

## COURT RULES EMPLOYEE OR INDEPENDENT CONTRACTOR DETERMINATION IS LITMUS TEST WHEN UNIONS COLLECTIVELY BARGAIN

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Companies can refuse to bargain with unionized workers when the workforce has been classified as independent contractors and not employees as determined under the National Labor Relations Act (NLRA), according to a recent decision by the U.S. Court of Appeals for the District of Columbia Circuit. The circuit court held that the significant opportunity for entrepreneurial gain or loss determined the classification of the employee.

In *FedEx Home Delivery, Inc. v. National Labor Relations Board*, --- F3d ---, 2009 WL 1046789 (C.A.D.C), the International Union of Teamsters attempted to organize the workers at two of the plaintiff's home terminals in Delaware. After winning the two representation elections, the Teamsters were certified as the collective bargaining representative at the terminal. The plaintiff company refused to bargain with the union, maintaining that the drivers were not employees under the NLRA.

The defendant rejected the plaintiff's request for review of the regional director's decision and direction of election, and it found the plaintiff had violated sections 8(a)(1) and (5) of the NLRA. 29 USC §§ 158(a)(1) and (5). The plaintiff company filed a petition to review with the defendant filing a cross-application for enforcement, which was supported by the intervening teamsters.

The circuit court began its review of the matter by exploring the common-law agency test, as delineated in the Restatement (Second) of Agency §220(2), which is used to determine if a person is classified as an employee or an independent contractor.

The court's majority highlighted the difficulties inherent in the common law test in that it focused on the element of control that an employer could exert over a worker. The majority noted that although the common law test required consideration of the totality of the circumstances surrounding the relationship, the extent of actual supervision had become the most important element.

The majority then went on to discuss a series of cases in which the courts had gradually moved

away from the control inquiry. Although all of the factors of the common law test were retained, the appellate court noted that the inquiry had shifted to one of whether or not the worker had significant entrepreneurial opportunity for gain or loss.

The court then examined the circumstances surrounding the drivers at the plaintiff company. The court noted that the drivers signed a Standard Contractor Operating Agreement that specified that the drivers were not employees of the plaintiff, that it could not prescribe hours of work, and that the drivers were not subject to reprimand or other discipline. The drivers had to supply and maintain their own vehicles, although the vehicles were required to conform to government regulations and safety requirements.

In addition, drivers were permitted to use the vehicles for commercial or personal business so long as the plaintiff's logos were not visible. The drivers could operate multiple routes and hire their own employees. Drivers could take time off without the plaintiff company requiring that they seek a replacement driver for their routes. Furthermore, the drivers could assign their contractual rights to their routes without the plaintiff's permission, which the majority found to be significant in its analysis.

The majority then concluded that because the evidence clearly showed the drivers had entrepreneurial opportunity, they were independent contractors and not employees.

The partial dissent argued that the majority was mistaken in its contention that entrepreneurial opportunity had become the focus of the common law test to determine if a worker was an employee or independent contractor. The dissent argued that although it was within the power of the defendant to change the focus of the common law test, the court did not possess such authority itself.

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