

# NLRB Alerts: New Independent Contractor Test and Challenges to Remedial Authority

AUTHOR: JAMES KEANEY

It is never a dull week with the National Labor Relations Board (NLRB) under the current administration. On Tuesday, June 13, 2023, the NLRB published a decision that will likely make it more difficult for employers to treat workers as independent contractors (as opposed to employees with organizing rights), at least in some cases.

The question of whether workers are employees or independent contractors has been a major issue throughout the history of labor law in the United States. But, with the burgeoning gig economy, it has become an even more hotly contested issue in recent times.

The key difference between this recent decision and a previously controlling NLRB decision (*SuperShuttle*) centers on the concept of “entrepreneurial opportunity” and the weight accorded to it when analyzing whether workers are independent contractors or employees. As an initial matter, both decisions recognize the traditional test for independent contractors necessitates consideration of many different factors. There is no disagreement there.

But they disagree (quite strenuously) on how the concept of “entrepreneurial opportunity” should fit into this multi-factor test: is this concept an “animating principle” relevant to consideration of all factors, or is it a just concept relevant to only one of the many factors that must be considered? In other words, how important and central is “entrepreneurial opportunity” in distinguishing between employees and independent contractors?

Under *SuperShuttle*, the potential of “entrepreneurial opportunity” animated the whole multi-factor analysis. However, under this recent NLRB decision overruling *SuperShuttle*, “entrepreneurial opportunity” has much less weight: (1) it is strictly limited to “actual” or “realistic” entrepreneurial opportunity (whatever this may mean); and (2) the concept does not have a pervasive role in the multi-factor analysis. Rather, under this new decision, “entrepreneurial opportunity” is a concept relegated to or subsumed within just one of the multiple factors of the traditional independent contractor test—that is, the factor of whether a worker is engaged in an independent business.

This difference may seem academic, but in some cases it is not. Nonetheless, one may fairly wonder how much of an impact this new decision will have. But—as always—only time will tell.

In other NLRB-related news, the Fifth Circuit Court of Appeals is currently considering a challenge to a recent Board decision that significantly broadened the remedies available in unfair labor practice proceedings. We covered that recent NLRB decision in a separate blog article, so check back there for more background.

In this recent appeal, the nature and scope of the NLRB's remedial authority stands front and center. In their opening brief, challengers contend the NLRB does not have authority to order, among other things, relief for “foreseeable” harms resulting from labor violations—that is, the type of relief available in a tort lawsuit, but not available in labor law proceedings. What the NLRB argues in response remains to be seen, though it is safe to say the NLRB will argue that ordering such relief falls squarely within its authority.

But what we do know now is that Fifth Circuit is generally reputed to be one of the more conservative federal appellate courts in the country. It will be interesting to see how they address the challengers' claim that the NLRB has engaged in an “unprecedented and unlawful expansion” of its remedial authority. Similar arguments had success in the context of challenges to the President's authority to issue vaccine mandates. So one can reasonably expect the Fifth Circuit to, at the very least, closely scrutinize this issue of the NLRB's ultimate authority.

Once again, only time will tell whether the Fifth Circuit agrees with the challengers. But stay tuned for further developments, as this appeal may have significant implications for employers across the country.