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DOJ Antitrust Division Weighs in on Worker Classification Debate at the National Labor Relations Board

The Antitrust Division's Amicus Brief Explains That Uncertainty Over the Test for Distinguishing Employees From Independent Contractors Is Likely to Increase Litigation and Cause Competitive Harm

SUMMARY

The National Labor Relations Board is currently considering a policy change that could affect the collective bargaining rights of millions of American workers, including those in the emerging “gig economy.” Late last year, the Board called for public comments on whether to overrule a 2019 decision that established its current test for distinguishing employees from independent contractors. The Board’s ongoing worker classification debate has generated substantial interest among those waiting to see how it will alter collective bargaining rights. Last week, the Antitrust Division filed an amicus brief in the case bringing a separate issue into focus: the consequences of this debate for labor market competition. According to the Division, “ambiguity and underinclusiveness” in the Board’s definition of “employee” will expose workers and employers to increased liability under the antitrust laws. The Division also argues that over-classifying workers as independent contractors will harm competition. As the Division’s brief demonstrates, the current debate at the Board could have significant ramifications for antitrust enforcement in labor markets, a topic that has generated considerable interest from regulators and private litigants in recent years.

THE NLRB’S WORKER CLASSIFICATION DEBATE

Under the National Labor Relations Act, only “employees” are afforded collective bargaining rights.¹ The statute defines “employees” to exclude “any individual having the status of an independent contractor.”² Many federal statutes draw a similar distinction, and the Supreme Court has long held that the test for

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classifying employees and independent contractors is derived from the common law of agency.³ For nearly a decade, the Board has fiercely debated how that common law test should be applied to workers who maintain some control over their hours, earnings, and activities on the job. This debate has garnered widespread attention because of its implications for many longstanding business models—taxi services, parcel delivery, makeup artists, etc.—and the growing “gig economy.” As the Board prepares to enter the fray once again,⁴ the Antitrust Division has filed a brief explaining the implications of the Board’s decision for labor market competition. According to the Division, a broad definition of “employee” will allow gig workers to bargain collectively without the fear of antitrust liability, while a narrower definition may expose workers to antitrust suits and harm competition.

A. THE *SUPERSHUTTLE* DECISION AND THE SIGNIFICANCE OF “ENTREPRENEURIAL OPPORTUNITIES” ON THE JOB

The question pending before the Board is whether to overrule its 2019 decision in *SuperShuttle DFW, Inc.*, which announced a major shift in the Board’s approach to classifying employees and independent contractors. *SuperShuttle*’s significance turns on its understanding of how a worker’s “entrepreneurial opportunities” fit into the common law test for evaluating whether a worker is an employee or an independent contractor. According to *SuperShuttle*, the existence of “entrepreneurial opportunit[ies] for gain or loss” while on the job—*e.g.*, the chance to buy your own supplies, set your own hours, or hire others to perform your work—is “a principle by which to evaluate the overall effect of the common-law factors.”⁵ If more of those opportunities are available, the worker is likely to be an independent contractor, and therefore ineligible for collective bargaining and other benefits provided by the NLRA.

In articulating this view of “entrepreneurial opportunity,” *SuperShuttle* expressly overruled the Board’s *FedEx Home Delivery* decision from only five years prior. That earlier decision, which held that FedEx delivery drivers were employees, afforded much less weight to a worker’s opportunities for gain and loss.⁶ It also made it harder for employers to prove that those opportunities were available to workers in a particular case.⁷

The weight given to “entrepreneurial opportunities” is critical to the gig economy. Many gig workers set their own hours, buy their own materials, and enjoy considerable freedom while at work. If the Board adheres to *SuperShuttle*, more of those workers will remain independent contractors under federal labor law. But if the Board departs from that standard, many will be able to collectively bargain on wages, benefits, and working conditions.

Dozens of amici have filed briefs in response to the Board’s call for public comments. Most address the impact of the *SuperShuttle* test on workers’ rights under the NLRA. Last week, the Antitrust Division offered its views on a distinct but important issue: the relevance of the worker classification debate to antitrust law.

B. THE ANTITRUST DIVISION BRIEF

The federal antitrust laws, which generally prohibit attempts by competitors (including employees) to coordinate on price, do not apply to collective bargaining. Under the Clayton Act and the Norris-LaGuardia Act, specific labor-related activities like picketing and boycotts are exempted from the antitrust laws.⁸ Courts have also recognized a broader non-statutory labor exemption, which protects from antitrust scrutiny any agreements that are the result of collective bargaining. As the Supreme Court explained in *Brown v. ProFootball, Inc.*, that implied immunity is necessary because “it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other *any . . .* competition-restricting agreements.”⁹ Antitrust immunity for collective action, however, extends only to the actions of employers and *employees*, and not to independent contractors. The upshot is that a narrower definition of “employee” under federal labor law means a broader range of conduct falls within the reach of the antitrust laws. That interplay is central to the Antitrust Division’s amicus brief.

To the Antitrust Division, a clear and expansive definition of “employee” under the NLRA is desirable for two reasons. *First*, the Division argues that “ambiguity and underinclusiveness” in the applicable test exposes workers and employers to unnecessary liability. As its brief explains, “independent contractors [have] traditionally been subject to antitrust scrutiny,” and courts have historically “construe[d] the labor exemptions [to the antitrust laws] narrowly.”¹⁰ Therefore, an imprecise definition of “employee” puts more workers at risk of antitrust liability if they coordinate together. It also puts employers at risk, as the antitrust laws may call into question a business’s attempt to fix the rates charged by its independent contractors. According to the Division, that uncertainty is only heightened by the fact that other regulators have adopted a definition of “employee” that is broader than *SuperShuttle*.¹¹ Notably, the Division’s support for a broad definition of “employee” here departs from its usual position that exemptions to the antitrust laws should be narrowly construed.¹²

Second, the Division’s brief argues that “misclassify[ing] workers as non-employees” may lead to competitive harm. The Division identifies three specific consequences of misclassification:

- (1) *Unlawful coordination among employers.* The Division warns that collusion is more likely to occur in labor markets than in product markets. If workers lack bargaining power because of misclassification, that could give employers greater leeway to coordinate on workers’ “terms of employment.”¹³
- (2) *One-sided contracts.* According to the Division, workers’ inability to bargain may lead to agreements that “further restrain competition in the labor market,” like “blanket non-competes” and “restrictions on employee information-sharing.” An under-inclusive definition of “employee” may produce a “self-reinforcing cycle,” whereby the inability to collectively bargain leads to more anticompetitive contracts.¹⁴

- (3) A “*race to the bottom*.” The Division argues that firms could gain an economic advantage by misclassifying their workers, “potentially enabling predatory schemes that may harm competition.” If the NLRB does not have the tools to effectively deter unfair misclassification, rivals may be forced to engage in similar practices to remain competitive.¹⁵

According to the Division, these harms are already occurring under the existing framework and will continue to grow without “intervention” by the Board.¹⁶

While the Division does not expressly ask the Board to overrule *SuperShuttle*, it argues that a broader definition of “employee” under the labor laws would be pro-competitive. In explaining this view, the Division places considerable emphasis on the evolving relationship between employers and workers in the modern economy: “The fundamental economic changes resulting from the erosion of traditional employment raise important questions not only for the NLRB, which is charged with protecting the right to organize, but also for the Division, which is charged with enforcing the antitrust laws.”¹⁷

ISSUES TO WATCH

It remains to be seen whether the Board will adhere to *SuperShuttle* or change course for the second time since 2019. Three issues are worth keeping an eye on as the Board moves towards a final decision.

1. Will the Board’s decision offer more clarity?

Even if the Board revisits *SuperShuttle*, it is not clear whether its decision would ultimately address the concerns raised by the Antitrust Division. The Division’s brief focuses largely on the costs of uncertainty, noting that an imprecise line between employees and independent contractors will invite litigation, increase costs, and cause confusion among competing regulators. But the Board’s test under *FedEx Home Delivery*—which rejected the notion that entrepreneurial opportunities could serve as an overarching framework for the analysis—was very fact-bound. If the Board overrules *SuperShuttle* and reverts to its earlier framework, it may not offer the guidance the Division asks for.

2. Will the Board’s decision last?

As the Board noted in both *FedEx Home Delivery* and *SuperShuttle*, the test for classifying workers stems from the law of agency and applies to many different federal statutes. The Supreme Court has frequently weighed in on how that test should be applied. In *National Mut. Ins. Co. v. Darden*, which involved the Employee Retirement Income Security Act (ERISA), the Supreme Court reversed a lower court that had departed from traditional agency principles and interpreted the term “employee” “in the light of the mischief to be corrected” by the statute.¹⁸ As the Court explained, “employee” has a settled meaning and is presumed to mean the same thing in each statute where it appears.¹⁹ If the Board attempts to address the Antitrust Division’s concerns about the modern economy when interpreting “employee” under the NLRA, it

may run into a similar objection. In that event, the outcome will likely depend on whether the Board can justify its change in the law as affirming, rather than ignoring, traditional agency law concepts.

3. Will the Board's decision affect antitrust enforcement?

The Division's brief notes that both the Department of Justice and the Federal Trade Commission have taken a recent interest in labor market competition.²⁰ In December 2021, the agencies held a joint workshop called "Making Competition Work: Promoting Competition in the Labor Market," where FTC Chair Lina Khan explained that the agency was reviewing its merger review process to account for effects on workers. Last fall, Chair Khan also sent a letter to Congress stating that the FTC and DOJ would consider "providing guidance to the courts" on how to apply the antitrust labor exemption to collective organizing by workers that "are classified as non-employees."²¹ This focus on labor competition is part of a larger effort by Biden administration antitrust regulators to expand their purview.²² According to the Division's brief, however, many competitive concerns raised by the DOJ and FTC could be addressed by collective bargaining. Therefore, it may be that action by the Board in either direction could alter antitrust enforcement priorities going forward.

If the Board broadens the definition of "employee" to include gig workers, that may foreclose the Division's ability to challenge collective action by those workers under the antitrust laws. But if the Board goes the other way and adheres to *SuperShuttle*, the Division would have broader authority to enforce the antitrust laws against workers and employers in the gig economy. Given the Division's concerns about the over-classification of workers as independent contractors, that would put the Division in the position of deciding whether to enforce the antitrust laws against parties it believes should be immune from liability. The Division's brief notes that it could "exercise its prosecutorial discretion not to pursue action against workers whose status as employees is unclear."²³ But if the Board holds that many workers are *clearly* independent contractors, that position may be more difficult to maintain.

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ENDNOTES

- 1 29 U.S.C. § 157.
- 2 29 U.S.C. § 152(3).
- 3 *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992).
- 4 The current case pending at the Board involves makeup artists and hairstylists at the Atlanta Opera House. See *Atlanta Opera, Inc.*, Case No. 10-RC-276292.
- 5 *SuperShuttle DFW, Inc.*, 367 NLRB No. 75, at 9 (2019). In overruling *FedEx Home Delivery*, the *SuperShuttle* decision adopted the reasoning of an earlier D.C. Circuit opinion, *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009).
- 6 *FedEx Home Delivery*, 361 NLRB 610 (2014).
- 7 *Id.* at 619.
- 8 *Brown v. Pro Football, Inc.*, 518 U.S. 231, 253 n.2 (1996) (Stevens, J. dissenting) (summarizing the statutory exemptions).
- 9 *Id.* at 237.
- 10 Brief of the United States Department of Justice as *Amicus Curiae* in Support of Neither Party at 4, *Atlanta Opera Inc.*, 10-RC-276292 (NLRB Feb. 10, 2022) (DOJ Amicus).
- 11 *Id.* at 5-6.
- 12 See, e.g., Statement of Interest on Behalf of The United States of America at 3, *Sitts v. Dairy Farmers of America, Inc.*, No. 16-cv-287 (D. Vt. July 27, 2020), ECF No. 285; Statement of Assistant Att’y Gen. Christine A. Varney, Remarks as Prepared for the AAL’s 11th Annual Conference: Antitrust Immunities 15 (June 24, 2010). The Division’s brief argues that the tendency of courts to narrowly construe antitrust exemptions (an interpretive principle the Division supports) is one reason the Board should adopt a clear and broad definition of “employee” in *Atlanta Opera*. DOJ Amicus, *supra* note 10, at 4.
- 13 DOJ Amicus, *supra* note 10, at 6.
- 14 *Id.* at 6-7.
- 15 *Id.* at 7.
- 16 *Id.* at 9.
- 17 *Id.* at 1.
- 18 503 U.S. at 324.
- 19 *Id.* at 322-23.
- 20 See U.S. Department of Justice and Federal Trade Commission, “Making Competition Work” (Dec. 6-7, 2021), <https://www.ftc.gov/news-events/events-calendar/making-competition-work-promoting-competition-labor-markets>.
- 21 Letter of Lina M. Khan, Chair, Federal Trade Commission to the House Subcommittee on Antitrust, Commercial, and Administrative Law 2 (Sept. 28, 2021).
- 22 See, e.g., Remarks of Chair Lina M. Khan on the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (July 1, 2021).
- 23 DOJ Amicus, *supra* note 10, at 5.

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