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National Labor Relations Board Returns to Longstanding Independent Contractor Standard

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On January 25, 2019, the National Labor Relations Board (Board) returned to the common-law agency test for determining whether workers qualified as independent contractors. *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019) The decision expressly overrules the Board's decision in *FedEx Home Delivery*, 361 NLRB 610 (2014), enf. denied 849 F.3d 1123 (D.C. Cir. 2017).

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The Board specifically found the *FedEx* decision impermissibly "shifted the independent contractor analysis, for implicit policy-based reasons, to one of economic realities, i.e., a test that greatly diminishes the significance of entrepreneurial opportunity and selectively overemphasizes the 'right to control' factors relevant to perceived economic dependency." *Id*. citing *FedEx Home Delivery*, 361 NLRB at 629 (Member Johnson, dissenting)

Instead, the Board held the proper test involves an application of the common law principles through the prism of entrepreneurial opportunity (i.e., whether the worker's position presents the opportunities and risks inherent in entrepreneurialism). The common law principles are:

(a) The extent of control which, by the agreement, the master may exercise over the details of the work;

(b) Whether the one employed is engaged in a distinct occupation or business;

(c) 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;

(d) The skill required in the particular occupation;

(e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) The length of time the person is employed;

(g) The method of payment, whether by the time or by the job;

(h) Whether the work is part of the regular business of the employer;

(i) Whether the parties believe they are creating the relation of master and servant;

(j) Whether the principal is or is not in business. *Id.* citing Restatement (Second) of Agency § 220 (1958)

Applying these principles in *SuperShuttle DFW, Inc.*, the Board found that shuttle van driver franchisees of SuperShuttle in the Dallas Fort-Worth area are not employees under the National Labor Relations Act (theAct) and fall outside of the Act's coverage. The Board noted the shuttle van driver franchisees owned their own shuttle vans and had complete control over their daily schedule, working conditions, and method of payment. The Board noted this arrangement provided franchisees with significant entrepreneurial opportunity and control over how much money they make each month.

With about 10.6 million independent contractors in the United States[1], and about 6 million workers in franchise businesses[2], the ruling has wide-ranging implications for businesses. Workers who are defined as independent contractors are expressly excluded from the provisions of the National Labor Relations Act.

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[1] Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements, May 2017, released June 7, 2018, USDL-18-0942, < https://www.bls.gov/news.release/conemp.nr0.htm>

[2] Economic Census: Core Business Series, 2012: Franchise Status for Selected Industries and States: 2012 NAICS 722513, 441110, 722511, 721110, 447110, 722515, 561320, 624120, 561720, 445110,

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