LABOR & EMPLOYMENT

NLRB FOCUSES ON "ENTREPRENEURIAL OPPORTUNITY" TO RETURN TO PRE-OBAMA BOARD INDEPENDENT CONTRACTOR TEST

by Sara H. Jodka

For those keeping track, there are number of different (yet somewhat similar) tests agencies and courts use to determine whether a worker is an employee or an independent contractor. For example, there is the Right-to-Control Test that the Internal Revenue Service uses for federal tax purposes, which is not to be confused with the common law Right-to-Control test used for ERISA and federal discrimination law (Title VII, Age Discrimination in Employment Act, Americans with Disabilities Act) purposes; the Economic Realities Test used for Fair Standard Act purposes; or the various other multi-factored tests employed by state courts on state employment and wage/hour issues and state agencies to determine workers' compensation and unemployment eligibility.

Not to be outdone, on January 25, 2019, the NLRB, which is Trump-appointed and Republican majority board, weighed in on the issue with a very pro-business decision, SuperShuttle DFW, NLRB Case No. 16–RC–010963 (Jan. 25, 2019). The case concerned airport shuttle drivers and concerned the issue of whether they were properly classified as independent contractors or misclassified as they should be classified as employees. Specifically, the Amalgamated Transit Union tried to organize shuttle drivers who each owned their own vehicles and paid a flat fee to be able to transport passengers to and from the airport. The drivers kept their fare money and they were free to work whenever they wanted.

The union, however, argued the drivers were under extensive rules as to how they could operate, including their dress code, background check requirements, training, communication system, etc. Come to find out, the requirements at issue were *all* imposed by the airport, not the franchisor. As explained in *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968), the NLRB applied the common law agency test, which analyzes the following ten factors where no one factor is dispositive:

1. The extent of control which, by the agreement, the master may exercise over the details of the work.
2. Whether or not the one employed is engaged in a distinct occupation or business.
3. 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.
4. The skill required in the particular occupation.
5. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
6. The length of time for which the person is employed.
7. The method of payment, whether by the time or by the job.
8. Whether or not the work is part of the regular business of the employer.
9. Whether or not the parties believe they are creating the relation of master and servant.
10. Whether the principal is or is not in business.

In weighing the factors, the NLRB recognized that requiring compliance with state- or customer-issued requirements was not the kind of control examined in a Right to Control analysis. Although the airport's requirements were extensive, the franchisor's requirements that its drivers follow them did not transform the drivers into the franchisor's employees.

The decision essentially returns the standard to the pre-2014 Right to Control Test standard, which was in place before the 2014 FedEx Home Delivery case, Case Nos. 34-CA-012735 and 34-RC-002205 (Sept. 30, 2014) case when a then Democratic-majority NLRB made it more difficult to establish independent contractor status when it adopted a version of the Economic Realities Test.

In shifting the test back to the Right-to-Control test, the Board noted that the FedEx standard was not correct to narrow entrepreneurial opportunity to just one part of one of the ten factors because entrepreneurial opportunity, like employer control, is an "animating principle by which to evaluate" all ten of the factors. The NLRB found the FedEx decision improperly shifted the independent contractor test, which reduced the significance of entrepreneurial opportunity. SuperShuttle reinstitutes that all ten factors are to be weighed equally to determine whether the weight favors employer control and employer-employee status or, rather, entrepreneurial opportunity and independent contractor status.

Takeaways

The decision is good for those companies seeking to work with independent contractors, especially those in the gig economy because the case facts are similar to those driving their own cars to make deliveries or transport passengers, *i.e.*, Uber, Lyft, Doordash, GrubHub, etc., but it certainly has impact beyond that and in other industries. This is yet another case example of the NLRB returning to pre-Obama era standards.

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