The Work Week

Bassford Remele Employment Practice Group

June 20, 2023

Welcome to another edition of *The Work Week with Bassford Remele.* Due to Juneteenth, this week's edition is being released on Tuesday.

Bassford Remele Employment Practice Group

Employee or Independent Contractor?
The NLRB Expands the Definition of Employee

Shannon Eckman

With Instacart and DoorDash at your fingertips, life can be easy. But thanks to a recent ruling by the National Labor Relations Board (the "Board"), the wonderful people who drop groceries and snacks on your doorstep (so you don't have to move from your couch) might be seeing some changes to their jobs, benefits, and protections. As a result, Instacart and DoorDash will need to prepare for what these changes mean for business, as will other employers who utilize independent contractors.

The *Atlanta Opera, Inc.* Decision

On June 13, 2023, the National Labor Relations Board (NLRB) issued a new ruling broadening the factors to be considered in the federal government's test to determine worker status as an employee or independent contractor. The Board's decision reversed the *SuperShuttle* standard from 2019 and returned to the 2014 framework for worker classification, known as the *FedEx II* standard.

The *SuperShuttle* standard emphasized the factor of "entrepreneurial opportunity," deeming it the "animating principle" in the independent-contractor test. The Board rejected this as the prominent factor in determining independent-contractor status and, instead, reinstalled the *FedEx II* standard, which relies on traditional common-law factors that weigh the evidence of an independent contractor or rendering services as an independent business.

In a statement, NLRB Chairman, Lauren McFerran, further explains the return to the *FedEx II* standard:

> The Board returns to the independent contractor test articulated in *FedEx II*, and reaffirms the Board's commitment to the core common-law principles that the Supreme Court has determined should guide the Board's consideration of questions involving employee status. Applying this clear

standard will ensure that workers who seek to organize or exercise their rights under the National Labor Relations Act are not improperly excluded from its protections.

These common-law factors include considerations such as: the extent of control which, by the agreement, the employer may exercise over the details of the work; the kind of occupation, with reference to whether the work is usually done under the direction of the employer or by a specialist without supervision; the skill required in the particular occupation; the length of time the person is employed; the method of payment; whether the work is part of the regular business of the employer; and a host of other non-exhaustive factors from the Restatement (Second) of Agency. Importantly, the Board's decision does not mean that the entrepreneurial-opportunity factor from the *SuperShuttle* standard cannot (or even should not) be considered. The Board simply decided that the entrepreneurial-opportunity factor cannot be a requirement, as it was under *SuperShuttle*.

The impact

A variety of sectors and industries will see some changes as a result of the Board's decision in *Atlanta Opera, Inc.* This ruling will increase the number of workers considered as employees instead of independent contractors, requiring employers to provide more benefits and protections. Potential examples include drivers, janitors, construction workers, and truckers. The ruling also makes it easier for workers to organize and join unions and is especially relevant to the app-based gig workers who have attempted to unionize in recent years (*i.e.,* Uber, Lyft, and DoorDash).

Apart from this recent Board decision, the Labor Department has proposed its own rule to make it harder to classify gig workers as independent contractors. However, this is not a final rule and still needs to go through a public-comment period. This rule would classify workers in the gig economy as employees instead of independent contractors, affording them basic benefits and protections. These rumblings with the Labor Department signal that there is more to come on the issue of appropriately classifying workers.

Take caution classifying

Classifying employees and independent contractors is extremely important. Misclassification poses risks of penalties, back pay, litigation, and other consequences—especially in Minnesota, which maintains one of the strictest wage-theft statutes in the county at a time when prosecution for wage theft will increase in the coming months.

If your business needs assistance in analyzing the classification of your workers, including navigating this change back to the *FedEx II* standard, we are here to help. At Bassford Remele, our experienced employment-law group can help your company correctly classify workers in compliance with this recent Board decision and avoid both the legal and business risks associated with misclassifying workers, including the penalties imposed under Minnesota's wage-theft statute.

LEARN MORE ABOUT OUR EMPLOYMENT PRACTICE »»