INDEPENDENT CONTRACTORS AND CONTINGENT WORKERS UNDER THE NATIONAL LABOR RELATIONS ACT

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The National Labor Relations Act (NLRA), as amended, excludes from its protection a few, limited categories of employees. One of these groups, independent contractors, has been the subject of considerable litigation over the past few years, with the Board finding certain occupations to be independent contractors in some cases and employees, covered by the Act, in other cases, depending on the facts as well as the composition of the Board deciding the case. Another group of employees that has been the subject of recent litigation are contingent workers who are employed by a personnel agency or contractor and utilized by another employer to augment the employer's workforce. In the past decade, the Board has issued two major and conflicting decisions in this area. The significance of these two issues reflects the changing nature of the workforce and its impact on the ability of these individuals to obtain union representation.

A. Independent Contractor or "Employee" Under the NLRA

In 1947, Congress amended the National Labor Relations Act (NLRA) and excluded independent contractors from protection of the Act. Section 2(3); 29 U.S.C. § 152(3). The test for determining whether an individual is an employee or an independent contractor under the NLRA was articulated by the Supreme Court in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968), which held that the common law agency test applies. The Court noted that all incidents of the relationship must be assessed and that no single factor was decisive.

The Board evaluates the following nonexclusive factors from the Restatement (Second) of Agency in determining whether an individual is an employee or independent contractor[1]:

1) The extent of control which, by the agreement, the master may exercise over the details of the work.

2) Whether or not the one employed is engaged in a distinct occupation or business.

3) The kind of occupation, with reference to whether, in the locality the work 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 the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.

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[1] *Roadway Package Sys., Inc. and Teamsters Local 63*, 326 N.L.R.B. 842 at 849-50 (1998) (Roadway); RESTATEMENT (SECOND) OF AGENCY § 220.

6) The length of time for which the person is employed.

7) The method of payment, whether by the time or by the job.

8) Whether or not the work is part of the regular business of the employer.

9) Whether or not the parties believe they are creating the relation of master and servant.

10) Whether the principal is or is not in the business.[2]

In *Roadway Pakage Sys., Inc.*,[3] the Board discussed the appropriate balancing of the various factors in the common law agency test. The employer argued that the level of control over the manner and means of accomplishing the work should be the predominant consideration while the union argued that the common law agency test should be broadly applied, with no one factor treated given primary consideration. In adopting the union's position, the Board emphasized that status determinations must be made by considering "all incidents of the employment relationship…with no one factor being decisive."[4] It also explained that the Restatement factors are not an exclusive list and that it is the total factual context that matters, noting that "although the same set of factors may be present in different cases, it may be entitled to unequal weight in each…"[5] The *Roadway* framework remains the method by which the Board makes status determination decisions.[6]

In evaluating employee status, the Board has also considers industry practice, noting that there is a "public policy interest in not disenfranchising workers simply because of the peculiarities of their trade."[7] For example, in *AmeriHealth Inc./AmeriHealth HMO*, the Board

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[2] Over the years, the Board has classified individuals in the following positions as employees in some cases and as independent contractors in other cases: owner-operators, newspaper carriers and taxi drivers. It has found the following to be employees: cable installers, catering staff, day care providers, drywall installers, freelance writers and artists, janitors, and vendors. Individuals in the following positions have generally been held to be independent contractors: owner-operators, newspaper carriers, taxi drivers, nude models, physicians, athletic officials, composers, slaughterers, free lance writers, and insurance agents. The fact that some of the same positions appear in both categories demonstrates the highly fact-specific and sometimes subjective nature of status determinations.

[3] Roadway, 326 N.L.R.B. 842.

[4] *Id*. at 849. In *Roadway*, the Board found that the drivers were employees because they did not operate independent businesses, but rather performed functions that were an essential part of one company's normal operations; were an integral part of the company's business under its substantial control; had no substantial proprietary interest beyond the investments in their trucks; and had no significant entrepreneurial opportunity for gain or loss.

[5] *Id.* at 850.

[6] *Dial-A-Mattress*, another case involving owner-operators, was decided on the same day as *Roadway* and is generally considered to be a companion case. In *Dial-A-Mattress*, the Board applied the *Roadway* framework and concluded that the drivers in that case were independent contractors. Key to the Board's determination was the fact that the owner-operators could hire drivers, the fact that Dial-A-Mattress played no role in the selection, ownership, or maintenance of the vehicles, there was no minimum compensation guaranteed, and the drivers could decline orders without penalty. According to the Board, these factors showed that Dial-A-Mattress had structured its relationship with the owner-operators to allow for entrepreneurial opportunities. *Dial-A-Mattress Operating Corp. and Local 363, Industrial and Allied Trade Workers, IBT*, 326 N.L.R.B. 844 (1998).

[7] *BKN*, 333 N.L.R.B. 143 (2001).

gave very little weight to the fact that the HMO exhibited minimal control over the physicians because such an arrangement was common in the industry.[8] Similarly, in *BKN, Inc.*, the Board held that freelance writers and artists were employees despite the fact that many aspects of the employment relationship favored a finding of independent contractor status.[9] While the writers and artists set their own hours, worked out of their homes, could work for other employers, and were hired on a project-by-project basis, these facts carried less weight because they were common in the industry. More important to the Board in that case was the fact that the employer closely supervised the work, set deadlines, did edits, and that the work done by the writers and artist was a major part of the company's normal operations.

In recent cases involving taxi drivers, the Board has generally found taxi drivers and lessees to be employees, rather than independent contractors, based largely on the method of compensation; that is, whether the driver pays a fixed rental fee to the employer and retains all the fares he or she collects, and on the extent to which the company controls the drivers' ability to utilize the cabs to work for other companies or for personal use. The Board is likely to classify drivers as employees if the drivers are unable to turn down customers, cannot use their vehicles for private business, and are paid a flat rate.[10] In *AAA Cab Services Inc*., the one recent case where the taxi drivers were held to be independent contractors, the Board emphasized the method of compensation, specifically that the drivers could keep all fares collected, work for other companies, control their own hours of work, and turn down calls from dispatch.[11]

Recent Emphasis on Entrepreneurial Opportunity as a Key Factor

In the past several years, many independent contractor cases have involved delivery owner-operators.[12] Like the taxi-driver cases, the Board generally evaluates factors including ownership of the vehicles, the method of compensation, the extent to which the company imposes policies and discipline, the drivers' ability to hire replacements, the extent to which drivers can establish an independent business organization, and the level of control drivers have over their routes.

While these cases analyze the range of common law agency principles described in *Roadway*, many of the decisions place significant emphasis on the entrepreneurial opportunities of the drivers. For example, in *Corporate Express Delivery*, the Board's determination that the owner-operators were employees turned on the fact that the drivers had "no proprietary interest in their routes and no significant opportunity for entrepreneurial gain."[13] According to the Board, the fact that the drivers could not add or reject customers, use their vehicles to conduct outside business, deviate from the route set by the company, or hire replacements favored a

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[8] *AmeriHealth Inc./AmeriHealth HMO and United Food and Commercial Workers Union, Local 56*, 329 N.L.R.B. 870 (1999).

[9] 333 N.L.R.B. 143.

[10] *See e.g., Friendly Cab*, 344 N.L.R.B. 528 (2005); *Stamford Taxi*, 332 N.L.R.B. 1372 (2000).

[11] 341 N.L.R.B. 462 (2004).

[12] *See e.g., Ingramo Enter. Inc*., 351 N.L.R.B. 1337 (2007); *Argix Direct, Inc. and Local 11, Int'l Bhd .of Teamsters*, 343 N.L.R.B. 1071 (2004); *Time Auto Transp., Inc. and Time Auto Transp., L.S.* 338 N.L.R.B. 626 (2002); *Corporate Express Delivery Sys. and Teamsters Local 886*, 332 N.L.R.B. 1522 (2000), enforced 292 F.3d 777 (D.C. Cir. 2002).

[13] *Corporate Express Delivery*, 332 N.L.R.B. at 1522.

finding of employee status because it demonstrated the employees' lack of control over their income. The D.C. Circuit agreed, concluding that the drivers lacked entrepreneurial opportunity and functioned as employees because they were not permitted to employ others to perform work for the company nor could they use their vehicles for other jobs.[14] In *Argrix*,[15] one of the few recent decisions in which owner-operators were held to be independent contractors, the drivers had independent business organizations, could hire replacement drivers, and were paid on a sliding scale. According to the Board, the drivers' ability to deviate from their route, use their vehicles to work for other carriers, and set their own schedules demonstrated the drivers ability to "chose to maximize or minimize their income" and thus, supported independent contractor status.[16]

Cases related to FedEx have generated some of the highest interest in recent years. In *FedEx Home Delivery v. N.L.R.B.*,[17] the Court denied enforcement of an NLRB order[18] which found the drivers to be employees under the Act and instead held they were independent contractors. The Court's decision is contrary to the vast majority of decisions issued by the Board and its Regional Directors prior to 2009, finding drivers to be employees rather than independent contractors.[19] Relying on common law agency principles, the NLRB decisions focused on facts including requirements that the drivers wear uniforms, display the FedEx logo, follow strict company policy, adhere to strict delivery schedules, and the fact that FedEx unilaterally determines the compensation rates for all its drivers.[20]

In finding the drivers to be independent contractors, the D.C. Circuit in *FedEx* followed its approach in *Corporate Express Delivery*, where it relied on the drivers' entrepreneurial opportunity for gain or loss as a determinative factor. As such, the Court's analysis was largely influenced by the fact that the drivers could use their trucks for personal business, could hire replacement drivers, could sell or assign their routes, and could take time off at their discretion. The dissent strongly criticized the majority for placing too much emphasis on the drivers' potential for entrepreneurial opportunities and urged the Court to consider all incidents of the employment relationship. In particular, the dissent highlighted factors favoring employee status including FedEx's requirement that the drivers wear a recognizable uniform, that the vehicles be

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[14] 292 F.3d at 780-81.

[15] 343 N.L.R.B. 1071 (2004).

[16] *Id.*, at 1020-21.

[17] 563 F.3d 492 (D.C. Cir. 2009).

[18] *FedEx Home Delivery & Int'l Bhd. Of Teamsters, Local Union 25*, 351 NLRB No.16 (2007).

[19] *See e.g.*, Decisions finding employee status: *FedEx Home Delivery & Int'l Bhd. Of Teamsters, Local Union No. 671*, Case No. 34-RC-2205 (Aug. 2, 2007); *FedEx Home Delivery & Int'l Bhd. Of Teamsters, Local Union 25, 351 NLRB No.16*; *FedEx Home Delivery & Truck Drivers Union, Local 170, Int'l Bhd. Of Teamsters*, Case 1-RC-21966 (Jan. 24, 2006); *FedEx Ground Package Sys., Inc. & FXG-HD Drivers Ass'n*, Case 4-RC-20974 (June 1, 2005*); FedEx Ground Package Sys., Inc. & Local 177, Int'l Bhd. Of Teamsters*, Case 22-RC-12508 (Nov. 2, 2004). Finding independent contractor status: *RPS, Inc., & Teamsters Local Union No. 355, Int'l Bhd. of Teamsters*, Case 5-RC-14905 (Aug. 3, 2000).

[20] In the one decision classifying the drivers as independent contractors, the Regional Director was influenced by the FedEx's claims that its drivers have substantial entrepreneurial opportunities. *RPS, Inc.*, N.L.R.B. Case 5-RC-14905. Specifically, the Regional Director was persuaded by the fact that the drivers owned their own vehicles, many used their vehicles for outside business, and some had incorporated their own business. This decision was not appealed to the Board and the Board denied review in all cases where employee status was found.

of a particular color and size, that the drivers submit to customer service rides to audit their performance, and that drivers be available for deliveries every Tuesday through Saturday. It also questioned the extent to which the drivers' had meaningful entrepreneurial opportunities. It noted that while drivers were permitted to use their vehicles for their own purposes, the drivers could use their vehicles for outside business only when not carrying goods for FedEx and provided all FedEx markings on the vehicle were removed or covered. These factors, combined with FedEx's demanding schedule, meant that almost none of the drivers at issue did in fact use their vehicles for outside business. The dissent explained, "if a company offers its workers entrepreneurial opportunities that they cannot realistically take, that does not add any weight to the Company's claim that the workers are independent contractors."[21]

Like the D.C. Circuit, but to a lesser degree, the Ninth Circuit has recognized the concept of entrepreneurial opportunity. In *Friendly Cab,* the Court affirmed the Board's finding that taxi drivers were employees because of the large degree of day-to-day control over the drivers' assignments, the imposition of discipline for failure to respond to dispatches, compliance with a strict dress code and the fact that the employer prevented drivers from soliciting or turning down customers, engaging in outside business, or subleasing to other drivers and required drivers to accept vouchers subject to certain fees. The Court specifically noted that the Board considered the prohibition on the drivers' operating an independent business and developing entrepreneurial opportunities in concluding that the drivers were not independent contractors.[22]

Economic Dependence as a Relevant Factor

It can be expected that the future discussion of the issue will include the concept of "economic dependence." This factor was hotly debated by the Board members in *St. Joseph News-Press*.[23] There the Board majority reversed the ALJ's finding of employee status for newspaper carriers. The ALJ had analyzed the nature of the employment relationship as one of "economic dependency," noting that the employer set the price of sale of the newspaper, set the routes and could terminate the carrier's contract or change its terms with thirty days notice. The Board held that the newspaper carriers were independent contractors in large part because they owned their vehicles, could use them for other purposes and had the ability to impact their own compensation as evidenced by their ability to hire replacements and hold contracts with the newspaper supplier on multiple routes.

Liebman dissenting, argued that the economic dependence of the carriers is a relevant factor and not inconsistent with the common-law agency test. That factor examines the economic relationship between the parties "to determine whether the carriers are economically independent businesspeople, or substantially dependent on the Respondent for their livelihood."[24] Liebman explained that the carriers were not independent business people because the contract between the carriers and newspaper was one of adhesion where the newspaper had the right to terminate or unilaterally change the contract terms while the carriers had no corresponding contractual right of modification. She further noted that the carriers sell the

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[21] 563 F.3d at 517.
[22] *Friendly Cab Co.*, 341 N.L.R.B. 722 (2004).
[23] 345 N.L.R.B. 474 (2005); *see also*, *The Arizona Republic*, 349 N.L.R.B. 1040 (2007).
[24] 345 N.L.R.B. at 484.

papers along a predetermined delivery route and the company sets the sale price of the newspaper, thereby controlling the price of the product the carriers distribute and precluding any opportunity for the carriers to independently increase profits. Liebman argued that the factor of economic dependency is just one of many factors to be considered, especially in view of the increasingly non-traditional nature of employment, noting that, as the Supreme Court observed in *Allied Chemical & Alkali Workers Local 1 v Pittsburgh Plate Glass Co.*, in "doubtful cases resort must still be had to economic and policy considerations to infuse §2(3) with meaning."[25] She further argued that by acknowledging "entrepreneurial opportunity", the Board majority endorsed the analysis of economic factors and its refusal to consider the economic dependency factor was therefore arbitrary.[26]

Future Trends

With the leadership of Chairwoman Liebman, the Board will likely consider the economic dependence and bargaining position of the parties when making status determination decisions. This may not represent a significant change, given that many of the factors already considered by the Board are related to the economic position of the parties. However, by specifically articulating economic dependence as a factor, the Board can look at whether the individual is truly an independent businessperson.

The Board will also likely determine the extent to which entrepreneurial opportunity becomes a key factor in status determinations. One can expect the Board to continue to investigate the extent to which workers can take advantage of those opportunities. How far the Board looks into these facts will likely impact the outcome of future decisions.

The newly constituted Board may issue its first decision on the issue whether individuals are independent contractors in *Lancaster Symphony Orchestra*. There the Regional Director held that the musicians at issue were independent contractors in large part because the employment relationship left the musicians with meaningful control over their earnings, they maintained exclusive control over their schedules, were free to work elsewhere, were paid per service rather than hourly, and provided their own instruments and clothes.[27] The case that has been awaiting review by the Board since 2007.

B. Contingent workers

Recognizing the unprecedented rise in the use of contingent workers, i.e., temporary agency or contract workers, who work side-by-side with regular employees of an employer ("user employer"), the Board in its 2000 decision in *M.B. Sturgis*,[28] held that employees of a contractor, such as an employment agency ("supplier") could be represented for purposes of collective bargaining in the same unit as the regular employees of the user employer, if the two groups shared a community of interest. Prior to that decision, a union that sought to represent a unit of an employer's employees and "supplier" agency employees, could not do so unless both

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[25] 404 U.S. 157, 168 (1971).
[26] 345 N.L.R.B. at 487.
[27] *Lancaster Symphony Orchestra*, Case No. 4-RC-21311 (2007).
[28] 331 N.L.R.B. 1238 (2000)

employers consented to that bargaining unit. In reality, employers rarely consented and the result was that the user employees were excluded from the bargaining unit that included employees performing the same work and under the same supervision. In *Sturgis*, the Board found that this consequence effectively denied representational rights guaranteed by the Act to these contingent employees.

In *Sturgis*, the Board rejected prior cases where the Board had held that multi-employer bargaining unit rules applied, requiring the express consent of both employers for an election in a combined unit that included "supplier" agency employees with employees of the employer. It held that it would follow its traditional analysis and determine whether the employees in a combined unit shared a community of interest warranting an election in a combined unit.

Four years later, the Board reversed *Sturgis* and returned to prior decisions requiring consent of both employers in order for the Board to hold an election in a combined unit. *Oakwood Care Center*.[29] In *Oakwood*, a long term care facility, the union sought to represent employees of Oakwood and employees of a personnel staffing agency who performed the same duties as employees of Oakwood. The staffing agency employees were jointly employed by the staffing agency and Oakwood, as each entity controlled certain aspects of the employment relationship. The Board overruled *Sturgis* and held that combined units of employees of the employer with the jointly employed agency employees constitute a multi-employer unit requiring that both employers consent a unit of combined employees.

With the reversal of *Sturgis*, contingent workers employed to augment an employer's workforce cannot obtain union representation unless both employers consent to the combined bargaining unit. Given the continued rise in the contingent workforce and the starkly opposing views of the Board members in *Sturgis* and *Oakwood*, it is likely that, if presented with the issue, the current Board will reverse *Oakwood* and return to the principles set forth in *Sturgis*.

[29] 343 N.L.R.B. 659 (2004).