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NLRB RESTORES THE LONG-STANDING TEST FOR DETERMINING INDEPENDENT CONTRACTOR STATUS

In *SuperShuttle DFW Inc.*[1], the National Labor Relations Board ("Board") held that it would return to its longstanding and previously defined framework for determining whether a worker is classified as an employee or an independent contractor under the NLRA ("Act").

The issue in *SuperShuttle* was whether franchisees who operate shared-ride vans for SuperShuttle Dallas-Fort Worth (a service for travelers heading in and out of the Dallas-Fort Worth airport) were properly classified as independent contractors (and therefore not covered by the Act) or employees.

COMMON-LAW AGENCY FACTORS CONSIDERED

Historically, when engaging in an analysis of whether to classify an individual as an independent contractor or an employee, the Board considered the following factors:

(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.

Over the years, the Board also considered a new factor: whether there was significant opportunity for gain or loss between the employer and the putative contractor, or "entrepreneurial opportunity."

In a previous decision, *Fedex Home Delivery*[2], the Board attempted to refine its definition of entrepreneurial opportunity as "an actual, not merely theoretical, opportunity for gain or loss", and treat it "as part of a broader factor that—in the context of weighing all relevant, traditional common-law factors identified [above] …—asks whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business."[3] The *Fedex* decision considerably weakened the significance of the entrepreneurial activity factor, effectively making it more difficult for employers to establish an independent contractor relationship.

RESTORING THE COMMON-LAW TEST

In the course of determining the proper classification for franchisees in *SuperShuttle*, the Board expressly overruled the holding in *Fedex*. The Board held that *Fedex's* treatment of entrepreneurial opportunity as just another factor was an impermissible alteration of long-standing precedent.

In *SuperShuttle*, the Board went on to clarify that entrepreneurial opportunity was not a "super-factor" or an "overriding consideration." Instead, "entrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain. Indeed, employer control and entrepreneurial opportunity are opposite

sides of the same coin: in general, the more control, the less scope for entrepreneurial initiative, and vice versa."

The Board further elaborated that it should not "mechanically apply the entrepreneurial opportunity principle to each common-law factor in every case. Instead…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."

THE VERDICT: SUPERSHUTTLE FRANCHISEES NOT EMPLOYEES

Utilizing this corrected framework, the Board ultimately concluded that SuperShuttle franchisees were not employees. The three-member Board majority cited several factors that weighed in favor of this decision:

- The extent of control factor – despite the fact that vehicle specifications and uniforms were in place, franchisees had total autonomy and control over their work schedule and trip location.
- The method of payment factor – franchisees paid a flat monthly fee to use SuperShuttle's proprietary software for dispatching, cashiering and taking reservations, which did not vary based on revenues earned.
- The "instrumentalities, tools and place of work" factor – franchisees bought or leased their own vans (even though SuperShuttle offered a van leasing service), paid their own tolls, gas and vehicle maintenance costs.

PRACTICAL IMPACT OF THE *SUPERSHUTTLE* DECISION

The Board's return to its longstanding test for determining independent contractor status is favorable for the health care industry and employers in general. The decision will afford more flexibility and predictability when determining whether individuals are contractors or employees under the Act.

This issue has arisen several times in the health care industry. One example has been determining whether physicians contracting with a hospital for the provision of on-call hematology and oncology services were independent contractors or employees. The *SuperShuttle* decision also provides some insight and reasonable guidance on the employment status of telemedicine providers — a subject that remains untouched by the Board.

Ultimately, the *SuperShuttle* decision should come as welcome news to hospitals and health systems as the industry continues to utilize creative and cost-saving contractual relationships.

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[1]*SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019)

[2]*FedEx Home Delivery*, 361 NLRB 610 (2014)

[3]*Id.*