NLRB IMPOSES STRICTER INDEPENDENT CONTRACTOR TEST ON EMPLOYERS

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US Labor, Employment, and Workplace Safety Alert

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INTRODUCTION

On 13 June 2023, the National Labor Relations Board held, in *The Atlanta Opera, Inc.*,[1] that it would return to a prior, employee-friendly standard for determining whether workers are employees or independent contractors under the National Labor Relations Act.

In doing so, the NLRB reversed another Trump-era precedent, which it believed prioritized a worker's "entrepreneurial opportunity" in determining status under the NLRA as an employee or independent contractor.

The decision is important to both union and nonunion employees because independent contractors are excluded from the NLRA's protections—which include the statutory rights to form a union and strike, among others—under Section 2(3) of the NLRA.

POST-ATLANTA OPERA, MORE WORKERS WILL LIKELY BE DEEMED EMPLOYEES AND, THUS, ELIGIBLE FOR UNION AND STRIKE PROTECTIONS

In *SuperShuttle DFW, Inc.*,[2] the Trump-era NLRB held that a worker's "entrepreneurial opportunity" should be afforded special weight relative to long-standing common-law factors and that the more opportunity workers possess, the more likely they are independent contractors. Specifically, *SuperShuttle* held that the NLRB would "evaluate the common-law factors through the prism of entrepreneurial opportunity[.]"

The *Atlanta Opera* NLRB criticized *SuperShuttle* as irreconcilable with Board and US Supreme Court precedent. In the Board's view, the common law agency test did not incorporate the concept of "entrepreneurial opportunity" in the 10 factors traditionally considered by the Board. In addition, the *Atlanta Opera* NLRB noted that the US Supreme Court had held in 1968 that, under Section 2(3) of the NLRA, "[t]here is no shorthand formula … all of the incidents of the [employer-worker] relationship must be assessed and weighed with no one factor being decisive."

Citing long-standing US Supreme Court and NLRB precedent[4] applying a holistic analysis of the common-law factors, *Atlanta Opera* holds that "entrepreneurial opportunity" is merely one additional consideration among the other nondispositive factors that the Board must consider in a fact-intensive analysis of an employer's workforce when determining who is an employee or independent contractor.[5]

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Critically, *Atlanta Opera* held that when the NLRB does consider "entrepreneurial opportunity," it "should only give weight to actual (not merely theoretical) entrepreneurial opportunity" by analyzing the limits employers impose on workers seeking such opportunities.

For example, the NLRB will consider the employer's ability to unilaterally change the terms or conditions of its relationship with a worker as a restraint on "entrepreneurial opportunity." Moreover, if a worker's daily work does not have an "entrepreneurial dimension," then the NLRB will not deem any underlying contracts merely permitting entrepreneurialism as sufficient to deny workers employee protections under the NLRA.

Moreover, the *Atlanta Opera* NLRB offered some guidance on what may indicate a worker's "entrepreneurial opportunity" by looking to whether the workers at issue are providing labor as part of an "independent business" or the employer's normal operations.

Specifically, the NLRB's "independent business analysis" requires consideration of whether the workers at issue (a) can realistically work for other employers, (b) retain an ownership or other proprietary interest in the employer, and (c) possess control over making key business decisions.

While *Atlanta Opera* can be viewed as expanding the definition of employee under the NLRA, it is notable that the Board rejected other worker classification tests offered by amici and commenting parties, including the even more employee-friendly "ABC test,"[6] which the NLRB reasoned may not be compatible with US Supreme Court precedent applying the common-law factors.

The NLRB also rejected requests from the US Department of Justice and other amici to adapt its holding to consider federal antitrust and trademark law, which it also reasoned would be incompatible with US Supreme Court precedent mandating that it apply the common-law factors.

EMPLOYER TAKEAWAYS POST-ATLANTA OPERA

The NLRB's decision in *Atlanta Opera* is another reversal of Trump-era precedent and restoration of a more employee-friendly standard under the NLRA.[7]

Employers should be concerned about *Atlanta Opera*—and especially how the NLRB applies the common-law factors in future cases—because it could expose them to unionization drives among workers they have classified as independent contractors and, therefore, out of the reach of the NLRA. It also could protect those workers under Section 7 of the NLRA, making it harder to administer the workforce. For union employers who utilize independent contractors, it raises the specter that those workers could be covered under existing collective bargaining agreements.

Post-*Atlanta Opera*, employers should consider engaging in a fact-specific analysis of their workforce through the common-law test's prism to determine which workers may now be found covered under the NLRA. Employers can expect that the NLRB General Counsel's office will aggressively enforce *Atlantic Opera's* holding, especially against employers in industries that are heavily populated with independent contractors. The NLRB General Counsel's aggressive approach may be indicated by, among others, the *University of Southern California* case,[8] in which the office has once again staked out the position that student athletes are employed by their universities (as well as the conference the school plays in and the NCAA).

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FOOTNOTES

[1] 372 N.L.R.B. No. 95 (June 13, 2023).

[2] 367 N.L.R.B. No. 75 (2019).

[3] *See* NLRB v. United Ins. Co. of Am., 390 U.S. 254, 259 (1968).

[4] *See*, e.g., Roadway Package Sys., 326 NLRB 842 (1998).

[5] The relevant factors in the Board's analysis derive from the Restatement (Second) of Agency. “In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: (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 a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.” Restatement (Second) of Agency § 220 (1958).

[6] The *Atlanta Opera* NLRB noted that under the “ABC test,” as codified by the California courts and legislature, the independent contractor analysis turns on the following questions: “(1) Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact? (2) Does the worker perform work that is outside the usual course of the hiring entity's business? (3) Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?”

[7] *See* Michael A. Pavlick & Taylor J. Arluck, *NLRB Expands Protections for Employee Abusive Conduct, Returns to Setting-Specific Standards*, K&L GATES HUB (May 17, 2023), https://www.klgates.com/NLRB-Expands-Protections-for-Employee-Abusive-Conduct-Returns-to-Setting-Specific-Standards-5-17-2023.

[8] *See*, e.g., Braden Campbell, *NLRB GC Files Complaint Saying USC Athletes Are Employees*, LAW360 (May 18, 2023), https://www.law360.com/articles/1679404/nlrb-gc-files-complaint-saying-usc-athletes-are-employees.

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