

In a 2019 Decision, the NLRB Establishes a (Not So) New Independent Contractor Test

October 13, 2023

By Richard P. Romeo

Originally posted on 2/18/2019, content updated on 10/13/2023

In 2019, the National Labor Relations Board (NLRB) revised its independent contractor test, overturning a controversial standard established in 2014.

The decision was a federal attempt to clarify the legal distinction between employees and independent contractors. Although many employers struggle to differentiate the two, one category is afforded certain rights and protections, while the other is not. Under the National Labor Relations Act (NLRA), employees are permitted to unionize; independent contractors are not. Similarly, contractors are not entitled to the same protection from unfair labor practices employees receive. Independent contractors also must pay their own income taxes, Medicare, and Social Security.

Traditionally, the NLRB has used a 10-factor, common-law test to guide every determination about whether a worker should be classified as an employee or independent contractor under the NLRA. Those factors are as follows:

1. The extent of control which, by the agreement, the master may exercise over the details of the work.
2. Whether or not the one employed 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 workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
6. The length of time for which the person is employed.
7. The method of payment, whether by the time or by the job.
8. Whether or not the work is part of the regular business of the employer.
9. Whether or not the parties believe they are creating the relation of master and servant.
10. Whether the principal is or is not in business.

At the core of this test is the question of “entrepreneurial opportunity”: the measure of an individual’s ability to develop and manage a business on their own terms.

In its decision in *FedEx Home Delivery*, 361 NLRB No. 55 (2014), the Board amended this long-standing system. First, the Board placed greater emphasis on “actual, not merely theoretical, entrepreneurial opportunity” and what effect an employer may have on a worker’s ability to pursue the opportunity. Second, the Board proclaimed it would start considering any evidence suggesting a company controlled a contractor’s capacity to operate an independent business. Together, these elements deemphasized the entrepreneurial opportunity question and placed a greater burden on companies to prove their workers were properly classified—that purported independent contractors were not, in fact, employees.

On January 25th, 2019, the NLRB reversed its previous decision and returned to its pre-*FedEx* test. The news should come as a relief to employers who felt over-encumbered by the 2014 rule. Regardless, the decision does not erase the risk of a worker misclassification claim. Note that the NLRB considers the merits of every claim individually and that no single factor automatically sways the Board’s determination.

If you have any questions about worker misclassification or any other Labor and Employment Law matter, please contact Richard Romeo at rromeo@offitkurman.com or 347.589.8547.