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How to Put the "Independent" In Independent Contractor Status

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So, you think that your "Independent Contractor Agreement" means that your non-employee contractors will be unable to unionize in your workplace. Not so. Or, perhaps you believe that you can avoid a union if your workers sign an Independent Contractor Agreement, and you allow them more control over their day-to-day tasks. Wrong again. What if you have your workers sign an Independent Contractor Agreement, and you allow them to do almost anything they want, as long as your work gets done too? Will *that* allow you to avoid your workers becoming unionized employees? Almost, but not quite.

The latter extreme was a tough lesson learned by FedEx in 2009, when it narrowly escaped having fleets of its independent contractors being converted to unionized employees. Fortunately, its unique worker arrangements saved the day. This month, however, the National Labor Relations Board ("NLRB") renewed its fight with FedEx, hopeful that this time FedEx will be forced to accept the union on the ground that its current independent contractors are employees.

The Facts

In 2006, a local union filed petitions with the NLRB seeking elections to be held at two FedEx terminals in Massachusetts to determine whether workers would unionize. Elections were held, and the union won both handily, becoming the collective bargaining representative at both locations. However, FedEx refused to bargain with the union, on the basis that its drivers were not employees, but independent contractors -- who, unlike employees, were ineligible for union representation via the NLRB. The union filed charges against FedEx, bringing the matter before the NLRB, which found that FedEx had violated the National Labor

Relations Act ("NLRA") by refusing to recognize its drivers as employees and negotiate with their union representatives.

Notably, the NLRB Chairman dissented from the NLRB's decision. His objection was based upon the NLRB's exclusion of evidence offered by FedEx to show the entrepreneurial opportunities given to FedEx drivers. FedEx appealed the decision to the U.S. Court of Appeals for the District of Columbia.

The Decision

The Court heard the matter in April 2009. In its analysis, the Court considered a number of factors that strongly supported the drivers' designation as employees. Those factors included several worker requirements: a five-day work week; a minimum of 40 hours of work weekly; wearing a recognizable uniform; conforming to grooming standards; using a white vehicle within a specific size range; displaying a FedEx logo that is larger than that required by the Department of Transportation; maintaining insurance; conducting two "customer service rides" per year; and being subject to route reconfiguration, if service is inadequate.

The Court also considered several factors which supported a conclusion that the drivers were independent contractors. The drivers maintained exclusive control over the following: how business objectives would be achieved; the specific hours worked; whether and when to take breaks; what routes to drive; and vehicle provision and maintenance. Even more, the drivers were not subject to reprimands or other discipline. Most of these items were reflected in a "Standard Contractor Operating Agreement," which was signed by each driver and expressly states that the driver is not an employee of FedEx "for any purpose."

In evaluating how the FedEx drivers should be regarded, the Court took the opportunity to apply **a new test** for independent contractor status -- one that focuses on whether the putative independent contractor possesses a significant **entrepreneurial opportunity** for gain or loss. Or, in other words, whether the worker's position presents the opportunities and risks inherent in entrepreneurialism.

Thus, in addition to the "traditional" factors noted above that FedEx argued evidences its drivers' status as independent contractors, other more unique arrangements received enhanced consideration by the Court in application of its new test -- the most significant item being FedEx drivers' ability to create and pursue their own businesses. Drivers could (and did) independently negotiate with FedEx for higher rates, sell their routes to other drivers, use their vehicles for personal or other commercial purposes (as long as they masked or removed the FedEx logo), and even independently incorporate their own businesses (e.g., moving or other delivery services) -- all without FedEx's permission or involvement. In addition, drivers could (and did) hire their own employees to serve their routes, which included the drivers being responsible for their employees' wages, benefits, expenses, training, exams, drug screening, taxes, insurance, and temporary replacements. This latitude to hire (or dismiss) others to complete FedEx's work -- even in place of themselves as the contracted party -- was compelling evidence in the Court's "entrepreneurial opportunity" assessment.

Not only did the considerable entrepreneurial opportunity weigh heavily in favor of

independent contractor status, but some factors that initially appeared to support the drivers being regarded as employees were discounted upon closer analysis. For example, FedEx's uniform requirement was not viewed as exerting control over the driver, but as creating customer security. FedEx's requirement that drivers adhere to governmental regulations was seen as "the law" controlling the worker -- not FedEx. FedEx's effort to monitor and improve worker performance did not make the worker into an employee because it was motivated by a concern for customer service. Based upon the many factors that favored the workers' designation as independent contractors and the few (diminished) factors that favored the workers' designation as employees, a totality of the circumstance assessment, with an emphasis on entrepreneurial opportunity, led the Court to conclude that the FedEx drivers were independent contractors. Therefore, FedEx was not required to negotiate with purported union representation.

The Challenge

This month, in a similar case in Connecticut, FedEx returned to the D.C. Circuit Court for affirmation of its initial determination, following a second attempt by the NLRB to establish FedEx's drivers as employees. The NLRB once again found that FedEx violated the NLRA by failing to negotiate with purported union representation. FedEx once again challenged the designation of its workers as employees and further attacked the NLRB's failure to apply the D.C. Circuit Court's precedent established in 2009 to this "materially indistinguishable" matter. The NLRB countered that the cases are materially distinguishable. It argued that a "great majority" of traditional factors point towards employee status in the present matter, including control FedEx exercises over drivers' work, drivers' lack of a distinct business, and the lack of a requirement for drivers to have any special skills. Consideration of similar factors under state laws in California, Oregon, and most recently Kansas, have resulted in determinations that FedEx workers are employees. It remains to be seen what result the present challenge in federal court will yield.

The Bottom Line

Courts do not look merely at labels ascribed in a formal agreement in deciding if a worker is an independent contractor or an employee. While courts have looked traditionally at several factors, they appear to be moving away from placing great reliance on the former right-to-control test in determining independent contractor status. That is, while the employer's level of control over a worker is still evaluated, courts also consider the extent to which workers have the opportunity to pursue their own business, and whether they have the inherent potential for greater rewards and/or bear greater risks on their own.
