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National Labor Relations Board Reconsiders Test for Employment Status

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It has been the source of speculation for some time that the standard for determining whether a worker is correctly classified as an employee or an independent contractor will soon be revised. On December 27, 2021, the National Labor Relations Board ("NLRB" or "Board") confirmed that it is now seeking public comment on whether it should abandon the current standard for making that determination. This input is being sought as the NLRB evaluates in the pending action of NLRB No. 10-RC-276292 (2021) whether makeup artists, wig artists, and hairstylists working for the Atlanta Opera are employees or independent contractors.

The standard currently applied in making that analysis was articulated in the case of *SuperShuttle DFW, Inc.,* 367 NLRB No. 75 (2019), in which the Board utilized the common-law agency test for determining whether a worker is an employee or an independent contractor. This test considers the following factors under the totality of the circumstances:

1. The extent of control which, under the terms of the agreement, the purported employer may exercise over the details of the work.
2. Whether the worker is engaged in a distinct occupation or business.
3. Whether in the geographical region at issue, the work is usually done under the direction of the purported employer or by a specialist without supervision.
4. The skill is required in the particular occupation.
5. Whether the purported employer or the worker supplies the instrumentalities, tools, and the place of work for the person performing the work.
6. The length of time for which the worker is engaged.
7. The method of payment – by the length of time or by the job?
8. Whether the work is part of the regular business of the purported employer.
9. Whether the parties believe they are creating an employment relationship.
10. Whether the purported employer is engaged in a particular line of business.

Before the *SuperShuttle* decision, the NLRB utilized the standard set forth in the case of *FedEx Home Delivery,* 361 NLRB 610 (2014), which relied upon entrepreneurial opportunity for economic gain rather than economic dependency as the standard for

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this analysis. Parties interested in weighing in on whether the Board should revert to the prior, more worker-friendly standard are invited to file briefs articulating their position on this issue on or before February 10, 2022.

Stay tuned as this standard continues to evolve, both within the NLRB and within the United States Department of Labor, which continues to express its intent to clarify the definition of what constitutes an independent contractor. It is evident that both agencies are laser-focused on preventing companies from improperly classifying employees as independent contractors to dodge responsibilities they owe to their employees under the Fair Labor Standards Act and other federal laws. It is recommended that employers remain vigilant in enforcing sustainable employment practices.

If you have questions about this agency action or any other employment-related matter, please call Connie Carrigan at (919) 250-2119 or e-mail her at ccarrigan@smithdebnamlaw.com.

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