NLRB Reworks Independent Contractor Test Under NLRA

On June 13 the National Labor Relations Board (NLRB) issued a decision in *The Atlanta Opera* overturning Trump-era NLRB precedent from its 2019 ruling in *SuperShuttle DFW, Inc.* on determining whether a worker is an employee covered by the National Labor Relations Act (NLRA) or an independent contractor excluded from coverage. The *Atlanta Opera* case restores an Obama-era NLRB standard announced in *FedEx Home Delivery* (2014).

Section 2(3) of the NLRA excludes independent contractors from its coverage. Based on this exclusion, determining if a worker is an employee, and thereby covered by the NLRA, or an independent contractor outside its coverage is a critical inquiry for businesses. In 1968 the U.S. Supreme Court issued *NLRB v. United Insurance Co. of America,* holding that the NLRA incorporates the "common-law agency test … in distinguishing an employee from an independent contractor." Both the Obama-era and Trump-era NLRB standards utilized the same 10-factor common-law test for determining a worker's status. In addition to the 10-factor common-law test, however, the NLRB has also historically considered whether putative contractors have a "significant entrepreneurial opportunity for gain or loss." Some factors the NLRB considers when determining whether purported contractors have entrepreneurial opportunity include if the worker can work for other companies, can hire their own employees, and have a proprietary interest in their work.

The Obama-era and Trump-era NLRB differed on how entrepreneurial opportunity impacts the 10-factor common-law test for determining a worker's classification. The Obama-era NLRB held that entrepreneurial opportunity represents one aspect of a relevant factor that asks *whether the evidence tends to show* that a putative contractor is, in fact, rendering services as part of an independent business. In contrast, the Trump-era NLRB held in *SuperShuttle DFW, Inc*. that "entrepreneurial opportunity … has always been at the core of the common-law test" and accordingly "is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain."

The *Atlanta Opera* decision rejects the Trump-era NLRB's elevation of entrepreneurial activity as a heightened factor in analyzing whether a worker is covered by the NLRA and criticizes the Trump-era NLRB's reasoning that entrepreneurial activity is a controlling principle by which to evaluate the overall effect of common-law factors for determining a worker's status, stating "[t]o be clear, the Supreme Court has never suggested, let alone held, that 'entrepreneurial opportunity' is the principal guidepost in the common-law analysis." *The Atlanta Opera* returns to the Obama-era NLRB standard from *FedEx Home Delivery* and expressly rejects proposals to install a different standard, such as the "ABC test" codified by California's courts and legislature. The NLRB also reaffirmed that entrepreneurial opportunity is still a factor to be considered, but explained that the analysis will look at whether the worker can *realistically* work for other companies, have ownership interests in their work, and have control over important business decisions.

This decision is a continuation of the current NLRB's pro-labor rulings and eases the standard for workers (and unions) to demonstrate that they are employees and therefore covered under the NLRA rather than uncovered independent contractors.

Employers should be aware that each law governing the worker relationship utilizes its own classification tests and definitions for determining whether a worker is a covered employee or an independent contractor. The *Atlanta Opera* decision impacts a worker's status for purposes of coverage under the NLRA, which gives employees – but not contractors – the right to unionize and grants protections against unfair labor practices. The decision does not determine whether a worker is an employee or independent contractor in the context of other applicable federal or state laws.

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