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August 30, 2023

August Tip of the Month: NLRB Decision Modifies Independent Contractor Analysis



On June 16, 2023, the National Labor Relations Board issued a decision reinstating an Obama-era standard used to determine whether a worker is an employee or an independent contractor under the National Labor Relations Act.

The key difference between the now-current standard and the former Trump-era standard relates to the Board's treatment of "entrepreneurial opportunity" as a component of the independent contractor analysis. Under the Trump-era standard, the Board primarily focused on whether a worker had an entrepreneurial opportunity for economic gain or loss in connection with the at-issue position. Pursuant to the updated standard, the entrepreneurial opportunity assessment merely considers a company's constraints on a worker's independence to engage in actual entrepreneurial opportunities, rather than theoretical entrepreneurial opportunity. This change will likely make it easier to classify workers as employees and, as such, fall within the protections of the NLRA. In view of this shift, employers should closely assess their contractor classifications in order to ensure compliance and minimize exposure.

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