NLRB's Stricter Contractor Test May Bring Organizing Risks

By **Robert Lian and James Crowley** (June 26, 2023)

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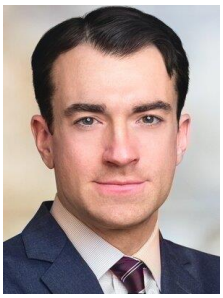

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With increasingly diverse and complex work arrangements, companies face challenges in answering a seemingly basic legal question: Is a worker an employee of the company, or an independent contractor?

On June 13, the National Labor Relations Board took up that question in Atlanta Opera Inc.[1] A board majority in Atlanta Opera held that a group of makeup artists, wig artists and hairstylists who work at the Atlanta Opera are employees, not independent contractors, as the terms are defined in the National Labor Relations Act.

The board has long applied a multifactor common-law test for deciding whether a worker is an independent contractor exempt from the requirements of the NLRA. But, in Atlanta Opera, the board majority reversed its rule established in 2019 in SuperShuttle DFW Inc.[2] that entrepreneurial opportunity was "an important animating principle by which to evaluate" the common-law factors.

Instead, the board majority relegated entrepreneurial opportunity to "one aspect of a relevant factor that asks whether" an independent contractor is "rendering services as part of an independent business."

The board's decision is important because it could potentially bring more workers who were classified as independent contractors within the coverage of the NLRA, and give them the right to unionize and bargain collectively with employers.

As with the U.S. Department of Labor's anticipated independent contractor rule later this summer, the board's test adds another layer of complexity to the legal tests for determining a worker's status.

Background

Deciding whether a worker is an employee or an independent contractor under the NLRA has important implications for many businesses and workers. The NLRA offers a variety of protections to employees in the U.S., including the right to form and join labor unions.

The NLRA is explicit, however, that the term employee does not include "any individual having the status of an independent contractor."

Congress long ago mandated that courts apply common-law agency principles to determine whether a worker should be classified as an employee or an independent contractor under the NLRA.

But in NLRB v. United Insurance Co. of America, the U.S. Supreme Court in 1968 recognized that there is no shorthand formula that can be applied to find the answer, but the total factual context must be "assessed in light of the pertinent common-law agency principles."[3]

Following United Insurance, the board and courts generally consulted a 10-factor list from the Restatement (Second) of Agency for guidance in applying common-law agency principles, including:

- The extent of control the company has over the work;
- Whether the worker is engaged in a distinct occupation or business;
- Whether the kind of occupation is usually done under the direction of the company or by a specialist without supervision;
- The skill required in the particular occupation;
- Whether the employer or worker 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;
- Whether the employer pays by the time or by the job;
- Whether the worker's work is a part of the regular business of the employer;
- Whether the employer and worker believe they are creating an employer-employee relationship; and
- Whether the employer is or is not in business.

For a time, when applying these factors, the board and courts focused on an employer's right to exercise control over the worker, focusing particularly on which controls companies could use without transforming a contractor into an employee.

Gradually, however, the board and courts sought to identify the level of independence that separates a contractor from an employee under the NLRA.

But the board struggled to define exactly what it meant by independence and controls; "control" did not mean all kinds of control, but only certain kinds, and "independence" was not clearly defined.

That all changed with the NLRB's 2000 ruling in Corporate Express Delivery Systems.[4]

In Corporate Express, a delivery company engaged drivers who operated their own vehicles to deliver packages. The drivers voted to form a labor union, but the company asserted that the drivers were independent contractors, and were therefore not protected by the NLRA.

The board held that the drivers were employees because they were not permitted to employ others to do company work or to use their own vehicles for other jobs.

The U.S. Court of Appeals for the District of Columbia Circuit agreed, shifting the emphasis away from control in favor of a different inquiry: whether independent contractors have significant entrepreneurial opportunity for gain or loss.

In FedEx Home Delivery v. NLRB in 2009, the D.C. Circuit further refined the inquiry, describing the test as follows:

> [W]hile all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism.[5]

The facts of the case, known as FedEx I, involved a group of delivery drivers engaged to work at a Massachusetts trucking terminal. The drivers owned their own vehicles, hired their own employees, had the right to contract delivery services on multiple delivery routes, and were free to assign their right to those routes to third-party contractors. The drivers nevertheless elected a labor union to represent them in their dealings with the terminal company.

When the company refused to bargain with the union, the board held that the company had violated the NLRA. The D.C. Circuit denied enforcement of the board's order, however, holding that the drivers were independent contractors, not employees, and thus beyond the board's jurisdiction.

The court explained that the factors favoring a finding the contractors were employees were outweighed by evidence of entrepreneurial opportunity. In the court's view, emphasizing entrepreneurial opportunity would make line drawing easier.

Undeterred, the board adopted a new standard in 2014 in FedEx Home Delivery — known as FedEx II — which held that entrepreneurial opportunity represents merely "one aspect of a relevant factor that asks whether the evidence tends to show" that the contractor is "rendering services as part of an independent business."[6]

In announcing this standard, the board explained that the independent-business factor should not receive special weight in the common-law agency analysis.

Applying that standard, the board held that a separate group of drivers, engaged by the

same company as the drivers in FedEx I, were employees, not independent contractors, even though they were materially indistinguishable from the drivers in FedEx I, and the only difference was that they were located in Connecticut rather than Massachusetts.

But, in FedEx Home Delivery v. NLRB, the D.C. Circuit in 2017 refused to allow the board a redo of FedEx I.[7] Notably, the court in FedEx II explained that whether a worker is an employee or independent contractor under the NLRA involves common-law agency principles.

Applying those principles requires "'no special administrative expertise that a court does not possess.'"

While the board contended that FedEx I conflicted with the Supreme Court's requirement in United Insurance to consider "all of the common-law factors in evaluating employee status," the FedEx II court concluded that FedEx I "did consider all of the common-law factors as the law requires."

Thus, the D.C. Circuit sustained its holding in FedEx I and found that the drivers were independent contractors.

In response, the board — then solidly under control of Trump administration appointees — in SuperShuttle held that entrepreneurial opportunity was "an important animating principle by which to evaluate" the common-law factors.

In SuperShuttle, franchisees who operated shared-ride vans for a transport company at an airport elected a labor union. But the board held that the drivers were independent contractors, and therefore unprotected by the NLRA.

The board noted that the "skill required as a franchisee, the fact that driving is not a distinct occupation," and the company's involvement in the business through trademarks and branding favored a finding of employee status.

However, the franchisees' ownership or lease of their vans, their nearly complete control over daily work schedules, and the ability to set their own fares provided franchisees with significant entrepreneurial opportunity that pointed toward independent-contractor status.

As such, the board determined that the franchisees were independent contractors.

The Atlanta Opera Ruling

Earlier this month, however, in Atlanta Opera, a board majority overruled SuperShuttle and reinstated its FedEx II standard. In reaching this conclusion, the board majority contended that "the United Insurance Court's admonition against relying on a 'shorthand formula or magic phrase' weighed against the District of Columbia Circuit's approach" in FedEx I.

Rather than emphasizing entrepreneurial opportunity, the board majority made "a qualitative assessment of which factors are determinative in a particular case and why."

In addition, the board considered entrepreneurial opportunity as only one aspect of whether the contractor is "rendering services as part of an independent business." And this independent-business factor was given equal weight to all other common-law factors.

Finally, the board explained that it would "give weight only to actual (not merely theoretical)

entrepreneurial opportunity," and simultaneously consider "constraints imposed by a company on the individual's ability."

In a dissent from the Atlanta Opera majority, NLRB member Marvin Kaplan argued that the majority's decision conflicted with D.C. Circuit precedent, and the board could have found that the hair stylists, makeup artists and wig artists were employees under the NLRA without overruling SuperShuttle.

According to Kaplan, the workers had "little opportunity for economic gain or, conversely, risk of loss," while the opera "exercise[d] significant control" over their schedules and compensation and restricted them from subcontracting.

This lack of entrepreneurial opportunity, Kaplan argued, rendered the stylists and artists employees.

Implications for Employers and Contracting Companies

Pending challenge in court, the Atlanta Opera decision presents complex issues for companies that use independent contractors.

Under the board majority's new standard, companies that viewed their workers as being outside the scope of the NLRA could become vulnerable to union organizing and unfair labor practice charges.

For those companies, the new standard could bring more workers within the NLRA's coverage — regardless of whether the indicia favoring a finding that they are employees are outweighed by entrepreneurial opportunity.

Like the SuperShuttle standard, the board majority's new standard recognizes that "no one factor [is] decisive," and "'there is no shorthand formula or magic phrase that can be applied to find the answer'" to whether a worker is an independent contractor or an employee under the NLRA.

But missing from this new standard is any "animating principle by which to evaluate" the common-law factors "in cases where some factors cut one way and some the other."

That evaluation is left to the board under the new standard.

Whether a court would defer to the board's discretion in making a choice between two conflicting factors, particularly in light of the flip-flopping standards over the past few decades, has yet to be seen.

However, several courts have recognized that the board's status determinations — including whether a worker is an independent contractor or an employee — are not given great or even normal deference.

The test set forth in Atlanta Opera creates a further level of complexity for businesses that regularly use independent contractors as part of their business model and, if ultimately upheld, will require companies to reconcile that standard against the tapestry of other legal tests for determining worker status, including the soon-to-be-issued final rule from the DOL under the Fair Labor Standards Act.

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[1] Atlanta Opera, Inc., 372 NLRB No. 95 (2023).

[2] SuperShuttle DFW, Inc., 367 NLRB No. 75 (2019).

[3] NLRB v. United Insurance Co. of America, 390 U.S. 254 (1968).

[4] Corporate Express Delivery Systems, 332 NLRB 1522 (2000).

[5] FedEx Home Delivery ("FedEx I"), 563 F.3d 492 (D.C. Cir. 2009).

[6] FedEx Home Delivery ("FedEx II"), 361 NLRB 610 (2014).

[7] FedEx Home Delivery v. NLRB, 849 F.3d 1123 (D.C. Cir. 2017).