

UNHAPPY NEW YEAR FOR GIG ECONOMY COMPANIES? LABOR BOARD WILL RECONSIDER INDEPENDENT CONTRACTOR STANDARD IN 2022

Insights
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In one of its final moves of the year, the National Labor Relations Board announced in late December that will reconsider the current legal standard for determining whether workers are independent contractors or employees. This almost certainly means we'll see a new test created in 2022 that makes it harder for gig economy companies and other businesses to classify their workers as contractors for union organization and other labor relations purposes. What do businesses need to know about this December 27 announcement?

What's Happened to Date?

Like many other legal standards enforced by the NLRB, the independent contractor test has swung back and forth on a pendulum over the past decade.

- In 2014, the Obama-era Labor Board issued a decision that "refined" the independent contractor test and made it easier for workers to be classified as employees.
- In 2018, the Trump-era Board reversed course and handed down a decision that requires equal weight to be given to both the right-to-control aspects of the relationship between business and worker and the role of the workers' entrepreneurship in operating their own businesses.
- By August 2021, President Biden was able to fill three of the five seats on the National Labor Relations Board, meaning the Board now has a majority of members more aligned with unions than management – and setting the

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stage for critical legal standards to be flipped. Up next on its docket is the independent contractor test.

Service Focus

Labor Relations

What Happened Last Week?

The International Alliance of Theatrical Stage Employees (IATSE) union is seeking to organize a collection of makeup artists, wig artists, and hairstylists at the Atlanta Opera into a union, but those workers are classified as independent contractors and thus unable to form a union. IATSE sensed the timing was right to upend the legal test that prevents these workers from being tabbed as employees and asked the Labor to reconsider the standard. [In a brief December 27 decision](#), the Board agreed that it was time to take a fresh look at this issue.

The Board invited interested parties to file briefs in order to examine the following questions:

- Should the Board adhere to the current independent contractor standard?
- If not, what standard should replace it?
- Should the Board return to the 2014 Obama-era standard, either in its entirety or with modifications?

What's Next?

The Board will receive submissions from business associations, workers' advocacy groups, unions, and other parties through February 10. After all briefs have been submitted, it shouldn't be too long before the NLRB issues a ruling in the *Atlanta Opera* case – and we can predict with almost-near certainty that the standard will be shifted to make it more difficult for businesses to classify workers as independent contractors. We could see the Board lay down a rule that overemphasizes the significance of the various factors that determine whether a hiring entity has a “right to control” the worker, adopting somewhat of an “economic dependence” test. We could also see the Board shifting to something akin to a [California-style ABC Test](#) that places a key emphasis on whether the worker at issue is performing work that is part of the usual course of the hiring entity's business.

What Should You Do?

Nothing has changed today, and nothing will change for at least a few months. However, if you have a workforce that consists of independent contractors in any capacity, you should consult with your Fisher Phillips attorney or any member of our Gig Economy Team or Labor Relations Practice Group in order to begin planning for the future.

Remember that this development will only impact the contractor classification test when it comes to labor relations issues – union organizing, unfair labor practices, and the like. The federal government (not to mention the states) has a variety of different legal standards to use depending on whether you are looking at [wage and hour compliance](#), [unemployment compensation](#), or other situations. Make sure to coordinate with your legal counsel to develop a workforce strategy that works best among this patchwork of obligations.

We will monitor these developments and provide updates as warranted, so make sure that you are subscribed to [Fisher Phillips' Insights](#) to get the most up-to-date information direct to your inbox. If you have further questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Gig Economy Team](#) or [Labor Relations Practice Group](#).