



FOR IMMEDIATE RELEASE

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WLF Urges NLRB Not To Upend Test For Deciding Independent-Contractor Status

(The Atlanta Opera, Inc.)

“The independent-contractor model is a crucial catalyst for the nation’s economy.”
—Cory Andrews, WLF General Counsel & Vice President of Litigation

WASHINGTON, DC—Washington Legal Foundation (WLF) today filed an *amicus curiae* brief asking the National Labor Relations Board (NLRB) not to overhaul the test for whether a worker qualifies as an independent contractor.

The National Labor Relations Act makes it “an unfair practice for an employer . . . to refuse to bargain collectively with the representative of his employees.” 29 U.S.C. § 158(a)(5). The term “employee,” under Section 2(3) of the Act, “shall not include . . . any individual having the status of independent contractor.” 29 U.S.C. § 152(3). For more than 50 years, the Supreme Court has held that the “obvious purpose” of Section 2(3) “was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.” Congress enshrined that common-law test in the 1947 Taft-Hartley amendments.

The NLRB now proposes to nullify those amendments and the Supreme Court’s decision by replacing the common-law test with a new, more expansive test. But as the D.C. Circuit recognized more than a decade ago in vacating the Board’s first attempt to impose a new test, a key part of the common-law agency test is “whether the putative independent contractors have ‘significant entrepreneurial opportunity for gain or loss.’” The Board is considering eradicating that factor.

In its brief, WLF argues that the Board can be sure that, if challenged in court, an erratic, novel construction of the NLRA would receive little or no deference. WLF also argues that the current test, by allowing individuals to provide services for others while maintaining independent control over their own work, gives firms that contract with such individuals an increased flexibility that promotes efficiency and spurs productivity. The NLRB’s latest action threatens to erode that very efficiency and productivity.

Celebrating its 45th year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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