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NLRB Considers Abandoning Current Standard for Independent-Contractor or Employee Status

Labor Relations Update Blog on **December 31, 2021**

In what will have a significant impact on the employment status of "gig" economy workers under federal labor law, the National Labor Relations Board ("NLRB" or "Board") seems poised to revert to a more worker-friendly standard for determining independent contractor or employee status.

On December 27, 2021, the NLRB invited public input on whether it should abandon the current standard for determining if a worker is properly classified as an independent contractor or is an "employee" under the National Labor Relations Act ("NLRA"). *See The Atlanta Opera, Inc.,* NLRB No.10-RC-276292 (2021).

The case at issue involves a determination of whether the workers – makeup artists, wig artists, and hairstylists – are employees of The Atlanta Opera, Inc. or independent contractors. In reconsidering the standard, the Board asks interested *amici* to provide responses to the following two questions:

1. Should the Board adhere to the independent-contractor standard in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019)?
2. If not, what standard should replace it? Should the Board return to the standard in *FedEx Home Delivery*, 361 NLRB 610, 611 (2014), either in its entirety or with modifications?

In *SuperShuttle*, the Board returned to the traditional common-law agency test for determining whether a worker is an employee or independent contractor, overturning the 2014 Board decision in *FedEx*. The current test considers the following factors under the totality of the circumstances:

(a) The extent of control which, by the agreement, the master may exercise over the details of the work.

(b) Whether or not the one employed is engaged in a distinct occupation or business.

(c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.

(d) The skill required in the particular occupation.

(e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.

(f) The length of time for which the person is employed.

(g) The method of payment, whether by the time or by the job.

(h) Whether or not the work is part of the regular business of the employer.

(i) Whether or not the parties believe they are creating the relation of master and servant.

(j) Whether the principal is or is not in business.

The Board, in *SuperShuttle,* found the majority decision in *FedEx* erroneously diminished the significance of "entrepreneurial opportunity" as a factor in the independent-contractor analysis, and revived the "economic dependency" standard when constructing the analysis. Pursuant to this standard, companies have been able to emphasize the "entrepreneurial opportunity" for economic gain when determining employment status.

The Board split 3-2 on inviting public discourse in the matter. The dissenters assert there is no need to revisit the *SuperShuttle* standard set in 2019, given no party in the present case asked the Board to overrule, modify, or revisit the precedent, nor has anything occurred warranting a re-examination of the decision. The majority argues previous Board majorities have overruled precedent *sua sponte*, and the Board, in recent years, "has not hesitated to reverse precedent despite the absence of adverse judicial decisions."

Interested *amici* may e-file briefs not exceeding 20 pages in length to the Board by Thursday, February 10, 2022.

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