Workin' for a Livin': The Blurred Line Between Employees and Independent Contractors Has Taken Another Hit in the World of Ride-Sharing

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Workin' for a Livin': The Blurred Line Between Employees and Independent Contractors Has Taken Another Hit in the World of Ride-Sharing

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In 1968, the U.S. Supreme Court determined under the common law of agency[2] that a group of unrecognized unionizing agents were employees rather than independent contractors.[3] The applied test evaluated ten non-exhaustive aspects of the employment relationship in question.[4] Factors weighed include the extent of *control;* the *skill* required, the *ownership* of tools and the place of work; the *length* of the employment and; whether or not the work is part of the *regular business* of the employer.[5]

While both the National Labor Relations Board and the courts have revisited and refined the proper application of the aforementioned factors, the core function of the test has remained the same.[6] Conversely, where the individual factors of the test have endured without change, overarching principles used in evaluating the significance of each factor have transformed.[7] The most recent emphasis adopted by the Board revolves around a worker's *entrepreneurial opportunity:* "a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain." [8]

The case at hand involved airport transportation company, SuperShuttle, and franchisees who operated the shared-ride vans.[9] Franchisees sought coverage under Section 2(3) of the National Labor Relations Act, which excludes independent contractors from its provisions.[10] As statutory employees, franchisees would instead be more protected by worker-friendly laws than in their current independent contractor status.[11] In its decision, the Board gave the most weight to the franchisee's ownership and control of their vans, their complete control over work schedules, and the principle instrumentality of the work.[12] Ultimately, the Board reasoned that the given factors provide franchisees with significant entrepreneurial opportunity and control over how much money they make each month.[13]

The decision explicitly states that entrepreneurial opportunity is neither a "super-factor," nor a "trump card," the explanation of which makes the opposite seem true.[14] Dissenting member McFerran argues that the SuperShuttle drivers were, in fact, employees under any reasonable interpretation and application of the common-law test.[15] Indeed, the focus on entrepreneurial opportunity imposes an ideologic stranglehold on worker classification.[16]

In the past, parties have meticulously argued both in favor of[17] and against[18] an employer-employee relationship in order to fall under or abstain from laws and doctrines such as worker's compensation and respondeat superior.[19] The ruling in this case appears to undermine the logic and rationales behind past decisions in favor of a harsher approach meant to restrict any likelihood of unionizing ride-sharing companies

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in future litigation.[20] The result of this case imposes a pin-hole view on the categorical employee by tainting the test with a superfluous concept as a means to an end.

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[2] Restatement (Second) of Agency § 220 (1958).

[3] NLRB v. United Ins. Co. of America, 390 U.S. 254 (1968).

[4] *Id.*

[5] *Id.*

[6] FedEx Home Delivery v. NLRB, 563 F.3d 492, 497 (D.C. Cir. 2009)

[7] Roadway Package Sys., Inc., 326 NLRB 842, 849 (1998)

[8] SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338, 367 NLRB 75 (2019)

[9] *Id.* ("Before 2005, SuperShuttle DFW designated its drivers as employees. During that period, SuperShuttle assigned drivers—who earned hourly wages—to regularly scheduled shifts picking up customers in company-owned shuttle vans. In 2005, SuperShuttle converted to a franchise model, which remains in place.").

[10] 29 U.S.C. § 152 (1935).

[11] *Id.*

[12] *SuperShuttle*, *supra* note 7, at 14.

[13] *Id.*

[14] *Id.* at 9.

[15] *Id.* at 15.

[16] *See generally* Tabatha Abu El-Haj, *Public Unions Under First Amendment Fire,* 95 Wash. U. L. Rev. 1291 (2018).

[17] *See* Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 2d 184 (S.D.N.Y. 2003).

[18] *See* Fitzgerald v. Mobil Oil Corp., 827 F. Supp. 1301 (E.D. Mich. 1993).

[19] *See generally* Frieler v. Carlson Marketing Group, Inc., 751 N.W.2d 558 (Minn. 2008).

[20] Susan Dynarski, *Fresh Proof That Strong Unions Help Reduce Income Inequality*, N.Y. Times (July 6, 2018), https://www.nytimes.com/2018/07/06/business/labor-unions-income-inequality.html.

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