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NLRB Restores Independent Contractor Test in SuperShuttle

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On Friday, January 25, 2019, the National Labor Relations Board ("NLRB") overruled an Obama-era decision focused on determining whether workers were independent contractors or employees and restored entrepreneurship as a key element in the NLRB's analysis of the ten factors that comprise the test to determine independent contractor or employee status. *SuperShuttle DFW, Inc.*, No. 16-RC-010963 (Jan. 25, 2019).

As explained in the 1968 Supreme Court decision, *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968), the NLRB applies the common law agency test, which includes analysis of the following ten factors:

1. The extent of control which the master may exercise over the details of the work;
2. Whether or not the worker is engaged in a distinct occupation or business;
3. The kind of occupation, including whether the work is usually done under the direction of the employer or by a specialist without supervision;
4. The skill required in the particular occupation;
5. Whether the employer or worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
6. The length of time for which the worker is employed or engaged;
7. The method of payment, whether by time or by job;
8. Whether or not the work is part of the regular business of the employer;
9. Whether or not the parties believe they are creating a master-servant relationship;
10. Whether the principal is or is not in business.

The NLRB found that, over time, its analysis retained all these factors, but shifted the emphasis from control to whether workers had significant entrepreneurial opportunity for gain or loss. While entrepreneurial opportunity is not a factor in the test, it is - like employer control - a principle that assists the evaluation of the factors. Where the factors reflect more employer control, they support an employer-employee relationship; where they reflect more entrepreneurial independence, they support independent contractor status.

In 2014, the NLRB refined this test in *FedEx Home Delivery*, 361 NLRB 610 (2014), enforcement denied 849 F.3d 1123 (D.C. Cir. 2017) (*FedEx II*). *FedEx* declined to follow a D.C. Circuit opinion that treated "entrepreneurial opportunity … as an 'animating principle' of the overall inquiry."[1] Instead, the *FedEx* Board reduced entrepreneurial opportunity to "one aspect of the relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*

." Instead of continuing to weigh a worker's ability to exert entrepreneurial control, the *FedEx* Board focused on actual entrepreneurial activity.[2] Thus, the *FedEx* Board limited entrepreneurial independence in the analysis to a subset of a new factor - whether the worker was actually providing services as part of an independent business - instead of part of the overall analysis, as it had been for over 45 years. Therefore, the *SuperShuttle* decision overruled the Board's 2014 *FedEx* decision and restored the traditional common law test described under *United Insurance* and its progeny.

In *SuperShuttle*, the Board determined that *FedEx* did not "refine" the independent contractor test as it claimed, but instead "fundamentally shifted" the analysis for policy-based reasons, which greatly diminished the significance of entrepreneurial opportunity. The Board determined it appropriate to overrule that "refinement" and restore the long-standing independent contractor test. Rather than restrict entrepreneurial opportunity to just one part of one of the ten factors of the test, the *SuperShuttle* Board instead found that entrepreneurial opportunity, like employer control, is an "animating principle by which to evaluate" all ten of the factors. In sum, *SuperShuttle* reinstitutes the Board's analysis that all ten factors be weighed equally to determine whether the scale tips more towards employer control and an employer-employee relationship or towards entrepreneurial opportunity and independent contractor status.

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[1] *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009) (*FedEx I*). Given the D.C. Circuit's decisions in *FedEx I* and *FedEx II* and the Board's decision Friday in *SuperShuttle*, the Board's now-overturned *FedEx* decision is an outlier in the recent independent contractor analysis, having been rejected twice by the D.C. Circuit and now by the current Board.

[2] Ironically, this is the exact opposite approach taken by the Obama Board's decision in *Browning-Ferris*, which rewrote the NLRB's joint-employer test. In *Browning-Ferris*, the Board stated that a reserved, yet untapped, ability to control workers provided by a supplier or staffing company rendered the user employer a joint employer. To the contrary, the *FedEx* Board found that workers were only independent if they actively engaged in their entrepreneurial opportunity - ignoring any reserved ability to control their own work.