More Workers Likely To Be Considered Independent Contractors and Not Employees, Under NLRB's New Ruling

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The National Labor Relations Board ("the Board") has revised the standard for determining who are independent contractors excluded from the National Labor Relations Act's ("the Act") protections, meaning more workers are likely to be found to be independent contractors rather than employees.

The NLRB's decision in ***SuperShuttle DFW, Inc.*, 367 NLRB No. 75** on January 25, 2019, involved a petition for an election filed by a union seeking to represent the SuperShuttle van drivers who transported passengers to and from the Dallas-Fort Worth area airports. The drivers each signed a Uniform Franchise Agreement with SuperShuttle, under which each driver paid a flat one-time initial fee, and then a flat weekly fee to maintain the franchise.

The Regional Director of the Board applied the 10-factor common law agency test and found the drivers/franchisees to be independent contractors and not employees. As a result, the drivers had no rights under the Act and the petition for a union election was dismissed.

A majority of the Board affirmed, but in doing so went out of its way to emphasize that in deciding independent contractor cases, it will use the concept of "entrepreneurial opportunity for profit and loss" as an overarching interpretative device. The Board overruled prior cases, including its **2014 decision in *FedEx Home Delivery*, 361 NLRB 610**, which limited the importance of the workers' "entrepreneurial opportunity," and instead emphasized economic dependency and control. The Board suggested that in the future, each of the agency test factors would have to be viewed through the "entrepreneurial opportunity" lens.

The 10 agency test factors are:

1. How much control the employer/principal may exercise over the details of the work;
2. Whether or not the worker is engaged in a distinct occupation or business;
3. The kind of occupation and whether the work is usually done under the direction of the employer or by a specialist without supervision;
4. The skill required in the occupation;
5. Whether the employer or the worker supplies 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 an independent contractor relationship; and
10. Whether the principal is or is not in business.

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In finding that the SuperShuttle van drivers/franchisees were independent contractors and not employees under this agency test, the majority of the Board considered the most significant factors to be that the drivers: (a) were required to provide their own vehicles and to cover all of the costs of operation and maintenance of the vehicles, (b) were able to accept or decline trips booked by passengers, (c) paid a flat weekly franchise fee unconnected to the amount of fares they collected, and (d) their earnings were determined by how much they chose to work, how well they managed expenses, and how well they managed the process of selecting which fares to accept or decline.

What does this mean for employers?

Because both the majority and dissent emphasized the fact-intensive nature of the employee vs. independent contractor inquiry, the practical effect of the decision will only become known over time. For now, the case can be taken as a sign that the current Board will be more open to independent contractor arguments, and that advocates should frame their arguments by emphasizing the worker's opportunity to realize a profit or loss from his/her efforts, rather than a wage. If you have further questions about the effects of this ruling, please contact your Miller Canfield attorney or any of the authors of this alert.