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LEGISLATIVE ACTION ALERT

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NLRB ISSUES LATEST
INDEPENDENT CONTRACTOR DECISION

On June 13, the NLRB issued its long-awaited decision concerning the test by which to determine whether workers are employees covered under Section 2(3) of the National Labor Relations Act or, instead, are independent contractors excluded from coverage. The Board held, once again, that its earlier, pre-Trump standard, enunciated in *FedEx Home Delivery (FedEx II)*, a 2014 decision, would control. In doing so, it overruled the Trump-Board's decision in *SuperShuttle DFW, Inc.,* which held that "entrepreneurial opportunity" was a core factor in that determination. In that case the Trump-Board held that it was not essential that the workers in question had actually engaged in significant entrepreneurial activity; it was enough that they had the opportunity to do so, even if they had not done so. In other words, it was enough for that Board that there was an opportunity for the workers to engage in such activities; i.e. to act as independent businesses, even though they had not, in fact, done so.

While there is no single factor that is determinative, the Board will now, once again, consider the following:

a. The extent of control which, by the parties' agreement, the employer may exercise over the details of the work;
b. Whether or not 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 for which the person is employed;
g. The method of payment, whether by the time or by the job;
h. Whether or not the work is a part of the regular business of the employer;
i. Whether or not the parties believe they are creating the relation of employer and employee;
j. Whether the principal is or is not in business;
k. Whether the purported contractors have the ability to work for other companies, could hire their own employees and have a proprietary interest in their work

Moreover, the Board has made it clear that entrepreneurial opportunity is not, as both the Trump-Board and the D.C. Circuit Court of Appeals had held, an "animating principle" of the inquiry, but is merely one aspect of

a relevant factor that asks whether the evidence tends to show that the worker is, in fact, rendering services as part of an independent business.

The bottom line is that an employer that opposes unionization on the asserted independent contractor status of the workers will have a much more difficult time than under the now rejected *SuperShuttle* standard.

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