Labor & Employment Issues
In Focus
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NATIONAL LABOR RELATIONS BOARD REVERSES INDEPENDENT CONTRACTOR RULE

On January 25, 2019, the National Labor Relations Board ("NLRB" or "Board") made it easier for employers to classify workers as independent contractors excluded from federal labor protections, reversing an Obama era standard. *SuperShuttle DFW*, N.L.R.B., 16–RC–010963, (Jan. 25, 2019). The Board ruled in a 3-1, party-line vote that shuttle van drivers for SuperShuttle are independent contractors and not employees. The ruling strips SuperShuttle drivers in Dallas-Fort Worth, of the right to organize.

The Board overruled a 2014 case, *FedEx Home Delivery*, in which a Democratic majority of the NLRB established a standard making it easier for workers to be considered employees rather than contractors. The Board in *SuperShuttle* found that the Obama-era ruling had "impermissibly altered the board's traditional common-law test" by "severely limiting" the significance of workers' "entrepreneurial opportunity" when analyzing whether they were contractors or employees.

The ruling has implications for many businesses, including ride-hailing companies like Uber and Lyft, which rely on drivers whom they claim are independent contractors and not direct employees. Moreover, 10.6 million workers were independent contractors in 2017, accounting for nearly 7 percent of the American workforce, according to the U.S. Labor Department.

In its decision, the NLRB used a legal framework which combines an analysis under the common law with an examination of entrepreneurial opportunity. The NLRB's ruling uses a common-law test which considers 10 non-exhaustive factors to determine whether a worker is an independent contractor or employee. Those factors include the level of control a business exerts over a worker, the method of payment, and the amount of supervision involved in the job. The Board can "evaluate the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate," according to the ruling.

Entrepreneurial opportunity has always been at the core of the common-law test for the agency, the NLRB said. Conversely, according to the decision, the Obama-era Board impermissibly changed the traditional test for independent contractors by underplaying the importance of entrepreneurial opportunity and emphasizing workers' economic dependency on companies. In addition, the U.S. Court of Appeals for the District of Columbia Circuit also pointed to the importance of considering entrepreneurial opportunity in a 2017 decision which overruled the NLRB's Obama-era holding and held that FedEx Home Delivery drivers were in fact independent contractors.

In dissent, Lauren McFerran, the NLRB's sole Democratic member, argued that her Republican colleagues have no evidence to support their contention about entrepreneurial opportunity being at the center of the common-law test for agency. In addition to departing from the common law, the NLRB's standard fails to consider the realities of working relationships, McFerran said. "The majority's approach here," she wrote, "might easily be called the 'economic unrealities' test." In the same vein, Wilma Liebman, the Board chair during President Obama's first term, called the new ruling the latest example of the current Board "ignoring worker realities and constricting labor law rights."

While the decision is not about ride sharing *per se*, its' holding could have been written by Uber and Lyft. The thesis on which the labor board based its decision—that SuperShuttle drivers are not employees because they "have total autonomy to set their own work schedule"—is particularly attractive to the ride sharing companies. In fact, SuperShuttle drivers are largely in thrall to the company. They pay the company an initial franchise fee (for drivers in Dallas-Fort Worth, $500), a flat weekly fee to use the SuperShuttle brand and its dispatch system ($575), and a decal fee ($250). The drivers are required to supply their own shuttle van (average cost: $30,000), for a total investment of up to $40,000. SuperShuttle sets the fares that customers pay. Drivers' vehicles must meet stringent specifications, per the franchise agreement: seat eight people, including the driver; be no more than five years old; be one of five acceptable models; and use SuperShuttle's proprietary blue-and-yellow paint scheme and logo. The airport contract requires SuperShuttle to provide at least 16 hours of driver training each year, on topics including disciplinary guidelines, dress standards, and customer service.

SuperShuttle's franchise agreement also lists 25 reasons for which SuperShuttle can fire drivers without recourse. These include unauthorized use of SuperShuttle trademarks, use of a relief driver who hasn't been approved by SuperShuttle, and working for a competitor. SuperShuttle can also terminate a driver for failing to make payments to the company within three days of written notice of default. The franchise agreement warns that drivers "who do not wish to be franchisees and independent business people but who prefer a more traditional employment relationship should not become SuperShuttle franchisees."

Despite these myriad dictates from SuperShuttle, its drivers are not employees, according to the Board, because they "set their own work schedules and select their own assignments; SuperShuttle does not set schedules or routes, nor does it require franchisees to be active during certain days or hours. Thus, franchisees have complete control over their schedules." This control by drivers, plus the hefty financial investment drivers make in their work, proves "significant entrepreneurial opportunity." The "limited employer controls are vastly outweighed by the general control that franchisees have over their working conditions, including scheduling and selecting bids," the Board writes.

With this decision, the continuing saga of the status of ride sharing drivers made a significant move toward the employer's goal of independent contractor status.

ME-TOO MEANS YOU-TOO: POTENTIAL UNION LIABILITY FOR STEWARD SEXUAL HARASSMENT

Can a union be held liable for sexual harassment perpetrated by a steward or delegate who is not a union officer? In today's climate, the question is increasingly pertinent, and the answer may surprise some.

Analysis of the few cases that have addressed this issue, including recent decisions in New York federal courts, yields three circumstances under which conduct of a steward or delegate who is not an officer may arguably result in union liability for sexual harassment. A union may be liable for a non-officer steward's sexual harassment of another employee if the union knows or should know of, allows and does not cure the harassment and the steward: (1) acts in a lead employee role; (2) violates the traditional duty of fair representation; or (3) is "aided and abetted" by the union. The first two instances impute liability under traditional actual or apparent authority theory. Thus, if the union grants a steward authority to act on its behalf or the union allows workers to reasonably believe the steward wields such authority in an area of union activity, the steward may be deemed to act as the union's agent, making it liable.

The first scenario for such liability occurs when the delegate acts in a "lead-employee" manner. For example, the steward may arrange schedules, assignments or overtime or other managerial powers delegated to him by the employer. If the steward uses these powers to harass or discriminate against a co-worker, the employer may be liable because the steward acts as the employer's agent. Similarly, the union may be liable if the aggrieved worker reasonably believes that the steward acts on behalf of the union as its agent as well.

The second scenario arises in the traditional duty of fair representation context. The union's duty of fair representation includes the obligation not to discriminate based on sex or other protected categories. A union which uses stewards to fulfill its duty as to "union activity" may be liable for their harassment when the steward actively or by inaction causes the Union to breach the duty. Thus, a steward empowered by the union to assist in grievances or represent the workers at disciplinary meetings and in these roles discriminates against or harasses a co-worker may render the union liable for his misconduct, again as the union's actual or apparent agent.

The third scenario is "aiding and abetting," not based on agency theory. In "aiding and abetting," the union knows or should know of the steward's discrimination or harassment of a co-worker, allows or does not cure it, and substantially assists the violation. While we found no case imposing liability on a union under this theory, courts consider and plaintiffs' counsel increasingly utilize it.

It should be noted that since the steward is not an officer, the union is not automatically liable. Rather, courts appear to apply analysis similar to that used for imputing liability to an employer for a coworker's harassing behavior. In that context, vigorous union reaction to cure the alleged discrimination or harassment tends to weigh against union liability. Applying this same analysis, training stewards against discrimination or harassment as part of their preparation for the position may also militate against union liability.

CITING "PRIVACY," OSHA ELIMINATES RECORD KEEPING REQUIREMENTS

Continuing the theme of reducing workers' rights, the Department of Labor's Occupational Safety and Health Administration ("OSHA") is rescinding two major parts of its electronic recordkeeping rule, no longer requiring the submission of injury and illness data from Forms 300 and 301. The current rules require establishments with 250 or more workers to electronically submit information related to Work-Related Injuries and Illnesses and Incidents which caused such injuries or illnesses. These establishments are still required to electronically submit information from OSHA Form 300A (Summary of Work-Related Injuries and Illnesses).

So anxious to implement these rule changes was OSHA, that they were announced during the partial government shutdown. Secretary of Labor R. Alexander Acosta has cited privacy concerns as one reason for the changes, in the sense that the reports would include the nature of workers' injuries and illnesses. This explanation, unsurprisingly, was greeted with criticism. The Public Citizen Health Research Group, the American Public Health Association, and the Council of State and Territorial Epidemiologists filed suit against OSHA because the agency initially announced on its website – instead of through a proposed rule – that it no longer was accepting Forms 300 and 301. The groups claim that action violates the notice-and-comment protocol as mandated in the Administrative Procedure Act, and on December 12, 2018, Judge Timothy J. Kelly of the U.S. District Court for the District of Columbia on Dec. 12 allowed the suit to proceed, although without staying implementation.

The AFL-CIO and other unions requested a meeting with OSHA before the government shutdown, but received no response. In a statement issued Jan. 24, AFL-CIO Director Peg Seminario said the rollback "allows employers to hide their injury records and keep workers, the public and OSHA in the dark about dangerous conditions in American workplaces." She added, "This backward action flies in the face of recommendations from the National Academy of Sciences, Engineering, and Medicine and the public health community strongly endorsing the collection and use of this injury data for prevention."

PRIVATE SECTOR UNION MEMBERSHIP SLIPS

Continuing long term trends, in 2018 private sector union membership fell nationwide. According to the federal Bureau of Labor Statistics, the percentage of private sector union-represented workers fell to an all-time low of 6.4% in 2018, from 6.5% in 2017.

Including public sector workers, the numbers show that the percent of wage and salary workers who are members of unions fell to 10.5 percent in 2018, also the lowest number recorded since BLS began tracking the statistic. Digging deeper into the report, there were numerous highlights, including that men are more likely to be represented by unions than women by a rate of 11.1% to 9.9%; African-Americans were more likely to be union members than Caucasian, Asian or Hispanic employees; older workers aged 45 to 64 were unionized at a higher rate, with workers from 45 to 54 unionized at a rate of 12.8% and workers aged from 55 to 64 unionized at a rate of 13.3%. Meanwhile, the gap between union membership for men and women of about 1 percentage point, 11.1 percent vs. 9.9 percent is down from about 10 points in 1983.

Utilities (20.1%), transportation and warehousing (16.7%), and telecommunications (15.4%) were the industries with the highest unionization rates while finance (1.3%), food services (1.3%), and professional and technical services (1.5%) were among the lowest. When including the public sector, the highest unionization rates in 2018 were in protective service occupations (33.9%) and in education, training, and library occupations (33.8%). Unionization rates were lowest in farming, fishing, and forestry occupations (2.4%); sales and related occupations (3.3%); computer and mathematical occupations (3.7%); and in food preparation and serving related occupations (3.9%). Hawaii and New York had the highest union membership rates (23.1% and 22.3% respectively), while North Carolina and South Carolina had the lowest (2.7% each). California (2.4 million) and New York (1.9 million) had the largest number of unionized employees.

Overall, 14.7 million workers belong to unions, compared to 17.7 million workers, or about 20.1 percent of the workforce, in 1983, the first year for which comparable union data are available. Union membership in both the public and private sectors declined, with 7.2 million employees in the public sector belonging to a union, compared with 7.6 million workers in the private sector. However, the union membership rate of public-sector workers, at 33.9 percent, was more than five-times higher than that of private-sector workers, 6.4 percent.

Statistics like these, in combination with the onslaught of negative news from the courts and legislatures make it that much more imperative for unions to organize.

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