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ALERT

Employment Law re: Atlanta Opera, Inc.

Introduction

On June 13, 2023, the National Labor Relations Board ("NLRB"), the federal agency responsible for enforcing U.S. labor law in relation to collective bargaining and unfair labor practices, issued a new decision on the classification of independent contractors in *The Atlanta Opera, Inc. and Make Up Artists and Hair Stylists Union, Local 798, IATSE*, 372 NLRB No. 95 (June 13, 2023).

The decision in *The Atlanta Opera, Inc*. overturned a previous decision issued in 2019 in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019) and its most recent independent-contractor test, and reinstated the NLRB's prior standard from the decision in *FedEx Home Delivery,* 361 NLRB 610 (2014) (*FedEx II*), narrowing the definition of independent contractors and making it more difficult for employers to classify workers as independent contractors under the National Labor Relations Act ("NLRA").

The new employee-friendly standard

Both the *SuperShuttle* and the *FedEx* tests consider a non-exhaustive list of common-law factors when determining if a worker is properly classified as an independent contractor. Section 2(3) of the NLRA, as amended by the Taft Hartley Act in 1947, provides that the term "employee" shall not include "any individual having the status of independent contractor." 29 U.S.C. § 152(3). The Supreme Court has long mandated that independent-contractor status be determined by applying the common law of agency. (*NLRB v. United Insurance Co. of America* , 390 U.S. 254, 256 (1968).) In conducting the analysis under the common-law agency test, the NLRB and the courts apply the non-exhaustive factors set forth in the Restatement (Second) of Agency §220 (1958):

A. The extent of control by the employer over the essential details of the day-to-day work;
B. Whether or not the worker is engaged in a distinct occupation or business;
C. Whether the work is usually done under the direction of the employer or by a specialist without supervision;

D. The skill required in the occupation;
E. Whether the employer or the individual supplies the instrumentalities, tools, and the place of work;
F. The length of time for which the individual is employed;
G. The method of payment;
H. Whether or not the work is part of the regular business of the employer;
I. Whether or not the parties believe they are creating an independent-contractor relationship; and
J. Whether the principal is or is not the same type of business.

The main difference between the *FedEx* and the *SuperShuttle* tests is the weight given to a worker's "entrepreneurial opportunity" to function as an independent business when determining whether a worker is an employee or an independent contractor. "Entrepreneurial opportunity" is the opportunity that a worker has to function as an independent business and to experience the risk of loss and gain that comes with being a business owner.

While the *FedEx* Test permitted entrepreneurial opportunity as a consideration, this was not the primary element to determine whether the worker was in fact operating an independent business. On the other hand, *SuperShuttle* held that the NLRB would "evaluate the common-law factors through the prism of entrepreneurial opportunity[,]" such that a worker's "entrepreneurial opportunity" should be afforded special consideration compared to the common-law factors, and the more opportunity workers possess, the more likely they are independent contractors.

The NLRB's standard in the *Atlanta Opera* decision looks at how functionally independent a worker is, *i.e.* not just whether the worker has the potential to conduct business with other clients, but how functional that potential happens to be. *Atlanta Opera* held that when the NLRB does consider "entrepreneurial opportunity," it "should only give weight to actual (not merely theoretical) entrepreneurial opportunity" by analyzing the limits employers impose on workers seeking such opportunities. Accordingly, employers must now confirm that their independent contractors are truly operating an independent business.

The *Atlanta Opera* NLRB noted that the common-law agency test did not include "entrepreneurial opportunity" in the 10 factors traditionally considered by the NLRB, listed above. Accordingly, when looking at "entrepreneurial opportunity", this is simply one additional consideration among the other factors that the NLRB must consider in conducting its analysis based on the specific facts and circumstances of an employer's workforce when determining whether a worker is an employee or an independent contractor.

In particular, the NLRB's "independent business analysis" will focus on whether a worker (a) can realistically work for other employers, (b) retains an ownership or other proprietary interest in the employer, and (c) possesses control over making key business decisions.

What this means for employers

The *Atlanta Opera* decision is important to both union and nonunion employees because independent contractors are excluded from the NLRA's protections, including the statutory rights to form a union and strike,[1] among others. In the wake of *Atlanta Opera*, employers could be exposed to attempts to unionize among workers that had been classified as independent contractors. Furthermore, independent contractors hired by union employers could potentially become covered under existing collective bargaining agreements.

Accordingly, employers would be well-advised to conduct a fact-specific analysis of their workforce by applying the common-law list of factors outlined above to determine which workers may now be found covered under the NLRA.

The information provided in this article does not, and is not intended to, constitute legal advice; instead, all information, content, and materials are for general informational purposes only.

Please do not hesitate to contact us at Brothers Smith LLP if you have any questions.

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[1] Section 7 of the NLRA provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title]."

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