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# A Powerful "One-Two" Punch: NLRB and DOL Signal Contractor Classification Crackdown

FEBRUARY 8, 2022

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Transportation providers would do well to pay close attention to twin developments unfolding before the NLRB and the DOL that could have a very detrimental effect on those providers who use independent contractors as drivers, sales agents, or otherwise. Likewise, commercial users of transportation services should similarly be attuned to the implications that these developments could have on capacity, overall transportation spend, and their relationships with their providers.

*A Potential New NLRB Standard for Worker Classification*

The National Labor Relations Board (NLRB) has indicated it may return to a more worker-friendly standard for evaluating whether independent contractor classification is proper. On December 27, 2021, the NLRB invited public comment on whether it should replace the current standard for determining whether a worker is properly classified as an independent contractor or is instead an "employee" under the National Labor Relations Act (NLRA). Such a shift would have a significant impact on the treatment of independent contractors in the transportation industry.

The case at issue, *The Atlanta Opera, Inc.,* NLRB No.10-RC-276292 (2021), involves a determination of whether the subject workers are independent contractors or are actually employees of The Atlanta Opera, Inc. In reconsidering the standard for contractor classification, the NLRB has invited interested *amici* to provide responses to the following two questions: First, should the NLRB adhere to the existing independent-contractor standard most recently set forth in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019); and if not, what standard should substitute, such as a return to the Obama-era standard set forth in *FedEx Home Delivery*, 361 NLRB 610, 611 (2014), either in its entirety or with modifications?

In *SuperShuttle*, the NLRB adopted the traditional common law agency test for determining whether a worker is an employee or independent contractor, as originally explained in the 1968 Supreme Court decision, *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968). This common law agency test includes an analysis of the following 10 factors:

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 an employer or by a specialist without supervision;

4. The skill required in the particular occupation;
5. Whether the putative 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 putative employer;
9. Whether or not the parties believe they are creating a master-servant relationship; and
10. Whether the principal is or is not in business.

In *SuperShuttle*, the NLRB determined that *FedEx* did not "refine" the independent contractor test as it claimed, but instead "fundamentally shifted" the analysis for policy-based reasons, which greatly diminished the significance of entrepreneurial opportunity. The NLRB overruled that "refinement" and restored the long-standing independent contractor test. Rather than restrict entrepreneurial opportunity to just one part of one of the 10 factors of the test, the NLRB in *SuperShuttle* instead found that entrepreneurial opportunity, like employer control, is an "animating principle by which to evaluate" all 10 of the factors. Pursuant to this standard, companies have been able to emphasize the "entrepreneurial opportunity" for economic gain when determining employment status.

In the recent *Atlanta Opera* case, the NRLB split 3-2 on inviting public comment on the test. The dissenting members assert there is no need to reconsider the *SuperShuttle* standard, since no party in *Atlanta Opera* asked the NLRB to overrule or modify the precedent. The majority argues previous NRLB majorities have overruled precedent *sua sponte*. As President Biden promised to implement an aggressive, pro-union platform and to roll back management-side gains under Trump, it was only a matter of time until the NLRB decided to revisit the test.

Overturning *SuperShuttle* and replacing it with a more restrictive independent contractor test could make it easier for independent contractors and "gig" workers to be deemed to be employees of those companies and consequently allow them to engage in collective bargaining under the NLRA. Interested parties may electronically submit briefs not exceeding 20 pages in length with the NLRB by Thursday, February 10, 2022.

*NLRB and DOL Reach "Memorandum of Understanding" on Information-Sharing for Contractor Misclassification*

On January 6, 2022, the U.S. Department of Labor's Wage and Hour Division (DOL) and the NLRB announced a "memorandum of understanding" (MOU) between the agencies to share information and collaborate on investigations of potential violations of federal labor and employment laws, placing particular emphasis on worker misclassification.

Based on the MOU unveiled, employers may see the following efforts toward collaboration between the NLRB and DOL:

- **Referral of Workers Between DOL and NLRB.**

The agencies are aiming to create a formal referral process, including advising workers of potential violations of laws enforced by the other agency and providing workers with contact information for the other agency.

- **Information Sharing**. The agencies are aiming to create a system to exchange information and data. This includes sharing confidential information and data not otherwise subject to public disclosure, such as the identity of individuals providing information during an investigation, internal opinions of investigators, and information covered by the attorney-client privilege or the work product doctrine.
- **Coordinated Investigations and Enforcement.** The MOU calls for coordinated investigations between the DOL and NLRB when matters fall within the agencies' jurisdictions. The MOU states that where there are overlapping statutory violations, "they shall explore whether it is appropriate for one agency to settle or litigate the matter while the other holds it in abeyance, considering under which statute it would be most feasible and practical to proceed." This presents the possibility that a company could resolve or litigate a matter with one agency only to learn of a new enforcement proceeding by the other agency shortly thereafter.
- **Increased Scrutiny of Employment Relationships.** The MOU indicates that the agencies will target companies with "complex or fissured employment structures, including joint employer, alter ego, and business models designed to evade legal accountability, such as the misclassification of employees."

These measures represent an active effort to increase enforcement and scrutiny on companies-including those in the transportation industry-that engage independent contractors as drivers, sales agents, or otherwise. In connection with the MOU, the DOL and NLRB will be holding joint training sessions for their field staff and will collaborate on efforts involving worker classification issues and other violations of law.

On account of these two developments, now is an excellent time for transportation companies to minimize risk by taking care to audit not only their independent contractor agreements but, just as importantly, their worker classification practices. In addition, advocates of the independent contractor model must continue to make their voices heard at the NLRB and DOL even in the face of strong and chilly political headwinds.

**For more information on these topics, contact a member of the firm's Transportation & Logistics or Labor & Employment practice groups.**

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