

RECENT DEVELOPMENTS UNDER THE NATIONAL LABOR RELATIONS ACT

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Change in Independent Contractor Analysis

- In 2014, the NLRB limited who could be considered an independent contractor, rather than an employee, for purposes of NLRA coverage.
 - Focus hinged on actual entrepreneurial opportunity and whether the contractor was rendering services as part of an independent business.
FedEx Home Delivery, 361 NLRB No. 55 (2014)
- The NLRB abandoned the *FedEx Home Delivery* test in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019).
 - NLRB returns to the common-law factors test set forth in the Restatement (Second) of Agency.
 - “The Board may evaluate the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate.”



Managerial Employees Exclusion

- Managers are not covered by the NLRA.
- In *University of Southern California v. NLRB*, 918 F.3d 126 (D.C. Cir. 2019), the court unanimously rejected the NLRB’s “subgroup majority status role” established in *Pacific Lutheran University*, 361 NLRB No. 157 (2014).
- Under *Pacific Lutheran*, the Board would not consider a faculty subgroup seeking to organize to be managers unless the subgroup had majority control of any committee that made managerial decisions.
- Under the current precedent, the essential determination is whether the subgroup “is structurally included within a collegial faculty body to which the university has delegated managerial authority.”

New NLRB Analysis of Work Rules

- The 2015 General Counsel Memo governing work rules has been withdrawn.
- The Board is taking a less aggressive stance on policing employer work rules.
- In *Boeing Company*, 365 NLRB No. 154 (2017), the Board attempted to strike a balance between employees’ Section 7 rights and an employer’s right to maintain discipline and productivity in the workplace.
- June 6, 2018, NLRB GC Robb issued a Guidance Memorandum detailing how Regional Offices are to interpret workplace rules.
- Work rules will now be categorized into:
 - (1) rules that are generally lawful to maintain,
 - (2) rules warranting individualized scrutiny, and
 - (3) rules that are plainly unlawful to maintain.

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