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National Labor Relations Board Modifies Independent Contractor Standard (Yet Again)

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Practices: Employment, Labor & Benefits

Executive Summary

- On June 13, 2023, the National Labor Relations Board ("NLRB" or the "Board") issued its long-awaited decision in The Atlanta Opera, Inc., overturning its 2019 independent contractor standard (SuperShuttle DFW, Inc.) and reinstating a narrower, multi-factor test for determining whether workers are employees or independent contractors under the National Labor Relations Act ("NLRA").
- It is anticipated that the return to the multi-factor test could result in many more workers being classified as employees, and therefore be permitted to join unions and be covered by NLRA protections.

BACKGROUND

In 2014, the Obama-era Board issued a decision that "refined" the independent contractor standard and made it easier for workers to be classified as employees. The NLRB retained certain common-law factors but reframed the analysis by limiting the importance of the workers' "entrepreneurial opportunity" and shifting to the "economic realities" of the parties' relationship. This analysis became known as the "economic realities" test, which made it easier for employers to classify workers as employees.

In 2018, in SuperShuttle DFW, Inc., the Trump-era Board reversed course, which effectively returned to the traditional independent contractor standard. Under SuperShuttle DFW, Inc., when a worker had entrepreneurial opportunity, there was a presumption that the employer exercised less control, which resulted in a determination of independent contractor status. In January 2021, the Trump administration issued a final rule regarding the classification of independent contractors under the Fair Labor Standards Act ("FLSA"). The rule, entitled "Independent Contractor Status Under the Fair Labor Standards Act," endorsed an "economic realities" test to determine the nature of a worker's relationship with a business. That rule pointed to a list of non-exhaustive factors to be considered, although sought to streamline the analysis by focusing on two "core factors": (1) the nature and degree of control over the work; and (2) the worker's opportunity for profit or loss.

THE DECISION

In The Atlanta Opera, Inc. decision, the NLRB overruled its prior ruling in SuperShuttle that entrepreneurial opportunity for gain or loss should be the animating principle of the independent contractor test. Instead, the

NLRB reverted back to the Obama-era independent contractor standard from 2014, which applies the common-law agency test for determining worker status (found in the Restatement (Second) of Agency §220). The NLRB stated that the analysis should turn on the questions of whether the putative contractor: "(a) has a realistic ability to work for other companies; (b) has proprietary or ownership interest in their work; and (c) has control over important business decisions," such as scheduling, hiring, assignment of employers, purchasing equipment, and committing capital.

The NLRB further explained that entrepreneurial opportunity would be taken into account, along with the traditional common-law factors, by asking whether the evidence tends to show that a supposed independent contractor is, in fact, rendering services as part of an independent business. The common law factors include the following, with no one factor being dispositive:

- The extent of control, which by agreement, the employer may exercise over the details of the work.
- Whether or not the individual is engaged in a distinct occupation or business.
- Whether the work is usually done under the direction of the employer or by a specialist without supervision.
- The skill required in the particular occupation.
- Whether the employer or individual supplies instrumentalities, tools and the place of work.
- The length of time for which the individual is employed.
- The method of payment.
- Whether or not the work is part of the regular business of the employer.
- Whether or not the parties believe they are creating an independent contractor relationship.
- Whether the principal is or is not in business.
- Whether the evidence tends to show that the individual is, in fact, rendering services as an independent business.

In The Atlanta Opera, Inc., the opera opposed a petition to be unionized by a group of makeup artists, wig artists, and hairstylists who performed work for the opera. The opera argued that the artists and stylists were independent contractors and not employees entitled to protection under the NLRA. The NLRB disagreed with the opera's arguments. In reaching its ruling, the NLRB found that most of the common-law factors above pointed towards the workers being statutory employees, rather than independent contractors. In particular, the Board found that the opera exercised control over the individuals day-to-day work, gave feedback and instructions on their work, provided necessary equipment and supplies and even paid the workers an hourly wage with the potential for overtime. The Board did note that the workers' distinct occupations, special skillsets, and lack of expectation of continuous employment weighed in favor of independent contractor status, but ultimately these factors were not sufficient to deem them as such.

KEY TAKEAWAYS FOR EMPLOYERS

The Atlanta Opera, Inc. decision returns the NLRB to an independent contractor standard that makes it easier to classify workers as employees entitled to the protections under the NLRA (including but not limited to the right to organize for union representation).

Employers who utilize independent contractors as part of their workforce should proceed with caution, knowing that their workers could potentially be deemed statutory employees with union rights, absent strict compliance with the reinstated independent contractor standard described here. It is highly advisable for employers to self-audit by applying the factors of the common law test to each independent contractor they utilize to determine if they would be deemed properly classified. Additionally, employers should be mindful of how their engagements with service providers are structured, and how these workers might be assessed using the standard set forth above.

If you have any questions about this article or need any assistance evaluating your business's relationships under the reinstated independent contractor standard, please contact Kevin S. Borozan or any member of Masuda Funai's Employment, Labor and Benefits Group.