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# NLRB Restores Employee-Friendly Independent Contractor Test

Human Resources & Employment

On June 13, 2023, the National Labor Relations Board (NLRB) overruled the Trump-era decision that “entrepreneurial opportunity” is the animating principle of the test to determine whether a worker is an employee or independent contractor under the National Labor Relations Act (NLRA). In doing so, the NLRB restored the common-law “totality of the circumstances” test.

## Background

In its recent ruling in *The Atlanta Opera, Inc.*, the NLRB struck down its 2019 decision in *SuperShuttle DFW, Inc.* and reaffirmed its 2014 decision in *FedEx Home Delivery (known as FedEx II)*.

In *FedEx II*, the NLRB held that, in accordance with its longstanding principles and U.S. Supreme Court guidance, it would use a nonexhaustive list of common-law factors enumerated in the Restatement (Second) of Agency, Section 220 (1958) to distinguish employees from independent contractors and assess all of the factors without finding any one factor to be decisive.

Five years later, in *SuperShuttle*, the NLRB held that a worker’s entrepreneurial opportunity should be the animating principle in the inquiry, with a greater opportunity rendering independent contractor status more likely. The NLRB stated it would “evaluate the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate.”

## Atlanta Opera Decision

In *Atlanta Opera*, the NLRB rejected the *SuperShuttle* decision and reaffirmed *FedEx II*. The NLRB reiterated that employment status should be determined by assessing the following list of nonexhaustive factors:

- 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 a 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.

Rather than have any animating principle, the NLRB stated that “all of the incidents of the [employment] relationship must be assessed and weighed with no one factor being decisive.”

To the extent that the assessment includes “entrepreneurial opportunity,” the NLRB stated that it should be in the context of weighing all of the relevant, traditional common-law factors and “whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business.” In evaluating whether a putative independent contractor performs services on behalf of an independent business, the NLRB will not only consider the common-law factors and whether the person has significant entrepreneurial opportunity, but also whether the putative contractor:

- has a realistic ability to work for other companies;
- has proprietary or ownership interest in their work; and
- has control over important business decisions, such as the scheduling of performance; the hiring, selection and assignment of employees; the purchase and use of equipment; and the commitment of capital. This factor synthesizes the full constellation of considerations that the Board has addressed under the rubric of entrepreneurialism.

The NLRB will also consider evidence that the employer has imposed constraints on a worker’s ability to render services as part of an independent business. Such evidence includes:

- limitations placed by the employer on the individual’s realistic ability to work for other companies, and
- restrictions on the individual’s control over important business decisions.

Pursuant to this inquiry, the NLRB “will consider whether the terms or conditions under which the individuals operate are promulgated and changed unilaterally by the company.” Further, the NLRB stated that entrepreneurial opportunity should only be given weight for actual (not merely theoretical) entrepreneurial opportunity. Entrepreneurial opportunities that workers cannot realistically take will not be considered in the analysis.

This is a totality of the circumstances test, and outcomes will be evaluated on a case-by-case basis. The burden of proof is on the party asserting independent contractor status.

### **The Upshot**

This decision will very likely be appealed to the U.S. Court of Appeals for the District of Columbia Circuit. Although the appellate court has previously rejected the *Fedex II* standard, some observers think that this go-around could be different, and the court will uphold *Atlanta Opera*. In light of the *Atlanta Opera* decision, companies should know that:

- It is likely that many more workers will be considered employees, giving them NLRA protection and allowing them to join unions.
- Companies that previously relied on *SuperShuttle* to deny workers Section 7 rights should reexamine their analysis before continuing to do so.
- Companies should engage in a fact-specific analysis to determine employment classification, weighing the relevant factors to distinguish employees and independent contractors in their workforce.
- It is always a good idea to consult with counsel in making these decisions.

If you have any questions or want more information about the recent NLRB decision, please contact a member of Gould & Ratner’s [Human Resources and Employment Law Practice](#).