

Employment Law Summer Recap 2014: Part 1 of 11 – FedEx sings Nico & Vinz’s “Am I Wrong” ...to Classify Our Drivers as Independent Contractors?

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Am I wrong for thinking out the box from where I stay?
Am I wrong for saying that I choose another way?

Those are the opening lyrics to Nico & Vinz’s (catchy would be an understatement) summertime hit “Am I wrong.” The music stations play it so often that my car radio now just automatically turns off in protest. You can listen to the song if you like, but just remember, it’s sorta like eating a Lay’s potato chip. You know who is probably belting out the opening lyrics to this song as I type? FedEx executives after the loss they just suffered in the 9th Circuit.

You see, FedEx classifies its drivers as independent contractors. Many players in the logistics industry do so as well. But a decision handed down by a three-judge panel out of the 9th Circuit in [Alexander v. FedEx Ground Package System, Inc.](#) said that FedEx exercised too much control over these folks (and by folks, I mean more than 2,300 drivers operating in Oregon and California), and as a result, it should have classified them as employees rather than as independent contractors.

The decision will likely upend FedEx’s driver business model in part because it makes it more expensive for FedEx to operate its business – an added expense that we can expect it will pass along to us, the consumers. Why more expensive? Because, among other things, FedEx will now have to (i) make the required employer contributions on behalf of these individuals (i.e. to Social Security and unemployment benefit funds); (ii) take out new insurance policies (i.e. for workers’ compensation insurance); (iii) offer them health insurance and (possibly) pension benefits along with other benefits like paid vacation; (iv) incur the administrative and operational costs associated with treating these individuals as employees (i.e. additional training and development, compliance, etc.); and (v) potentially pay them back for millions in lost wages. Further, these individuals can now sue FedEx under many of the employment laws that did not previously cover them (i.e. Title VII) – yet another potential expense for FedEx.

The counter, of course, is that if you treat someone like an employee, then you have to treat them like an employee is all aspects of the relationship, including with respect to their compensation and benefits. If that affects your bottom line negatively, we are sorry, but as Nico might say, that’s not just how I feel, that’s not just how I fe-e-e-e-e-I; that’s just what the law says. While an oversimplification,

that was essentially the 9th Circuit's view here, and those agreeing with the 9th Circuit would likely tell you that if you don't like it, the proper course of action is to (i) call your congressperson and ask that they change the law; and/or (ii) exercise less control over these drivers so that they truly are independent contractors.

But there's a third option too, which FedEx will no doubt pursue first: asking the full 9th Circuit bench to revisit this issue given the importance of the case, including that it conflicts with a host of other decisions by courts scattered throughout the country endorsing FedEx's classification decision, and that an adverse decision may impact the dozens of other pending FedEx driver misclassification cases.

However this case is eventually resolved, at this point just about everyone who traffics in the employment law arena knows that employee misclassification is a hot-button issue. Besides the threat of litigation, and as we wrote about this summer [here](#) and [here](#), federal and state agencies continue to aggressively pursue employers failing to classify their employees properly. The main reason: to recover lost tax revenue and other social safety net subsidies (i.e. employment taxes, FICA, FUTA, workers' compensation and unemployment insurance funds).

We will continue to track this FedEx case, but just know that it remains more important than ever to analyze your independent contractor relationships and restructure them where appropriate.

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