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# LABOR BOARD DUNKS ON EMPLOYER'S CONTRACTOR CLASSIFICATION ATTEMPT

NBA's Timberwolves Foul Out In Front Of NLRB

Insights  
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In a ruling sure to leave businesses and gig economy companies crying foul, the National Labor Relations Board concluded that workers producing electronic video display content for the NBA's Minnesota Timberwolves were misclassified as independent contractors and are actually employees. The Board's 2-1 decision, announced on August 18, is a setback for businesses seeking certainty in their classification decisions, and is a reminder that the current roster of Labor Board members remains decidedly pro-worker and pro-union. Until the Board is comprised of a majority of Republican appointees, businesses need to be wary in their approach to classification situations (*In re Minnesota Timberwolves Basketball LP*).

## THE KEY PLAYERS: ELECTRONIC CONTENT PRODUCERS

Just like any game of basketball, every classification dispute centers around two competing parties: the workers and the business. The business in this case is Minnesota Timberwolves Basketball LP, which owns both the NBA's Timberwolves and the WNBA's Lynx, both of which play their home games at Target Arena in Minneapolis. Between the two teams, there are some 60 or so games per year played at the arena, and at each game, a roster of specialized crewmembers ensures the fans stay entertained and informed.

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On the other side of the contest are those crewmembers, classified by the Timberwolves as independent contractors. At every game, a crew of 16 workers ensures that the arena's four-sided video display board displays live game footage, replays of critical action, real-time statistics, video shots of the crowd, advertisements, pre-produced video content, and other graphic displays. The 16 spots are filled from a roster of 51 individuals who are each qualified to perform a variety of roles – camera operators, replay operators, technical directors, engineers, and similar jobs.

In February 2016, the International Alliance of Theatrical Stage Employers filed a petition with the National Labor Relations Board (NLRB) seeking to represent the workers and form a union. However, because only employees and not independent contractors can unionize, the key question in this representation petition was whether the workers were properly classified. Although the NLRB's Regional Director sided with the NBA team and concluded the workers were correctly designated as independent contractors, the union stepped up on behalf of the workers and requested review by the Labor Board. Last week, the Board reversed the decision of the Regional Director and ruled in favor of the workers and union, permitting the union organizing drive to proceed.

## **CALLING A FOUL: LABOR BOARD RULES FOR WORKERS**

The NLRB first set the ground rules for the contest. It relied upon a series of common-law agency principles, solidified in a critical 2014 decision, to help guide its decision-making process when it comes to misclassification disputes. The standard calls for an analysis of 11 factors to help render a determination, although the list is nonexhaustive, no single factor is determinative, and the entire relationship must be assessed and weighed with all factors considered.

The Board acknowledged that a series of factors seemed to fall in favor of independent contractor status. For example, the workers could remove themselves from the roster of potential assignments at any time, and could decline an invitation to work a game with no negative consequences. There were no minimum or maximum game requirements they could work each season. They were allowed to cancel an accepted work assignment without any repercussions, so long as they found a replacement on their own; they did not even need to receive approval from the Timberwolves

before switching with another worker. Just about all of the crewmembers performed similar work for other entities, and the Timberwolves games were not their only assignment. Finally, the workers were paid on a per-game basis, which made their work much more like a “gig” worker who gets paid per assignment instead of by the hour or with a set salary.

However, in examining the full spectrum of factors that surrounded the workers’ jobs, the Board felt that the balance fell in favor of employee classification. The critical findings of the Labor Board were:

- The crewmembers were told when and where to perform their work; there was no individual negotiation over game days and tip-off times, and the Timberwolves required them to show up to work at certain times in advance of the games for preparation and pregame work.
- The business provided just about all of the tools, equipment, and supplies needed for the crewmembers to perform their work, including cameras, cables, instant replay machines, sound equipment, broadcasting gear, headsets, and – of course – the center-hung video board suspended over the basketball court.
- A majority of the crew had worked for the company year after year, and there was an understanding that each crewmember would return the following season to continue work.
- The core of the Timberwolves’ business was not just playing basketball games, but providing entertainment services for the thousands of customers who paid good money to attend the games. This meant that the crewmembers were instrumental in carrying out functions deemed to be instrumental to the very essence of what the team did.
- Although the Timberwolves paid the workers on a per-game basis, there was evidence that the rate of pay was closely tied to the amount of time spent working each game. For example, during home openers or other games where extra work would be needed, the crewmembers were paid a premium to reflect the additional time and work.

- While the crewmembers were permitted some amount of freedom and independence when performing their work, they were also required to adhere to any “live call” direction they received from the team (regarding specific video shots or content needed) and to a predetermined “script” unique to each game and unilaterally created by the team (this could include shots of the team mascot, or video of fans in the seats during the “kiss cam” and other features). As the Board said, “the Employer holds and exerts control far exceeding that possessed by crewmembers themselves over when and how they will perform video production work, as well as the manner and means by which that work is accomplished.”

## **OVERTIME: WHAT DOES THIS MEAN FOR EMPLOYERS?**

In some ways, this decision is not all that surprising. Despite a vigorous and well-reasoned dissent by the lone Republican member of the Labor Board (Philip Miscimarra), the NLRB has tilted decidedly in favor workers over the course of the past several years. Until new appointees are in place by the new administration, you can expect similar decisions to be issued by the Labor Board over the course of the next several months. And while it is possible the Timberwolves will appeal this decision to a federal appeals court, the result of any such maneuver will take considerable time – and success in court is certainly not guaranteed.

Any business that retains independent contractors needs to pay attention to this decision and the Labor Board’s philosophy when it comes to these issues. Although there has been some positive movement when it comes to misclassification at the federal level (such as the recent [withdrawal of the Department of Labor’s opinion letter](#)), the Labor Board – along with other administrative agencies, state bodies, and the court system – will no doubt continue to scrutinize independent contractor relationships. There is potential danger with every such business arrangement, so you should work with your legal counsel to ensure that you are doing everything you can to reduce your exposure.

For more information, contact your regular Fisher Phillips attorney, or any member of our [Wage and Hour Law Practice Group](#) or [Gig Economy Practice Group](#).

*This Legal Alert provides an overview of a specific NLRB decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*