Companies using independent contractors score big following NLRB ruling

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In a ruling with significance for companies using independent contractors, the National Labor Relations Board (NLRB) returned to its long-standing traditional common law test (see SuperShuttle DFW, Inc.). The business-friendly decision overruled the highly debated 2014 FedEx Home Delivery case, which made it harder for individuals to be classified as independent contractors. The current NLRB majority found that the 2014 ruling had "impermissibly altered the [b]oard's traditional common-law test" by "severely limiting" the significance of workers' "entrepreneurial opportunity."

Background and return to the traditional test

The National Labor Relations Act (NLRA) protects an employee's right to unionize and collectively bargain over terms and conditions of employment. The NLRA, like many other employment laws, extends only to employees and does not cover independent contractors. For many years, the NLRB used the traditional common-law test for determining independent contractor status. Under the common-law test, the board reviewed a number of factors related to the degree of autonomy and control an individual has when providing labor or services and the structure of the business relationship.

In 2014's FedEx Home Delivery case, the board took a different approach by adding "rendering services as part of an independent business" as a new factor and downplaying the significance of entrepreneurial opportunity. Under the 2014 standard, the board focused on whether the individual was economically dependent on the alleged employer rather than on whether they had entrepreneurial opportunity.

In the SuperShuttle DFW, Inc. decision, decided on January 25, 2019, the board restored the traditional common-law test and advised that it would evaluate the common-law factors through the prism of entrepreneurial opportunity. The common-law factors, the board explained, are not added up to see how many favor independent contractor or employee status. Rather, the board is to perform a qualitative assessment of the facts for each case. Applying the traditional standard to the SuperShuttle drivers, the board found that drivers were properly categorized as independent contractors and not covered by the NLRA. The board noted that the drivers made a significant investment and demonstrated autonomy in their businesses by purchasing or leasing vans, paying fees to SuperShuttle regardless of the fares they earned, and choosing when and where to drive.

Reminders for employers

Misclassification of employees as independent contractors can lead to back wages, taxes, steep fines and penalties from several state and federal agencies. While the recent NLRB decision has restored the traditional common-law factors for evaluating independent contractor status under the NLRA, there is not a bright-line test to determine if a worker is an independent contractor or employee under any standard. Positions should be evaluated with counsel on a case-by-case basis to avoid misclassification.

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