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Legal Sidebar

NLRB Adopts New Standard for Identifying Covered Employees

Jon O. Shimabukuro
Legislative Attorney

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The classification of workers as employees rather than independent contractors is critical for purposes of most federal labor and employment laws. In general, the rights and protections afforded by these laws are available only to employees and not independent contractors. A majority of the National Labor Relations Board (NLRB or Board) recently concluded that a group of drivers who provide services for the shared-ride van company SuperShuttle are independent contractors and not employees for purposes of the National Labor Relations Act (NLRA), the federal law that provides collective bargaining rights to most workers in the private sector. As a result of the Board's determination, SuperShuttle will not be obligated to negotiate with the drivers over employment-related subjects like wages and benefits.

Notably, in reaching its decision in *SuperShuttle DFW*, the Board majority emphasized the drivers' entrepreneurial opportunity for gain or loss, a factor the agency previously identified as only one of several that should be considered when evaluating employee status. Contending that entrepreneurial opportunity is a "prism" through which it would now examine all of the common law factors that have traditionally been considered when making employee status decisions, the Board overruled a prior standard that it adopted in 2014. This new approach has been criticized by some because it could deny a growing number of workers, such as those providing services in the gig economy, collective bargaining rights. Concern over how workers are classified for purposes of the NLRA prompted the introduction of legislation in the 115th Congress that would have made it more difficult to designate workers as independent contractors. The Protecting Workers' Freedom to Organize Act, for example, would have amended the NLRA to establish a presumption of employee status unless specified criteria were satisfied. In light of *SuperShuttle DFW*, it may be possible that similar measures will be introduced in the 116th Congress.

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Employees v. Independent Contractors

Under section 2(3) of the NLRA, the term "employee" is defined to exclude "any individual having the status of an independent contractor[.]" To determine whether a worker is an employee or independent contractor, the NLRB has applied a common law agency test that examines various factors, including the control exercised by a company over the worker, whether the worker is engaged in a distinct occupation or business, and the level of skill required by the worker to provide services. The Board has indicated that no one factor is determinative, and that the relationship between a company and an individual should be evaluated in its entirety. In *NLRB v. United Insurance Company of America*, a 1968 case involving the employment classification of a group of insurance workers, the U.S. Supreme Court further observed:

> [T]here is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.

The party asserting an individual's classification as an independent contractor has the burden of establishing that worker status.

In 2014, applying the common law agency test to a group of FedEx Home Delivery drivers, a majority of the Board indicated that it would also consider whether an alleged independent contractor has an actual entrepreneurial opportunity for gain or loss. While the Board acknowledged its past consideration of a worker's entrepreneurial opportunity, it attempted in *FedEx Home Delivery* to "more clearly define the analytical significance" of this factor. In *FedEx Home Delivery*, the Board explained that it would give weight to only actual and not theoretical entrepreneurial opportunity, and that any constraints imposed by a company on an individual's ability to pursue such an opportunity would be considered.

Applying the common law agency test to the FedEx drivers, the Board concluded that they had little entrepreneurial opportunity for gain or loss because the company exercised significant control over the drivers' ability to sell their delivery routes. The Board also noted that the drivers' work commitment to the company made it difficult for them to pursue other outside business activities. In addition to having little entrepreneurial opportunity, it was determined that the drivers satisfied most of the common law factors for finding them to be employees and not independent contractors. For example, the Board found that FedEx exercised pervasive control over the drivers' day-to-day work, the drivers performed duties that were a regular part of FedEx's business, and no special skills were required for the drivers to perform their duties.

In *SuperShuttle DFW*, a majority of the Board criticized the approach taken in *FedEx Home Delivery*. The majority contended that the 2014 standard focused too heavily on economic dependency and a company's control over workers, minimizing consideration of entrepreneurial opportunity: "Large corporations such as FedEx or SuperShuttle will always be able to set terms of engagement . . . but this fact does not necessarily make the owners of the contractor business the corporation's employees." The majority indicated that employee status determinations should continue to require consideration of the various common law factors, but emphasized that a worker should be deemed an independent contractor when a qualitative evaluation of the factors demonstrate an opportunity for economic gain or loss. According to the *SuperShuttle DFW* majority, entrepreneurial opportunity will "help evaluate the overall significance of the [common law] agency factors."

Applying its new standard, the majority concluded that the SuperShuttle drivers were independent contractors and not employees. Citing the drivers' ability to work as much as they choose, their discretion in choosing assignments, and their entitlement to the money earned from their chosen assignments, the majority maintained that the drivers have a "significant opportunity for economic gain and significant risk

of loss." Moreover, the majority contended that these factors were not outweighed by any countervailing factors that might support the conclusion that the drivers were SuperShuttle employees.

In a dissenting opinion, the last remaining NLRB member to be appointed by President Obama criticized the standard adopted by the majority in *SuperShuttle DFW*. The dissent maintained that the standard's focus on entrepreneurial opportunity was inconsistent with how the common law agency test was meant to be conducted. The dissent contended that by emphasizing entrepreneurial opportunity, the new standard applied the kind of "shorthand formula" that was criticized by the Court in *United Insurance*. Even when the drivers' entrepreneurial opportunity was considered, the dissent argued that such opportunity was "minimal at best." The dissent noted that the fares charged by the drivers are fixed and cannot be adjusted. In addition, the drivers are prohibited from working for competing transportation companies. Ultimately, the dissent observed, SuperShuttle "creates, controls, and constrains that 'opportunity.'"

A Presumption of Employee Status?

Critics of the new employee classification standard contend that it will likely deny the NLRA's protections to a greater number of workers. That view may prompt the reintroduction of legislation that would presume an individual's status as an employee unless specified criteria are satisfied. Under four bills introduced in the 115th Congress – the Protecting Workers' Freedom to Organize Act (S. 2069), the Workplace Action for a Growing Economy Act (S. 2143/H.R. 4548), the Workplace Democracy Act (S. 2810/H.R. 5728), and the Workers' Freedom to Negotiate Act (S. 3064/H.R. 6080) – an individual performing any service for a company would have been presumed to not have the status of an independent contractor unless the following factors were satisfied:

> (1) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;
>
> (2) the service is performed outside the usual course of the business of the employer; and
>
> (3) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

Supporters of this kind of approach to employee classification contend that it would deter misclassification and ensure that workers are not deprived of their rights. Organizations like the U.S. Chamber of Commerce have criticized the approach, however, as simply an effort to increase union membership. Earlier this year, the Bureau of Labor Statistics reported that the 2018 union membership rate for private-sector employees was 6.4 percent. To date, legislation that would presume employee status for purposes of coverage under the NLRA has not been introduced in the 116th Congress.