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EMPLOYEE OR INDEPENDENT CONTRACTOR? THE DEBATE CONTINUES

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The classification of workers as employees or independent contractors has been the subject of an ongoing legal debate.This debate is particularly relevant with the continuous rise of gig companies such as Uber and Lyft. On one hand, workers are fighting for the protection of federal labor law; and, on the other hand, companies are seeking to maximize their workforce and contribute to the economy with lower overhead costs, which arguably allows for greater product optimization.

The genesis of this debate can be traced back to a 1968 decision, *NLRB v. United Ins. Co. of America*, where the Supreme Court found that the common-law agency test applied to employee-independent contractor classifications under the National Labor Relations Act ("NLRA"). In subsequent decisions, the Supreme Court, relying on Section 220(2) of the Restatement (Second) Agency, cited a non-exhaustive, multifactor test, as guidance to determine whether a worker should be classified as an employee or an independent contractor.

The common-law agency test received great deference until 2009 in *FedEx Home Delivery*. There, the court prioritized one factor, "entrepreneurial opportunity", of a worker as an "animating principal" when considering a worker's classification. However, the NLRA Board (the "Board") under the Obama administration rejected the court's decision. The Board reiterated that entrepreneurial opportunity was one of several factors to consider under the common-law agency test, and not dispositive when determining worker classification.

Ten years later, under the Trump administration, in *SuperShuttle DFW, Inc.*, the Board adopted the court's holding in *FedEx* stating that, "entrepreneurial opportunity…has always been at the core of the common-law test." Accordingly, entrepreneurial opportunity has been the guiding principle since 2019. However, this changed with the Board's ruling on June 14, 2023, in *Atlanta Opera*.

Now under the Biden administration, and in a 3-1 ruling, the Board overturned its previous ruling in *SuperShuttle DFW, Inc* under the Trump administration. In doing so, the Board signaled the return to the *FedEx* common-law agency test with entrepreneurial opportunity given the same consideration as various other factors. The Board noted that it would also consider things such as whether workers can realistically work for other companies, have ownership interest in their work, and have control over important business decisions.

This debate is far from over, particularly given that we are a year away from a national election. However, for the time being, the pendulum has swung in favor of what some would consider a more employee-friendly analysis. Under the current common-law agency test, companies should take a holistic approach to various factors when determining whether a worker is properly classified as an employee or an independent contractor.

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