Alert

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COZEN O'CONNOR

NLRB Deals Another Blow to Gig Workers' Rights Under NLRA

Last week, the Division of Advice of the National Labor Relations Board (Board) released a previously issued advice memorandum (memorandum) concluding that drivers for the ride-sharing platform Uber are independent contractors and not "employees," and recommending dismissal of pending unfair labor practice charges. This conclusion means that Uber drivers, and, by logical extension, other "gig workers" engaged in similar platforms, are excluded from the rights afforded to employees under the National Labor Relations Act, including the right to form or join a union and the right to engage in protected concerted activity. The memorandum was released less than a week after Uber and Lyft drivers called upon each other for a nationwide strike to protest working conditions, including complaints related to wages and working conditions — activity that ironically would be protected for individuals classified as employees under the NLRA.

In the memorandum, the NLRB Division of Advice applied the employer-friendly independent contractor test the Board recently established in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (Jan. 25, 2019). *SuperShuttle* overruled a 2014 Obama Board case, *FedEx Home Delivery*, and listed 10 non-exhaustive common-law factors to be examined when determining independent contractor status. *SuperShuttle* explained that "where the common-law factors, considered together, demonstrate that the workers in question are afforded significant entrepreneurial opportunity, [the Board] will likely find independent contractor status."

In applying the *SuperShuttle* test to Uber drivers, the memorandum considered the 10 common-law factors "through 'the prism of entrepreneurial opportunity.'" In conclusion, it determined that Uber drivers had significant opportunities for "economic gain and, ultimately, entrepreneurial independence" in three ways: (1) freedom to set their own work schedules; (2) control over their work locations; and (3) ability to work for competitors. Accordingly, the memorandum concluded that Uber drivers were independent contractors. In doing so, the memorandum glossed over the fact that the method of payment for Uber drivers is more frequently considered inferential of an employment relationship; a legal inference that the memorandum dismisses as "questionable."

This conclusion of the Division of Advice follows other recent decisions at the federal level that make it easier for employers to classify workers as independent contractors under federal laws. Within the last month, the U.S. Department of Labor issued an opinion letter that also found that the gig workers at issue in that case were independent contractors and not subject to minimum wage and overtime restrictions under the Fair Labor Standards Act (FLSA). Similarly, the U.S. Court of Appeals for the Fifth Circuit recently issued an employer-friendly opinion clarifying the level of control an employer may exercise over independent contractors without risking FLSA liability.

While these decisions may signal the immediate trend for federal regulation and enforcement, they do not impact state law tests for determining independent contractor status for such issues as state income tax and eligibility for unemployment compensation and workers' compensation benefits. Accordingly, employers are well advised to be aware of applicable state laws and to expect to see workers push for even more state-level legislation on the issue of employee status.

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