

Re-Classification Coming: NLRB Poised to Change the Test for Misclassification and Ramp Up Enforcement Efforts

Labor & Employment Law Update

By Christopher Miller on March 1, 2022



On December 27, 2021, the NLRB entered a formal Notice and Invitation for briefing from the public to aid in its consideration of: (1) overturning the independent-contractor standard established in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019); and (2) returning to the standard from *FedEx Home Delivery*, 361 NLRB 610,

611 (2014) either in its entirety or with modifications.

The notice and invitation come as part of the Board's review of a finding that certain makeup artists, wig artists, and hairstylists are employees of The Atlanta Opera, Inc. and not independent contractors. The Board appears likely to upend the 2019 decision from the Republican-dominated Board in *SuperShuttle* and return to some form of the Obama-era test set forth in *FedEx* which focused on the existence of a worker's actual, not theoretical, entrepreneurial opportunities and his/her relative economic dependence on the putative employer. Indeed, Board Chairwoman Lauren McFerran filed a 15-page dissenting opinion in *SuperShuttle* back when she was the Board's lone Democrat.

This comes on the heels of last month's memorandum of understanding between the Board and the US Department of Labor to share information in order to target employers for misclassifying workers as independent contractors. It also follows a memorandum issued last fall by the NLRB's General Counsel opining that college athletes are employees entitled to the protections of Section 7 of the NLRA and promising to pursue any misclassification of such individuals as an independent violation of Section 8(a)(1). This was contrary to another

Board holding in *Velox Express, Inc.*, 368 N.L.R.B. No 61 (2019) finding that misclassification was not itself a violation of the Act, meaning that yet another decision from the Republican-majority Board may be on the chopping block as well.

Collectively, these developments make clear that independent contractor relationships will receive more scrutiny and be evaluated using less business-friendly standards than during the Trump administration. Companies should proactively address these threats by evaluating any independent contractor relationships they have and consulting with legal counsel about measures to take in order to avoid the prospect of future administrative action and challenges.

The NLRB is being very aggressive these days and intends to reshape labor law in the United States at an unprecedented level. Employers who are currently union or maintain a non-union workplace need to pay close attention not only to the Board's policy initiatives, but also to key decisions set to come out in the near future.

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