

LABOR BOARD CHANGES INDEPENDENT CONTRACTOR ANALYSIS

On January 25, 2019, a full majority of the National Labor Relations Board (“NLRB”) issued a decision overruling yet another employee-friendly Board decision from the Obama era. In *SuperShuttle DFW, Inc.*, the NLRB overruled its 2014 decision in *FedEx Home Delivery*, which had altered the Board’s independent contractor test by holding that a worker’s entrepreneurial opportunity represents merely “one aspect of a 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.”

The Board’s majority in *SuperShuttle* found that the *FedEx* decision improperly diminished the importance of entrepreneurial opportunity in the Board’s independent contractor analysis and that it revived an “economic dependency” standard, which had made it easier to find that a worker was an employee – and thus protected by the National Labor Relations Act – where the worker is not providing services as part of an independent business. The *SuperShuttle* Board returned to the common-law agency test set out in the 1958 version of the Restatement of Agency, a legal treatise that identifies ten non-exclusive factors, including the level of control exerted over the worker, the method of payment, and the amount of supervision over the worker, to determine whether a worker is an independent contractor or employee.

Applying the common-law test to the facts of this case, which involved shuttle-van-driver franchisees of SuperShuttle at Dallas-Fort Worth Airport, the Board’s majority found that the franchisees’ ownership the principal instrumentality of their work, the method of their compensation, and their significant control over their daily work schedules and working conditions provide them with significant entrepreneurial opportunity. The majority concluded that because those factors, along with the absence of supervision and the parties’ understanding that the franchisees are independent contractors, outweigh the factors supporting employee status, the franchisees are independent contractors. Accordingly, they were blocked from petitioning the Board for union representation.

Lauren McFerran, the NLRB’s only Democratic member, dissented from the Board’s ruling. She stated that the majority has no evidence to support its contention that entrepreneurial opportunity is at the center of the common-law test for agency. In addition to departing from the common law, the NLRB’s new standard fails to consider the realities of working relationships, Member McFerran wrote – “The majority’s approach here might easily be called the ‘economic *unrealities*’ test.”

ASHER, GITTLER & D'ALBA, LTD.
200 West Jackson Boulevard, Suite 720
Chicago, IL 60606 – 312.263.1500

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