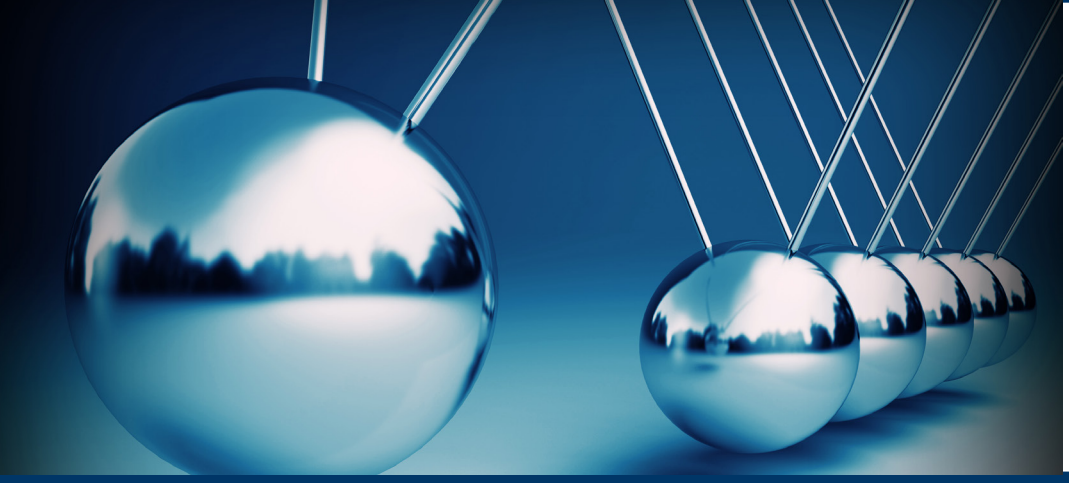

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NLRB Weighs in on Employee/Independent Contractor Divide

A multitude of laws govern the relationship between a business and its employees. Comparatively few govern the relationship between a business and independent contractors who perform work for it. But the legal dividing line between "employee" and "independent contractor" often blurs, and can vary by both jurisdiction and purpose. Unsurprisingly, businesses, and some workers themselves, tend to classify workers as independent contractors, while government agencies, seeking to expand their own jurisdiction, classify workers as employees. Businesses who misclassify workers as independent contractors have faced millions of dollars of liability for unpaid employment taxes, wage and hour violations, and benefit plan violations.

Last week the National Labor Relations Board ("NLRB") entered the debate, holding that drivers for FedEx Home Delivery were employees under the National Labor Relations Act ("NLRA") entitled to unionize. It turned aside FedEx's claim that the drivers acted as independent contractors, whom the NLRA did not protect. The NLRB's decision comes after a federal appeals court rejected a similar finding in an earlier FedEx case involving similar facts. Given the dispute between the NLRB and the intermediate federal courts, as well as the importance of the independent contractor model to FedEx's business plan, it seems likely that the U.S. Supreme Court will ultimately address this issue.

The NLRB held that no bright line exists between "employee" and "independent contractor," rather every case needed to consider a wide array of factors, all of which go to the basic question of whether the worker is "rendering service as part of an independent business." According to the NLRB, constituent parts of this analysis include (1) significant entrepreneurial opportunity, (2) a realistic ability to work for other companies; (3) a proprietary or ownership interest in the work being done; and (4) control over important business decisions, such as scheduling work, hiring, selection and assigning employees, purchase and use of equipment and commitment of capital.

The "Independent Business" analysis itself was only part of the overall 11-part analysis that the NLRB applied:

1. Extent of control by employer;
2. Whether the individual is involved in a distinct occupation or business;
3. Whether the work is usually done with or without supervision;

If you have any questions about the issues addressed here, or any other matters involving Labor and Employment issues, please feel free to contact:

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4. Specialized skills;

5. Who provides the supplies and tools;

6. Length of employment;

7. Method of payment;

8. Whether the work is part of the employer's regular business;

9. The parties' beliefs about the nature of the relationship;

10. Whether the employer is in the business that the worker performs; and

11. Whether the worker is rendering service as part of an independent business.

The NLRB's newly announced 11 factor test joins the 20 factor test which the Internal Revenue Service uses "the 3 part" ABC test used in most states for unemployment benefits purposes and in Massachusetts for all purposes, and several other multi-factor tests for determining when a worker is an "employee" versus an independent contractor. Someone running a business could be forgiven for thinking, along with Charles Dickens, that "the law is an ass – an idiot."

However, the clear take-away from this decision and most of the other enforcement initiatives over the past decade is that an employer should treat a worker as an employee unless he or she acts as an independent contractor. All the various iterations of the distinction get to the same basic point – is the worker independent of the principal or not? No matter which jurisdiction or law is at issue, it's safer to treat the worker as an employee. Businesses should think several times about every individual to whom they issue a 1099 rather than a W-2, and adjust business practices accordingly when there are serious concerns.

FedEx likely made a very considered decision to operate on this business model, knowing the risks involved. However, other employers inadvertently get into trouble because they did not think enough about how properly to classify their employees. Whichever way the courts decide the ultimate status of FedEx Home Delivery drivers under the National Labor Relations Act, the law in this area will remain highly tilted towards finding most workers to be employees rather than independent contractors. Employers should act accordingly.

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