LABOR AND EMPLOYMENT LAW
INFORMATION MEMO
JUNE 20, 2023

The National Labor Relations Board: The Show Must Go On, But With a New Independent Contractor Test

On June 13, 2023, the National Labor Relations Board (the Board), in its decision in *the Atlanta Opera, Inc*,[1] brought back for an encore, its *2014 FedEx II*[2] standard for determining independent contractor status under the National Labor Relations Act (the Act). In doing so, the Board overruled and closed the curtains on its *2019 SuperShuttle*[3] decision, bringing back a pro-employee standard for determining whether workers are employees covered under the Act or independent contractors not subject to the Act's protections.

If this sounds like a lot of theater jargon, thank the makeup artists, wig artists and hairstylists who work at the Atlanta Opera. The petitioning Union in this case, Make-up Artists and Hair Stylists Union, Local 798, IATSE, sought to represent these gig workers, collectively known as "stylists," claiming that they are statutory employees. However, the Atlanta Opera asserted that the stylists were independent contractors and thus not covered by the Act. In its decision, the Board determined that these gig workers, were not independent contractors as designated by the Atlanta Opera, but actually employees covered under the Act. Employers now have a new script to follow: a guide on how to interpret a list of common law and other factors when conducting an independent contractor analysis under the Act. The highlights are below:

Synopsis:

Our story begins with the 1968 Supreme Court decision *NLRB v. United Insurance Co. of America*.[4] There, the Court established a common-law agency test to determine whether someone was an employee or independent contractor for purposes of the Act. This multi-factor test was fact-intensive and considered a non-exhaustive list of relevant factors:

1. the extent of control which, by the agreement, the master may exercise over the details of the work;
2. whether or not the one employed is engaged in a distinct occupation or business;
3. 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;
4. the skill required in the particular occupation;
5. whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
6. the length of time for which the person is employed;

1 *The Atlanta Opera, Inc.,* N.L.R.B., Case 10-RC-276292 (6/13/23).

2 *FedEx Home Delivery*, 361 NLRB 610 (2014) (*FedEx II*).

3 *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019) (*SuperShuttle*).

4 390 U.S. 254, 258 (1968).

7. the method of payment, whether by the time or by the job;
8. whether or not the work is a part of the regular business of the employer;
9. whether or not the parties believe they are creating the relation of master and servant; and
10. whether the principal is or is not in business.

Over the years, the Board considered additional factors including whether independent contractors had a "significant entrepreneurial opportunity for gain or loss," including: (i) the ability to work for other companies; (ii) the ability to hire their own employees; and (iii) the extent they hold a proprietary interest in their work.

In its 2014 *Fedex II* decision, the Board solidified its commitment to the Court's 1968 decision and the common law factors and rejected inclusion of "entrepreneurial opportunity" as the predominant factor that informed the entire analysis. Rather, the Board reaffirmed that a worker's entrepreneurial characteristics should be considered in conjunction with the single factor addressing whether the worker is engaged in a distinct job or business. In practice, this meant that the *FedEx II* decision did not emphasize a worker's independent entrepreneurial activities in determining his/her employment status. The *FedEx II* decision was an employee-friendly decision, because it makes it easier for a worker to recognized as a protected employee under the Act.

Enter *SuperShuttle…* In its 2019 *SuperShuttle* decision, the Board effectively overturned *Fedex II*, and held that the significant entrepreneurial opportunity factor was essentially a separate and "*Super*" factor. In other words, this factor was the overarching lens from which a fact-finder must review all of the common law factors. In *SuperShuttle*, the Board held that a group of franchisee shared-ride van drivers were independent contractors primarily because they had significant entrepreneurial opportunity for their own economic gain or loss. In doing so, the Board rejected *Fedex II* because it limited consideration of entrepreneurial opportunity to a single factor. The *SuperShuttle* decision directed the test to assess whether all common law factors, taken as a whole, show that the worker had a significant opportunity for economic gain, or loss. In practice, this was an employer-friendly test because the approach created a more stringent test for workers seeking status as an employee covered under the Act.

The *SuperShuttle* test remained *status quo* until the Board's *Atlanta Opera* decision on June 13, 2023.

The New (Old) Standard:

Meet the new boss, same as the old boss. In its *2023 Atlanta Opera* decision, the Board swung the pendulum back from the pro-employer *SuperShuttle* standard and returned to the pro-employee *FedEx II* standard.

This means that in evaluating independent contractor status, the Board will be guided by the non-exhaustive common-law factors, including entrepreneurial opportunity as a separate and distinct factor. In doing so, the Board stated that it will give weight only to "actual (not merely theoretical) entrepreneurial opportunity, and that it…[would] evaluate the constraints imposed by a company on the individual's ability to pursue this opportunity."

The test is likely to give gig workers and other professions traditionally considered independent contractors more rights under the Act. The Board Chairman, Lauren McFerran, has made clear the intention of the *Atlanta Opera* decision is for more workers to be considered employees, commenting

that, “applying this clear standard will ensure that workers who seek to organize or exercise their rights under the National Labor Relations Act are not improperly excluded from its protections.”

What Next:

All of this may be *much ado about nothing*. Chances are the Board’s *Atlanta Opera* decision will be reviewed by the D.C. Circuit, but this will take a lot of time, money and litigation. Unsurprisingly, in an analysis conducted by Bloomberg Law,[5] more union petitions to represent workers classified as independent contractors were filed under *FedEx II,* than under *SuperShuttle.* In other words, employers should prepare for increased union efforts to organize and represent gig workers. To that, add the possibility for more employee misclassification claims and greater protections for workers under the Act.

Plot Twist:

Note that this decision provides for an independent contractor analysis standard as applicable to the National Labor Relations Act. Other federal and state law provide for separate standards for determining if a worker is an independent contractor or an employee. For example, the Fair Labor Standards Act prescribes a test for determining independent contractor status, which differs from the Board’s standards. Practically, this means that employers have to review all of the ways a worker can be classified as an independent contractor by keeping track of these multiple tests.

This might be the beginning of a new show and we recommend that you consult with a trusted labor and employment attorney if you have any questions.

The End…(maybe).

5 Bloomberg Law, Robert Iafolla, *Employees Almost Always Win With Trump NLRB Test Set for Change,* February 22, 2022 (https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/X55GIBJ8000000#jcite) (visited June 13, 2023).

Bond has prepared this communication to present only general information. This is not intended as legal advice, nor should you consider it as such. You should not act, or decline to act, based upon the contents. While we try to make sure that the information is complete and accurate, laws can change quickly. You should always formally engage a lawyer of your choosing before taking actions which have legal consequences. For information about our firm, practice areas and attorneys, visit our website, www.bsk.com. Attorney Advertising. © 2023 Bond, Schoeneck & King PLLC.