Updates
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NLRB Returns to the Obama-Era Standard for Independent Contractors

The National Labor Relations Board (NLRB or the Board) issued a decision on June 16, 2023, returning to an Obama-era standard used to determine whether a worker is an employee or an independent contractor under the National Labor Relations Act (NLRA or the Act). While employees have rights under the NLRA, independent contractors do not. The shift in the NLRB's standard could lead to broader NLRA coverage.

The decision, *Atlanta Opera Inc.*, 372 NLRB No. 95 (2023), involves a union's April 2021 petition to represent makeup artists, wig artists, and hair stylists (collectively known as "stylists") at the Atlanta Opera. In June 2021, the acting regional director determined that the stylists were employees with organizing rights, but the Atlanta Opera challenged that decision by filing a request for review by the Board. The Board granted review and invited the parties and interested amici to file briefs addressing whether the Board should continue to adhere to the independent contractor standard set out in *SuperShuttle DFW*, 367 NLRB No. 75 (2019) or whether some different test should replace it. Ultimately, a Board majority overruled *SuperShuttle* and reinstated the independent contractor test set out in *FedEx Home Delivery*, 361 NLRB 610 (2014) (*FedEx II*). The Board then determined that the stylists were employees under the Act.

Factors for Employee Determination

The readopted *FedEx II* test applies a list of the following 10 common-law factors to use when determining whether an individual is an independent contractor or an employee:

1. Extent of control by the employer.
2. Whether or not the individual is engaged in a distinct occupation or business.

3. Whether the work is usually done under the direction of the employer or by a specialist without supervision.
4. Skill required in the occupation.
5. Whether the employer or individual supplies instrumentalities, tools, and place of work.
6. Length of time for which individual is employed.
7. Method of payment.
8. Whether or not the work is part of the regular business of the employer.
9. Whether or not parties believe they are creating an independent contractor relationship.
10. Whether the principal is or is not in business.

The list of common law factors is nonexhaustive, and the Board also considers whether the evidence tends to show that the individual is, in fact, rendering services as an independent business. Further, no single factor determines whether an individual is properly an independent contractor or an employee. Rather, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." The *FedEx II* test considers "a range of dimensions" in the relationship that cannot be boiled down to one overriding factor.

By returning to the *FedEx II* standard, the Board overruled its Trump-era decision, *SuperShuttle*, which applied the same 10 common-law factors, but primarily focused on whether a worker had entrepreneurial opportunity for economic gain or loss. Under *SuperShuttle*, "where the common-law factors, considered together, demonstrate that the workers in question are afforded significant entrepreneurial opportunity," the Board would likely find that the workers were independent contractors.

Now, entrepreneurial opportunity may still be relevant as one aspect considered among the common law factors, but the assessment only considers a company's constraints on a worker's independence to engage in actual entrepreneurial opportunity instead of theoretical entrepreneurial opportunity.

When discussing the practical implications of their decision, the Board majority wrote:

Neither the common law, nor the policies of the Act, support the *SuperShuttle* Board's expansive view of how "entrepreneurial opportunity" should operate to exclude workers from statutory coverage. Indeed, the explicit policy of the Act is "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . . ." Sec. 1, 29 U.S.C. § 151. In light of that policy, exclusions from statutory coverage should be interpreted narrowly, not expansively, as the Supreme Court has made clear.

In his dissent, Board Member Marvin Kaplan lauded the *SuperShuttle* standard as "the most effective measure" for the independent contractor/employee determination. He argued that the revived *FedEx II* approach "wrongfully diminished the significance of entrepreneurial opportunity" and challenged the ability of the *FedEx II* standard to withstand review by the circuit courts.

Takeaway

This shift back to the *FedEx II* standard will likely make it more difficult for companies to show that workers are independent contractors under the NLRA. Companies engaging independent contractors should carefully review classifications.

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