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NLRB Makes It Easier to Reclassify Independent Contractors as Employees

In a highly anticipated, but not surprising, decision issued on June 13, 2023, the National Labor Relations Board (NLRB) reverted to past precedent, making it more difficult for individuals to be classified as independent contractors. In [The Atlanta Opera, Inc.](#), makeup artists, wig artists, and hair stylists who worked at the Atlanta Opera filed an election petition with the NLRB seeking union representation. In finding the individuals were *not* independent contractors—a crucial fact that would have scuttled the union petition—the Board rejected its 2019 decision in *SuperShuttle*. Distilled to its essence, under *SuperShuttle*, when an individual possessed entrepreneurial opportunity, it was presumed the employer exercised *less* control, which favored independent contractor status. When an individual possesses entrepreneurial opportunity, he/she functions as an independent business and experiences the risk/reward challenges faced by a business owner.

NLRB Returns to Obama-Era Independent Contractor Test

Instead, with *Atlanta Opera*, the NLRB returned to the standard adopted in its 2014 decision, *FedEx Home Delivery*, whereby entrepreneurial opportunity is but *one* factor among many geared toward discerning whether the evidence tends to show a supposed independent contractor is rendering services as part of an independent business. In so doing, the NLRB noted it intended “that the Board should give weight only to actual (not merely theoretical) entrepreneurial opportunity, and that it should necessarily evaluate the constraints imposed by a company on the individual’s ability to pursue this opportunity.” When determining whether an individual has “entrepreneurial opportunity,” the Board will consider whether the contractors can work for other companies, can hire their own employees, have a proprietary interest in their work, and have

control over business decisions such as scheduling, purchase of equipment, and commitment of capital.

NLRB Predictably Downplays Significance of Entrepreneurial Opportunity

The Board's commentary regarding "actual" not "merely theoretical" opportunities is interesting given its past insistence that "theoretical" or "indirect" control was sufficient to make two entities joint employers. Despite this cognitive dissonance, the Board forged ahead and held it would "return" to a holistic review of a number of non-exhaustive, common-law factors to determine whether an individual is an independent contractor, including:

- the extent of control which the company may exercise over the details of the work;
- whether the one employed is engaged in a distinct occupation or business;
- the kind of occupation;
- any specialized skill required in the particular occupation;
- whether the employer or the individual supplies the instrumentalities, tools, and the place of work;
- the length of time of the engagement;
- the method of payment;
- whether the work is part of the regular business of the employer;
- whether the parties believe they are creating an independent contractor relationship; and
- whether the principal is or is not in business.

None of the above factors are dispositive.

Key Takeaways

Why is this "employee" versus "independent contractor" classification important? The National Labor Relations Act ("Act") excludes an independent contractor from the definition of a "covered employee." Only employees have the right to join a union,

collectively bargain, and enjoy the Act's workplace protections. The *Atlantic Opera* decision conveniently has made it much easier for the NLRB to classify individuals as employees—who can vote for a union.^[1] Moreover, the NLRB's General Counsel has previously shared her belief that misclassifying workers as independent contractors is a *per se* violation of the Act.

Employers must carefully analyze their relationships with these parties (e.g., staff agencies, subcontractors) for seemingly innocuous (to date) boilerplate contract language either reserving direct or indirect control and/or actions that arguably exhibit direct or indirect control. Companies utilizing and relying upon a bevy of independent contractors to perform their services (i.e., gig economy companies) may have those same individuals claim "employee" status with the concomitant ability to unionize. At the same time, some individuals who prefer the flexibility of being an independent contractor may be forced into employee status. To further complicate matters, *Atlanta Opera* does not determine whether an individual is an employee or independent contractor under other applicable state or federal laws (e.g., Department of Labor, Wage & Hour Division.)

If you have any questions about this article or other labor law issues, please contact the authors or any attorney in Frost Brown Todd's [Labor and Employment](#) practice group.

^[1] There is a modicum of hope. Beyond question, this decision will be appealed. The employer can appeal to any federal court without regard to where it is headquartered or where the dispute arose. We expect the employer to file an appeal with the U.S. Court of Appeals for the District of Columbia ("D.C. Circuit"). In two prior separate rulings, *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Circuit 2009), denying enforcement of *FedEx Home Delivery*, 351 NLRB No. 16 (2007); (*FedEx I*); and *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017), denying enforcement of *FedEx Home Delivery*, 361 NLRB 610 (2014) (*FedEx II*), the D.C. Circuit rejected the NLRB's narrow reading of "independent contractor" under the Act. In *FedEx II*, the D.C. Circuit cited a passage from *FedEx I* where the D. C. Circuit noted whether the putative independent contractors have

“significant entrepreneurial opportunity for gain or loss” is a more accurate proxy for independent contractor status. Round three may be just around the corner.

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