NATIONAL EMPLOYMENT LAW PROJECT

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Breaking Down the NLRB Decision in *Atlanta Opera* and Its Potential Impact on App-Based Ridehail and Delivery Workers

In June 2023, the National Labor Relations Board issued a long-awaited decision in the case *Atlanta Opera*, 372 NLRB No. 95 (2023), revising the standard for who is a covered employee under the National Labor Relations Act (NLRA).

The decision has opened the door for the Board to consider whether ridehail and delivery workers are entitled to union rights under federal labor law.

The Board sided with the hair and makeup stylists petitioning for union representation at the Atlanta Opera, holding that they were employees entitled to the protections of the NLRA, not independent contractors. In doing so, the Board rejected a Trump-era standard and reestablished a more worker-friendly legal test for determining who is an employee and who is an independent contractor under the NLRA.

This factsheet lays out some of the legal background of this case, breaks down the Board's decision, and explains how it may impact the rights of workers who obtain work through online platforms or apps ("app-based workers") to organize a union or engage in other protected concerted activity under the NLRA.

The reinstated legal standard will apply to *all* workers challenging their status as independent contractors—including the workers most frequently misclassified as non-employees and denied federal labor rights, such as domestic workers, truckers, janitors, and construction workers. But this explainer focuses on the potential impact of the decision on app-based ridehail and delivery workers.

Worker Classification Under the NLRA

The NLRA protects workers' rights to form or join a union and to engage in other forms of protected "concerted activity" without fear of retaliation by their employer. It forms the bedrock of the nation's federal labor protections, safeguarding the right to join a union and to take any concerted action with a coworker to improve the conditions of work.[1] But those protections only extend to those who meet the definition of "employee" in Section 2(3) of the Act. Independent contractors have been explicitly carved out since the passage of the Taft-Hartley Act in 1947.

A key question, then, is which workers are protected employees under the NLRA. The statutory definition is not very instructive. But over the years, the

Supreme Court has confirmed that the terms "employee" and "employer" in the NLRA follow a multi-factor approach that focuses on the company's right to control the work —the "common law approach."[2] Only federal labor law is affected by *Atlanta Opera.*

The *Atlanta Opera* decision only affects employee coverage under the NLRA. Other federal statutes (such as the Fair Labor Standards Act) and many state statutes (like California's AB5, or state wage and hour laws) are unaffected.

Atlanta Opera only establishes the analysis for determining which workers are entitled to form or join a union or take protected, concerted activity under federal law. Eligibility for other workplace protections—like state and federal minimum wage, unemployment insurance, workers' compensation, and discrimination protections—is determined by other statutory definitions, and the Board's *Atlanta Opera* decision has no impact on those.

The Board's Evolving Standard

The *Atlanta Opera* ruling comes four years after the Board's 2019 decision in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), in which a majority Republican-appointed Board narrowed the test for determining employee status. Concentrating the legal inquiry on whether or not the workers had "entrepreneurial opportunity for profit or loss," the Board there concluded that bus drivers who drove a shuttle between downtown Dallas and Dallas-Fort Worth airport were independent contractors, excluded from the protections of the Act. The practical impact of the *SuperShuttle* decision was that ride-hail drivers who theoretically could work for different platforms would likely have been considered independent contractors and not protected by the NLRA.

In *Atlanta Opera*, the Board rejected the simplistic understanding of employment in *SuperShuttle* and reinstated the analysis it adopted in a 2017 case, *FedEx Home Delivery*, 361 NLRB 610 (2014) (*FedEx II*). So, what's the upshot? In determining whether workers are covered employees or exempt independent contractors, the Board will apply a fact-specific, multi-factor test. As *Atlanta Opera* lays out, the Board will focus on the following eleven factors,[3] with no one factor weighing more than others:

a) the extent of control the employer can exercise over the work;
b) whether or not the worker is engaged in a distinct occupation or business;
c) whether this kind of work is usually done under the direction/supervision of the employer or by a specialist without supervision;
d) the skill required in the work;
e) whether the employer or worker supplies the "instrumentalities", tools, and place of work;
f) the length of time the worker is employed;
g) the method of payment—whether by time or by the job;
h) whether or not the work is part of the regular business of the employer;
i) whether or not the parties believe they are creating an independent contractor relationship;
j) whether the employer is or is not in business; and
k) whether the evidence tends to show that the worker is, in fact, rendering services as an independent business.

Notably, the Board emphasized that it would consider whether a worker is in fact "rendering services as part of an independent business." It will look at the facts on the ground—rather

than any theoretical opportunity the worker may have to operate independently—and consider whether the employer has effectively limited the worker's ability to run an independent business. In particular, it will consider whether the terms or conditions under which the individuals operate are "promulgated and changed unilaterally by the company."[4]

How *Atlanta Opera* May Impact App-Based Ridehail & Delivery Workers

> Under the reinstated standard, the Board is more likely to find that DoorDash delivery workers, Uber drivers, and other similar workers are protected employees with full labor rights under federal law.

Applying the *Atlanta Opera* test, the Board will now consider how corporations like Uber and DoorDash exercise and retain significant control over their workers through take-it-or-leave-it contracts and hidden or opaque data-driven assignments; unilateral determination of pay rates; and management of when, where, and how drivers work.

The Board will consider that many app-based workers are not running their own distinct business; they are performing the very work of the corporation they work for, under terms and conditions that are "promulgated and changed unilaterally by the company." And ridehail and delivery workers perform labor at the core of the companies' business model; these are not workers in a "distinct occupation or business" like a plumber contracted by a restaurant to fix a broken pipe.

Of course, not all of the factors weigh decidedly in favor of employee status. Workers must provide their own vehicle, a key "instrumentality" of work—although many Uber drivers rent or lease their cars directly from Uber or affiliated companies (like Hertz, which has a partnership with Uber).[5] Ridehail and food delivery companies also often include terms in the contracts that workers are required to sign before commencing work, declaring their intent to create an independent contractor relationship. But contractual clauses denying the existence of an employment relationship, especially when buried in lengthy take-it-or-leave-it adhesion contracts, should not be especially compelling evidence.

In the final analysis, it is not possible to say how the Board might rule in any one case, with individual factors pointing in different directions, but many of these factors weigh clearly in favor of employee status.

Any determination by the Board of employee status under the NLRA would be dependent on the facts of the individual case, but the analysis above broadly applies to many grocery delivery workers, Amazon Flex drivers, and many other app-based workers whose work is largely controlled by the company for whom they work. With *Atlanta Opera*, these workers are one step closer to clarifying their rights as employees entitled to a protected right to organize under federal law.

What Happens Next?

How might the status of app-based delivery and ridehail workers come before the Board?

First, a group of workers organizing to form a union could **petition for an election** before the Board. In determining whether the workers may form a union, the Board would first need to decide whether the workers are covered employees, applying the above legal analysis to the workers before them. Only if the Board decides the workers are, in fact, employees can it go on to set up a union election.

Second, workers—regardless of whether they have union representation—can **file unfair labor practice charges** with the Board.[6] Workers who believe that their employer has violated their protected rights to organize, by illegally obstructing their unionizing or by retaliating against them for engaging in protected concerted activity, can file unfair labor practice (ULP) charges with the Board to seek redress.

If, for example, an organized group of food delivery workers for DoorDash believe that DoorDash has unlawfully interfered with their organizing—maybe by terminating/deactivating certain activist workers, or by sending push notifications through the DoorDash app to workers' phone with incorrect information about worker organizing activities—they could file ULPs.[7]

Workers could even argue that the companies' deliberate misclassification of them as independent contractors is in itself a violation of labor law because it interferes with their right to exercise collective action.[8] Again, the Board will need to first resolve whether or not the workers are employees entitled to the protections of the NLRA. Only then can it resolve and remedy the possibly unlawful behavior of the employer.

Conclusion

The Board's decision is an important course correction reaffirming the scope of protections under federal labor law. By restoring its prior legal analysis, the Board ensures that workers who are not true independent contractors will be entitled to the Act's protections.

> For those too long denied the right to organize and protections against anti-union employer retaliation, this decision portends a better future.

For workers interested in taking collective action to improve conditions or forming a union, or for those whose labor rights have been violated by their employer, this decision offers a roadmap towards legal recognition under labor law. Petition for a union election or file unfair labor practice charges and force the NLRB to resolve whether the foundational promises of this country's bedrock federal labor protections apply to them as employees. For those too long denied the right to organize and left without protections against anti-union employer retaliation, this decision may point to a better future.

Endnotes

[1] Section 7 of the NLRA states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…." 29 U.S.C. § 157.

[2] *See NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968) (holding that the starting point for independent-contractor determinations under the Act is the common law agency test, and "[t]here is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.").

[3] The factors are taken from the Section 220 of the Restatement (Second) of Agency.

[4] In so holding, the Board also overruled two other decisions, *Arizona Republic*, 349 NLRB 1040 (2007), and *St. Joseph News-Press*,

345 NLRB 474 (2005).

[5] Brett Helling, *The New Uber Xchange Program (and 3 Alternatives to Rent for Uber)*, GigWorker (Apr. 14, 2023), https://gigworker.com/uber-xchange/.

[6] Undocumented workers interested in filing unfair labor practice charges should seek additional legal advice before doing so. Federal labor law provides inadequate remedies for undocumented workers who suffer employer retaliation; if terminated, such workers are ineligible for reinstatement or backpay. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

[7] Some other examples of prohibited unfair labor practices include: threatening employees with adverse consequences if they engage in concerted activity; coercively questioning employees about their union sympathies; and spying on employees' union activities.

[8] The Board in 2019 held that misclassification on its own was not a cognizable unfair labor practice in the case *Velox Express, Inc.*, 368 NLRB No. 61 (2019). However, since then, the NLRB General Counsel penned a memo to the regional directors suggesting an interest in revisiting the applicability of that decision. *See Memorandum GC 21-04*, Office of the NLRB General Counsel (Aug. 12, 2021). More recently, she filed a brief urging the Board to reconsider *Velox* and to find a Brooklyn restaurant liable for misclassifying its workers. *See Kirin Transportation Inc. and Tiande Wang et al.*, Case No. 29-CA-280295, NLRB Region 29 (Brief in Support of Limited Exception to the Administrative Law Judge's Decision, Jul. 19, 2023).