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NLRB narrows independent contractor definition and reverts to Obama-era rule

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In a decision that could make it easier for certain independent contractors to be considered employees, thus giving them the right to join unions, the National Labor Relations Board ("NLRB" or the "Board") has returned to the more worker-friendly standard that was last employed by the Obama-era Board.[1]

While shifts like this are common since the Board majority traditionally changes when the president's party changes, the Board's decision is important for employers because employees are entitled to additional rights and benefits that are not afforded to independent contractors.

The Board decided that a worker's entrepreneurial opportunity for gain or loss will not constitute a so-called "animating principle" of the standard. This means that the Board should (1) give weight only to actual, not merely theoretical, entrepreneurial opportunity for gain or loss and (2) determine whether the evidence tends to show that a worker is, in fact, rendering services as part of an independent business.

Only time will tell if the Board delivered a distinction without a significant difference for most cases. For example, while Republican member Marvin Kaplan disagreed with the Board's decision to overrule the standard, he still agreed with the Board that the workers at issue were employees under either the former or current standard. In short, how the standard is applied will be critical.

The common-law agency test to distinguish employees from independent contractors

The U.S. Supreme Court long ago held that the common-law agency test should be used to distinguish employees from independent contractors under the National Labor Relations Act.[2] The Court acknowledged that it is often difficult to determine whether a worker is an employee or independent contractor.[3] And in such a situation, "there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[4]

In applying the common-law agency test, the Board has looked to Section 220 of the Restatement (Second) of Agency, which addresses the relationship between "masters" and "servants." Under Section 220(1), "[a] servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."

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Section 220(2) provides a nonexhaustive list of factors to consider:

- the extent of control that, by the agreement, the master may exercise over the details of the work;
- whether 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 the work is a part of the regular business of the employer;
- whether the parties believe they are creating the relation of master and servant; and
- whether the principal is or is not in business.

The ever-changing importance of entrepreneurialism in distinguishing employees from independent contractors

In the latest decision, the Board overruled its decision in *Supershuttle Dfw, Inc.*, ("*SuperShuttle*"),[5] finding the standard

improperly elevated entrepreneurial opportunity above other factors. The Board, in turn, restored the standard set forth in *FedEx Home Delivery*, ("*FedEx II*").[6]

Before *SuperShuttle* and *FedEx II*, there was *FedEx Home Delivery v. NLRB*, ("*FedEx I*").[7] In 2009, the D.C. Circuit noted that, while the Board had retained the common-law factors, it had "shifted the emphasis away from the unwieldy control inquiry in favor of a more accurate proxy: whether the [workers] have significant entrepreneurial opportunity for gain or loss."[8]

The D.C. Circuit held that, "while 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."

In 2014, the Obama-era Board responded to *FedEx I* with *FedEx II*. While the Board reaffirmed that, in evaluating independent contractor status, the "inquiry remains guided by the nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency § 220," the Board "more clearly define[d] the analytical significance of a putative independent contractor's entrepreneurial opportunity for gain or loss."[9] The Board expressly declined to adopt the holding in *FedEx I* to the extent it treats entrepreneurial opportunity as an "animating principle" of the inquiry.[10]

Rather, "the Board should give weight to actual, but not merely theoretical, entrepreneurial opportunity, and it should necessarily evaluate the constraints imposed by a company on the individual's ability to pursue this opportunity."[11]

Moreover, entrepreneurial opportunity represents only "one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, rendering services as part of an independent business."[12]

In addition to significant entrepreneurial opportunity, the factor encompasses whether the worker "has a realistic ability to work for other companies," "has proprietary or ownership interest in her 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."[13]

In 2019, the Trump-era Board in *SuperShuttle* overruled *FedEx II*. The Board explained that "entrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain."[14]

The Board rejected the notion that, under its formulation, entrepreneurial opportunity was "an independent common-law factor," a "super-factor," an "overriding consideration," a "shorthand formula," or a "trump card" in the independent-contractor analysis.[15]

Now, the Biden-era Board has restored the *FedEx II* standard. While the current standard narrows the definition of independent contractor by limiting the importance of entrepreneurialism, only time will reveal the significance (and duration) of the Board's decision.

Notes

[1] *See The Atlanta Opera, Inc. and Make-Up Artists and Hair Stylists Union, Local 798, IATSE*, No. 10-RC-276292 (NLRB June 13, 2023).

[2] *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968).

[3] *Id*. at 990-91.

[4] *Id*. at 991.

[5] 367 NLRB No. 75 (Jan. 25, 2019).

[6] 361 NLRB 610 (2014).

[7] 563 F.3d 492 (D.C. Cir. 2009).

[8] *FedEx I*, 563 F.3d at 497 (cleaned up).

[9] *FedEx II*, 361 NLRB at 610.

[10] *Id*.

[11] *Id*.

[12] *Id*. at 620.

[13] *Id*. at 621.

[14] 367 NLRB No. 75, slip op. at 15.

[15] *Id*.

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