BUCK

US

FYI®
For Your Information®

Celebrating 40 years of FYI®

NLRB Returns to Prior Independent Contractor Test

Volume 42

Issue 16

February 14, 2019

Authors
Nancy Vary, JD
Abe Dubin, JD

As the debate over worker classification continues, the NLRB recently decided to revert to the common-law independent contractor test it applied prior to 2014. In *SuperShuttle DFW, Inc.*, the board returned to its decades-old multi-factor test under which no one factor is decisive in determining a service provider's status. This business-friendly decision effectively broadens the definition of independent contractor for federal labor law purposes.

Background

Independent contractors — unlike employees — are not protected by the National Labor Relations Act (NLRA or Act). For purposes of the Act, an individual's classification dictates whether he or she may unionize or bring unfair labor practice charges. In making that classification, the National Labor Relations Board (NLRB or board) for years employed a common-law test that took into account a variety of factors, including what the parties intended and the level of control the company had over the individual's work.

> **Buck comment.** Proper classification of an individual as an employee or as an independent contractor is also significant under tax, workers' compensation, discrimination, leave and unemployment laws.

In 2014, the Obama board made classification as an independent contractor more difficult to achieve. In *FedEx Home Delivery*, the board added a new factor to the independent contractor analysis for purposes of the NLRA — whether the individual rendered services "as part of an independent business." Emphasizing economic realities, the board severely limited the significance of entrepreneurial opportunity for gain or loss by making it merely one aspect of that factor. Other factors the board considered included whether the individual had a realistic ability to work for other companies, a proprietary or ownership interest in his or her work, and control over important business decisions (such as work scheduling, hiring, equipment purchase, and capital commitment).

NLRB returns to common-law standard

In its January 25 *SuperShuttle DFW Inc.* decision, the board overruled *FedEx* and broadened the standard for who is considered an independent contractor under the NLRA. The issue arose when Amalgamated Transit Union, Local 1338 sought to represent franchisees and relief drivers who operated shared-ride vans for SuperShuttle Dallas-Fort Worth.

Before 2005, SuperShuttle DFW designated drivers as employees. In 2005, SuperShuttle switched to a franchise model, and required drivers to sign a one-year franchise agreement that characterizes them as nonemployee franchisees who operate independent businesses. When the drivers sought to unionize, SuperShuttle argued they were ineligible because they were independent contractors. The Acting Regional Director dismissed the union's representation petition, concluding that the franchisees in the petitioned-for bargaining unit were independent contractors — not statutory employees. The union filed a request for review.

On review, the board found that SuperShuttle DFW drivers who transported passengers to and from Dallas-Fort Worth and Dallas Love Field airports supplied their own vans, paid franchise fees, controlled their own schedules, operated with minimal supervision, could accept or decline any bid, and kept all fares they received from riders. In *SuperShuttle DFW Inc.*, the board said that these factors indicate an independent contractor status. In reaching that conclusion, it relied on traditional common-law factors including:

- The type of relationship the parties believe they are creating
- The length of time the person is employed
- Who supplies the tools and place of work
- The method of payment (time worked or by the job)
- The agreed-to extent of control the company may exercise over the details of the work
- Whether the work is usually done under the employer's direction or by a specialist without supervision.

By contrast, many states use the ABC test

More than 20 states use a three-factor test to determine whether workers are employees or independent contractors for certain state law purposes. In contrast to the board's multifactor analysis in *SuperShuttle DFW Inc.,* the so-called "ABC test" presumes workers are employees unless the employer can establish:

- The worker is free from the control and direction of the hiring entity over the performance of work, both contractually and in fact.
- The worker performs tasks that are outside the hiring entity's usual business.
- The worker is customarily engaged in a trade, occupation or business of the same nature as the work performed for the hiring entity.

(See, for example, our May 23, 2018 *For Your Information* discussing the California Supreme Court's recent adoption of the ABC standard in *Dynamex Operations West v. Superior Court*.)

Concluding that the *FedEx* test did not simply refine — but fundamentally shifted — the common-law independent contractor analysis, the board confirmed that employers should only use common-law factors to determine who is an independent contractor, including whether the individual is engaged in a distinct occupation and the work is part of the employer's regular business. In making that determination, “all the incidents of the relationship must be assessed and weighed with no one factor being decisive.” Applying those common-law factors, the board concluded that SuperShuttle franchisees who transported passengers to and from Dallas-Fort Worth and Dallas Love Field airports were independent contractors.

In closing

The board’s return to the traditional common-law standard for determining independent contractor status may provide some relief to businesses that use contract labor. Because the board’s standard applies only to status determinations under the NLRA, some workers may be classified as independent contractors for that purpose but treated as employees under other federal or state laws that use different tests.

Produced by the Knowledge Resource Center

The Knowledge Resource Center is responsible for national multi-practice compliance consulting, analysis and publications, government relations, research, surveys, training, and knowledge management. For more information, please contact your account executive.