BusinessManagement DAILY

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NLRB ruling limits independent contractors right to form or join a labor union

In a big win for employers, the National Labor Relations Board has adopted a broad definition to distinguish independent contractors from employees, making it difficult for contractors to form or join a union.

Its decision in *SuperShuttle DFW Inc.*, emphasized that contractors retain great flexibility to control their work, set their own schedules and use their own equipment. That means, the NLRB ruled, they are not covered by the National Labor Relations Act.

The decision will make it much harder for gig economy workers to seek union representation. It "throws a roadblock into unionization efforts involving such workers, as federal law does not permit independent contractors to unionize," said a statement from the Fisher Phillips law firm.

The NLRB issued the three-to-one decision on Jan. 25.

SuperShuttle DFW, Inc., involved driver franchisees of SuperShuttle at Dallas-Fort Worth Airport. The case arose after a union tried to organize the drivers and negotiate a collective bargaining agreement on their behalf.

The drivers' freedom to take an entrepreneurial approach to their work shaped the NLRB ruling.

"This decision likely offers the greatest benefit to businesses that engage workers to provide temporary or short-term services," according to Ogletree Deakins employment lawyers Bernard J. Bobber and Jesse R. Dill. Writing in the firm's blog, they noted, "These types of businesses, including those providing services in the 'gig economy,' are now more likely able to avoid union organization and charges of unfair labor practices under the NLRA."

Entrepreneurial opportunity

The board found that the franchisees' leasing or ownership of their work vans, their method of compensation and their "nearly unfettered control over their daily work schedules and working conditions" provided the franchisees with "significant entrepreneurial opportunity for economic gain."

Those factors, along with the absence of supervision and what the board called the parties' own "understanding that the franchisees are independent contractors," resulted in the finding that the franchisees are not employees under the NLRA.

The new NLRB standard aligns closely with the standard the Department of Labor uses to distinguish between employees and independent contractors for determining coverage under the Fair Labor Standards Act. (*Learn more about that standard at* ***www.theHRSpecialist.com/6factor***.)

The *SuperShuttle DFW, Inc.*, decision overruled *FedEx Home Delivery*, a 2014 NLRB decision that modified the test for determining independent-contractor status by limiting the significance of a worker's entrepreneurial opportunity for economic gain.

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Online resource: Find a link to the NLRB’s decision at **www.nlrb.gov/case/16-RC-010963**.

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