Recent Labor Board Developments Focus on Independent Contractors and Joint Employers

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The National Labor Relations Board is continuing its rollback of progressive Obama-era decisions under the Trump administration. In recent years, the Board had uprooted several long-established standards regarding the determination of independent contractor and joint employment status, leaving employers to scramble to interpret the Board's new and more progressive direction. However, the Board's recent decision in *SuperShuttle* and its proposed new rule on joint employment seem to indicate a return to the pre-Obama-era standards.

I. The SuperShuttle Decision

Section 2(3) of the National Labor Relations Act (NRLA) excludes independent contractors from the definition of covered "employee" and, therefore, does not provide them a right to bargain collectively. Prior to the Board's 2014 decision in *FedEx Home Delivery,* the Board often took its lead from the Supreme Court's decision in *United Insurance* and applied a 10-factor common-law agency test to determine whether an individual should be classified as an employee or independent contractor, with no one factor being determinative. Those 10 factors were then used to determine whether and to what extent a company exercised control over the means and manner of the worker's performance. However, in *FedEx*, the Board argued that the standard had shifted over time, making the alleged contractor's opportunity for gain or loss the primary consideration for determining independent contractor status, diverging from *United Insurance.*

In *SuperShuttle,* the Board backtracked and held that franchisees of SuperShuttle at the Dallas/Fort Worth airport were independent contractors – not employees able to unionize and bargain collectively. In doing so, the Board overruled *FedEx,* restoring emphasis on the 10 factors set forth in the common-law agency test. The Board reasoned that the *FedEx* decision went too far when it declared the "entrepreneurial opportunity" factor as the "overriding consideration in all but the clearest cases" and the "single animating principle in the inquiry." Indeed, "entrepreneurial opportunity" was not even a factor in the common law agency test prior to *FedEx.* Instead, whether a putative contractor had "entrepreneurial opportunity" was simply a conclusion to be reached from the analysis of the 10 common-law agency factors.

While *SuperShuttle* may be helpful for companies whose designation of independent contractors under the Act is challenged, in its decision the Board reiterated that there is no bright-line rule, shorthand formula, or magic phrase that can be used for the independent contractor analysis. Still, the return to the pre-*FedEx* standard brings

clarity, familiarity, and a less stringent standard for businesses determining whether workers can properly be classified as independent contractors.

II. Proposed Rule on Joint Employment

In September of 2018, the Board gave notice of a proposed rule that would require application of a more stringent standard before two businesses can be considered joint employers. Prior to 2015, the Board had generally found an employment relationship only where the alleged joint employer exercised its right to control or determine the conditions of employment for another company's workers, and not in a limited and routine manner. Then, in the 2015 *Browning Ferris* decision, it lowered the standard and found that the mere *right* to exercise control or determine the terms and conditions of employment—whether exercised or not—was sufficient to find a joint employment relationship. The Board's decision was motivated by the desire to ensure that the growing number of employees of franchises, staffing agencies and other subcontracting arrangements could collectively bargain with companies who ostensibly shared controls over the terms and conditions of their employment. The dissent argued that the Board had re-characterized and expanded the traditional joint employment test, which would:

> [S]ubject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity, including what have heretofore been unlawful secondary strikes, boycotts, and picketing.

The dissent further reasoned that these types of employment relationships predated the 1935 passage of the Act, and that Congress was obviously aware of such employment relationships when, decades earlier in the Taft Hartley amendments, it limited bargaining obligations to the employer and defined "employee " and "employer" according to their common-law definitions. The dissent also opined that the Board had overstepped its authority in re-defining the joint employment standard, as such a re-imagining of the joint employment test was only within the purview of Congress.

In subsequent decisions, the Board has gone back and forth in its application of the more inclusive *Browning Ferris* standard, leaving employers to speculate —at their own peril—as to their collective bargaining obligations. The new rule seeks to eliminate this uncertainty by providing that a company may only be considered a joint employer of a second company's employees "if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine." In its notice of the proposed rule change, the Board also made clear that indirect influence and contractual reservations of authority would no longer be sufficient to establish a joint-employer relationship.

The purpose of the rule change is to provide consistency and predictability to the determination of joint employment status, and to avoid requiring third-party companies who have had no involvement in setting wages, benefits, and other terms and conditions of employment to collectively bargain with another company's employees. The rule also seeks to prevent third-party companies from being subject to liability for unfair labor practices committed by another company. This comes in the wake of the NLRB's litigation in the fast food industry seeking to impose liability on franchisors for alleged unfair labor practices committed by franchisee owners following the "Fight for $15" protests.

Until a final rule is promulgated, the NLRB's standard for determining joint employment will remain unclear. However, both the decision in *SuperShuttle* and the proposed rule on joint employment appear to indicate that the Board is rolling back some of the more progressive decisions rendered during the Obama administration.

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