NLRB Changes the Independent Contractor Standard

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Practice Area: Labor and Employment

On June 13, 2023, the National Labor Relations Board ("NLRB") once again issued a decision that alters the standard employers must use when determining whether a worker is an independent contractor. Specifically, in *The Atlanta Opera, Inc.*, 372 NLRB No. 95 (2023) (*Atlanta Opera*), the NLRB provided that its analysis of whether a worker is an employee or independent contractor will look to a number of common-law factors and no longer consider entrepreneurial characteristics to be a main consideration in making that determination.

Where the Law Previously Stood

Under the early standard for independent contractor status, as set out in *FedEx Home Delivery*, 361 NLRB 610 (2014), the NLRB decided that its independent contractor analysis would be guided by traditional entrepreneurial driven common law factors and that no one factor would be determinative of the classification status. The NLRB opined that when it considered the worker's entrepreneurial characteristics, it would only weigh actual (as opposed to theoretical) entrepreneurial opportunity and it would assess whether the worker does in fact provide services from his or her independent business.

In 2019, the NLRB shifted the criteria for independent contractor status in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019). In this decision, the NLRB maintained the focus on the entrepreneurial efforts of the worker more heavily weighed the worker's entrepreneurial opportunity for gain or loss. More specifically, the decision placed entrepreneurial opportunity at the center of the independent contractor analysis.

Current Independent Contractor Standard

With *Atlanta Opera*, the NLRB moved away from one factor having more importance in the independent contractor/employee analysis – stating that no one factor can be relied on when determining whether a worker is an independent contractor or an employee. Rather, the NLRB will undertake an analysis that considers several factors in reaching a decision. The Board will now look to the following factors in making its assessment:

1. How much control does the employer exercise over the details of the work?
2. Is the worker engaged in a distinct, from that of the employer, occupation or business?
3. Is the work typically done under the direction of the employer or by a specialist without supervision?
4. How much skill is required in the occupation?
5. Does the employer or the worker supply instrumentalities, tools, and the place of work?
6. How long did the person perform work for the employer?
7. What is the method of payment provided to the worker?
8. Is the work provided part of the employer's regular business?
9. Does the employer and the worker believe that they are creating an independent contractor relationship?
10. Does the worker have their own business?

Though the NLRB provided these factors to consider when assessing whether a worker is an independent contractor or employee, this list is not exhaustive. For this reason, when it comes to classifying workers, employers must look at the "big picture" as opposed to putting too much weight on any one factor.

With the pivot of the NLRB, it is again time for employers to take stock of the risk of using "independent contractors" in their business undertakings. Where independent contractors will be used, employers must take steps to formalize the relationship and set out the terms, conditions and expectations of the work. This will include:

1. Existence of a formal agreement between the parties memorializing the relationship and expectations.
2. Payment on other than an hourly basis – look to rate for the project (which may include the consideration of hours needed for completion) or a day rate for the work performed.
3. Evaluate the "old" 20 factor test of the IRS for critical components in the establishing of independent contractor criteria.
4. Don't attempt to "stretch" the definition as the consequences of an adverse finding by the NLRB are significant but it is only one of the federal and state agencies that will be interested in discussing your "misclassification decision" with you.
5. Caution should be exercised by employers in having large numbers of "independent contractors" as under the NLRB standard, these persons will have a right to vote in organizing campaigns, or even act as "salts" in an organizing attack on an employer who may not just be "dismissed" when their intentions are identified without significant liability.

Companies often face challenges when it comes to properly classifying independent contractors and the evaluating of legal rights and vulnerabilities in organizing efforts. Employers should consult with experienced labor and employment counsel to maximize compliance and reduce potential for legal exposure.
