Labor Board Returns to Stricter Independent Contractor Standard: 4 Things Employers Need to Know

Insights
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A highly anticipated decision by the National Labor Relations Board (NLRB) makes it significantly harder for companies to classify their workers as independent contractors. The Board's June 13 decision in *Atlanta Opera* reverts to a broader independent contractor standard that was established during the Obama administration in 2014 — which means more workers will again be considered "employees" under federal labor law. What are the top four things employers need to know about this development?

1. How Did We Get Here?

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. The Board 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 workers to be classified as employees.
- In 2018, in *SuperShuttle*, the Trump-era Board reversed course, which effectively returned to the traditional independent contractor test. The Board noted, "Control and entrepreneurial opportunity are two sides of the same coin; the more of one, the less of the other." Under *SuperShuttle*, 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.

2. What Happened in this Case?

Atlanta Opera is a professional opera company based in Atlanta, Georgia that is known for producing a wide range of operatic repertoire, including both classic and contemporary works. For each production, the director chooses makeup artists, wig artists, and hairstylists that will provide makeup and hair and wig treatments to onsite performers. Hairstylists do not work pursuant to written contracts, rather they agree to an hourly pay rate and fill out timesheets accordingly.

Stylists are not on the Opera's payroll, rather they are required to sign a W-9 tax form and a direct-deposit form. Personnel files are not maintained for stylists and the Opera does not provide them with any information, training, or orientation. There are no uniform requirements and stylists are not required to adhere to the Opera's rules and regulations. Stylists perform their day-to-day hair, wig, and makeup work largely free from immediate or direct supervision by the Opera.

Thus, when the stylist filed an election petition with the Board seeking union representation, the Opera argued they were not entitled to representation because they were independent contractors rather than employees. The Opera noted that, under *SuperShuttle*, the stylists had significant entrepreneurial opportunity because they chose when and where to work and whether to accept or reject opportunities with the Opera at all.

The union, which was seeking to organize the independent contractors, argued *SuperShuttle* should be overruled, and further, that emphasis should be placed on the entrepreneurial opportunity analysis. In this way, the union argued, the workers should be considered employees and able to join a union.

3. What Changed?

In this case, the Board struck down the *SuperShuttle* independent contractor test in a two-part fashion:

- First, the Board narrowed the scope of the entrepreneurial opportunity, effectively making it very difficult for employers to establish. The Board noted it will "give weight only to actual (not merely theoretical) entrepreneurial opportunity" and "evaluate the constraints imposed by a company on the individual's ability to pursue this opportunity." Under this new standard, the Board will also consider whether the worker:
    1. has a realistic ability to work for other companies;
    2. has proprietary or ownership interest in their work; and
    3. has control over important business decisions, such as the scheduling of performance; the hiring, selection, and assignment of employees; the purchase and use of equipment; and the commitment of capital.
- Second, the Board returned to the Obama-era independent contractor test supporting its pro-employee roots. Under this standard, the Board had little trouble concluding that the stylists were the Opera's employees who could join in union organizing efforts. It concluded that:
- **The Opera controlled the details of the stylists' work:** The Opera's director dictated every aspect of a character's look — from overall aesthetic to hairstyle and nail polish color.
- **The Opera subjected the stylists to continuous feedback:** The Opera's director communicated a continuous stream of detailed feedback and instructions.

- **The Opera supplied all instrumentalities, tools, and places of work:** The Opera's director dictated the time and place of rehearsals and performances, the stylists' daily schedules, and the availability of breaks.
- **The Opera paid stylists an hourly rate with a fixed number of working hours:** Stylists were afforded the opportunity for overtime.
- **The stylists' work was part of the regular business of the Opera:** The Opera conceded that stylists were involved in all of its productions.
- **The Opera was in business (which was, moreover, the same business as the stylists were in):** Stylists were a key element of the Opera's productions.

There were several common law factors that pointed to independent contractor status. Stylists: (1) were engaged in a distinct occupation as theatrical makeup artists and wig-hair specialists; (2) possessed a specialized skillset; and (3) had the opportunity to work for other employers. But the NLRB found these were outweighed by the multitude of other factors.

4. What Does the Ruling Mean for Employers?

Here are seven key takeaways you should note from the NLRB's ruling:

- *Atlanta Opera* has made it significantly easier to classify workers as employees, which will lead to more opportunities to organize workers who are currently excluded from union organizing.
- Now, workers at any number of gig companies – or any other business that deploys independent contractors as part of its workforce – may claim they are employees with union rights.
- Online businesses and others that utilize individuals' services on a temporary basis are also at risk of union organizing efforts.
- Employers will need to operate under the assumption that workers who are currently independent contractors may soon be deemed employees by the current Board, absent strict compliance with the Board's current assessment of the independent contractor and entrepreneur opportunity tests.
- Implications are significant for employers on both sides of the staffing equation regarding the risk of third-party representation and eventually a duty to bargain over conditions of staffed workers.
- It is imperative that employers review staffing contracts for extraneous language reserving the right to direct and/or indirect control.
- Additionally, employers will want to ensure that staffing providers have sound employee-engagement programs.

Conclusion

We'll continue to monitor NLRB and other agency decisions that impact your day-to-day operations and provide updates as necessary, so you should sign up for Fisher Phillips' Insight System to ensure you receive updates directly to your inbox. If you have questions, contact your Fisher Phillips attorney, the author(s) of this Insight, or any attorney on our Gig Economy Team or in our Labor Relations Practice Group.

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