Hirschfeld Kraemer

We work for employers

SAN FRANCISCO | SANTA MONICA | NAPA

Ian W. Forgie

NLRB Returns to Employer-Friendly Standard for Employee vs. Independent Contractor Test; Little Impact Foreseen for CA Employers

In its recently issued decision in *SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338*, the National Labor Relations Board (NLRB) reversed course on the test it uses to determine whether a worker is an employee or an independent contractor, adopting a more employer-friendly standard.

While it retains the common law's multi-factor test for determining independent contractor status, which the NLRB has always purported to follow, *SuperShuttle* reintroduces the worker's "entrepreneurial opportunity for gain or loss" as the test's "animating principle." *SuperShuttle* overturns the NLRB's 2014 *FedEx Home Delivery* decision, which downplayed the importance of "entrepreneurial opportunity" in determining independent contractor status.

While *SuperShuttle* represents yet another episode in the Trump NLRB's efforts to roll back Obama-era NLRB decisions that were seen as favorable to employees, it will have little impact on California employers, who must comply with the California Supreme Court's decision in *Dynamex* (which we blogged about here and here.)

The NLRB's "Common Law" Test for Determining Employee/Independent Contractor Status

At issue in *SuperShuttle* was whether airport shuttle drivers who worked for SuperShuttle Dallas-Fort Worth (SSDFW) were employees, whose concerted activities are protected by the National Labor Relations Act (NLRA), or independent contractors, who are not covered by the NLRA.

In its decision, the NLRB went through the common law test of factors to be considered. These include:

- The extent of control which, by the agreement, the master may exercise over the details of the work.
- Whether or not the one employed is engaged in a distinct occupation or business.

- 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.
- The skill required in the particular occupation.
- Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
- The length of time for which the person is employed.
- The method of payment, whether by the time or by the job.
- Whether or not the work is part of the regular business of the employer.
- Whether or not the parties believe they are creating the relation of master and servant.
- Whether the principal is in business or not.

No single factor is determinative, and a case-by-case analysis is required. In *SuperShuttle*, the NLRB noted that:

> …the Board, while retaining all the common-law factors, had shifted the emphasis from control to whether putative independent contractors have significant entrepreneurial opportunity for gain or loss . . . while the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism.

The "entrepreneurial opportunity" is critical, the NLRB determined, when considering the relationship between SSDFW and its drivers. While the drivers provided their own vehicles, set their own hours, and could, at least theoretically, work wherever they chose, much of the terms and conditions of their work were regulated by the contract between SSDFW and the public agency that operates the Dallas-Fort Worth airport. (And in this regard, the NLRB dismissed the significance of these aspects of employer control, characterizing them as government regulation of the terms and conditions of employment, which is not considered when determining independent contractor status.)

The SSDFW contract required drivers to wear a uniform, place certain decals on their vehicles, and maintain the interior condition of their vans to a standard set by the airport. It also required drivers to submit their vehicles to periodic inspection. Further, SSDFW set the fares drivers charged, and prohibited drivers from working for any of its competitors. Nonetheless, the NLRB found the drivers were independent contractors, because "the [drivers'] freedom to keep all fares they collect, coupled with their unfettered freedom to work whenever they want, provides them with significant entrepreneurial opportunity."

The critical distinctions between the *FedEx* and *SuperShuttle* tests, which both purport to apply the common law test and to consider the worker's entrepreneurial activity, are:

- the level of emphasis placed on the entrepreneurial factor, and
- whether the factor evaluates the worker's entrepreneurial potential, as emphasized in *SuperShuttle*, or whether the workers are, to quote *FedEx Home Delivery*, "*in fact*, rendering services as part of an independent business."

By placing more emphasis on the *potential* for entrepreneurial activity, while at the same time re-emphasizing entrepreneurial opportunity's centrality in the independent contractor test, *SuperShuttle* gives employers more latitude and certainty in designing independent contractor arrangements.

Under the *SuperShuttle* test, a well-designed independent contractor relationship can survive challenge even if, as was the case in *SuperShuttle*, the workers actually perform no work for other entities.

Takeaways

While a critical decision within the NLRA context, *SuperShuttle* will likely have little impact on how most California employers structure relationships with independent contractors. The *SuperShuttle* test is a far cry from the test announced by the California Supreme Court in *Dynamex*, which completely dispensed with the common law multi-factor test in favor of a three-element test that makes independent contractor status far more difficult to maintain.

From a practical standpoint, then, *Dynamex* remains the independent contractor standard for California employers.

Ian Forgie is an associate in Hirschfeld Kraemer LLP's San Francisco office. For more information, contact Ian at iforgie@hkemploymentlaw.com or (415) 835-9075.

Read more at https://www.hkemploymentlaw.com/blog/nlrb-returns-to-employer-friendly-standard-for-employee-vs-independent-contractor-test-little-impact-foreseen-for-ca-employers/#ko4Po07eMhvkvK77.99