

The National Labor Relations Board (NLRB) Refines Test for Determining Independent Contractor Status Versus Employee Status

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The **National Labor Relations Board** has published a decision (***FedEx Home Delivery, 361 NLRB No. 55***) holding **FedEx delivery drivers to be employees** under the National Labor Relations Act **instead of independent contractors**. This is in opposition to both arguments by FedEx and a ruling by the Court of Appeals for the District of Columbia in a related case involving FedEx drivers at a different facility.

In its September 30, 2014 decision, the NLRB clarified the test it will apply in future cases and specifically refused to adopt the reasoning of the Court of Appeals setting up a future battle at the United States Supreme Court. The proper classification of individuals as employees or independent contractors can be critically important for tax, benefits and other labor and employment purposes. The NLRB test articulated in the FedEx case reaffirms the totality of the circumstances approach the NLRB has historically used, but declined to find that “entrepreneurial opportunity” is always of primary importance.

Entrepreneurial opportunity has been defined as the opportunity for gain or loss in the business along with the ability to work for other companies, hire their own employees, and have a proprietary interest in their work.

While this issue seems destined for further litigation and argument in the courts and ultimately at the Supreme Court, it is a good reminder that proper classification of employees remains an important and sometimes difficult issue. Properly classifying an individual at hire is only the first step in the process and employers should regularly self-audit their classifications to ensure they remain proper.

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