Labor Board Makes It Easier To Classify Workers As Independent Contractors

Insights
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In a significant ruling which will benefit companies, the National Labor Relations Board today revised the test it uses for determining whether workers are employees or independent contractors by making it easier for entities to classify them as contractors (*SuperShuttle DFW, Inc.*). The decision throws a roadblock into unionization efforts involving such workers, as federal law does not permit independent contractors to unionize or join forces with employees in organizing efforts. What do employers need to know about this development?

Union Attempts To Organize Franchisee Drivers
SuperShuttle DFW is a franchise operation that uses the name, logo, color scheme, and other proprietary mechanisms of the SuperShuttle brand, transporting passengers to and from the airports in the Dallas-Fort Worth area. In 2005, upon converting to the franchise model, all drivers for the operation were required to sign agreements confirming they were independent contractor franchisees. They were then responsible for supplying their own shuttle vans and paying SuperShuttle DFW a weekly fee for the right to utilize the brand name and the dispatch/reservation system.

The workers had no set schedule and could choose the number of hours or days they worked per week. They could work as much—or as little—as they wanted, whenever they chose to do so. They were then entitled to collect all the money they earned for completing the assignments they selected. They were also permitted to hire their own relief drivers to operate their vans if they so chose.

The Amalgamated Transit Union sought to represent a unit of SuperShuttle DFW drivers, including those who signed an agreement to operate as independent contractor franchisees. Given the status of these workers, the company objected and contended that they should be precluded from organizing into a union due to their being independent contractors. The union cited to a 2014 Obama-era NLRB decision that "refined" the independent contractor test and made it easier for such workers to be classified as employees.

Today, the NLRB overturned that 2014 decision and returned to a more balanced standard, one that gives more of an equal weight to both the right-to-control aspects of the relationship and the role of the workers' entrepreneurship in operating their own businesses.

Labor Board Returns To More Accurate Standard

The 2014 decision did much more than "refine" the independent contractor test, according to today's majority decision. Instead, it "fundamentally shifted the independent contractor analysis, for implicit policy-based reasons." The NLRB said that the earlier ruling selectively overemphasized the significance of the various factors that determine whether a hiring entity has a "right to control" the worker, adopting somewhat of an "economic dependence" test.

The problem with such a test, the Board said, is that it "greatly diminishes the significance of entrepreneurial opportunity" displayed by those same workers. Instead of simply relegating the question of whether the position presents the opportunities and risks inherent in entrepreneurialism to one of many factors that should be examined in determining classification status, that question should be examined with greater weight.

Entrepreneurial opportunity, the Board said, should be treated as a principle by which to evaluate the overall effect of the common law factors on a contractor's independence to pursue economic gain. "Indeed," the majority said, "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."

Once the independent contractor test was returned to its common law roots, and the role of entrepreneurship was elevated to its proper place in the analysis, the Board had little trouble in concluding that the franchisee drivers for SuperShuttle DFW were independent contractors who could not join in union organization efforts. It concluded that:

- The drivers were free from control by SuperShuttle in most significant respects of their work, including setting their own schedule, deciding whether to accept dispatch requests, and selecting their own routes;
- The drivers are entitled to all of the fares and tips they earn from customers, and do not share them at all with the SuperShuttle company;
- The drivers made a significant investment in the instrumentalities and tools of their job, as they were required to provide their own shuttle vans;
- SuperShuttle generally did not supervise the drivers in any meaningful way, as the drivers enjoyed "near-absolute autonomy" in performing their daily work; and
- The parties believed they were entering into an independent contractor relationship given the clear and express language of their written agreement.

While there were several common law factors that pointed to employee status—the fact that most drivers did not engage in a distinct business, worked as part of the hiring entity's regular businesses, and did not have any particular skill or specialized expertise to perform the work—these were outweighed by the multitude of other factors.

What Does Today's Ruling Mean For Employers?

Today's decision is yet another step toward restoring balance to our nation's federal labor law, which had decidedly tipped in favor of workers and unions over the previous decade. By returning to a flexible standard that takes a variety of factors into account, while fully considering the entrepreneurial role played by workers in the analysis, the Labor Board has created an environment more suited to a fair application of realistic legal standards.

It is important to note, however, that today's majority expressly states that the entrepreneurship question should not be applied in a rigid and mechanical manner and serve as an end-all-be-all factor in the analysis. As the board said, it should not be treated as a "superfactor," an "overriding consideration," a "shorthand formula," or a "trump card" in the independent contractor analysis. Moreover, today's decision does not impact the contractor analysis enforced at the state level, or involving other federal agencies, so businesses should still proceed with caution.

If you have a workforce that consists of independent contractors at all, or you are interested in determining whether portions of your workforce could be properly classified as contractors under today's new standard, you should consult with your Fisher Phillips attorney or any member of our Labor Relations Practice Group.

This Legal Alert provides information about a specific federal labor board decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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