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Recent Developments Under the National Labor Relations Act

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I. NATIONAL LABOR RELATIONS ACT UPDATE- WHO IS COVERED?

A. Independent Contractors

On January 25, 2019, the NLRB issued its *SuperShuttle* decision, which impacts the way the agency differentiates between employees and independent contractors, expressly overruling *FedEx Home Delivery*, 361 NLRB 610 (2014) (*FedEx*), enf. denied, 849 F.3d 1123 (D.C. Cir. 2017 (*FedEx II*). *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019). The Board's ruling in *SuperShuttle* has great implications for a wide range of businesses that rely on independent contractors, rather than direct employees.

The issue before the Board in *SuperShuttle* was whether franchisees who operate shared-ride van services for SuperShuttle Dallas-Fort Worth are employees covered under Section 2(3) of the NLRA, or independent contractors who are excluded from coverage. The Acting Regional Director had issued a Decision and Order in which she dismissed the representation petition at issue because she found that the franchisees in the petitioned-for bargaining unit were independent contractors, not statutory employees, by applying the Board's traditional common-law agency analysis. 367 NLRB No. 75, slip op. at 1. The Board granted the union's request for review of the decision on November 1, 2010.

Section 2(3) of the NLRA excludes from the definition of a covered "employee" "any individual having the status of an independent contractor." 29 U.S.C. 152(3). The party asserting independent contractor status bears the burden of proof on the issue. 367 NLRB No. 75, slip op. at 1. The Board applies the common-law agency test to determine whether a particular worker is an employee or an independent contractor. *Id*., citing *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968). This inquiry involves applying non-exhaustive list of factors set forth in the Restatement (Second) of Agency 220 (1958):

(a) The extent of control which, by the agreement, the master may exercise over the details of the work.

(b) Whether or not the one employed is engaged in a distinct occupation or business.

(c) 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.

(d) The skill required in the particular occupation.

(e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.

(f) The length of time for which the person is employed.

(g) The method of payment, whether by the time or by the job.

(h) Whether or not the work is part of the regular business of the employer.

(i) Whether or not the parties believe they are creating the relation of master and servant.

(j) Whether the principal is or is not in business.

367 NLRB No. 75, slip op. at 1. The total factual context must be assessed, and no one factor is decisive. *Id*., citing *United Insurance*, 390 U.S. at 258.

In the 50 years since *United Insurance*, the Board and courts have refined the proper application of the common law factors to the independent contractor analysis. *Id*. In another case involving Fed Ex Home Delivery, the D.C. Circuit Court of Appeals noted that the Board had "shifted the emphasis from control to whether putative independent contractors have significant entrepreneurial opportunity for gain or loss." 367 NLRB No. 75, slip op. at 2, citing *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (citations omitted). Entrepreneurial opportunity is not an individual factor, but, like employer control, is a principle to help evaluate the overall significance of the agency factors. *Id*. In general, factors that indicate control indicate employee status, while factors supporting entrepreneurial opportunity indicate independent contractor status. *Id*.

In 2014, the Board issued its *FedEx* decision, in which the Board majority rejected the significance of entrepreneurial opportunity and held that it would give weight to actual, rather than theoretical, entrepreneurial opportunity; that it would necessarily evaluate the constraints imposed by a company on an individual's ability to pursue the opportunity; and that it would evaluate whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business, in the context of weighing the relevant common law factors. 367 NLRB No. 75, slip op. at 2 The latter factor "would encompass not only whether the putative contractor has a significant entrepreneurial opportunity, but also whether the putative contractor (a) has a realistic ability to work for other companies; (b) has a proprietary or ownership interest in his work; and (c) has control over important business decisions, such as the scheduling of performance, the hiring selection, and assignment of employees, the purchase of equipment, and the commitment of capital." *Id*. (footnote omitted). The D.C. Circuit Court of Appeals denied enforcement of the majority decision in *FedEx II*.

After an extensive review of the facts, the Board in *SuperShuttle* in a 3-1 decision overruled the Board's 2014 decision in *FedEx* and returned the test "to its traditional common-law roots." *Id*. at 8-12. It stated that the Board majority in *FedEx* had "impermissibly altered the Board's traditional common-law test for independent contractors by severely limiting the significance of entrepreneurial opportunity to the analysis." *Id*. at 11-12. Now, "consistent with Board precedent . . . the Board may evaluate the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate." *Id*. at 9 (footnote omitted).

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