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NLRB and DOL Target Independent Contractor Misclassification

Recent developments at the National Labor Relations Board (NLRB) and the U.S. Department of Labor's Wage and Hour Division (DOL) could make it more difficult for businesses to classify workers as independent contractors. On January 6, the NLRB and the DOL announced that they entered a [Memorandum of Understanding](#) which provides for and encourages interagency cooperation through "information sharing, joint investigations and enforcement activity, training, education, and outreach." In a [separate press release](#), the NLRB stated that the Memorandum of Understanding "will allow for better enforcement against... misclassification of workers as independent contractors."

The NLRB's partnership with the DOL is the latest of many pro-employee initiatives that NLRB General Counsel Jennifer Abruzzo has made in her first six months in office. Abruzzo seeks to reverse several pro-employer precedents established during President Donald Trump's administration. This includes reconsidering the test for classifying independent contractors under the National Labor Relations Act (NLRA). The NLRB's opportunity to "reconsider its standard for determining the independent contractor status of workers" arose last year from a case involving hair stylists, wig artists, and makeup artists for The Atlanta Opera. On December 27, 2021 the NLRB invited [briefs](#) in *The Atlanta Opera, Inc.* 371 NLRB No. 45 (2021) to determine whether it should continue to follow the independent contractor standard set in a 2019 decision during the Trump administration, or should it return to a 2014 Obama-era standard in its entirety or with modifications.

The current independent contractor standard was established in *SuperShuttle DFW*, 367 NLRB No. 75 (Jan 25, 2019). In *SuperShuttle DFW*, the board overturned *FedEx Home Delivery*, 361 NLRB 610 (2014) which made it harder to classify workers as independent contractors. Under *FedEx Home Delivery*, a worker's "economic dependence" on an employer was the decisive factor in independent contractor determination. *SuperShuttle* emphasized a

worker's "entrepreneurial opportunity" for profit or loss when determining their employment status. It is likely that the NLRB under President Joe Biden's administration will remove the *SuperShuttle DFW* framework and either reinstate *FedEx* or adopt a test that further restricts when a company can classify someone as an independent contractor.

David Weil, Biden's pick to lead the DOL's Wage and Hour Division, is an ardent opponent of independent contractor relationships. If confirmed by the Senate, Weil will take control of the Division at a time of expansive growth. The Division recently [announced](#) that they plan to hire 100 new investigators in the coming weeks, with "significantly more hiring activity" later this year.

These developments at the DOL and the NLRB could mean trouble for employers that misclassify workers as independent contractors. For example, an NLRB investigation of an unfair labor practice that leads to the conclusion that certain workers have been misclassified as employees could lead to the DOL finding a company is liable for unpaid overtime and minimum wages.

Considering this heightened scrutiny and potential narrower legal standard, it is now more important than ever to evaluate how companies structure an independent contractor relationship. It is particularly important for employers to seek guidance from experienced counsel when developing and implementing policies related to working with independent contractors.

If you have questions, consult with [Katherine Koop Irwin](#), [Ryan Stevens](#), or any attorney in Frost Brown Todd's [Labor & Employment](#) practice group.

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