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Independent Contractor vs. Employee Mis/Classification Issue Continues To Evolve: The NLRB Weighs In (Again)

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As the independent contractor versus employee status debate evolves across the United States through legislation, court decisions, and agency enforcement actions, the National Labor Relations Board ("NLRB" or "Board") clarified its standard on January 25, 2019 in *SuperShuttle DFW, Inc.*1 In this decision, the Board returned to the common-law independent contractor test in effect prior to 2014, in which various factors are weighed to assess a service provider's proper status.

With the continual expansion of the gig economy beyond ride-sharing and home services apps, and as many other businesses look to understand, attract, and cater to a workforce of millennials who communicate and interact differently, it is imperative for businesses to assess how they recruit, engage and compensate their service providers. No longer is it enough to rely upon the method of payment (*e.g.,* pay via 1099 or W-2) or industry past practices/norms (*e.g.*, consultants are always independent contractors) to classify and treat service providers as independent contractors or employees. The legal risks and attendant financial exposure are too great nowadays for any business to ignore this evolving area of law, including the NLRB's *SuperShuttle* decision. As discussed herein, the NLRB's sphere of influence goes beyond the union versus non-union question, and the *SuperShuttle* decision impacts all businesses that engage individuals to provide services outside of the typical employer-employee paradigm.

Prior History and the *SuperShuttle* Decision

Section 2(3) of the National Labor Relations Act ("NLRA" or "Act"), which defines an "employee," excludes from its coverage "any individual having the status of an independent contractor." Therefore, the line between an independent contractor and a statutory "employee" is jurisdictional and the Board has no authority over independent contractors. If an individual providing services is an independent contractor within the meaning of the NLRA, then he/she is excluded from the NLRA's coverage. If the individual is deemed an employee under the NLRA, then the employee may utilize the NLRB's processes, foster unionization along with co-workers, and/or engage in protected concerted activity (typically non-union employees taking action/speaking up for their mutual aid and assistance).

For decades, the Board has assessed whether a service provider is an independent contractor or employee through the traditional common-law agency test found in the Restatement (Second) of Agency §220. Under that test, the Board looks at the following factors, assessing and weighing them, with no one factor being decisive:

- The extent of control, which by agreement, the master may exercise over the details of the work.
- Whether or not the one employed is engaged in a distinct occupation or business.

- 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.
- The skill required in the particular occupation.
- Whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work.
- The length of time for which the person is employed.
- The method of payment, whether by the time or by the job.
- Whether or not the work is part of the regular business of the employer.
- Whether or not the parties believe they are creating the relation of master and servant.
- Whether the principal is or is not in business.

In *FedEx I*,2 the D.C. Circuit Court of Appeals observed that the Board's assessment of the common-law factors has shifted over time in its focus from control to whether the putative independent contractor had "significant entrepreneurial opportunity for gain or loss." The court noted that the common-law test is "qualitative as opposed to quantitative," meaning that all factors must be weighed, as opposed to simply basing independent contractor versus employee status on the number of factors met in favor or against the status. Moreover, the court stated that "entrepreneurial opportunity is not an individual factor in the test; rather, entrepreneurial opportunity, like employer control, is a principle to help evaluate the overall significance of the agency factors."

In 2014 during the Obama administration, in a case involving *FedEx Home Delivery*, the Board claimed to "refine and restate" the independent contractor versus employee test by adding a new factor: "rendering services as part of an independent business."3 Under this new factor, the Board minimized the focus on "entrepreneurial opportunity" by burying it, claiming that it was just "one aspect" of the newly created factor. The Board further stated that this new "independent-business factor" includes whether the putative contractor has significant entrepreneurial opportunity (actual not theoretical) for gain or loss; and "(a) has a realistic ability to work for other companies; (b) has proprietary or ownership interest in her work; and (c) has control over important business decisions, such as the scheduling of performance; the hiring, selection, and assignment of employees; the purchase and use of equipment; and the commitment of capital." Furthermore, the Board stated that, in applying this factor, the Board is to consider evidence that "the employer has effectively imposed *constraints* on an individual's ability to render services as part of an independent business. Such evidence would include limitations placed by the employer on the individual's realistic ability to work for other companies, and restrictions on the individual's control over important business decisions." The Board shifted focus away from a test of "entrepreneurial opportunity" to a test of "economic dependency" – *i.e.*, the Board began to focus on whether the worker felt economically controlled by the putative employer. Simply put, the Board altered the analysis to make it much harder for a service provider to be deemed an independent contractor which, in essence, expanded who is covered by the Act. The D.C. Circuit Court of Appeals denied enforcement of the Board's 2014 decision.

In *SuperShuttle*, the current Board overruled its 2014 *FedEx* decision and returned to application of the common-law test that predated *FedEx*. In so doing, the *SuperShuttle* Board highlighted that the *FedEx* Board morphed the common-law independent contractor test into an "economic realities" test that diminished the entrepreneurial opportunity analysis and overemphasized the right of control test.

By reverting to the common-law test, the *SuperShuttle* Board noted:

> entrepreneurial opportunity is not an independent common-law factor, let alone a "superfactor" . . . . Nor is it an "overriding consideration," a "shorthand formula," or a "trump card" in the independent-contractor analysis. Rather . . . 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 *SuperShuttle* Board also made clear that the entrepreneurial opportunity principle need not be mechanically applied to each of the 10 common-law factors. Rather, 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."

Showing its agreement with the *FedEx I* court, the *SuperShuttle* Board stated that the:

> independent- contractor analysis is qualitative, rather than strictly quantitative; thus, the Board does not merely count up the common-law factors that favor independent contractor status to see if they outnumber the factors that favor employee status, but instead it must make a qualitative evaluation of those factors based on the particular factual circumstances of each case [citing to *FedEx I*]. Where a qualitative evaluation of common-law factors shows significant opportunity for economic gain (and, concomitantly, significant risk of loss), the Board is likely to find an independent contractor.

Under this restated analysis, the *SuperShuttle* Board found that SuperShuttle franchisees, who drive customers to and from Dallas-Fort Worth and Love Field Airports, are independent contractors. Among the many facts analyzed, the drivers make a significant investment in their businesses by purchasing or leasing vans, remit a weekly flat fee payment to SuperShuttle regardless of the fares they earn, and choose when and where they drive.

Practical Implications

While this area of the law continues to evolve and businesses are forced to react to state court decisions, such as the California Supreme Court's April 30, 2018 *Dynamex* decision,4 and grapple with state and local agencies seeking to collect unemployment insurance contributions or back taxes for putative independent contractors, the NLRB's *SuperShuttle* decision provides a moment of clarity. For starters, the Board's rationale is now consistent with the D.C. Circuit's *FedEx* decisions, which will provide clearer guidance for businesses. Also, the *SuperShuttle* decision appears to be more adaptable to assessing business relationships that are formed as the modern workforce continues to change.

Yet, despite the *SuperShuttle* decision, the future of the independent contractor versus employee analysis is not carved in stone. The decision may be appealed to the court of appeals. Moreover, the S*uperShuttle* decision was issued by the three members of Republican-majority NLRB, the composition of which could change based on the outcome of 2020 presidential election. Furthermore, regardless of whether the *SuperShuttle* decision remains good law, businesses will have to deal with the NLRB's highly anticipated joint-employer standard resulting from rulemaking or decision. Stated differently, while an individual providing services to a business may be an independent contractor, the business and independent contractor may nonetheless be deemed joint employers, which adds another slew of issues.

For the time being, businesses should take a fresh look at how their engagements with service providers are structured, implemented and documented to pass muster under the *SuperShuttle* decision. Of course, the NLRB's standard is just one of the many varying standards in the employment realm that businesses must address with their experienced legal counsel.

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