# NLRB Modifies Independent Contractor Standard

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On June 13, 2023, the National Labor Relations Board (the "Board") issued a decision revamping the test to determine whether a worker is an employee or an independent contractor under the National Labor Relations Act (the "NLRA"). As a result, workers previously categorized as independent contractors may now be entitled to the rights and protections afforded to employees under the NLRA.

**Employee vs. Independent Contractor: Why Does the Distinction Matter?**

Whether a worker is considered an employee or an independent contractor dictates whether the worker is entitled to certain protections under the NLRA. For example, the NLRA protects employees' rights to organize, 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. On the other hand, independent contractors are not entitled to these rights under the NLRA.

**The Board Returns to an Employee-Friendly Test**

Although the independent contractor test has been a hotly contested issue for over a decade, each iteration of the test has largely relied on the same factors. These factors include, but are not limited to, the extent of control exercised by a hiring entity over the worker, whether the worker is engaged in a distinct occupation or business, and the level of skill required by the worker to provide services.

The previous test, outlined in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), viewed each factor through the prism of the worker's "entrepreneurial opportunity" for economic gain or loss. This employer-friendly approach made it more difficult for workers to qualify as employees, meaning they were not entitled to the rights afforded to employees under the NLRA.

In the Board's latest decision, *The Atlanta Opera, Inc.*, 372 NLRB No. 95 (2023), the Board deemphasized the importance of entrepreneurial opportunity. Instead, the Board explained, entrepreneurial opportunity is only one of many factors used to gauge whether a worker is an employee or independent contractor. Consequently, it is now easier for workers to achieve employee status, meaning many workers previously classified as independent contractors under the *SuperShuttle* analysis may now qualify as employees.

**Preparing for Compliance**

Because many workers may now qualify as employees, employers must avoid engaging in conduct that violates the NLRA. For example, employers cannot forbid employees from, or take or threaten adverse action against employees for, engaging in concerted activities such as talking with one or more co-workers about wages and benefits or other working conditions, petitioning for better hours, participating in a concerted refusal to work in unsafe conditions, or joining with co-workers to talk about problems in the workplace.

In addition to companies understanding how to classify their workers moving forward, employers must be

mindful of the differences between state and federal labor laws. Compliance will require a nuanced approach if any states enact legislation in response to the *Atlanta Opera* ruling.

The Seigfreid Bingham team will continue to monitor the latest developments and legal requirements in this area of law. If you have any questions concerning the Board's ruling, please do not hesitate to contact the firm's Employment Law attorneys for further information concerning compliance for your specific situation.

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