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Last week, the National Labor Relations Board (NLRB) returned to a traditional standard for determining independent contractor status versus employee status. In doing so, the Board clarified the role that "entrepreneurial opportunity" has in evaluating whether someone is an independent contractor. The decision is a return to the standard used prior to 2014 that weighed 10 factors equally in determining independent contractor status.

The case involved *SuperShuttle DFW, Inc.*, a group of SuperShuttle franchisees that drive customers to and from Dallas-Fort Worth and Love Field Airports. In its decision, the Board concluded that the franchisees were not employees as defined by the National Labor Relations Act (NLRA), and were independent contractors separate from the Act's coverage.

The decision overrules a 2014 decision involving *FedEx Home Delivery*, which modified the applicable test for determining independent contractor status by severely limiting the significance of a worker's "entrepreneurial opportunity" for economic gain.

Listed below are the 10 factors the NLRB uses in determining independent contractors status. Keep in mind that no one factor is decisive in evaluating independent contractor classification. Each of the 10 factors must be assessed and weighed.

- Extent of control by the employer.
- Whether or not the individual is engaged in a distinct occupation or business.
- Whether the work is usually done under the direction of the employer or by a specialist without supervision.
- Skill required in the occupation.
- Whether the employer or individual supplies instrumentalities, tools, and place of work.
- Length of time for which individual is employed.
- Method of payment.
- Whether or not work is part of the regular business of the employer.
- Whether or not the parties believe they are creating an independent contractor relationship.
- Whether the principal is or is not in the business.

Although the NLRB decision is welcome news, the future of independent contractor status remains somewhat uncertain. First, the three Republican appointees to the five-person Board issued the decision. The composition of the Board could change based on the outcome of the presidential election in 2020. Second, businesses could also face liability from the joint employer standard proposal. As the law firm of Little Mendelson recently pointed out, "while an individual providing services to a business may be an independent contractor, the business and independent contractor may nonetheless be deemed joint employers, which adds another slew of issues."

Companies should take a renewed look at their business relationships in light of the recent NLRB decision. Start by reviewing them under the 10-part test to ensure compliance. Relying solely on method of payment (compensation via W-2 vs 1099) or industry norms may not be sufficient for determining whether a service provider is an independent contractor.

**Questions?** NLBMDA members with questions should contact Ben Gann, NLBMDA Vice President of Legislative and Political Affairs, at ben@dealer.org or 202.367.2346.