Legal Update Article

Labor Board Returns to 2014 Test for Determining Whether Individual Is Independent Contractor

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The National Labor Relations Board has returned to its Obama-era standard for determining whether an individual is an independent contractor under the National Labor Relations Act. *The Atlanta Opera, Inc.*, 372 NLRB No. 95 (2023).

The Board's decision returns to the standard it previously set, requiring all incidents of the working relationship be assessed, with no one factor being decisive *(FedEx Home Delivery,* 361 NLRB No. 610 (2014) *(FedEx II)).* As a result of the Board's latest decision, the threshold for finding employee status will be much easier for the Board general counsel to establish.

The Atlanta Opera overrules the Board's 2019 decision holding entrepreneurial opportunity for gain or loss is the primary factor of the independent contractor test *(SuperShuttle DFW, Inc.,* 367 NLRB No. 75).

Common-Law Agency Test

In evaluating independent contractor or employee status, the Board has traditionally applied the common-law agency test, consisting of 10 factors:

1. Who controls the details of the work
2. Is the work performed a distinct occupation or business
3. Is the work being performed typically done under the supervision of an employer
4. Does the work require special skill
5. Who supplies the tools or equipment
6. The length of the engagement
7. Is compensation based on time spent or completion of a job
8. Is the employer in the business of work that is performed
9. Do the parties believe they have created an independent contractor relationship
10. Whether the employer is in business

Over time, the Board increasingly weighed entrepreneurial opportunity for gain or loss as an indicia of independent contractor status. Entrepreneurial opportunity did not become a separate factor in the Board's analysis; rather, the Board used it to evaluate the overall significance of the 10 agency factors. Accordingly, factors demonstrating entrepreneurial opportunity indicated independent contractor status, whereas factors indicating employer control supported employee status.

FedEx II and *SuperShuttle*

The Board continued to apply the 10 common-law factors in *FedEx II,* but it held that entrepreneurial opportunity would be a factor in its analysis only as a component of the second factor (is the work performed a distinct occupation or business), not overall. In other words, in considering whether an individual is engaged in a distinct occupation or business, the Board would consider the extent to which there was a risk

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of losing money or an opportunity to increase compensation based on the individual's decisions and effort.

Subsequently in 2019, the Trump-era Board overruled *FedEx II* in *SuperShuttle* and determined the "entrepreneurial opportunity" component was the critical part of the independent contractor or employee analysis. In fact, the Board held it was the prominent consideration when weighing the above factors.

The Atlanta Opera

The case at issue centers on a group of makeup artists, wig artists, and hairstylists working at The Atlanta Opera. While the Board ultimately determined the individuals were employees and not independent contractors, the independent contractor analysis remains fact-specific for each case. The crux of the decision, therefore, centers on how the Board will evaluate entrepreneurial opportunity when determining independent contractor status.

The Atlanta Opera provides that no one factor, including entrepreneurial opportunity, will be decisive in analyzing independent contractor status. Instead, the Board will consider all factors when determining whether an individual is an employee or an independent contractor. This standard, the Board explained, will align with U.S. Supreme Court precedent *(United Insurance,* 390 U.S. 254 (1968)) holding "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."

The Board also noted the "entrepreneurial opportunity" factor will depend on whether the individual is rendering services as part of an independent business or if they are performing functions that are essential to the employer's normal business operations. This will encompass not only whether the putative contractor has a significant entrepreneurial opportunity, but also whether the putative contractor has:

1. A realistic ability to work for other companies;
2. A proprietary or ownership interest in their work; and
3. Control over important business decisions, such as the scheduling of performance, the hiring, selection, and assignment of employees, the purchase of equipment, and the commitment of capital.

Additionally, any weight given to entrepreneurial opportunity also must be "actual (not merely theoretical)," the Board instructed, and take into consideration any employer restraints imposed on the individual to actually pursue the opportunity, such as restrictions on the individual's business decisions or their ability to work for other companies.

Takeaways

The Board's decision may have a significant impact on employers, primarily those frequently hiring contract or gig workers.

The distinction between independent contractors and employees can have important consequences because independent contractors are not considered employees under the Act and are excluded from the law's coverage. Consequently, independent contractors do not have Section 7 rights to engage in protected concerted activity and, therefore, do not have the right to unionize. Employers will need to carefully

analyze contractual relationships with employees to ensure classifications meet Board standards for independent contractors.

Please contact a Jackson Lewis attorney if you have questions.