Asher, Gittler & D'Alba, Ltd.
Release: Volume 44 No. 25

NLRB RETURNS TO MORE EMPLOYEE-FRIENDLY TEST FOR DETERMINING INDEPENDENT CONTRACTOR STATUS

On June 13, 2023, the National Labor Relations Board issued its decision in *Atlanta Opera, Inc.*, Case No. 10-RC-276292, and returned to the Board's previous standard for determining independent contractor status, applying the non-exhaustive common law factors enumerated in the Restatement (Second) of Agency. This case was initiated when an IATSE local union filed a petition to represent make-up artists, wig artists, and hairstylists (collectively "stylists") who work at the Atlanta Opera, but the employer challenged that petition, claiming that the stylists were independent contractors. On June 17, 2021, the Acting Regional Director issued a decision finding that the stylists were statutory employees, because, among other factors, they do not choose when and where they work, they have little to no independent authority over the details of their work, they do not supply equipment or tools, their work is part of the Opera's regular business, and they enjoy no entrepreneurial opportunity in their work for the Opera. The Acting Regional Director relied on the Board's decision in *FedEx II*, 361 NLRB 601 (2014) which had been overruled by the Trump Labor Board in *Supershuttle DFW*, 367 NLRB No. 75 (2019). The employer filed a request for review.

Many amicus briefs were submitted by interested parties, including the State of Illinois. The Board overruled *SuperShuttle*, returned to the standard in *FedEx II*, and in so doing, affirmed that the makeup artists, wig artists, and hairstylists who work at the Atlanta Opera are "employees" under Section 2(3) of the National Labor Relations Act and not independent contractors. The Board reiterated that the *SuperShuttle* Board's decision to make "entrepreneurial opportunity" an "animating principle" of the independent contractor analysis is contrary to Supreme Court precedent, common law, Board law, and Congress's intent. Indeed, the availability of entrepreneurial opportunity is only one factor the Board should consider. The purpose of the Act is to protect workers, therefore, as the Supreme Court has held, exclusion from statutory coverage as an employee should be narrowly applied. In line with that purpose, the Board found that when considering "entrepreneurial opportunity," it should "give weight only to actual (not theoretical) entrepreneurial opportunity, and that it should necessarily evaluate the constraints imposed by a company on the individual's ability to pursue this opportunity."

The Board took the analysis further in favor of workers, and reaffirmed the principle, established in *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 861 (D.C. Cir. 1995), that "if a company offers its workers entrepreneurial opportunities that they cannot realistically take, then that does not add any weight to the company's claim that the workers are independent contractors." In other words, while the Board did not exclude "entrepreneurial opportunity" from the list of factors that must be considered in the independent contractor analysis, this factor should be viewed with realistic skepticism and the Board should thoroughly evaluate whether the putative contractor actually has the ability to control the success of the enterprise. Even where workers have some proprietary interest in their work, they will not be considered independent contractors where the employer asserts

substantial limitations on their ability to take advantage of such interest. The fact that an employer allows its workers to engage in some activity that may be considered "entrepreneurial," by itself, is not sufficient to deny them the protections of the Act.

In returning to and applying the Restatement (Second) of Agency factors in this case, the Board found that the Atlanta Opera failed to meet its burden to show that the stylists are independent contractors. The Board found that the Opera exercises "substantial control" over the stylists' day-to-day work of executing the director's vision for each show, and dictates the hours and location of the work. In addition, the Opera supplied all of the stylists' instruments and tools of work, they were paid an hourly wage, and the work was an integral part of the Opera's regular business. These factors weighed in favor of employee status. On the other hand, the stylists were highly skilled individuals, who were employed specifically because of those skills for short, finite periods of time. These factors weighed in favor of contractor status. However, in analyzing whether the stylists were in fact rendering services to the Opera as "independent businesses," the Board found that the stylists were "fundamentally constrained in their ability to make entrepreneurial decisions." The stylists' income did not depend on the success or failure of any production, they had no proprietary interest in their work, and the Opera determined their wages and hours of work and made all business decisions regarding who would be hired and for what tasks. Even though the stylists had a realistic opportunity to also work for other employers, the Board did not give this substantial weight because of the seasonal nature of the work for the Opera, which precluded the stylists from choosing to work there exclusively. Ultimately, the Board weighed these factors in accordance with precedent to determine that the stylists were statutory employees.

This decision underscores the importance of the protections given to employees under the National Labor Relations Act. An employer may not designate a worker as an independent contractor and take away those protections simply because that individual has a modicum of control over their work, is hired because of a specialized skill, or has the opportunity to also work for others. If you believe you are being deprived of rights because you are improperly classified as an independent contractor, please contact the attorneys at Asher, Gittler & D'Alba.

ASHER, GITTLER & D'ALBA, LTD.
200 West Jackson Boulevard, Suite 720
Chicago, IL 60606 – 312.263.1500
www.ulaw.com

Dated. June 29, 2023

U.S. News & Report's Best Law Firms Designation is for Chicago Tier 1 rankings in Employment Law (Individuals), Labor Law (Union), and Litigation (Labor and Employment) and a National Tier 2 ranking in Litigation (Labor and Employment).