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## NLRB Reinstates Obama-Era Independent Contractor Test

Client Bulletins

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On June 13, 2023, the National Labor Relations Board (NLRB) carried on with its trend of reversing Trump-era precedent. In its 3-1 decision, *The Atlanta Opera, Inc.*, the NLRB overturned the Trump NLRB's 2019 decision, *SuperShuttle DFW, Inc.*, which placed particular emphasis on workers' "entrepreneurial opportunity" when classifying them as employees or independent contractors. Instead, the NLRB revived the classification test issued under the Obama NLRB with its 2014 *FedEx Home Delivery* decision. Under that decision, the NLRB considered the following 10 factors in determining whether a worker ought to be classified as an employee or an independent contractor:

1. The extent of control which the master may exercise over the details of the work;
2. Whether or not the worker is engaged in a distinct occupation or business;
3. The kind of occupation, including whether the work is usually done under the direction of the employer or by a specialist without supervision;
4. The skill required in the particular occupation;
5. Whether the employer or worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
6. The length of time for which the worker is employed or engaged;
7. The method of payment, whether by time or by job;
8. Whether or not the work is part of the regular business of the employer;
9. Whether or not the parties believe they are creating a master-servant relationship; and
0. Whether the principal is or is not in business.

Under this test, a worker's "entrepreneurial opportunity" was simply one aspect of the analysis, and it was used to help determine whether a worker was rendering services as part of an independent business. In *FedEx*, the NLRB focused on *actual* entrepreneurial activity rather than the mere *opportunity* for economic gain or loss. In short, the *FedEx* Board did not give any particular or special weight to "entrepreneurial opportunity" and instead considered it alongside whether a worker was providing services as part of an independent business.

This changed with the Trump Board's *SuperShuttle DFW, Inc.* decision. As [Benesch previously highlighted](#), the Trump NLRB, with its *SuperShuttle* decision, explained that previous Obama-era NLRB precedent had improperly shifted the independent contractor analysis for "policy-based reasons, which greatly diminished the significance of entrepreneurial opportunity." Thus, the Trump NLRB's *SuperShuttle* decision still followed Obama-era precedent that the above 10 factors must be considered in determining whether a worker is an employee or independent contractor, but also went on to provide that *entrepreneurial opportunity* should serve as a guiding principle for the evaluation of

each factor. Thus, under the Trump NLRB's *SuperShuttle* test, the above 10 factors were to be considered, but the broader consideration was an employee's *entrepreneurial opportunity* for economic gain or loss.

With its June 13, 2023, *Atlanta Opera* decision, the NLRB has returned to the Obama-era *FedEx* precedent. In this decision, the Biden Board criticized *SuperShuttle*'s emphasis on *entrepreneurial opportunity* as a kind of "super factor," explaining that it "subordinated the common law to a particular vision of supposed 'economic reality' where workers are deemed 'entrepreneurs.'" The Biden Board also noted that the U.S. Supreme Court has "never suggested, let alone held, that 'entrepreneurial opportunity' is the principal guidepost..." including the Supreme Court's 1968 decision in *NLRB v. United Insurance Co. of America* that originally directed the NLRB to the 10-factor test.

In sum, the Biden Board's *Atlanta Opera* decision serves as another example of the Board's sweeping attempts to reverse Trump-era precedent. This time, the decision returns the Board to the Obama-era test to determine whether a worker is an employee or an independent contractor. Although the Board affirmed that it will still consider *entrepreneurial opportunity* in its analysis, it is no longer a "super factor."

**To learn how this can affect your business, contact a member of Benesch's [Labor & Employment Practice Group](#).**

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