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TOP STORY

STRATEGIC PERSPECTIVES—The importance of being an "employee"

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Prestigious employer has approximately 20 openings for a highly skilled position in a competitive field: compensation equaling $76,000 per year, work week of 50-60 hours during busy periods, and employee must abide by employer's rules.

If you are thinking that this sounds like a job description for a certified public accountant, or maybe an auditor, you're wrong. After NLRB Regional Director Peter Sung Ohr's March 25, 2014, decision held that grant-in-aid scholarship football players at Northwestern University are "employees" under the NLRA, the above could be the educational institution's new recruiting pitch.

This job description highlights the reality that although the college football players were labeled "student-athletes" and not "employees," bodies such as the NLRB will look past such labels and examine the totality of the relationship when determining whether an individual is an employee. In Northwestern's case, the NLRB did not look to whether the university classified football players as employees or student-athletes, or even whether the football players themselves agreed to a student-athlete relationship with Northwestern. Instead, the NLRB applied one of the many tests used to determine whether an individual is an employee.

Common law test. The NLRB applied the common law definition of "employee" in determining that Northwestern scholarship football players are employees. Under the common law definition, an employee is a person who performs services (1) for another; (2) under a contract of hire; (3) subject to the employer's control or right of control; and (4) in return for payment. Applying these factors, the NLRB concluded that the football players are employees of Northwestern University because:

- The players perform football-related services for the university which generated revenues of approximately $235 million from 2003 through 2012.

- The players are under a contract for hire because each player must sign a "tender" before the beginning period of the scholarship. The "tender" is the equivalent of an employment contract and gives the players detailed information concerning the duration and conditions under which the compensation will be provided to them.

- The players are subject to special rules that restrict many aspects of their lives, including: underclassmen cannot lived off campus and upperclassmen must receive approval before moving off campus; players must receive permission before obtaining outside employment; players must abide by a social media policy which, among other things, prohibits a player from denying a coach's "friend request." Players risk losing their scholarship if they violate these rules, and the regular student population is not subject to these rules.

- The scholarships serve as compensation for the athletic services the players perform. The monetary value of the scholarships totals as much as $76,000 per year.

Ohr noted that the players devote 50-60 hours per week to football-related activities during training camp and 40-50 hours per week during the football season, which runs from approximately late August to early January.

FedEx drivers. Maybe you're not a sports fan, or maybe it doesn't matter much to you whether student athletes could be considered employees in the opinion of one NLRB Regional Director. However, you may be more concerned with the August 27 decision of the Ninth Circuit Court of Appeals, which ruled in two companion cases that FedEx delivery drivers are employees, not independent contractors, as a matter of both California and Oregon law. The appeals court reversed a grant of summary judgment to FedEx and a corresponding denial of summary judgment to the drivers in several class action wage suits (among other claims) against the courier brought under state law

A central part of FedEx's business is its contracts with drivers to deliver packages to customers. Drivers are identified as independent contractors under the company's operating agreement (OA), which governs the parties' relationship. When a wave of lawsuits challenged FedEx's independent contractor model (with cases filed in 40 states), the Judicial Panel on Multidistrict Litigation consolidated the cases for multidistrict litigation (MDL) proceedings in a federal district court in Indiana. The MDL court held that nearly all of the plaintiffs were independent contractors as a matter of law in those states where such status is guided by common law agency principles. That holding applied to the California and Oregon plaintiffs here. Reversing the MDL court, the Ninth Circuit sent both cases back with instructions to enter summary judgment in the drivers' favor on their status as employees.

Right to control test. While the OAs were fairly clear, the Ninth Circuit found, to the extent they were ambiguous, extrinsic evidence supported a finding that FedEx exercised substantial enough control over the drivers to suggest they were not "independent contractors." Looking at additional policies and procedures and applying the "right to control" test, the court considered the following:

- FedEx's extensive and detailed grooming and appearance standards, "from their hats down to their shoes and socks."

- FedEx's equally meticulous vehicle specifications, including being painted a specific shade of white, marked with the FedEx logo, conforming to specific dimensions (which apply also to internal shelving and from what materials it is made).

- Drivers' work hours are adjusted by FedEx managers so that they work 9.5 to 11 hours daily; they cannot leave their terminals in the morning until all their packages are available and must report back to the terminals before a specified time.

- FedEx determines what packages to deliver and when. Each driver is assigned a specific service area that only can be altered at FedEx's sole discretion.

- FedEx's right to control the workers' "entrepreneurial opportunities"; drivers' ability to operate more than one vehicle or route was contingent on FedEx's approval, which depended on the company's business needs and the specific terminal capacity. To hire additional help, drivers had to be "in good standing" and replacement drivers had to be "acceptable" to FedEx.

What was their agreement? California also takes into consideration the parties' beliefs as to the nature of their relationship, and the OA said the drivers were independent contractors and disclaimed any authority to direct drivers as to the manner or means of their work. But other contract provisions, plus other policies and procedures, allowed FedEx to exert considerable control over the drivers' day-to-day work. Neither FedEx's belief nor the drivers' own perceptions provided the final answer. Simply calling the drivers independent contractors didn't make it so.

Plus, the drivers' work was "wholly integrated" into the company's operations. "The drivers look like FedEx employees, act like FedEx employees, [and] are paid like FedEx employees," the appeals court noted.

And picking up and delivering packages is not just part of FedEx's regular business, it is "essential to FedEx's core business."

Agreement doesn't control. This analysis highlights the important issue that a worker's status as an "employee" does not depend on how the employer classifies the putative employee, even if both parties agree to the classification. Similarly, Northwestern classified its football players as "student-athletes," and one could argue that the football players, by signing the "tender," agreed to their status as a student-athlete. Such a classification, however, is not sufficient to establish that an individual is or is not an employee. Instead, one must apply one of several legal tests to determine whether an individual is an employee.

Beyond union issues. As the FedEx cases illustrate, the act of labeling an individual as an "employee" has much broader implications than the right to unionize and bargain. Whether an individual is an "employee" determines whether he or she is protected under various laws that govern the employment relationship:

- Federal, state, and local anti-discrimination statutes
- FLSA coverage and state and local wage and hour protections, including overtime pay
- Workers' compensation coverage
- Unemployment benefits
- Tax laws (unemployment, social security, income taxes)
- ERISA obligations
- Employer mandate of the Affordable Care Act
- Insurance coverage and entitlement to other employer-provided benefits
- Vicarious liability to employees or third parties for employee torts
- Breach of contract claims
- Intellectual property rights
- Applicability of green card requirements, as opposed to requirements for student or other visas

Misclassification issues. Properly classifying an individual as an employee is important to the employer as well because an employer may face penalties and fines for misclassifying an individual. Significantly, the IRS may levy fines and even criminal penalties for failure to properly classify employees and withhold wages. The IRS states that although there are no magic factors that make a worker an employee or independent contractor, the key is to consider the entire relationship, consider the degree or extent of the right to direct and control, and finally, to document each of the factors used in coming up with the determination.

According to the DOL, employee misclassification generates substantial losses to the Treasury and the Social Security and Medicare funds, as well as to state unemployment insurance and workers' compensation funds. As a result, several years ago the DOL signed a Memorandum of Understanding with the IRS so the agencies can work together, sharing information to reduce the incidence of misclassification of employees, to help reduce the tax gap, and to improve compliance with federal labor laws. A number of states have signed similar MOUs with the DOL. In fact, DOL recently

announced that it is awarding $10.2 million dollars to 19 states to implement or improve worker misclassification detection and enforcement initiatives in unemployment insurance programs.

And then, of course, there is the threat of litigation, as numerous cases involving all manner of drivers — cable/satellite/appliance installers, security guards, janitors, construction workers, and a surprising number of exotic dancers — can attest. Employers and employees should understand that mere labels do not define whether an individual is an "employee" and that important implications arise when determining whether to label an individual as an "employee."

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Companies: Federal Express Corp; Northwestern University

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