AN EMPLOYEE IS AN EMPLOYEE IS AN EMPLOYEE: ALEXANDER V. FEDEX GROUND

By Joel M. Grossman

In the 1920s, author Gertrude Stein famously said, "A rose is a rose is a rose." In light of *Alexander v. FedEx Ground*, that phrase could just as well be: an employee is an employee is an employee. Alexander is one of many cases in which the company and the workers agreed that the workers would be treated as independent contractors and not as employees. In this case, the court deemed that agreement to be meaningless. Instead, quoting the leading California case on independent contractor vs. employee, *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, the court looked to see whether FedEx Ground had: "the right to control the manner and means of accomplishing the result desired," and answered yes. Therefore the agreement signed is deemed irrelevant.

The court relied on several facts in determining whether FedEx Ground controlled, or maintained the right to control, FedEx drivers. First, the court noted that FedEx Ground by contract maintained the right to control the drivers' and their vehicles' appearance. Drivers were to be clean-shaven, have neat hair and no body odor. The vehicles, though owned by the drivers, had to be painted a very specific shade of white and had to display FedEx logos. FedEx Ground even maintained control over the shelving in the vehicles, with specific dimensions required. The drivers—who owned the vehicles—were free to use them for their own purposes when not delivering packages for FedEx Ground, but had to remove or cover up the FedEx logo.

The court also found that FedEx Ground had the right, and actually controlled the hours worked by the drivers, requiring them to work 9.5 to 11 hours a day. The court also found that FedEx Ground controlled important aspects of how and when drivers delivered their packages. It noted that FedEx Ground assigned the drivers specific areas and negotiated windows of delivery with the customers. Thus, the driver had to deliver the package to a client within the window that FedEx Ground, not the driver, had arranged. Though FedEx Ground did not control certain parts of the delivery process, the court noted the right to control does not need to be absolute. It must simply be extensive, so that it controls not just the final result—having a package delivered—but also the means and manner used to obtain that result.

The *Alexander* case serves as the latest example of the danger of classifying workers as independent contractors. Among other things, independent contractors need not be paid overtime, need not be provided meal and rest breaks, and need not be reimbursed for work-related expenses. Employees, of course, must be paid overtime pursuant to federal and state law and must be provided meal and rest breaks and must be reimbursed for business expenses. If a large group of workers is classified as independent contractors and a court later determines that they were really employees, the damages could be very significant.

Of course, the issue of employee vs. independent contractor can arise in all sorts of workplaces. For example, very recently, several strip clubs in New York reached a settlement with a class of exotic dancers who claimed that they had been improperly classified as independent contractors instead of employees. Such cases are frequently litigated and usually settled.

There is no doubt that certain workers are properly classified as independent contractors, and their employers run little risk by maintaining this classification. In such cases the employer is focused only on the end result of an assignment and does not control the way in which the result is achieved. At the same time, when there is a high degree of control over the manner and means of work, the employer runs a serious risk by classifying its workers as independent contractors. The employer should take very little comfort from a written agreement in which the worker agrees that he or she is an independent contractor because, like Gertrude Stein's rose, an employee is an employee is an employee. ■

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