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NEWSLETTERS

When Is A Musician Like A Truck Driver? The Ever-Changing Definition Of Employee Under Federal Law

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That squeaky noise you hear isn't the string section warming up. It's the sound of the definition of "independent contractor" slowly but surely narrowing. After decisions in the past year from the 7th Circuit on Federal Express drivers, the NLRB's defining of employee in the Northwestern Football case and the Department of Labor's (DOL) attack on worker misclassification, the latest effort to examine the definition of independent contractors comes from the world of classical music.

The D.C. Circuit Court of Appeals recently examined whether musicians from the Lancaster Symphony Orchestra in Pennsylvania could properly be classified as employees or as independent contractors. The National Labor Relations Board (NLRB) had already looked at the issue in 2011, found the musicians to in fact be employees and ordered that an election be held to determine whether a majority of these "employee" musicians wanted to be represented by the Greater Lancaster Federation of Musicians, Local 294.

The appellate court in reviewing the NLRB's decision delivered a Solomon-like ruling acknowledged that both sides of this case had sound arguments; but the court, which ultimately deferred to the NLRB's interpretation of the National Labor Relations Act, said that it must do so in cases which presented "two fairly conflicting views."

On the one hand, the orchestra exercised great control over the musicians – where and what they played, whether they could cross their legs and 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 only engaged the musicians for no more than 140 to 150 hours a year. They signed agreements which held them 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. Thus, they exercised entrepreneurial freedom.

In reaching its decision, the court followed the factors set forth in two cases decided within the logistics and transportation industry: *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009); *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002). Those factors are:

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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, 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”

At the end of its analysis, the court concluded that “we believe that the relevant factors point in different directions,” and then afforded 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 case highlights yet again the intense focus being placed upon worker classifications. The logistics and transportation industry in particular has been at the center of that scrutiny. Employers in this sector should take great pains to review all independent contractor arrangements to make certain that they comply with the ever changing legal landscape.

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