

Independent Contractor Status: A Return to the Traditional Common Law Test by the NLRB

In *Super Shuttle DFW, Inc.*, a National Labor Relations Board majority (3-1) overruled a 2014 Obama Board case, *FedEx Home Delivery*, and returned to the traditional common-law test for determining independent contractor status in the workplace. In its opinion, the Board majority stated that the *FedEx* decision misperceived the role of entrepreneurial opportunity for gain and loss, holding that entrepreneurial opportunity was merely one aspect of the relevant factors in determining independent contractor status; thus significantly limiting its importance. In overruling *FedEx*, the *Super Shuttle* majority found that the *FedEx* Board impermissibly altered the common law test and ignored longstanding precedent.

As the majority in *Super Shuttle* explained: “properly understood, entrepreneurial opportunity is not an independent common-law factor.” Rather “entrepreneurial opportunity, like employee control, is a principle by which to evaluate the overall effect of the common-law factors.” “Indeed, employer control and entrepreneurial opportunity are opposite sides of the same coin: in general, the more control, the less of the entrepreneurial initiative and vice versa.” Finally, the Board held that entrepreneurial opportunity should not be applied mechanically to each of the common-law factors. “The Board may evaluate common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such evaluation appropriate.”

The Board applied this new test to the franchise van operators in *Super Shuttle* who transported passengers to and from Dallas-Fort Worth International, and the majority found them to be independent contractors and not employees. In reaching this conclusion, the Board majority found that the franchisees own or lease their vans and have nearly complete control over their daily work schedules and working conditions. The franchisees pay a monthly fee to Super Shuttle and keep all the fees that they collect. These factors “provide franchisees with significant entrepreneurial opportunity and control over how much money to make,” thus tilting the analysis in favor of their being independent contractors.

This is a significant change in the direction of the law. Under the last administration, both the NLRB and the Department of Labor attempted to narrow the definitions of independent contractors. This decision moves in the opposite direction. While the Board majority in this case explains that they are simply returning to the traditional common-law test that the Board applied prior to *FedEx*, and Chairman John Ring describes the decision in terms of “clarity,” this decision will impact efforts to unionize workers. This redefined test will have application to all types of business. Its greatest impact, however, will be in the gig economy, which encourages the individual control of work schedules and most terms of employment. This is the fastest growing sector of employment and the decision, therefore, will narrow the universe of workers who are eligible to unionize today.



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