

Electronic Alert

Volume 22, Issue 2

February 5, 2019

NLRB Reinstates Longstanding Independent Contractor Standard

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Companies using independent contractors or franchisees take note – the National Labor Relations Board (NLRB) recently overruled its 2014 *FedEx* decision, reinstating its longstanding independent contractor standard in *SuperShuttle DFW, Inc.*

What This Means for Employers

Unlike employees, independent contractors are not covered by the National Labor Relations Act (NLRA), which means that they may not take collective action by being organized and represented by a union. The *SuperShuttle* decision reinstated an analytical framework that is more favorable to employers. However, each work relationship must still be assessed independently using the common-law factors to determine whether it is characterized more by employer control (employer-employee), or by significant autonomy and entrepreneurial opportunity for economic gain (independent contractor).

Employers should also be aware that this decision only applies to the analysis of whether a worker is an employee or independent contractor under the NLRA, not under other state or federal employment laws. Therefore, it is possible that some workers may be considered independent contractors under the NLRA, but employees under some state or federal employment laws.

The Common-Law Independent Contractor Standard

The common-law agency test takes into account the following factors to determine whether an individual is an employee or independent contractor, none of which is determinative:

- The extent of control which, by the agreement, the master may exercise over the details of the work
- Whether or not the one employed is engaged in a distinct occupation or business
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision
- The skill required in the particular occupation
- Whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work
- The length of time for which the person is employed
- The method of payment, whether by the time or by the job
- Whether or not the work is part of the regular business of the employer
- Whether or not the parties believe they are creating the relation of master and servant
- Whether the principal is or is not in business

The Board's *SuperShuttle* Decision

The *SuperShuttle* case dealt with whether airport shuttle van drivers at the Dallas-Fort Worth Airport (called “franchisees” by SuperShuttle) were independent contractors or employees under the NLRA. The drivers in question entered a franchise agreement with SuperShuttle in which they paid an initial fee and a flat weekly fee for the use of the SuperShuttle brand. The drivers owned their own vehicles, chose when they drove by accepting rides from SuperShuttle dispatch, and kept 100% of the ride fares they collected.

In applying the common-law independent contractor standard to the SuperShuttle drivers, the Board announced that it was overruling the *FedEx* case, which severely limited the significance of a worker’s entrepreneurial opportunity for economic gain. The Board observed that entrepreneurial opportunity has “always been at the core of the common-law test,” and that examining the common-law factors through that lens was consistent with its longstanding approach prior to *FedEx*.

The Board found that the SuperShuttle drivers were independent contractors under the NLRA because the following factors demonstrated that the drivers had significant entrepreneurial opportunity for economic gain and control over their work: (1) the drivers owned their vans, (2) received all of the proceeds from the fares they collected, (3) had full control over their work schedules and working conditions, and (4) the parties had previously agreed upon their status as independent contractors.

For questions on whether your workers should be treated as independent contractors or employees, please contact Trevor Caldwell at tcaldwell@barran.com or (503) 276-2117, or Kyle Abraham at kabraham@barran.com or (503) 276-2132.