Legal Update Article

Labor Board Returns to Pre-2014 Test for Determining if Individual Is an Independent Contractor

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February 15, 2019

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The National Labor Relations Board (NLRB) has held that in deciding whether an individual is an independent contractor or an employee, it will return to focusing on the extent to which the arrangement between the ostensible employer and the alleged employee provided an "entrepreneurial opportunity" to the individual, overruling a 2014 Board decision. *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (Jan. 25, 2019).

Designation of an individual as an employee or independent contractor can have important consequences because the National Labor Relations Act (NLRA) does not cover independent contractors.

Common-Law Agency Test

In evaluating independent contractor/employee status, the Board traditionally has applied the common-law agency test, consisting of 10 factors:

1. Who controls the details of the work
2. Is the work performed a distinct occupation or business
3. Is the work being performed typically done under the supervision of an employer
4. Does the work require special skill
5. Who supplies the tools or equipment
6. The length of the engagement
7. Is compensation based on time spent or completion of a job
8. Is the employer in the business of work that is performed
9. Do the parties believe they have created an independent contractor relationship
10. Whether the employer is or is not in business

According to the Board, over time, it took into account in its analysis entrepreneurial opportunity for gain or loss by the individual in question. Entrepreneurial opportunity did not become a separate factor in the Board's analysis; rather the Board used it to evaluate the overall significance of the 10 agency factors. Generally, according to the Board, common-law factors that support a worker's entrepreneurial opportunity indicate independent-contractor status; factors that support employer control indicate employee status. The relative significance of entrepreneurial opportunity depends on the specific facts of each case, the Board explained.

Entrepreneurial Opportunity Factor

The Board continued to apply the 10 common-law factors in *FedEx Home Delivery,* 361 NLRB 610 (2014), but it held that entrepreneurial opportunity would be a factor in its analysis only as a component of the second factor (is the work performed a distinct occupation or business), not overall. In other words, in considering whether an individual is engaged in a distinct occupation or business, the Board would consider the extent to which there was a

risk to lose money or an opportunity to increase compensation based on the individual's decisions and effort.

The *FedEx* Board wrote that it wanted "to more clearly define the analytical significance of a putative independent contractor's entrepreneurial opportunity for gain or loss." It held that it would give weight to actual, not merely theoretical, entrepreneurial opportunity, and that it would necessarily evaluate the constraints imposed by a company on an individual's ability to pursue this opportunity.

In addition, the Board held that it would evaluate (in weighing all relevant common-law factors) whether the evidence tended to show that the putative independent contractor, in fact, is rendering services as part of an independent business. The Board held that this factor would encompass not only whether the putative contractor has a significant entrepreneurial opportunity, but also whether the putative contractor has (a) a realistic ability to work for other companies; (b) a proprietary or ownership interest in his work; and (c) control over important business decisions, such as the scheduling of performance, the hiring, selection, and assignment of employees, the pur¬chase of equipment, and the commitment of capital.

SuperShuttle

In *SuperShuttle,* the Amalgamated Transit Workers Union petitioned the NLRB to represent a unit of SuperShuttle drivers. SuperShuttle sought to dismiss the petition on the grounds that the drivers were independent contractors, not employees.

Siding with SuperShuttle and dismissing the petition, the Board overruled *FedEx Home Delivery* and returned to the "entrepreneurial opportunity" component as the critical part of the independent contractor/employee analysis.

The Board described the entrepreneurial opportunity inquiry as a prominent consideration in weighing all of the factors:

> ... the Board's independent-contractor analysis is qualitative, rather than strictly quantitative; thus, the Board does not merely count up the common-law factors that favor independent contractor status to see if they outnumber the factors that favor employee status, but instead it must make a qualitative evaluation of those factors based on the particular factual circumstances of each case. (Citation omitted.) Where a qualitative evaluation of common law factors shows significant opportunity for economic gain (and, concomitantly, significant risk of loss), the Board is likely to find an independent contractor.
>
> Our dissenting colleague further claims that our approach is inconsistent with the Supreme Court's decision in *United Insurance.* To the contrary, we will continue to adhere, as we must, to the Court's decision, considering all of the common-law factors in the total factual context of each case and treating no one factor (or the principle of entrepreneurial opportunity) as decisive. And where the common-law factors, considered together, demonstrate that the workers in question are afforded significant entrepreneurial opportunity, we will likely find independent-contractor status.

The Board found that some of the factors supported a finding of employee status while others supported independent contractor status. However, because the following facts

demonstrated significant entrepreneurial opportunity, the Board concluded the drivers were independent contractors:

- Drivers supplied their own vans at a cost of $30,000 or more and thus had money at risk.
- Drivers paid a fixed monthly fee to SuperShuttle, not a fluctuating fee based on revenue.
- SuperShuttle notified drivers of passenger transport requests and the drivers were free to take the fare or decline it.
- Drivers were free to work whenever they wanted to. There were no set hours and no required number of hours.
- Drivers retained all of the revenue from the fares they earned.
- Drivers could hire other drivers, and thus increase the time their van would be in operation and generating revenue without any increase charge from SuperShuttle.

Takeaways

Businesses that wish to structure independent contractor relationships while pursuing a common business purpose with those independent contractors will look to *SuperShuttle* for guidance. However, there were many facts in that case weighing in favor of employee status. For example, SuperShuttle and the drivers were part of an organization that generated revenue by providing transportation services. The drivers wore uniforms, their vans displayed the same SuperShuttle logo, they had the same required training, and their services were marketed by SuperShuttle. Because of the Board's decision to emphasize the drivers' entrepreneurial opportunity, those indicia of employee status took on less significance than they would have before *SuperShuttle.*

Please contact Jackson Lewis with any questions about this case or the NLRB.