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LEGAL UPDATE | NLRB Rolls Back Limitations on Independent Contractor Classification

The National Labor Relations Board's recent ruling in *SuperShuttle DFW, Inc*. returns to a longstanding standard in evaluating proper independent contractor classification. Although its scope is limited, the recent ruling eases restrictions on proper independent contractor classification for purposes of unionization rights under the NLRA, specifically where the workers' role involves "entrepreneurial opportunity."

The case involved the issue of whether franchisees of shuttle-van drivers at Dallas-Fort Worth Airport qualified as employees or independent contractors. Amalgamated Transit Union sought to represent a group of SuperShuttle DFW drivers as employees. SuperShuttle representatives emphasized that because the franchisees do not share fares with SuperShuttle and operate their vehicles with little control, the franchisees have total autonomy over their work, thereby classifying them as independent contractors and exempt from the National Labor Relations Act.

By a 3-1 party-line vote, the Board ruled that the franchisee shuttle van drivers for SuperShuttle were independent contractors under the common law test. In doing so, the Board further held that entrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common law factors.

The decision reverses the Board's prior ruling in *FedEx Home Delivery*, where the Board found that a worker's "entrepreneurial opportunity" was merely a consideration as part of the broader factors under the common law test. This test considers any constraints placed on an employee's ability to conduct an independent business.

The Board affirmed, finding that the franchisees' ownership (or lease) and control of their vans, the nearly unfettered control over their daily work schedules and working conditions, and the method of payment by a monthly fee all weighed in favor of independent contractor status. The combination of these factors demonstrated that the franchisees are provided with significant entrepreneurial opportunity and control over how much money they make each month.

While the Board's reemphasis on "entrepreneurial opportunities" does not affect contract employees in California, which has its own independent contractor test for state law wage and

hour purposes[1], these same individuals may be considered exempt from coverage by the NLRA. Nonetheless, this decision comes as good news for companies that prefer to use contract labor by allowing for more factual inquiry into a worker's entrepreneurial opportunity in determining his or her employee status for the purposes of unionizing.

[1] Click here for a link to our article on California's *Dynamex* case which sets forth stricter requirements on independent contractor classification.