Legal Update Article

Lessons for Construction Industry in Labor Board's New Test to Classify Independent Contractors

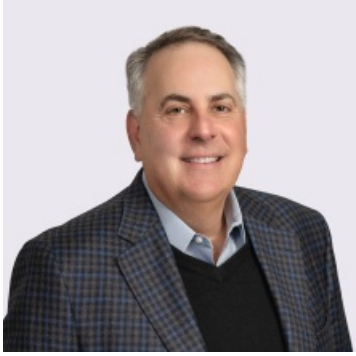
By Tanya A. Bovée, Richard D. Landau & Poonam Sethi

June 29, 2023

Meet the Authors

Tanya A. Bovée

(She/Her)
Principal
(860) 522-0404
Tanya.Bovee@jacksonlewis.com



Richard D. Landau

Principal
914-872-6886
Richard.Landau@jacksonlewis.com

Poonam Sethi

The National Labor Relations Board (NLRB) has made finding independent contractor status harder under the National Labor Relations Act. ***The Atlanta Opera, Inc.,*** 372 NLRB No. 95 (2023). This decision may significantly affect business in the construction industry, where employers frequently confront the dilemma of how to classify their work relationships.

The NLRB's decision overturned precedent set in 2019 in *SuperShuttle DFW, Inc.,* 367 NLRB No. 75, that entrepreneurial opportunity for gain or loss is the primary evidence of the independent contractor test.

Workers who are independent contractors are exempt from coverage under the Act. Independent contractors often are used in the construction industry to meet the short-term and fluctuating needs in the industry. Building or property owners and general contractors usually do not have their own employees working on projects, opting to use subcontractors. Subcontractors generally are classified as independent contractors and sometimes they hire their own independent contractors to perform work for specific projects.

Under *The Atlanta Opera,* employee classifications for construction projects must be considered carefully with proper attention to mitigating risks.

Background

Historically, the NLRB has applied the common-law agency test to make employee-status determinations. The test consisted of 10 factors:

1. The extent of control that, by agreement, the company may exercise over the details of the work;
2. Whether or not the worker is engaged in a distinct occupation or business;
3. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the company or by the worker without supervision;
4. The skill required in the particular occupation;
5. Whether the 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 person is engaged;
7. The method of payment, whether by time or by job;
8. Whether or not the work is a part of the regular business or services of the employer;
9. Whether or not the parties believe they are creating an employer-employee relationship; and
10. Whether the worker is or is not engaged in their own business and performs work at other companies.

This framework favored finding employee status. *SuperShuttle DFW, Inc.* elevated

(Pooh-numb Say-tea • She/Her)
Associate
914-872-8012
Poonam.Sethi@jacksonlewis.com

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workers' entrepreneurial opportunity (typically related to being able to work for other companies) over the other factors when classifying workers as employees or independent contractors.

New Standard

The NLRB reinstated its prior standard to give entrepreneurial opportunity the same weight as the non-exhaustive factors above. The NLRB also extended the independent-business analysis to include an assessment of whether the purported contractor has true entrepreneurial opportunity. This requires considering whether the contractor:

1. Has a realistic ability to work for other companies (as opposed to a theoretical one);
2. Has a proprietary or ownership interest in their work; and
3. Has control over important business decisions related to performing the work at issue, such as the scheduling of work performance; the hiring, selection, and assignment of employees; the purchase and use of equipment; and the commitment of capital.

Thus, *The Atlanta Opera* requires a more granular evaluation of entrepreneurialism in making employee-versus-independent contractor determinations.

Implications

Construction employers need to reevaluate how they classify their workers and understand the impact of any potential changes. Construction workers who are classified as employees are afforded the right to unionize and can be entitled to back wages, overtime, and benefits. Improperly classifying employees can result in additional costs and taxes and potential violations of state and federal law.

Finally, employers should monitor the progress of the U.S. Department of Labor's Independent Contractor Final Rule on the standard for determining whether a worker is an employee or independent contractor under the Fair Labor Standards Act. Publication of the Final Rule is expected in October 2023.

If you have any questions about properly classifying relationships as employer-employee or company-contractor, please contact one of the authors of this article or the Jackson Lewis attorney with whom you regularly work.