

## **FEDERAL COURT HOLDS THAT (MOST) FEDEX GROUND DRIVERS ARE INDEPENDENT CONTRACTORS**

On December 13, 2010, a Federal Judge in Indiana ruled that most FedEx Drivers were properly classified as independent contractors and as such were not entitled to the benefits of an employee. This ruling came out of a multi jurisdictional proceeding in which over 40 initial lawsuits by FedEx drivers were consolidated into one lawsuit. In the ruling Judge Miller held that in 20 of 28 class actions the drivers were properly classified as independent contractors. This case is part of an epic saga of independent contractor status that is being followed by companies and lawyers alike. The misclassification of an independent contractor can cause a company hundreds of thousands of dollars in fines and assessments from the IRS, DOL and Employment Security Divisions.

This ruling is a beacon of hope for other industries and a precedent that will undoubtedly be challenged. The determination and tests for independent contractor status varies with the agency or court that is conducting the examination however, generally, the court or agency is looking to ascertain who has the right to control the individual. Right to control is determined by a variety of factors including the behavioral control (instructions as to where, when and how to do work), financial control (how payment is made, benefits given etc.) and the relationship or the parties (the contractual outlines of the relationship). Broadly speaking, the more control the company has the less likely the individual is to be deemed and independent contractor.

The FedEx cases sparked a series of controversies over who is an independent contractor, with the drivers arguing that their uniforms, routes and scheduling belied the hallmarks of an employee and as such that they should be entitled to all of the benefits of one and the company vehemently arguing that the drivers were independent and that the control was over service requirement and not the means and methods used to obtain the service.

In the 182-page decision, Judge Robert Miller Jr. sided with FedEx and differentiated the control of the drivers noting that FedEx's controls on drivers were results-oriented and not method driven. Judge Miller stated that the number one factor was the right to control and then found that the "customer-based constraints on the drivers are results-oriented controls that don't indicate employee status... [Specifically] FedEx provides work to and pays contractor-drivers to provide the specific result of timely and safely delivered packages to FedEx customers."

The Judge not only examined the behavioral control of the parties but also the contractual relationship of the parties. In doing so, Judge Miller reviewed the FedEx operating agreement and company policies and found that they sufficiently outlined an independent contractor relationship. One key factor in this determination was the method of termination of the relationship. Employees are generally at will and can

be terminated at any time, for any reason at all. Independent contractors should have a durational relationship that terminates with notice. The Judge found the fact that FedEx can't discharge drivers on a whim, the way an at-will employment relationship can be ended, as a strong indicator that the drivers were independent contractors.

While the FedEx case is heartening to employers it is also a reminder that a strong written agreement alone is insufficient to survive a misclassification audit, rather the implementation is also essential. Companies that do not have both strong agreements and actual independence are unlikely to survive an audit. Any company that utilizes independent contractors on a regular basis should have their agreements and practices reviewed by labor counsel to ensure compliance and prevent another chapter in the independent contractor saga.

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(In re FedEx Ground Package Sys. Inc. Emp't Practices Litig., N.D. Ind., No. 3:05-MD-527 RM, 12/13/10 ).