



FOR IMMEDIATE RELEASE

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## **COURT URGED TO ESTABLISH CLEAR RULES DIFFERENTIATING BETWEEN EMPLOYEES AND INDEPENDENT CONTRACTORS (FedEx Home Delivery v. NLRB)**

The Washington Legal Foundation (WLF) this week urged the U.S. Court of Appeals for the District of Columbia Circuit to establish rules that will allow employees to know when they should classify their workers as employees and when they should be classified as independent contractors.

In a brief filed in *FedEx Home Delivery v. National Labor Relations Board*, WLF argued that lack of clarity in the rules has spawned considerable confusion within the business community. WLF argued that many smaller firms, when in doubt about the proper classification, will err in favor of an "employee" classification in order to avoid the potentially ruinous financial penalties they could face if a court later determined that someone classified as an independent contractor was really an employee. Conversely, some firms will take advantage of the ambiguity and their competitors' caution by inappropriately classifying employees as independent contractors, thereby gaining an unfair competitive advantage, WLF argued.

"As this case well illustrates, some businesses improperly skirt the law by classifying individuals as independent contractors when they quite clearly are employees," said WLF Chief Counsel Richard Samp after filing WLF's brief. "By doing so, businesses do not merely gain an unfair cost advantage over rivals; they also strengthen the hands of those who would do away with the independent contractor model completely," Samp said. "WLF strongly supports use of the independent contractor model; it believes that independent contractors play a key role in driving economic growth and business innovation," Samp said.

The case concerns a determination by the National Labor Relations Board (NLRB) that FedEx Home Delivery (FedEx) violated federal labor law by classifying certain of its delivery drivers as independent contractors, a status generally reserved for workers who perform their duties without being subject to control by the firm to which they are providing services. FedEx is asking the appeals court to overturn that determination.

In its brief, WLF argued that it is essential for the appeals court to set down clear rules that differentiate between employees and independent contractors. For that reason,

WLF argued, courts should not defer to the case-by-case determinations of the NLRB regarding whether a particular company's workers are employees. Rather, WLF argued, the courts should establish their own rules that will apply in *every* case, without regard to how the NLRB has ruled in a particular case. WLF argued that the overriding factor in determining whether a worker is an independent contractor or an employee is the right-to-control test: the extent of supervision exercised by a putative employer over the means and manner of the worker's job performance.

WLF argued that under the right-to-control test, the FedEx drivers quite clearly are employees, not independent contractors. Among the factors that demonstrate an employee/employer relationship are: (1) all of the drivers work virtually full-time driving their trucks for FedEx -- they work on the five days specified by FedEx, within the relatively tight time frames required by FedEx's customers; (2) much of their pay is based on time spent on the job, rather than the quantity of work performed; (3) they virtually always are required to accept the packages assigned to them; (4) they have very little, if any, ability to build up their delivery routes, given that they cannot solicit customers or establish pricing; and (5) they are required to wear FedEx uniforms while delivering packages.

WLF noted that classifying employees as independent contractors provides a significant competitive advantage to companies that can get away with doing so. For example, when dealing with independent contractors, companies do not have to withhold federal, state, local, Social Security or Medicare taxes; pay the employer's share of employment taxes; pay unemployment or workers' compensation insurance; offer benefits like sick and personal leave, vacation, health insurance, tuition reimbursement, retirement contributions and stock options; and pay minimum wage and overtime. The cost-savings incentives to mis-classify workers as contractors is great, WLF said, thus increasing the need for courts to carefully monitor classification decisions to ensure a level playing field.

WLF is a public interest law and policy center with members in all 50 states. WLF devotes a substantial portion of its resources to defending the rights of the business community, and to ensuring that companies can compete against one another on an even playing field.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, [www.wlf.org](http://www.wlf.org).