

COURT MAKES IT HARDER TO DISTINGUISH EMPLOYEES FROM CONTRACTORS

by
Richard A. Samp

Businesses often have great difficulty determining whether their workers should be classified as employees or independent contractors. Classifying workers incorrectly can cost businesses dearly, so they routinely turn to court decisions for guidance. Unfortunately, a 2-1 decision issued last month by the U.S. Court of Appeals for the District of Columbia Circuit, *FedEx Home Delivery v. NLRB*, 2009 U.S. App. LEXIS 8272 (D.C. Cir. Apr. 21, 2009), adopted an entirely new set of rules for distinguishing employees from independent contractors, thereby making an already uncertain area of the law much more unsettled.

At issue was the proper classification of Federal Express drivers who deliver packages from central depots to residences. The drivers have some degree of independence: they own their own trucks, and they are allowed to hire others to drive their trucks for them. On the other hand, FedEx closely controls other aspects of their work. The drivers work on the five days specified by FedEx, within the relatively tight time frames required by FedEx's customers; much of their pay is based on time spent on the job, rather than the quantity of work performed; they are virtually always required to accept packages assigned to them; they can do little to build up a delivery route, given that they cannot solicit customers or establish pricing; and they are required to wear FedEx uniforms. Based on those facts, the National Labor Relations Board ruled that the drivers were employees entitled to collective bargaining rights. FedEx argued that the drivers were independent contractors, and it appealed to the D.C. Circuit. In the course of ruling for FedEx, the court developed an entirely new set of rules for distinguishing employees from independent contractors.

To determine whether a worker is an "employee" under federal labor law, traditionally courts have relied on common law rules governing a worker's status. While agency law permits courts to look to a sometimes bewildering number of factors in determining a worker's status, courts have generally applied the right-to-control test: "the extent of actual supervision exercised by a putative employer over the means and manner of the workers' performance." *North Am. Van Lines v. NLRB*, 869 F.2d 596, 599 (D.C. Cir. 1989). The NLRB argued that, given the extensive control exercised by FedEx over the way its drivers performed their job, the drivers were "employees" under the right-to-control test.

But at the urging of FedEx, the D.C. Circuit abandoned the right-to-control test. The court ruled that it will henceforth differentiate employees from independent contractors based on the extent of "entrepreneurial opportunity" available to the worker. The court held that the FedEx drivers were independent contractors because they were offered significant entrepreneurial opportunity (e.g., the opportunity to hire others to drive their route and to take on a second route), albeit only a few of the drivers availed themselves of those opportunities. Unfortunately for employers seeking guidance, the court decision provides very little explanation regarding how this new standard – which has not been adopted in other

circuits – is to be applied in other factual settings. Judge Merrick Garland dissented; he would have ruled that the drivers were employees under the right-to-control test.

The NLRB has not yet determined whether it will seek further review of the panel’s decision.

Richard A. Samp is Chief Counsel of the Washington Legal Foundation (WLF). An *amicus curiae* brief he authored for WLF and the U.S. Business and Industry Council urged adherence to the right-to-control test.

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