



HR AFFILIATES

HR UPDATES

On June 13, the National Labor Relations Board (NLRB) decided a case, Atlanta Opera, that makes it harder for employers to classify their workers as independent contractors. If you utilize independent contractors as part of your business model, now would be a good time to evaluate the nature of the work they perform for you and whether they should be classified as a bona fide employee. We can help you with the analysis under the new Atlanta Opera guidelines.

**Here are the top four things you should know:**

**1. How Did We Get Here?** The NLRB in Atlanta Opera, not surprisingly, overturned a Trump-era administrative decision and reverted to the 2014 Obama-era Labor Board's decision referred to as the "economic realities" test. This multi-factor test makes it harder for employers to classify workers as independent contractors. Prior to Atlanta Opera, the NLRB under Trump determined that workers who exercise a high level of "entrepreneurial opportunity" in their roles, like makeup artists and costume stylists, are independent contractors.

**2. What Happened in Atlanta Opera?** Atlanta Opera is a professional opera company that utilized a variety of independent contractors as stylists, costume designers, and makeup artists. These stylists did not work pursuant to a written contract, but completed time sheets and were paid an hourly rate. They were not required to adhere to the Opera's rules and regulations. Stylists performed their work largely free from any form of supervision by the Opera.

When the stylists sought a petition for union representation, the Opera argued they were not eligible for representation because they were independent contractors and exercised significant entrepreneurial opportunity. The Opera noted the stylists chose how, when, and where to work and whether to accept or reject opportunities with the Opera at all.

**3. What Changed?** First, the Board narrowed the scope of the entrepreneurial opportunity, effectively making it very difficult for employers to establish. After Atlanta Opera, the Board will consider whether the worker:

- has a realistic ability to work for other companies;
- has proprietary or ownership interest in their work; and
- has control over important business decisions.

Second, the Board returned to the Obama-era independent contractor economics reality test supporting its pro-employee roots. It concluded, among other points, that:

- The Opera controlled the details of the stylists' work;
- the Opera subjected the stylists to continuous feedback;
- the Opera supplied all instrumentalities, tools, and places of work;
- the Opera's director dictated the time and place of rehearsals and performances, the daily schedules, and the availability of breaks; and
- the Opera paid stylists an hourly rate, including overtime, with a designated number of working hours.

For that reason, the stylists were eligible to petition to seek union representation.

**4. What Does the Ruling Mean for Employers?** Here are key takeaways you should note from the NLRB's ruling:

- Atlanta Opera has made it significantly easier to classify workers as employees, which will lead to more opportunities to organize workers who are currently excluded from union organizing.
- Employers who rely on independent contractors should re-evaluate their duties and the level of control you exercise over how and when they perform the work.
- Review existing independent contractor agreements you utilize to ensure there is no language that would be contrary to the new "old" economic realities test.

We will continue to monitor NLRB and other agency decisions that impact your day-to-day operations and provide updates as necessary. If we can assist you with an assessment of your independent contractor workforce, we'd be more than happy to help!