

LABOR RELATIONS

Expert Analysis

## Independent Contractor Update: Courts, NLRB, Legislatures Weigh In

Employer reliance on independent contractors has continued to attract the time and attention of courts, regulators and litigants. Notably, the New York Joint Enforcement Task Force on Employee Misclassification recently issued its Annual Report stating that the New York Department of Labor found 133,000 workers were misclassified as independent contractors in 2014. See NYS Dep't of Labor, Annual Report of the Joint Enforcement Task Force on Employee Misclassification (Feb. 1, 2015).

As this month also marks the one-year anniversary of the New York Commercial Goods Transportation Industry Fair Play Act, we thought it would be a good time to review the requirements of that law. The column also discusses other developments regarding independent contractors over the course of the last year, including the National Labor Relations Board's (NLRB) new test for independent contractor misclassification, and notable rulings by New Jersey and California courts.

### Delivery Drivers

In the fall of 2014, the NLRB revisited its standard for classifying workers as independent contractors not protected under the NLRA in *FedEx Home Delivery*, 361 NLRB No 55 (2014). In this 3-1 decision (member Philip Miscimarra recused himself), the board held a group of FedEx home delivery drivers classified as independent contractors were covered employees.

FedEx refused to recognize or bargain with the Teamsters local union claiming to represent a group of Connecticut drivers, contending the drivers were independent contractors. In finding the workers were employees, the board stated its decision was guided by the non-exhaustive list of common law factors acknowledged by the U.S. Supreme Court and outlined in the Restate-



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ment (Second) of Agency §220 (1958), with no one factor being determinative. These include, among others, extent of control by the employer; whether the employer supplies the instrumentalities, tools and the place of work; length of employment; and whether the work is part of the regular business of the employer.

The board in 'FedEx' held entrepreneurial opportunity is just one factor to consider in the common law analysis to determine whether workers are "rendering services as part of an independent business."

The board declined to follow *FedEx Home Delivery v. NLRB*, 563 F3d 492 (D.C. Cir. 2009), in which the U.S. Court of Appeals for the D.C. Circuit held drivers in Massachusetts, performing the same jobs as the Connecticut drivers, were independent contractors. The board rejected the circuit's approach, which emphasized the "significant entrepreneurial opportunity for gain or loss" available to the workers as the decisive factor. Specifically, in support of its argument that the drivers were independent contractors, FedEx cited evidence that they were permitted by their contracts to sell their routes for profit and to operate multiple routes.

The board held entrepreneurial opportunity is just one factor to consider in the common law analysis to determine whether workers are "rendering services as part of an independent business." In addition, the board found the drivers' right to sell routes was "more theoretical than actual," drivers were given long shifts preventing moonlighting, and vehicles were specifically tailored for FedEx's operations. The board did not find evidence that the drivers advertised for other work or maintained "any type of business operation or business presence" and, thus, concluded they did not have the initiative or authority associated with independent contractor status.

On March 16, 2015, four members of the board (Miscimarra again recused himself) denied a motion for reconsideration in the FedEx case. FedEx had filed a petition for review of the NLRB's decision in the D.C. Circuit (No 14-1196) in October 2014. The D.C. Circuit is now expected to review the board's decision, as the appeal had been in abeyance pending resolution of the reconsideration proceedings. Interestingly, as noted above, in 2009 the D.C. Circuit held FedEx drivers in Massachusetts were independent contractors.

### Distinguishing Factors

On Jan. 29, 2015, the board in *Porter Drywall*, 362 NLRB No. 6 (2015), applying the standards set forth in *FedEx*, found the employer satisfied its burden to show the workers in question were independent contractors and thus excluded from the petitioned-for bargaining unit.

Porter Drywall, whose primary business is drywall installation, retained crew leaders, who in turn hired drywall installers to assist them. Crews would range from one to 12 workers, with Porter exercising no decision-making authority over who was hired in the crew leader's team. The union asserted the crew leaders engaged by Porter and the drywall installers those crew leaders hired should be included in the petitioned-for bargaining unit.

Applying the rationale from its FedEx decision, the board found the crew leaders were distinguishable from the delivery drivers in *FedEx*, particularly because entrepreneurial opportuni-

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ties were actual, rather than theoretical, at Porter. The crew leaders did not exclusively work for Porter, and oftentimes even competed directly against it. Crew leaders often worked for several general contractors over the course of their careers. Crew leaders evaluated job opportunities and determined if employment by a particular general contractor would be profitable on a case-by-case basis, as they were paid a square footage rate for each project.

In addition, the board found it compelling that crew leaders practiced a skilled trade using their own tools and supplies, paid their own crews, set crew sizes on jobs and carried their own insurance. The board held the crew of drywall installers were employees of the crew leaders, and not Porter because, among other things, the crew leaders were responsible for selecting, supervising, paying and insuring their crews and exclusively directed crew work.

### Fair Play

The New York Commercial Goods Transportation Industry Fair Play Act became effective April 10, 2014. NY Lab Law §862. The law creates a legal presumption that drivers in the commercial goods transportation industry are employees rather than independent contractors, unless one of two tests is met.

the business entity beyond ordinary tools and equipment;

- Own or lease the capital goods, gain the profits and bear the losses of the business entity;
- Make its services available to the general public or others in the business community;
- Provide services reported on a federal income tax form 1099 if required by law;
- Perform services pursuant to a written contract, specifying the independent contractor/business relationship;
- Pay/provide for any necessary license or permit;
- Hire employees without contractor's approval and pay for them;
- Not be represented as contractor's employee;
- Have the right to perform similar services for others on whatever basis and whenever it chooses.

Under the Fair Play Act, employers must post notice of the law in a prominent and accessible place on job sites, even if the company classifies drivers as employees. Failure to do so can result in penalties of up to \$5,000. Willful violation of the Fair Play Act can result in civil penalties of up to \$5,000. Employers may also face criminal prosecution for violations of the law, punishable by up to 60 days in jail or a fine of up to \$50,000,

plus debarment from performing public works contracts for up to five years. Corporate officers and certain shareholders may also be held personally liable under the law.

Following the Fair Play Act, New York's Department of Labor issued extensive guidelines for companies to distinguish between employees and independent contractors in the messenger courier industry. See NYS Dep't of Labor, Guidelines for Determining Worker Status Messenger Courier Industry (April 2014). These guidelines list indicators of independence, indicators of employment and neutral factors for on-demand and route delivery services, and state that bike and foot messengers are considered employees by industry practice. The guidelines note that in the event they conflict with the Fair Play Act, the act takes precedence.

### New Jersey

On Jan. 14, 2015, in *Hargrove v. Sleepy's*, 220 NJ 289 (2015), the New Jersey Supreme Court held the "ABC test," similar to the one described above, governs whether a worker is an employee

or independent contractor under the New Jersey Wage Payment Law and the New Jersey Wage and Hour Law.

In reaching its decision, the court rejected the "economic realities" test, the "right of control" test, and a hybrid test. The ABC test is arguably the most difficult standard to overcome, and presumes that an individual is an employee unless the employer can make a three-prong showing as to the individual's autonomy and independent nature of services. Interestingly, the court acknowledged that the Fair Labor Standards Act applies the less stringent economic realities test. However, the court stated, "New Jersey decided to take a different approach" and the "ABC test operates to provide more predictability and may cast a wider net than [the] FLSA economic realities standard."

### California

In March 2015, ride-sharing companies Uber and Lyft lost motions in class action lawsuits brought by drivers from both companies alleging they have been misclassified as independent contractors. California federal courts denied motions for summary judgment brought by Uber and Lyft, respectively, ruling that juries would have to decide whether the drivers are employees or independent contractors. *O'Connor v. Uber Technologies*, No. 3:13-cv-03826-EMC (N.D. Cal. March 11, 2015); *Cotter v. Lyft*, No. 3:13-cv-04065-VC (N.D. Cal. March 11, 2015).

The district court judges in both cases said the drivers resemble independent contractors in some respects, such as their ability to choose their work hours and the riders they accept, and employees in other respects, such as the companies' control over drivers' interactions with customers and the power to fire at any time. Notably, the court stated in *Lyft*: "As should now be clear, the jury in this case will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem...[b]ut absent legislative intervention, California's outmoded test for classifying workers will apply in cases like this." *Lyft* at \*19; see also *Uber* at \*27. ("It is conceivable that the legislature would enact rules particular to the new so-called "sharing economy.").

### Conclusion

The area of independent contractor classification continues to evolve and, as noted above, may become the subject of still more legislative efforts to apply standards or create specific exceptions.

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The New York Commercial Goods Transportation Industry Fair Play Act, which became effective April 10, 2014, creates a legal presumption that drivers in the commercial goods transportation industry are employees rather than independent contractors, unless one of two tests is met.

The first test is a three-factor test, commonly referred to as the "ABC test," under which drivers will be considered independent contractors if they are: (A) free from control and direction in performing the job, as provided by contract and in fact; (B) performing services outside the usual course of business for the employer; and (C) customarily engaged in an independently established trade, occupation, profession, or business similar to the service they are performing. Under the alternative test, drivers will be considered independent contractors if it can be established that they are a "separate business entity." To do so, a sole proprietor, partnership, corporation or other entity must satisfy the following 11 factors:

- Perform the service free from direction or control over the means and manner of providing the service;
- Not be subject to cancellation or destruction when its relationship with the commercial goods transportation contractor ends;
- Have a substantial investment of capital in