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NLRB Overhauls Independent Contractor Test for the Third Time in Less Than a Decade

For the second time in four years, and the third time in less than a decade, the National Labor Relations Board (the NLRB or the Board) overhauled its legal test for determining whether workers are employees covered by the National Labor Relations Act (the NLRA or Act) or independent contractors falling outside the parameters of the Act. On June 13, the NLRB issued its much-anticipated ruling regarding the employment status of makeup artists, wig artists, and hairstylists working at the Atlanta Opera. That ruling readopted an independent contractor test previously used by the NLRB from 2014 until 2019, which does not include an emphasis on a worker's "entrepreneurial opportunity for gain and loss" in determining employment status. This test creates a more burdensome standard for businesses to show that a worker is an independent contractor lacking organizing and other rights under the Act as well as the potential for increased disputes on the topic.

The History of the Board's Independent Contractor Standards

For over 40 years prior to its 2014 ruling, the NLRB relied on a common law agency test to determine independent contractor status under the Act, which is comprised of the following ten factors:

- The extent of control, which, by agreement, the employer may exercise over the details of the work.
- Whether or not the one employed is engaged in a distinct occupation or business.
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
- The skill required in the particular occupation.
- Whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work.
- The length of time for which the person is employed.
- The method of payment, whether by the time or by the job.
- Whether or not the work is part of the regular business of the employer.
- Whether or not the parties believe they are creating the relation of master and servant.
- Whether the principal is or is not in business.

In 2009, while considering the appeal of a Board decision regarding the employment status of Federal Express home delivery drivers, the U.S. Court of Appeals for the District of Columbia Circuit held that a worker's entrepreneurial opportunity for gain or loss was, like an employer's control, "a principle to help evaluate the overall significance" of those common law factors. In other words, the court determined that the common law test should be analyzed using two overarching principles as guideposts: the employer's control and the worker s entrepreneurial opportunities for gain or loss. The Board's 2014 decision,

during the Obama administration, minimized the role a worker's entrepreneurial opportunities play in the analysis, claiming that it was just one part of a newly-created factor analyzing whether a worker renders services as part of an independent business. By negating the focus on a worker's entrepreneurial opportunity as a guiding principle, the 2014 ruling made it much more difficult for businesses to classify workers as independent contractors, as businesses could no longer rely solely on a worker's entrepreneurial opportunities, no matter how great those opportunities potentially were, to justify an independent contractor classification. As such, that decision expanded the scope of the Act and those covered under it. In 2019, during the Trump administration, the Board overruled its 2014 decision as it pertained specifically to entrepreneurial opportunity, reverting back to the common law independent contractor test and using both employer control and entrepreneurial opportunity as guiding principles for that analysis. In its 2019 decision, the Board acknowledged that its 2014 ruling improperly transformed the independent contractor analysis into an "economic realities" test, emphasizing an employer's right of control and diminishing the importance of a worker's entrepreneurial opportunities. The Board's 2019 decision, in essence, restored balance to the analysis, again promoting employer control and entrepreneurial opportunity as overarching principles under which the common law factors should be analyzed. As the NLRB stated, "employer control and entrepreneurial opportunity are opposite sides of the same coin: in general, the more control, the less scope for entrepreneurial initiative, and vice versa."

The Current Standard

While its most recent decision does not totally abolish considerations of entrepreneurial opportunities under the independent contractor test, the NLRB again relegates entrepreneurial opportunity to being just one consideration under the factor analyzing whether a worker renders services as part of an independent business. By doing so, the Board again chose to emphasize factors relating to employer control, in turn minimizing a worker's opportunities for entrepreneurial gain or loss. For some businesses that rely heavily on workers who straddle the line between employee and independent contractor, this interpretation undoubtedly makes it more difficult to classify workers as independent contractors because it eliminates a business's opportunity to rely on the potential entrepreneurial opportunities enjoyed by its workers. For example, in the Board's 2014 ruling, it considered whether a delivery driver's opportunity to sell their routes to other individuals weighs toward a finding that the driver is an independent contractor. Such an entrepreneurial opportunity, even if not actually realized by the worker, could have been enough for a finding that the worker is an independent contractor under the 2019 standard. Now, that kind of fact weighs toward only one factor and likely does not have the potential, by itself, to tip the scales in favor of an independent contractor classification. The consequences of this increased burden on businesses to classify workers as independent contractors include the ability for those workers, if ultimately classified as employees, to organize under the Act, to collectively bargain, and to engage in protected, concerted activities to address working conditions. Businesses should note, however, that the new independent contractor test under the NLRA does not affect similar tests under other statutes, like Title VII of the Civil Rights Act of 1964 and the Fair Labor Standards Act. Although it could have negative consequences for businesses, the Board's most recent decision will likely be appealed to the D.C. Circuit Court of Appeals, which would be the third time the court has heard this exact issue. In the previous two times the court considered the Board's application of entrepreneurial opportunity under the independent contractor test, the last time being in 2017, it came down on the side of the business-friendly standard, holding that entrepreneurial opportunity, like employer control, is a guiding principle under which all the common law agency factors should be analyzed. Nevertheless, another similar ruling by the court would not necessarily bind the NLRB to such an interpretation. While the court in 2017 decided against application of the Board's 2014 ruling, the NLRB continued to apply the independent business factor until it overruled its own decision in 2019.

Bottom Line

The Board's most recent ruling is likely not the final word on this issue, as an appeal to the D.C. Circuit is a near certainty. Still, the decision should cause businesses to reconsider, at least temporarily, how they engage with workers and how their

agreements with those workers are structured and worded. In order to make an accurate determination as to how the Board might analyze such a relationship, businesses are encouraged to discuss those agreements with counsel, who can then perform an analysis using the common law factors and other considerations utilized by the NLRB in its June 13 ruling. Businesses should also note that the potential for entrepreneurial opportunities for gain or loss is no longer itself sufficient to classify workers as independent contractors. Given the more substantial burden for businesses in such a classification analysis, the risk of legal and financial exposure is increased. Businesses throughout the country should scrutinize and evaluate their use of independent contractors and consult with legal counsel to evaluate compliance and avoid the consequences of misclassification.

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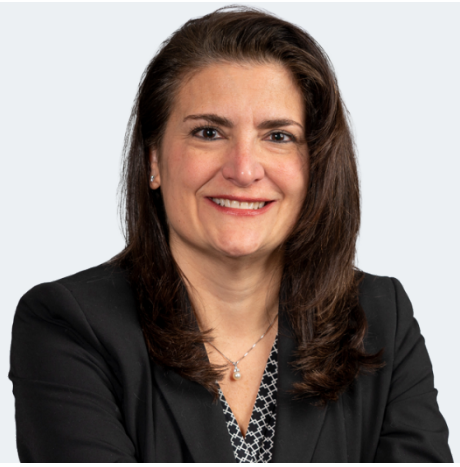

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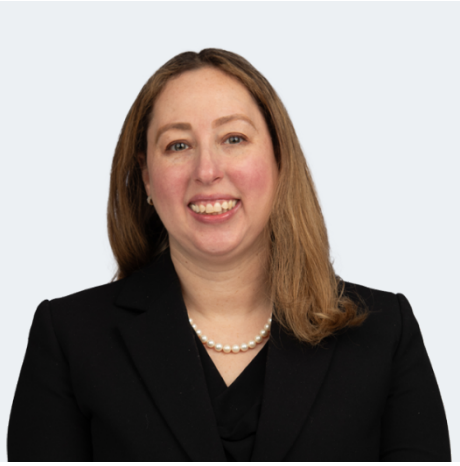

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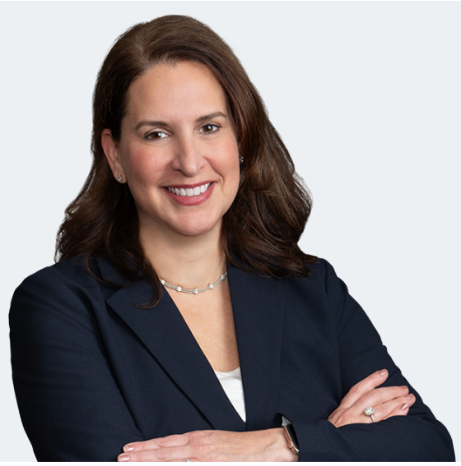

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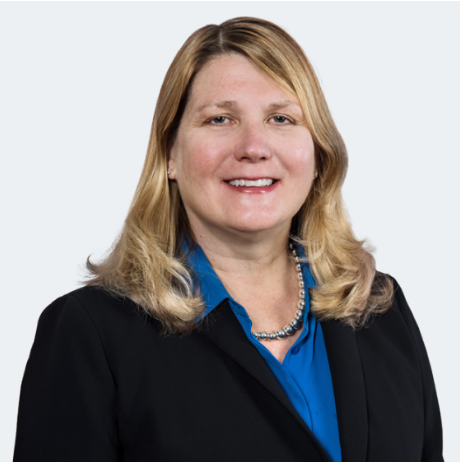

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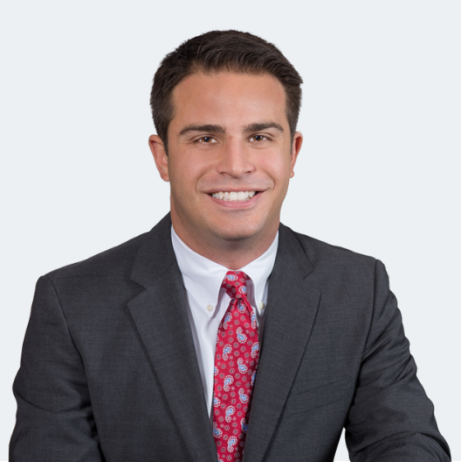

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