NLRB Overturns Obama-Era Independent Contractor Test

Written by Jonathan A. Keselenko, Christopher Feudo, Erin Olesen

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On January 25, 2019, the National Labor Relations Board issued a decision revising the test for independent contractor status under federal labor law. In *SuperShuttle DFW, Inc.*, the Board ruled that the test for determining whether a worker is an independent contractor under the National Labor Relations Act (the "Act") should focus on the degree of "entrepreneurial opportunity" available to the worker, rather than the worker's economic dependency on those they serve or the degree of control exercised over the work. As a result, workers who have the ability to choose their assignments and manage costs will more likely be considered independent contractors and thus not employees entitled to the protections of the Act.

For decades, courts and the Board have used a common law test to determine whether a worker is an employee or an independent contractor. The test evaluates ten factors, none of which are dispositive, including the extent of control exercised by the entity paying for the work, the skill required to do the work, the method of payment, and the length of time worked. In 2014, the Obama-era Board modified the application of this test in *FedEx Home Delivery*, emphasizing the degree of control exercised over the work and the worker's economic dependency on the supposed employer. In the *FedEx* case, the Board applied this analysis to delivery drivers operating out of a FedEx terminal who had opportunities, which they rarely if ever exercised, to sell their routes for a nominal profit and to operate multiple routes. The Board held that these "theoretical" – as opposed to "actual" – entrepreneurial opportunities did not deserve weight and thus could not overcome evidence that the drivers were not rendering services as part of an independent business.

In *SuperShuttle*, the Board overturned the *FedEx* case, holding that entrepreneurial opportunity – both potential and realized – deserved far more consideration than the *FedEx* analysis had provided. The Board stated that it will continue to apply the common law ten factor test, but noted that the factors should be assessed in light of the entrepreneurial opportunity available to workers.

The *SuperShuttle* case itself concerned airport shuttle franchisees who purchased their own vans, bid on assignments, and paid a consistent franchise fee to SuperShuttle regardless of their earnings. The Board reasoned that because the drivers had significant opportunity to gain or lose based on the choices they made in running their business –particularly in bidding on jobs – they were independent contractors and not employees.

The *SuperShuttle* case is expected to have an important impact for employers and workers. When workers deemed employees engage in union organizing or other efforts to change or protest the terms and conditions of their work, they are protected from retaliation and their employer must both recognize and bargain with any union representative they decide to elect. Companies engaging with independent contractors do not have any of these obligations, and can bargain directly with the independent contractors or terminate the relationship regardless of any associations the independent contractors join or actions they take. The *SuperShuttle* case will give companies more flexibility to adopt business models that rely extensively on franchises or contract labor, such as ride-sharing apps, with less concern about potential unionization among their workers.

Of course, employers should keep in mind that the *SuperShuttle* decision only addresses the test applicable to federal labor law. The test for determining independent contractor status differs under other federal statutes as well as various state laws. As we previously reported, the Department of Labor withdrew the more expansive Obama-era test for employee status under the Fair Labor Standards Act in June 2017. You can read that alert here.

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