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Ties Go To The Runner And The NLRB

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There's an oft-cited but unwritten rule in baseball that all ties go to the runner. The D.C. Circuit Court of Appeals this week applied that same concept in upholding a decision of the National Labor Relations Board (NLRB) finding that musicians for the Lancaster Symphony Orchestra in Pennsylvania were employees of the Orchestra and not independent contractors. In *Lancaster Symphony Orchestra v. NLRB*, the D.C. Circuit Court of Appeals examined an NLRB decision from 2011 in which the board concluded that the musicians were employees and had ordered an election to determine whether a majority of the "employee" musicians wanted to be represented by the Greater Lancaster Federation of Musicians, Local 294. The court in a Solomon-like ruling acknowledged that both sides of this case had sound arguments. The court worked its way through a ten-factor independent contractor analysis and concluded that "we believe that the relevant factors point in different directions." Finding that the two sides had "two fairly conflicting views," the court effectively declared a tie and showed deference to the NLRB's decision. "Here . . . we decide not how we would classify the musicians in the first instance, but only whether the board confronted two fairly conflicting views," the D.C. Circuit wrote. "Because it did, our case law requires that we defer to the board." The court's decision highlights the detailed balancing test that will be used whenever independent contractor-employee questions are raised. Any time there are multi-factor tests, balancing the impact of those factors will always be the difficult issue. Here, the orchestra exercised great control over the musicians – where and what they played, whether they could cross their legs, their posture and even what they could talk about during rehearsals. The conductor exercises virtual "dictatorial control" over the musicians in terms of how they play, at what volume and pitch. Moreover and fundamentally, the musicians' work was "part of the orchestra's regular business." On the other hand, the orchestra engaged the musicians for no more than 140 to 150 hours a year. They signed agreements which held them out to be independent contractors. They could sign up for all or for parts of the orchestra season and they were free to play for other orchestras and groups or even teach. As such they had entrepreneurial freedom. The court used the 10-factor tests previously set out in *FedEx Home Delivery v. NLRB,* 563 F.3d 492 (D.C. Cir. 2009), and *Corporate Express Delivery Systems v. NLRB,* 292 F.3d 777 (D.C. Cir. 2002). Those factors are:

1. "the extent of control" the employer has over the work
2. whether the worker "is engaged in a distinct occupation or business"
3. whether the "kind of occupation" is "usually done under the direction of the employer or by a specialist without supervision"
4. the "skill required in the particular occupation"
5. whether the employer or worker "supplies the instrumentalities, tools,

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and the place of work for the person doing the work”
6. the “length of time for which the person is employed”
7. whether the employer pays “by the time or by the job”
8. whether the worker’s “work is a part of the regular business of the employer”
9. whether the employer and worker “believe they are creating” an employer-employee relationship
10. whether the employer “is or is not in business”

The case highlights yet again the intense focus being placed upon worker classifications and the continuing effort pushed by the NLRB and the Department of Labor to shrink the independent contractor category while expanding the definition of employee. Employers should take great pains to review all independent contractor arrangements to make certain that they comply with the ever-changing case law.