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INFORMATION MEMO
LABOR AND EMPLOYMENT LAW

FEBRUARY 21, 2019

NLRB Eases Burden of Demonstrating Independent Contractor Status by Overruling Prior Decision

On January 25, 2019, the National Labor Relations Board issued a decision clarifying the test for determining whether workers are independent contractors or employees. In *SuperShuttle DFW, Inc.*, the Board reversed its 2014 decision in *FedEx Home Delivery* where it revised the traditional common-law test for determining whether workers are employees or independent contractors. Prior to 2014, the test analyzed whether common-law factors set forth by the Supreme Court showed that the workers had significant entrepreneurial opportunity for gain or loss.

The Board in *FedEx* held that entrepreneurial opportunity was part of a broader factor in weighing all of the traditional common-law factors pertinent to whether the worker was "rendering services as part of an independent business." In addition to considering whether a worker has significant entrepreneurial opportunity, the Board held that it would also consider whether the worker "(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." The Board ultimately found that the workers at issue were employees and not independent contractors.

On appeal, the D.C. Circuit Court of Appeals vacated the Board's order and denied its application for enforcement. In doing so, the D.C. Circuit held that the Board did not have the "breathing room" to formulate a new legal test. The D.C. Circuit re-emphasized that the common-law test developed by the Supreme Court should be applied to determine whether the workers had significant entrepreneurial opportunity.

Through its decision in *SuperShuttle,* the NLRB rejected its "independent business" test and agreed with the D.C. Circuit that the common-law factors articulated by the Supreme Court should be applied to determine whether workers have sufficient entrepreneurial opportunity for gain or loss so as to be independent contractors, or whether employer control renders them employees. The factors to be examined include: (a) the extent of control the employer may exercise over the work; (b) whether or not the worker is engaged in a distinct occupation or business; (c) whether the kind of occupation is usually done under the direction of an employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the instrumentalities, tools, and place of work are supplied by the employer or the worker; (f) the length of time the worker is employed; (g) the method of payment, whether by 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 an employer-employee relationship; and (j) whether the principal is or is not in business.

The workers in *SuperShuttle* drove shuttle vans to and from the Dallas-Fort Worth Airport under franchisee agreements with SuperShuttle. The workers owned their own vans, had nearly complete control over their own work schedules, could hire relief drivers, and retained all of the fares they collected while paying a monthly franchise fee to SuperShuttle, all of which demonstrated that the workers had substantial entrepreneurial opportunity. Although SuperShuttle did have some control over the work, the workers were not engaged in a distinct business, and they did not have any special training or skills, the Board found that the employer's control over the workers was outweighed by the workers' entrepreneurial opportunity, and that they therefore qualified as independent contractors.

Despite the NLRB's clarification regarding its test for determining independent contractor status, it remains a thorny, fact-intensive question. In addition, different federal and New York State agencies often apply different standards to resolve issues related to independent contractor status, so this NLRB decision may not necessarily be applicable in another forum. If your business has questions concerning the classification of its workers as employees or independent contractors, it is best to seek legal counsel.

If you have any questions about this Information Memo, please contact Nicholas P. Jacobson, any of the attorneys in our Labor and Employment Law Practice, or the attorney in the firm with whom you are regularly in contact.

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