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Democrat-led NLRB Eyes New Independent Contractor and Joint Employer Tests

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The Democrat-majority National Labor Relations Board readied for 2022 by announcing plans to confront two President Trump-era legal tests—one that determines whether an independent contractor is actually an employee protected by federal labor law and a second that identifies when joint employers have a duty to collectively bargain—which could greatly expand the scope of union organizing efforts in the coming year.

The Board announced on December 27 that it wanted input from unions, employers, and others on whether to keep or replace the current independent contractor test established just two years ago in *SuperShuttle DFW*, 367 NLRB No. 75 (Jan. 25, 2019) (prior analysis here). In *SuperShuttle DFW*, the then Republican-majority Board held that a key factor in the independent contractor test should focus on whether a worker has an "entrepreneurial opportunity" for profit or loss and not on whether the worker was, in fact, rendering services as part of an independent business, as the Board under President Obama had decided in *FedEx Home Delivery*, 361 NRLB 610 (2014). By reversing the Obama Board's decision, *SuperShuttle DFW* returned to the independent contractor test it used without changes since the Supreme Court decided *NLRB v. United Insurance Co. of America*, 390 U.S. 254, in 1968.

The stakes are high, as the country continues to rely on so-called "gig" workers who provide short-term services like food delivery and ridesharing through computer apps. Overturning *SuperShuttle DFW* and replacing it with a more restrictive independent contractor test could make it easier for "gig" workers to be considered employees of the companies that operate those apps, and allow them collective bargaining under the National Labor Relations Act.

The announcement also came on the heels of a decision by the Board to re-examine the joint employer test, which establishes when one company is jointly liable for employees directly employed by another, such as in a franchisor-franchisee relationship or a staffing agency relationship. In 2020, the Board under Trump issued a rule that a company must possess "substantial direct and immediate control" over another's employees to be considered a joint employer (see prior discussion here). In issuing the joint employer rule, the Board overturned an earlier decision involving Browning-Ferris Industries under Obama that expanded the joint employer standard by holding that an employer's status is dependent on the employer's right to control employees, either directly or indirectly, and not actual control. Again, that decision under the Obama Board overturned longstanding precedent that had been established in 1984 under *TLI, Inc.*, 271 NLRB 798 (1984) and *Laerco Transp.*, 269 NLRB 324 (1984).

The Board's review of the independent contractor and joint employer tests is not surprising. Then-candidate Joe Biden promised to implement an aggressive, pro-union platform and to roll back management-side gains under Trump. Once Democrats took majority control of the five-member Board in August with the swearing-in of President Biden's nominee, David Prouty, it was only a matter of time until the Board decided to revisit the two tests, representing the third straight administration to take up these two matters after decades of stability on the issues.

It is unclear when the Board will make decisions regarding the tests. In the meantime, the Board's General Counsel, Jennifer Abruzzo, who is responsible for investigating and prosecuting U.S. labor law violations, continues to set a pro-union agenda.

Abruzzo's office recently settled an unfair labor practice charge with Amazon by requiring the e-commerce giant to post a notice informing employees of their right to seek collective action and that Amazon will not "call the police, when you are exercising your right to engage in union or protected concerted activities by talking to your co-workers in exterior nonwork areas during nonwork time." The settlement also requires Amazon to permit workers to come to work more than 15 minutes prior to their shift and to stay more than 15 minutes after their shift to engage in union discussions with other workers.

We will continue to monitor developments as they are announced and, as always, Benesch is available to answer any questions regarding the likely changes.

Please reach out to Benesch's Labor & Employment Practice Group for more information.

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