into-debt-worked-past-exhaustion-left-with-nothing/>; Brett Murphy, "Asleep at the wheel: Companies risk lives by putting sleep-deprived port truckers on the road," USA Today, December 28, 2017, <https://www.usatoday.com/pages/interactives/news/rigged-asleep-at-the-wheel/>. *See also* McClatchy DC, "Misclassified: Contract to Cheat," 2014, <http://media.mcclatchydc.com/static/features/Contract-to-cheat/> (detailing the effects of misclassification within the construction industry); National Employment Law Project, "Independent contractor classification in home care," <http://www.nelp.org/content/uploads/Home-Care-Misclassification-Fact-Sheet.pdf> (detailing the effects of misclassification within the home care industry).

²⁶ NELP, *supra* note 7, *citing* Tim Crowley, UI Tax Chief, U.S. Department of Labor, "Worker Misclassification – An Update from Constitution Ave." (Oct. 24, 2012), http://www.naswa.org/assets/utilities/serve.cfm?gid=86824dbe575c-4edb-9e93-444cef85c837&dsp_meta=0.

²⁷ NELP, *supra* note 7, *citing* Rebecca Smith, Paul Alexander Marvy and Jon Zerolnick, "The Big Rig Overhaul: Restoring Middle-Class Jobs at America's Ports through Labor Law Enforcement" (Feb. 2014), page 12, <http://www.nelp.org/page/-/Justice/2014/Big-Rig-Overhaul-Misclassification-Port-Truck-Drivers-LaborLaw-Enforcement.pdf?nocdn=1>.

B. Employers have long been operating under various statutes that render independent contractor misclassification unlawful, including statutes that are broader than the NLRA. The legal landscape has not resulted in a diminution of independent contractor arrangements as claimed by Employer’s amici.

For more than a century, labor and employment laws have required employers to comply with baseline labor standards like the right to collectively bargain, minimum wage and overtime, health and safety, and anti-discrimination protections for their employees but not for independent contractors. Many of these laws have broader definitions of covered employees than the National Labor Relations Act.

At the federal level, for example, the federal Fair Labor Standards Act’s (FLSA) broad definitions, based on state child labor protection laws, are intended to cut through any independent contracting arrangements that shielded companies from responsibility for work occurring in their businesses. The FLSA was “designed to defeat rather than implement contractual arrangements,” especially for workers who are “selling nothing but their labor.” *Secretary of Labor, U.S. Dept. of Labor v. Lauritzen*, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J., concurring). *See also Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1915) (Judge Learned Hand noting that employment statutes were meant to “upset the freedom of contract”). Its broad definitions cover some workers who would not be considered employees at common law. FLSA’s definition “stretches the meaning of ‘employee’”²⁸ to include work relationships that were not within the traditional common-law definition of “employee.” *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947). Velox Express and other employers represented by amici comply with the FLSA and its broader coverage provisions with no apparent harm to their business, contrary to their claims of economic peril.

²⁸ *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

At the state level, including in the states where Velox operates, companies comply with broadly-defined laws covering employees who might not be considered employees under the NLRA’s common-law standard.²⁹ State unemployment insurance and other laws that use the so-called “ABC” test are an example of these laws. They create a presumption of employee status and require employers to overcome this presumption by showing three factors:

- (a) an individual is free from control or direction over performance of the work, both under contract and in fact;
- (b) the service provided is outside the usual course of the business for which it is performed; and
- (c) an individual is customarily engaged in an independently established trade occupation, or business.

Twenty-seven states have some version of these provisions, including the two states where Velox operates: Arkansas and Tennessee use an ABC test for determining employee and independent contractor status.³⁰ Arkansas also has a broadly-defined test for coverage under its workers compensation act, using a “relative-nature-of-the-work” test covering workers who perform labor that is integrated into the business of the putative employer.³¹ In Tennessee, the state Department of Labor and Workforce Development also has an Employee Misclassification Advisory Task force, maintains an active “Employee Misclassification Education and Enforcement Fund (EMEEF)” webpage with informative videos and materials for workers and

²⁹ U.S. Dep’t of Labor, Wage and Hour Division, “State Labor Legislation,” <https://www.dol.gov/whd/state/laborlegislation2014.htm>.

³⁰ See Ark. Code Ann. § 11-10-210(e); Tennessee Department of Labor and Workforce Development, “Unemployment Insurance Tax,” <https://www.tn.gov/workforce/employers/tax-and-insurance-redirect/unemployment-insurance-tax.html>.

³¹ Ark. Code Ann. §§ 11-10-208.

employers, and publishes annual reports on the costs of misclassification to the state of Tennessee.³²

At least ten states have passed laws that aim to combat independent contractor misclassification in the construction industry through adoption of versions of the “ABC” test: Delaware, Illinois, Maine, Maryland, Minnesota, Nebraska, New Jersey, New Mexico, New York, and Pennsylvania. 19 Del. Code § 3501 (2009); Ill. Compiled. Stat. § 185:10 (2008); 39-A Me. Stat. § 1043 (2011); Md. Code, Labor and Employment § 3-903 (2009); Minn. Stat. § 181.723 (2009); N.J. Stat. § 34:20-4 (2008); Neb. Rev. Stat. § 48-2903 (2010); N.M. Stat. § 60-13-31 (2005); N.Y. Labor Law § 861-c (2010); 43 Pa. Stat. § 933.3 (2011).

Employers have thus long operated under various statutes that prohibit independent contractor misclassification, including many statutes that define employee more broadly than the NLRA. Notably, the Charging Party does not argue that the Board should modify the NLRA’s standard for determining whether an individual is an employee. Claims that finding independent contractor misclassification under the NLRA to be an unfair labor practice would discourage *bona fide* independent contractor arrangements are without merit.

IV. CONCLUSION

For all the reasons cited above the National Employment Law Project submits that the Board should find misclassification, standing alone, to be a violation of §8(a)(1).

³² Tennessee Department of Labor and Workforce Development, <https://www.tn.gov/workforce/injuries-at-work/injured-workers/injured-workers/employee-misclassification.html>.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief of *Amicus Curiae* National Employment Law Project was submitted by e-filing to the Office of the Executive Secretary of the National Labor Relations Board on April 30, 2018. A copy of the Brief of *Amicus Curiae* National Employment Law Project was also served upon the following via email on April 30, 2018:

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