Barley Snyder

National Labor Relations Board Restores Multifactor Independent Contractor Test

PUBLISHED ON
June 14, 2023

As part of its ongoing reversal of many Trump-Era NLRB precedents, the Board has now raised the burden for businesses to demonstrate that workers are independent contractors without organizing rights.

Background

The National Labor Relations Act excludes from its protections "independent contractors." Historically, the NLRB has used a multifactor test for determining whether an individual worker is an independent contractor or an "employee" based on Supreme Court precedent:

- The extent of control which the business may exercise over the details of the work;
- Whether or not the worker is "engaged in a distinct occupation or business";
- The kind of occupation, with reference to whether the work is usually done under the direction of an employer or by a specialist without supervision;
- The skill required in the particular occupation;
- Whether the business or the worker supplies the tools and the place where the work occurs;
- The length of time for which the worker is employed;
- The method of payment, whether by job or by hour;
- Whether or not the work is part of the regular business of the alleged employer;
- Whether or not the parties believe or intend they are creating an employment relationship; and
- Whether the principal is or is not "in business",
- Whether the evidence tends to show that the individual is, in fact, rendering services as an "independent business," also defined as whether the worker has "significant entrepreneurial opportunity for gain or loss," including whether the worker could hire their own employees, could work for other businesses, and/or had a proprietary interest in their work.

In 2019, in a case called *Supershuttle DFW, Inc.*, the Board elevated the final factor, based on a D.C. Circuit case that had been decided earlier. The *Supershuttle* decision held that "entrepreneurial opportunity" was the "animating principle" of the independent contractor test, the "core" of the determination.

The Current Case

On June 13, 2023, the Board decided *Atlantic Opera, Inc. and Make-up Artists and Hair Stylists Union, Local*

798, IATSE, a case involving makeup artists, wig artists and hairstylists who work at The Atlantic Opera, a regional opera company in Atlanta, Georgia. The opera company argued that these individuals were independent contractors rather than employees and, therefore, could not unionize. The NLRB disagreed.

While all four of the current NLRB Board members agreed that these individuals were "employees" rather than independent contractors, the three members forming the Democratic majority on the board went further and explicitly overruled the *Supershuttle* decision, restoring the prior multifactor (and fact-specific) test for independent contractor status. The decision can be found here.

Independent contractor status has been a source of significant controversy over the last several years, with the federal Department of Labor, a Pennsylvania task force, and other state and federal agencies seeking to target the misclassification of workers. The NLRB test is similar, but not identical, to tests used by the IRS, the Pennsylvania Bureau of Workers' Compensation, and the Pennsylvania Unemployment Compensation Board to determine if a specific worker is an employee or independent contractor.

If you have questions about the NLRB precedent or issues surrounding the classification of workers generally, please reach out to anyone in the Barley Snyder Employment Practice Group.

WRITTEN BY:

Joshua L. Schwartz

Partner

Tel: (717) 399-1535

Email: jschwartz@barley.com