

NLRB Clarifies Independent Contractor Standard

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The National Labor Relations Board (NLRB or Board) recently restated and refined its approach to determining whether workers are independent contractors, reaffirming that independent contractor status is based on common law agency principles with no one factor being decisive.

The NLRB also redefined the significance of the factor addressing a worker's entrepreneurial opportunity for a gain or loss, concluding that weight should be given to actual, not theoretical opportunities, and that the Board should determine whether the worker is in fact rendering services as part of an independent business.

Applying the clarified standard, the Board concluded that certain FedEx Home Delivery drivers were employees and not independent contractors.

The decision will make it more difficult for an employer to establish in Board proceedings that its workers are independent contractors where it exercises control and the workers do not operate an independent business. As always, employers must exercise caution in classifying workers as independent contractors. Determining whether a worker is an employee is context-specific and requires an analysis of various factors, with no one factor being determinative.

In *FedEx Home Delivery*, the union filed a petition seeking to represent about 20 drivers who worked at FedEx's Hartford, Connecticut terminal. The Regional Director determined that the drivers were employees and not independent contractors and therefore were entitled to the protections of the National Labor Relations Act. Following that the decision, the U.S. Court of Appeals for the District of Columbia Circuit concluded that drivers performing the same job at a different facility were independent contractors.

In declining to adopt the D.C. Circuit's ruling, the Board reiterated the application of the common law agency test, which considers factors such as the extent of control by the employer, whether the work is done under the direction of the employer or by a specialist without supervision, and whether the employer or the individual supplies the instrumentalities, tools and place of work. The Board also addressed the significance of whether the worker had "significant entrepreneurial opportunity," explaining that the focus was on whether the worker had an actual and not merely theoretical opportunity for gain or loss and is "rendering services as part of an independent business." It noted that this factor should be considered in the context of all relevant common law factors. The Board's ruling specifically rejected the D.C. Circuit's approach, which it criticized for providing overriding consideration of the entrepreneurial opportunity factor.

Brian Schwartz
+1.313.496.7551
schwartzb@millercanfield.com

Robert Zielinski
+1.312.460.4216

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zielinski@millercanfield.com