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## COURT ESTABLISHES NEW RULES FOR DIFFERENTIATING BETWEEN EMPLOYEES AND INDEPENDENT CONTRACTORS

*(FedEx Home Delivery v. NLRB)*

The U.S. Court of Appeals for the District of Columbia Circuit this week laid out a new set of rules regarding when employers should classify their workers as employees and when they should be classified as independent contractors. The new rules, which differ markedly from rules established by other courts, may spawn considerable confusion among employers seeking guidance regarding how to classify their workers.

The appeals court's 2-1 decision in *FedEx Home Delivery v. National Labor Relations Board* was a setback for the Washington Legal Foundation (WLF), which had filed a brief – on behalf of itself, the U.S. Business and Industry Council, and the Allied Educational Foundation – urging the court to clarify existing rules, not to establish an entirely new set of rules. WLF argued that lack of clarity in the rules has spawned considerable confusion within the business community. Instead of providing the requested clarity, this week's decision may lead to even more confusion.

WLF argued in its brief that many smaller firms, when in doubt about the proper classification, will err in favor of an “employee” classification in order to avoid the potentially ruinous financial penalties they could face if a court later determined that someone classified as an independent contractor was really an employee. Conversely, some firms will take advantage of the ambiguity and their competitors’ caution by inappropriately classifying employees as independent contractors, thereby gaining an unfair competitive advantage, WLF argued.

“As this case well illustrates, some businesses improperly skirt the law by classifying individuals as ‘independent contractors’ when they quite clearly are employees,” said WLF Chief Counsel Richard Samp after reviewing the court decision. “By doing so, businesses do not merely gain an unfair cost advantage over rivals; they also strengthen the hands of those who would do away with the independent contractor model completely,” Samp said. “WLF strongly supports use of the independent contractor model; it believes that independent contractors play a key role in driving economic growth and business innovation,” Samp said.

The case concerns a determination by the National Labor Relations Board (NLRB) that FedEx Home Delivery (“FedEx”) violated federal labor law by classifying certain of its

delivery drivers as independent contractors, a status generally reserved for workers who perform their duties without being subject to control by the firm to which they are providing services. The appeals court sided with FedEx and overturned the NLRB's determination. The NLRB may seek a rehearing; if it does so, WLF has pledged to file in support of the rehearing petition.

In determining whether a worker is an "employee" under federal labor law, courts traditionally have relied on common law rules governing a worker's status. Under those rules, the most important factor traditionally has been the extent to which the employer controls the worker's day-to-day activities; the more extensive the control, the more likely it is that the worker will be deemed an employee. Rejecting that approach, the D.C. Circuit held that it will henceforth differentiate employees from independent contractors based on the extent of "entrepreneurial opportunity" available to the worker. The court held that the FedEx drivers in this case were independent contractors because their work provided them with significant opportunities to establish their own delivery services. WLF attorneys expressed disappointment with the new standard because, in WLF's view, the new standard provides employers with little guidance regarding when the extent of "entrepreneurial opportunity" is sufficient to warrant "independent contractor" status.

In its brief, WLF argued that the overriding factor in determining whether a worker is an independent contractor or an employee should be the right-to-control test: the extent of supervision exercised by a putative employer over the means and manner of the worker's job performance. WLF argued that under that test, the FedEx drivers quite clearly are employees, not independent contractors. Among the factors that demonstrate an employee/employer relationship are: (1) all of the drivers work virtually full-time driving their trucks for FedEx – they work on the five days specified by FedEx, within the relatively tight time frames required by FedEx's customers; (2) much of their pay is based on time spent on the job, rather than the quantity of work performed; (3) they virtually always are required to accept the packages assigned to them; (4) they have very little, if any, ability to build up their delivery routes, given that they cannot solicit customers or establish pricing; and (5) they are required to wear FedEx uniforms while delivering packages.

WLF is a public interest law and policy center with members in all 50 states. WLF devotes a substantial portion of its resources to defending the property rights of the business community, and to ensuring that companies can compete against one another on an even playing field.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, [www.wlf.org](http://www.wlf.org).