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Gig Economy Employers Beware: Labor Board Ruling May Upend Independent Contractor Model

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The National Labor Relations Board (NLRB) recently issued a ruling that potentially has broad ramifications for any companies using independent contractors, such as those in the gig economy. Independent contractors are not covered under the National Labor Relations Act (NLRA) and cannot form unions or seek redress of alleged employer violations of the NLRA. Based on this case, it may now be more difficult to classify workers as independent contractors, at least from a labor law perspective.

The NLRB's decision in *The Atlanta Opera, Inc.* deemed makeup artists, wig artists, and hairstylists as covered employees, not independent contractors. The NLRB found that entrepreneurial opportunity is no longer the "animating principle" of the independent contractor test, which departs from a decision by the agency several years ago.

In the *Atlanta Opera* decision, the NLRB stated that entrepreneurial opportunity should still be considered "along with the traditional common-law factors, by asking whether the evidence tends to show that a supposed independent contractor is, in fact, rendering services as part of an independent business." The traditional common law factors include:

- The extent of control which, by the agreement, the [employer] may exercise over the details of the work
- Whether or not the one employed is engaged in a distinct occupation

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- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision
- The skill required in the particular occupation
- Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work
- The length of time for which the person is employed
- The method of payment, whether by the time or by the job
- Whether or not the work is part of the regular business of the employer
- Whether or not the parties believe they are creating the relation of [employer] and [employee]
- Whether the principal is or is not in business

Looking at this formulation, the NLRB found that the artists and stylists at issue did not render services as a part of their own independent businesses. Along with the common-law factors, the NLRB weighed whether the artists and stylists had a realistic ability to work with other companies, had an ownership interest in their work, and had control over business decisions.

Ultimately, according to the NLRB, the artists and stylists were tasked with executing the artistic vision of the employer's creative team, which dictated almost every aspect of a character's look. The artists and stylists may have had control over minor details, but did not work for other companies in the same capacity, have a business interest in their work, or have control over large business decisions.

By overruling the holding that independent contractor status hinges on entrepreneurial opportunity alone, the NLRB has made it easier for contractors to allege employee status and related protections under the NLRA.

Many employers in the gig economy, such as Uber, use an independent contractor model to staff their operations. And many, if not most, private sector employers use contractors to augment staffing in some way, shape, or form. Accordingly, all companies should take note of this decision.

Summer associate Sophia Vander Kooy assisted in drafting this post.