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NLRB Recalibrates Independent Contractor Test

By H. Carlton Hilson and Caroline H. Page February 2019

On January 25, 2019, the National Labor Relations Board ruled in *SuperShuttle DFW, Inc.* that franchisees who operate shared-ride vans for SuperShuttle at the Dallas-Forth Worth airport are independent contractors and thus are excluded from protection under the National Labor Relations Act. In finding that the drivers, who supply their own shuttle vans and pay franchise fees, are independent contractors, the Board overruled its 2014 *FedEx Home Delivery* decision. In *FedEx*, the 2014 Board had focused on an entity's "right to control" a worker to determine whether he or she could be properly classified as an independent contractor. *SuperShuttle* rejected the Board's 2014 analysis and found that it diminished the role that entrepreneurial opportunity plays as one of many factors used to correctly classify workers.

Utilizing the traditional common-law factors, the Board found that the shuttle drivers had significant opportunity for economic gain and significant risk of loss, which favored finding independent contractor status. Notably, the drivers were free from SuperShuttle's control in much of the day-to-day performance of their work. The drivers had complete autonomy over their own work schedules, including whether or not to accept a trip. In fact, the majority of the rules and procedures the shuttle drivers were required to follow were airport rules rather than SuperShuttle's own rules and procedures. Furthermore, the shuttle drivers kept all fares they collected, were subject only to monthly flat fees, were generally not supervised by SuperShuttle, and signed new contracts each year. According to the Board, all of these factors favored classifying SuperShuttle drivers as independent contractors.

This Board's decision indicates a more employer-friendly shift in the independent contractor analysis. By emphasizing consideration of traditional common law factors and renewing focus on entrepreneurial opportunity, the Board has created more latitude for entities to consider workers independent contractors rather than employees subject to the provisions and requirements of the NLRA. Of course, employers still must be mindful that independent contractor determinations must be made on a case-by-case basis and are highly fact intensive. Referring to workers as independent contractors does not, on its own, clarify their designation. We will continue to monitor this area of law and report any updates.

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