VOLUME 77 ◆ NUMBER 6

Employee Benefit Plan Review

If At First You Don't Succeed: National Labor Relations Board Readopts Highly Controversial "Independent Contractor" Standard

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The National Labor Relations Board (NLRB or Board) has decided in *The Atlanta Opera, Inc.*,[1] to make it easier to classify workers as "employees," who are covered by the National Labor Relations Act (NLRA), as opposed to "independent contractors," who are not.

The standard set forth by the Board mirrors the one the NLRB drew up a few years ago, which was subject to court criticism and short-lived. Nonetheless, unless and until the new standard is successfully challenged, many businesses may find themselves entangled in Board proceedings – including union election and unfair labor practice proceedings – involving workers who historically have fallen outside the NLRA's coverage.

Why this Matters

The NLRA provides most private sector employees in the United States the federal right to engage in protected concerted and union activities, including the right to join a union and collectively bargain. The practical consequence of the standard adopted by the Board in *The Atlanta Opera* is that a broader segment of the workforce will have these rights under the NLRA, at least in the eyes of the current Board. This comes at a time when union activity and popularity in the country are increasing. It also comes at a time when independent contractors make up a significant part of the workforce.

Companies that utilize independent contractors are now at an increased risk that the Board will classify such workers – who traditionally have been excluded from the NLRA's coverage – as "employees" covered by the NLRA.

The Independent Contractor Saga

The Board historically has applied common law principles to determine whether a worker is an employee covered by the NLRA or an independent contractor who is not. That standard looks to the totality of the circumstances and explores factors such as:

- The extent of control which, by the agreement, the master may exercise over the details of the work;
- Whether or not the one employed is engaged in a distinct occupation or business;
- 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.
- The skill required in the particular occupation;
- Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- The length of time for which the person is employed;
- The method of payment, whether by the time or by the job;
- Whether or not the work is part of the regular business of the employer;
- Whether or not the parties believe they are creating the relation of master and servant; and
- Whether the principal is or is not in business.[2]

As part of its analysis, the NLRB has historically looked at the individual's entrepreneurial opportunity for gain or loss, which could include such things as the individual's ability to work for other businesses, hire their own employees to perform such work, and be subject to profits and losses as a result of their work.

There was a subtle yet dramatic shift in 2014 when the Board issued its decision in *FedEx Home Delivery* (*FedEx II*).[3] In that case, the NLRB was faced with the question of whether certain drivers, who could run their routes as independent businesses, were independent contractors or employees. The Board decided the drivers were employees covered by the NLRA.

In so finding, the NLRB declined to follow a decision by the U.S. Court of Appeals for the District of Columbia Circuit in *FedEx Home Delivery v. NLRB* (*FedEx I*),[4] which found virtually identical drivers to be independent contractors. The Board expressly stated that it was refusing to adopt the District of Columbia court's holding that "treats entrepreneurial opportunity . . . as an 'animating principle' of the [independent contractor] inquiry."[5]

The employer appealed the Board's *FedEx II* decision to the District of Columbia Circuit Court. The District of Columbia Circuit Court rejected the Board's "newly announced approach."[6] In issuing this decision, the District of Columbia Circuit further noted that the Board is not afforded any special deference when it comes to the independent contractor standard, explaining that the independent contractor determination is a pure question of common law agency principles and the Board has no special administrative expertise with respect to that.[7]

The Board subsequently returned to the traditional standard in *SuperShuttle DFW, Inc.*[8] Therein, the Board explained, "consistent with Board precedent . . ., the Board may evaluate the common law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate."[9]

So was the state of affairs . . . until *The Atlanta Opera* decision.

A Summary of *The Atlanta Opera* Decision

In *The Atlanta Opera*, the Board decided to readopt the standard set forth in *FedEx II* for deciding independent contractor status. Acknowledging in the very first sentence of the decision that *FedEx II* "refined" the NLRB's historic approach, the Board nonetheless asserted that the short-lived 2014 decision "reaffirmed longstanding principles." The NLRB opined that the decision in *SuperShuttle* – like the District of Columbia Circuit Court's decision in *FedEx I* – improperly considered entrepreneurial opportunity to be an "animating principle" of the independent contractor test.

Using the new standard, the Board decided that hairstylists, makeup artists, and wig artists (collectively referred to as stylists), who work on opera performances were employees under the NLRA and could be represented by a union who petitioned the NLRB to hold a union election. A vote was held prior to the Board's decision and a majority of the stylists voted in favor of unionizing.

Background

The Atlanta Opera has planned and presented opera performances for over 40 years. It typically spends several years planning each production, and each production generally requires contributions from actors, choristers, orchestra members, stage managers, and stylists (as well as others).

Stylists are not on the opera's payroll, do not have written contracts, do not receive the same pay rates as one another, are designated vendors by the opera, and the opera does not withhold taxes from their pay. The stylists generally do not wear uniforms, do not receive training or orientations, and are not subject to the opera's rules and regulations (other than infectious disease policies). They are free to work with other performing arts entities and routinely market their skills to a variety of other clients, including theater, film, and private clients. Stylists are also free to do other jobs during the course of a production, though they typically work seven to nine hours on show days.

Stylists are informed of desired looks and are then expected to use their skills to effectuate that look. The opera generally provides necessary tools and equipment and sets the work hours. The stylists are only bound for a single production and may choose not to work on future productions without harming their chances of working for the opera again. Stylists do not receive a percentage of the opera's revenues and are not otherwise subject to the opera's profits or losses based on relative success of a production. Finally, the stylists cannot subcontract their work or hire anyone else to do the work for them.

In April 2021, a union filed a petition for a union election with the NLRB, seeking to be the exclusive collective bargaining representative of the stylists. The opera challenged the union's petition, asserting that the stylists were independent contractors who fell outside the NLRA's coverage. After a regional director rejected this argument, the opera asked the Board to review the decision. The NLRB granted review and invited interested parties to file briefs addressing whether the Board should continue to adhere to the historic standard set forth by the NLRB in *SuperShuttle* or some alternative standard, like the one endorsed by the Board in *FedEx II*.

The Decision

The Board ultimately readopted the independent contractor standard announced in *FedEx II*, and, applying that standard, decided that the stylists were employees, not independent contractors. Among other things, the NLRB concluded that: the opera exercised significant control over the stylists' day-to-day work; the stylists "do not display any signifiers of engaging in an independent business;" the stylists work in tandem with other departments at the opera; the stylists only have "negligible discretion in completing the details of their work;" the opera provides the stylists with the equipment and workspace they need to perform their work; the opera pays the stylists an hourly wage; the stylists' work is part of the employer's regular business; and the stylists "are fundamentally constrained in their ability to make entrepreneurial decisions." The Board found the circumstances weighed in favor of finding that stylists were employees and not independent contractors.

The Dissent

A dissenting Board member agreed that the stylists were employees under the NLRA pursuant to the standard historically used by the NLRB, and disagreed with the Board's decision to readopt the independent contractor standard created in *FedEx II*. The dissenter highlighted, in part, that in readopting the independent contractor standard set forth in *FedEx II*, the NLRB had to overrule two decisions in addition to the *SuperShuttle* decision, which is contrary to the majority's assertion that its decision is consistent with Board precedent. The dissent further predicted that the new standard would likely not survive judicial review, noting that the District of Columbia Circuit Court has already rejected it, and that the U.S. Court of Appeals for the Eleventh Circuit, which also would have jurisdiction over the opera in the event of an appeal, takes a similar approach.

Conclusion

There will be legal challenges to the standard set forth in the Board's decision in *The Atlanta Opera*. In the meantime, businesses should review their arrangements with workers they consider to be independent contractors to assess their risk and potential mitigation measures they may be able to take now to bolster their position that certain workers are independent contractors that fall outside of the Board's purview. This includes reviewing the language in any agreements with those workers and exploring whether there are ways to modify existing arrangements to make (even more) clear these workers are independent.

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Taking such action now is prudent, not only in light of the Board's decision in *The Atlanta Opera*, but also because of increased union activity across the country and the NLRB General Counsel's pursuit of an aggressive agenda to take the NLRA to many places it has never been. For example, the Board's General Counsel (GC), who is responsible for the investigation and prosecution of unfair labor practice charges, recently asserted allegations that college athletes are employees under the NLRA (an issue the NLRB took on once before and declined to decide) and that non-compete agreements can violate the NLRA.

With regard to non-competes, the GC recently issued a memorandum that touched on the independent contractor relationship. "A non-compete provision prohibiting independent-contractor relationships may . . . violate [the NLRA] in the context of industries where employees are commonly misclassified as independent contractors," wrote the GC. The GC further directed the Board's regional offices to submit "cases where a non-compete agreement would chill [rights protected by the NLRA] by effectively prohibiting employment relationships even though nominally prohibiting only independent-contractor relationships" to the Office of the General Counsel's Division of Advice to determine which of those cases to prosecute.

In short, companies utilizing independent contractors are now more likely to face scrutiny before the Board and should consider consulting with labor counsel to get ahead of it.

Notes

1. The Atlanta Opera, Inc., 372 NLRB No. 95 (2023).
2. See Restatement (Second) of Agency § 220 (1958).
3. FedEx Home Delivery, 361 NLRB 610 (2014).
4. FedEx Home Delivery v. NLRB, 563 F.3d 492 (D.C. Cir. 2009).
5. 361 NLRB at 610.
6. FedEx Home Delivery v. NLRB, 849 F.3d 1123, 1127 (D.C. Cir. 2017).
7. Id. at 1128.
8. SuperShuttle DFW, Inc., 367 NLRB No. 75 (2019).
9. Id. at slip op. *9.

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