

NLRB: Not-for Profit Canvassers Are Not Independent Contractors

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Canvassers for a Minneapolis-based not-for-profit were found last week by the NLRB to be employees and not independent contractors. In so ruling, the board reversed an administrative law judge's ruling to the contrary and applied its new standard from *FedEx Home Delivery*, 361 NLRB No. 55 (2014), in which the board "restated and refined" the analysis for evaluating whether individuals are employees or independent contractors. In coming to this conclusion, the board summarized the analytical framework it will use going forward to evaluate claimed independent contractor status:

- First, the board noted that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."
- Second, the inquiry will follow the common-law factors enumerated in the Restatement (Second) of Agency, Section 220 (1958).
- Third, in assessing a putative independent contractor's entrepreneurial opportunity for gain and loss, the board will "give weight to actual, not merely theoretical, entrepreneurial opportunity."
- Fourth, the board will examine whether the putative independent contractor is rendering services as part of an independent business.
- Fifth and finally, the burden of proof falls squarely on the party attempting to assert that it has an independent contractor relationship with the individual.

The board's evaluation of the common law factors here focused on the amount of control that the employer had over the individuals doing the canvassing. The board found that when the canvassers worked, they did so at times and locations determined by the not-for-profit. Their compensation was nonnegotiable and "strictly limited" by the organization's time and location restrictions. They used the organization's "tools and instrumentalities", including transportation and had no proprietary interest in any part of the canvassing operations. They were required to keep accurate and detailed records and if they did not comply with the organization's directives, they were subject to discipline. The board's analysis is instructive in terms of how the board will examine these factors in subsequent independent contractor cases. The case is *Sisters' Camelot and Christopher Allison and IWW Sisters' Camelot Canvassers Union* (September 25, 2015). A copy of the decision is available [here](#).

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