

What is the current standard used by the National Labor Relations Board to determine if a worker is an employee or an independent contractor?

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Each government agency has set its own standard for determining whether a worker is properly classified as an employee or an independent contractor. Employers need to take into account the tests used by different federal agencies as well as those used by different states.¹

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The National Labor Relations Board (“NLRB” or the “Board”) has, yet again, changed its standard for determining whether a worker is an employee or an independent contractor. On June 13, 2023, the Board issued its decision in *The Atlanta Opera, Inc.*, which overruled its 2019 decision *SuperShuttle DFW, Inc.* and returned to its prior standard laid out in its 2014 decision, *FedEx Home Delivery*. As we have discussed in other NLRB posts, the NLRB positions often change when the U.S. presidents change.²

In order to understand the difference between the two NLRB standards, and which standard is currently in place, it is worth noting that both standards apply the same 10-factor test taken from common law. These ten factors are:

1. the extent of control which, by the agreement, the employer 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 employer or by a specialist 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 doing the work;
6. the length of time for which the worker is employed;
7. the method of payment, whether by the time or by the job;
8. whether or not the work is a part of the regular business of the employer;
9. whether or not the parties believe they are creating the relation of employer and employee; and
10. whether the principal is or is not in business.

In addition to the above listed factors, the Board has also analyzed whether the worker in question can demonstrate that they have a significant entrepreneurial opportunity for profit or loss. Specifically, the Board would look at whether the worker could work for other companies, hire their own employees, and had a proprietary interest in their work.

In *SuperShuttle DFW, Inc.*, the Board found that the main, “animating principle” of the test should be the entrepreneurial opportunity for profit or loss. This reading of the standard generally favored employers, because it made it more likely that workers would be found to be independent contractors.

However, now that the Board has returned to its prior standard under *FedEx Home Delivery*, the entrepreneurial opportunity for profit or loss factor will not be afforded the same level of consideration. Rather, the Board now will look at all factors, including entrepreneurial opportunity, equally when determining whether a worker is an employee or an independent contractor. The Board’s return to its earlier rule likely means that more workers will be found to be employees rather than independent contractors.

Similarly, the standard under the U.S. Department of Labor (“DOL”) is in flux. Currently the DOL test looks at the following six factors in determining a worker’s classification:

1. opportunity for profit or loss depending on managerial skill;
2. investments by the worker and the employer;
3. degree of permanence of the work relationship;
4. nature and degree of control;
5. extent to which the work performed is an integral part of the employer’s business; and
6. skill and initiative.

As of this posting, the DOL has indicated it plans to propose a new rule for determining whether a worker is an employee or an independent contractor under the Fair Labor Standards Act (“FLSA”). The DOL had issued a rule on the independent contractor test in 2021 that narrowed the totality-of-the-circumstances analysis to focus on two core factors: (1) the nature and degree of control over the work and (2) the worker’s opportunity for profit and loss. The DOL considered these factors more probative and afforded them more weight than any other factors under the test.

The 2021 rule was officially rescinded on October 13, 2022. Under the new proposed rule, the DOL will determine a worker’s classification based on a totality-of-the-circumstances analysis of the economic reality of the worker’s relationship with the employer. Specifically, the test focuses on whether the worker is economically dependent on the employer for work or is in business for him- or herself. The test does not explicitly analyze each of the six factors laid out above, but rather takes a more comprehensive approach in examining the relationship between the worker and the employer. The proposed rule further designates the consideration of investment on the part of the worker as an independent factor, clarifies the analysis of the control factor (specifically by discussing how scheduling, supervision, price setting, and the ability to work with others should be considered), and returns to a traditional analysis of whether the worker’s work is integral to the employer’s business. It is expected that this new rule

will make it more likely that workers will be classified as employees rather than independent contractors.

So what does all of this mean for employers? Since each new standard under the NLRB and the DOL will make it more likely that workers will be classified as employees rather than independent contractors, employers should examine the job duties of their workers and consult with counsel to ensure that they continue to be classified correctly.

¹ For example, the test used by California is described here: [What Do Employers Need to Know Following the Passage of California's New Law on Independent Contractor Misclassification? | Quirky Questions \(quirkyemploymentquestions.com\)](#)

² See this prior article for another recent example: [The NLRB Reverses Course \(again\) on Employee Outbursts and Protected Concerted Activity | Quirky Questions \(quirkyemploymentquestions.com\)](#)