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By Robert Iafolla

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The gig economy loomed large in the public comments on the National Labor Relations Board's reconsideration of its Trump-era legal test for determining whether a worker is an employee protected by federal labor law or an independent contractor who is not.

Rideshare Drivers United, which represents 20,000 California-based drivers for Uber Technologies Inc., Lyft Inc., and other app-based drivers, asked the NLRB to adopt a standard that "unambiguously" recognizes that gig economy workers are employees. Those drivers lost the benefit of a 2019 change to the employment classification test under California law with the 2020 passage of a voter initiative known as Proposition 22.

The American Society of Journalists and Authors and a dozen other groups representing freelancers, on the other hand, urged the board to keep its current framework to avoid misclassifying "legitimate independent contractors as employees." The journalist and author society lost a legal challenge to California's standard that it made it more difficult for employers to classify workers as contractors.

The prominence of gig worker issues in the public comments, which were due at the NLRB on Thursday, underscores the high stakes that employment classification has in the gig economy. The NLRB received about 20 briefs as of Thursday afternoon, including comments from the U.S. Justice Department, the U.S. Chamber of Commerce, and the AFL-CIO.

Many companies use independent contractors in part to avoid the expense and legal liability that comes with employing workers. But Uber, Lyft, Doordash Inc., and other app-based gig companies rely on them. Those firms spent $225 million on Proposition 22 to ensure their passenger and delivery drivers remained independent contractors under California law.

Workers deemed as employees under the National Labor Relations Act get unionization rights and other protections for group action to improve the workplace. A worker's classification under one employment law doesn't necessarily determine what it would be under another, such as laws governing wages, anti-discrimination protections, or eligibility for workers' compensation.

The NLRB in December invited public briefing on potentially overruling its 2019 decision in *SuperShuttle DFW* , which elevated the concept of "entrepreneurial opportunity" when deciding if workers are independent contractors under the NLRA. The board also asked about returning to its prior standard from its 2014 ruling in *FedEx Home Delivery* .

The NLRB's then-Republican majority said in *SuperShuttle* that the Obama-era board underplayed the importance of entrepreneurial opportunity when it emphasized workers' economic dependency on companies in the *FedEx* ruling.

Lauren McFerran, who heads the board's current Democratic majority, dissented in *SuperShuttle*. The GOP majority approach's could "be called the 'economic unrealities' test" for its failure to consider the realities of working relationships, she said.

Uber Driver Status

The NLRB's legal arm applied the *SuperShuttle* decision in a 2019 memo that said Uber drivers are independent contractors. The memo said the company's business model "affords drivers significant entrepreneurial opportunity."

In a comment filed with the NLRB this week, the left-leaning Economic Policy Institute criticized the Uber advice memo. Those drivers don't have actual entrepreneurial opportunity because they can't develop markets, set prices, or determine routes, EPI said.

The U.S. Justice Department's Antitrust Division cited the changes to the labor market driven in part by the rise of the gig economy, saying in its brief that it "supports clarifying the NLRB's definition of 'employee.'"

Although the division didn't advocate for a specific legal standard, it said the NLRB could protect workers and labor market competition "by adopting a sound, up-to-date, consistent approach to worker classification that adequately protects workers' rights to organize."

But the Marketplace Industry Association, which represents technology companies that operate online marketplaces, called on the NLRB to stick with *SuperShuttle*. The current standard can survive judicial review, while the test from *FedEx* cannot, the group said in its brief.

Opera Case

The NLRB is considering its test for employment classification in a case involving a unionization bid by makeup artists and hair stylists at the Atlanta Opera. The board is reviewing a regional director's decision that the workers are employees under the NLRA.

The AFL-CIO told the board that the Atlanta Opera case is the wrong vehicle to reconsider the legal standard from *SuperShuttle*. Evidence strongly supports that the opera workers are employees—regardless of how entrepreneurial opportunity might affect the classification of different workers—so the NLRB should summarily uphold the regional director's ruling, the labor federation said in its brief.

Other briefs from organized labor endorsed using the Atlanta Opera decision to change the board's classification test. The United Food and Commercial Workers International Union, Service Employees International Union, and a Hawaii-based affiliate of the United Brotherhood of Carpenters and Joiners of America asked the board to return to the standard from its *FedEx* ruling.

The Chamber of Commerce, however, said in its comments that overturning *SuperShuttle* after just three years would boost uncertainty and undermine the NLRB's credibility.

"The Board's *SuperShuttle* decision properly restored its independent-contractor standard to accord not only with decades of precedent, but with controlling common law principles, congressional intent, and the Act itself," the Chamber said. "It should adhere to that standard."

The case is The Atlanta Opera , N.L.R.B., Case 10-RC-276292, briefs due 2/10/22 .

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Documents

NLRB docket