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NLRB Decision Reinstates Obama-Era Independent Contractor Standard

Article By:

Jared A. Phalen

Brian J. Moore

The National Labor Relations Board ("NLRB") reinstated the test established in *FedEx Home Delivery (FedEx II)*, lessening the requirements for a worker to be considered an employee and not an independent contractor. The decision in *The Atlanta Opera, Inc.*, issued on June 13, 2023, overruled the 2019 *SuperShuttle* decision, opting to return to "common-law principles." Now, the factors that will be used to determine whether a worker is an independent contractor or an employer will be:

- The extent of control by the employer
- Whether or not the worker is engaged in a distinct operation 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 occupation
- Whether the employer or worker supplies the instrumentalities, tools, and place of work
- The length of time for which the worker is employed
- The method of payment
- Whether the work is part of the regular business of the employer
- The belief of the parties when forming the relationship
- Whether services provided are a part of the employer's business or independent of the business

While these factors were considered under *SuperShuttle*, the former test placed greater weight in

“entrepreneurial opportunity,” such as the control exercised by workers over their day-to-day schedule, who owns the equipment used, control over the price of services, and profit sharing. Now, when determining whether a worker is an independent contractor or employee, the Board will give weight to all factors equally, not view the factors through a “prism of entrepreneurial opportunity,” and will only consider entrepreneurial opportunity actually taken by workers, not theoretical opportunities not utilized by workers.

What Employers Need to Know

The *Atlanta Opera, Inc.* decision will not cause massive waves in the employee vs. independent contractor analysis, however, it has the potential to effect some businesses more than others. For example, workers in “gig economy” or “app-based” companies such as Uber, DoorDash, and Instacart, are more likely to be considered employees under this test than the test in *SuperShuttle*.

Nevertheless, any shift in policy favoring workers being employees and not independent contractors is significant news for employers. Unlike independent contractors, employees can be entitled to union rights, minimum wage, and overtime pay under federal law. This shift continues the NLRB’s trend of reinstating Obama-era rules and abolishing employer-friendly rules.

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