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NLRB Restores Employer-Friendly Independent Contractor Standard

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Earlier this year the National Labor Relations Board (NLRB) made headlines by returning to its longstanding independent contractor standard and reaffirming the Board's adherence to the traditional common-law test. The Board's decision resets the standard for classifying independent contractors, reaffirms that entrepreneurial opportunity is a significant factor to consider and provides good news for employers who are faced with unionization efforts. Under the revised standard, workers are more likely to be classified as independent contractors and, therefore, excluded from the National Labor Relations Act (NLRA).

The case, *SuperShuttle DFW, Inc.*, involved shuttle van driver franchisees of SuperShuttle at the Dallas-Fort Worth and Love Field airports. Until 2005, SuperShuttle designated its drivers as employees, assigned regular work schedules, and paid hourly wages. When it converted to a franchise model, the franchisees had to supply their own shuttle vans, pay a franchisee fee and absorb a weekly fee for use of the reservation and dispatch system. Under this model, drivers were not required to work specific days or hours per week but instead could accept or reject any potential trips that were "offered" via SuperShuttle's reservation and dispatch service. The franchisee received all fares and did not share fares with SuperShuttle. In fact, other than the receipt of data from the reservation and dispatch service, there was little day-to-day communication between a franchisee and SuperShuttle.

The question before the NLRB hinged on whether the franchisee drivers were covered by the NLRA, and if so, whether they were effectively precluded from the right to unionize and collectively bargain. The Amalgamated Transit Union argued the franchisee drivers should be considered employees because SuperShuttle exercised substantial control over the franchisees' daily performance by requiring uniforms, mandating display of the SuperShuttle logo on franchisee vans, and prohibiting drivers from working for competitors, and because it could discipline franchisees and terminate franchise agreements.

In August 2010, the NLRB's acting regional director issued a Decision and Order in favor of SuperShuttle, relying on the NLRB's traditional common-law agency analysis and focusing on the fact that the franchisee drivers had considerable entrepreneurial opportunity. The acting regional director determined that the franchisees were independent contractors, relying on an analysis of the non-exhaustive set of common-law agency factors traditionally used.

However, a later Obama-era decision, *FedEx Home Delivery*, temporarily modified this traditional test. Under this 2014 decision, the NLRB kept the same common-law agency factors but reframed the analysis by limiting the importance of the workers' entrepreneurial opportunity and shifting to the "economic realities" of the parties' relationship. In doing so, the NLRB temporarily redefined the significance of an independent contractor's "entrepreneurial opportunity for gain or loss." This analysis became known as the "economic realities" test and made it arguably easier for workers to be construed as employees. However, the change in presidential administrations and political climate brought forth a change in the NLRB membership. This provided the current Board the opportunity to re-examine the *SuperShuttle* case and re-affirm the acting regional director's 2010 decision.

In overruling *FedEx*, the Board marks a return to the traditional independent contractor test. It re-emphasizes the role of entrepreneurial opportunity and rejects the Obama-era focus placed on "right to control." As the 3-1 *SuperShuttle* decision notes, "Control and entrepreneurial opportunity are two sides of the same coin; the more of one, the less of the other." Thus, where entrepreneurial opportunity exists, chances are the employer exercises less control, resulting in a determination of independent contractor status and vice versa. The decision gives employers more room to include potential entrepreneurial opportunity in the analysis, rather than being limited to the actual economic gains.

In light of the *SuperShuttle* decision, employers can now consider their workers' potential for business gains in addition to the traditional common-law factors that have been used for decades. In today's gig economy, workers may benefit from the increased potential for gains, but employers and franchisors will no doubt benefit in the short term from less stringent NLRA restrictions.

The case is 367 NLRB No. 75.

For assistance with labor matters, please contact any member of Baker Donelson's Labor & Employment Group.