

FedEx Drivers' Case Delivers Lesson For All Businesses

Labor & Employment Law Update

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Last week a federal appeals court ruled FedEx drivers are not independent contractors, but rather employees. The decision prompted many to ask, FedEx drivers are classified as independent contractors? In fact they are. According to the decision, *Alexander v. FedEx*, drivers provide their own vehicles (which must meet detailed specifications), pay their own operating expenses, determine their own routes, (provided they deliver the assigned packages on time) and sign an operating agreement accepting the independent contractor arrangement.

The FedEx case arose because a group of drivers challenged the independent contractor designation. However, various governmental agencies can and regularly do launch investigations on this issue *even when the parties involved are happy with the independent contractor arrangement*. The employee verses independent contractor distinction has potentially huge implications for payroll taxes, unemployment, social security, wage rates, overtime, benefits, exposure to liability, and applicability of various employment laws – worker's compensation, Title VII, ADEA, ADA, FLSA, FMLA, and more.

The IRS, state taxing authorities, unemployment agencies, state and federal departments of labor, and the EEOC and its state and local counterparts all have a stake in whether an individual is an employee or an independent contractor. To complicate matters further, each agency has its own criteria for differentiating between the two, and one agency's determination is not binding on another. There are no hard-and-fast rules; the IRS alone considers 20 factors.

Though each agency has its own means to determine when an independent contractor is actually an employee, it generally boils down to how much control you retain over the performance of the job. Referencing California law, the *Alexander* court stated: "The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." In other words, do you oversee the process or simply dictate the end result?

FedEx drivers must wear company uniforms, use company scanners, abide by the company's appearance, service and safety standards, drive company-approved trucks, and deliver their assigned packages within a specified time window. This, the court concluded, amounts to sufficient control over the manner and means of their work to render them employees despite their written

acceptance of independent contractor status.

So, what can you do to protect your business?

1. Realize the distinction is determined by law, not choice. The parties' agreement that an individual is an independent contractor – even if in the form of a written contract — does not make it so.
2. If the individual performs work for your organization exclusively and/or for an extended period, it will likely be difficult to justify an independent contractor relationship.
3. If the individual is regularly engaged in performing a service for hire and performs that service for others, independent contractor status may be appropriate. If he has formed his own business entity, your chances are likely better.
4. Involve competent counsel at the on-set; don't wait until problems arise. It is far more cost effective to address these issues up front than it is to defend an audit or a lawsuit and sort out back taxes, back wages, penalties and fines.

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