KUTAKROCK

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NLRB Reverts Back to Employer-Friendly Independent Contractor Standard

On Friday, January 25th, the National Labor Relations Board (the "Board") reverted back to its previous employer-friendly standard for determining whether workers are independent contractors or employees under the National Labor Relations Act ("NLRA"). This renewed standard allows employers to establish more easily that certain workers are independent contractors and, thus, not afforded coverage under the NLRA. As explained below, the re-adopted standard weighs a worker's "entrepreneurial opportunity" more heavily than the previous standard.

In *SuperShuttle DFW, Inc.*, issued last Friday, the Board held franchisees who drive passenger vans for SuperShuttle Dallas-Fort Worth are independent contractors. As a result, these franchisees cannot organize under the Amalgamated Transit Union. In reaching this decision, the Board utilized the common-law agency test to determine whether the workers were statutory employees or independent contractors; however, the Board placed particular emphasis on the factors demonstrating "significant entrepreneurial opportunity and control over how much money [the workers] make." Particularly, the Board determined the franchisees had "significant entrepreneurial opportunity and control" when considering the following three factors of the agency test:

1. The extent of control which, by the agreement, the master may exercise over the details of the work.
2. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
3. The method of payment, whether by the time or by the job.

SuperShuttle DFW, Inc., 367 NLRB No. 75 (2019). When considering these factors, the Board found that "SuperShuttle franchisees make a significant initial investment in their business by purchasing or leasing a van," which weighed heavily in the "instrumentality" factor. The Board also found that "[w]ith total control over their schedule, [the franchisees] work as much as they choose, when they choose; they keep all fares they collect, so the more they work, the more money they make; and they have discretion over the bids they choose to accept, so they can weigh the cost of a particular trip (in terms of time spent, gas, and tolls) against the fare received." Again, the Board ultimately decided that the franchisees were independent contractors who had "entrepreneurial opportunity" when considering these factors. With its decision in *SuperShuttle DFW, Inc.*, the Board abandoned its previous standard in *FedEx Home Delivery* issued in 2014, which did not take a worker's "entrepreneurial opportunity" into consideration to any significant degree.

In light of this important decision, we recommend employers conduct a basic assessment of the classification of their workers and whether such workers are independent contractors or statutory employees. After your basic assessment, please consult with your Kutak Rock attorney regarding the same. If your organization has any questions regarding the impact of this decision, please also reach out to your Kutak Rock attorney or other member of our National Labor and Employment Practice.