

FedEx Case Puts Package Delivery In 'Seismic' Situation

By Robert W. Wood

FedEx has settled a long-running worker status dispute with over 2,000 FedEx Ground drivers in California. Once it is approved by the 9th U.S. Circuit Court of Appeals, the settlement of this class action will create a \$228 million fund to resolve the claims of FedEx Ground and FedEx Home Delivery pickup and delivery drivers. Some claims date back to 2000 and continue through 2007.

The settlement comes in the wake of the 9th Circuit ruling in 2014 that FedEx misclassified drivers as independent contractors when they were really employees. See *Alexander v. FedEx Ground Package System Inc.*, 2014 DJDAR 11877 (Aug. 27, 2014). A key component of how FedEx does business was upended by the 9th Circuit when it ruled that 2,300 FedEx Ground drivers were misclassified. For years, FedEx called them — and paid them — as independent contractors.

Employees trigger a litany of federal and state tax withholding, fringe benefit, anti-discrimination, health care, pension, worker's compensation and unemployment insurance obligations. You avoid these entanglements by hiring independent contractors, but only if the arrangement is legitimate and passes legal muster. Thus, the non-employee status is subject to review.

Plainly, labels aren't enough. A variety of federal and state agencies can attack mislabeled workers. The issue can also arise in private litigation, including in class actions brought by the workers themselves. Disputes are common, and independent contractor vs. employee cases have factual and legal nuances galore. Was the FedEx case about a little overtime?

Hardly. FedEx avoided health care, workers compensation, paid sick leave and vacation, retirement and more. FedEx made drivers pay for their uniquely FedEx branded trucks, uniforms and scanners. Plus, fuel, insurance, tires, oil changes, maintenance and even workers compensation coverage.

Add in missed meal and rest period pay, overtime compensation and penalties. Some "independent contractors" even had to pay wages of employees FedEx Ground required them to hire to cover for them if they were sick or needed a vacation, to help out during the Christmas rush. The 9th Circuit said "We hold that plaintiffs are employees as a matter of law under California's right-to-control test."

There will be continuing controversy about this case not only at FedEx but across the package delivery and transportation industries. Many trucking companies use a similar model, calling — and paying — their drivers as independent contractors. How about taxis, Uber, Lyft and others? Some suits are challenging the line between independent contractor and employee in those contexts too.

In that emerging setting, some of the liabilities are to injured third parties. After all, respondeat superior liability clearly applies to employers for the acts of their employees. Outside of the employment relationship, the lines of liability are less clear. And the liabilities to workers themselves for fringe benefits, overtime and expenses can be even bigger.

FedEx Ground defended its independent contractor model fervently. Then, the 9th Circuit ruling said that FedEx controlled the drivers and that they were "independent contractors" in name only. It was a major blow to FedEx, which has fought about its independent contractor model of operation for many years. And while other cases

have chipped away at pieces of the FedEx empire, this case was a decisive one.

The court's finding that these 2,300 drivers are covered by California's workplace protection statutes could impact dozens of other FedEx cases across the country. The financial benefit of the contract arrangement was big. For years, FedEx has been able to shift on to its drivers the costs of such things as FedEx branded trucks, FedEx branded uniforms, and FedEx scanners, fuel, maintenance, insurance and more.

But a key question was just how much it would cost FedEx to get out of the mess. The 9th Circuit left open the question of how much the drivers should receive. This settlement avoids a retrial, but the cost to FedEx is big. Attorney Beth Ross of Leonard Carder LLP representing the class said, "The \$228 million settlement, one of the largest employment law settlements in recent memory, sends a powerful message to employers in California and elsewhere that the cost of Independent Contractor misclassification can be financially punishing, if not catastrophic, to a business."

Private lawsuits can sometimes do more than government enforcement efforts. Indeed, the amount of this one settlement is said to be comparable to what the U.S. Department of Labor has collected in back wages annually through nationwide enforcement of wage and hour law during at least the last seven years (2014: \$250 million; 2013: \$240 million; 2012: \$275 million; 2011: \$225 million; 2010 and 2009: \$175 million). See <http://www.dol.gov/whd/statistics/>.

The court's finding in *Alexander* that drivers in California are covered by California's workplace protection statutes impacts one of FedEx Ground's largest workforces. It also could influence the outcome in over two dozen cases nationwide in which FedEx Ground drivers are challenging the legality of their independent contractor classification. In addition, many trucking companies have been operating under a similar model in which they classify their drivers as independent contractors.

The worker status issue can come up almost anywhere. The tax law, labor and employment law, discrimination, pension and workers compensation laws are all clear that a contract does not bind this issue. It's that important.

From drivers to salespeople, custodians to lawyers, couriers to facialists, mercenaries to programmers, and newspaper carriers to scientists, there's no one-size-fits-all solution. The Internal Revenue Service cares, and so do state tax and labor agencies, workers compensation and unemployment insurance authorities and more. All of them scrutinize the status of workers.

It even matters under Obamacare. Independent contractors are not covered, assuming their status is legitimate. A central precept of the law is that one can tell the difference between employees and independent contractors. The IRS is active in reclassification efforts and more scrutiny is coming. The FedEx case is a good reminder that no matter how you label someone, the substance of the work relationship will control. In that sense, as attorney Beth Ross noted, the impact of the FedEx case is "seismic."



Robert W. Wood is a tax lawyer with a nationwide practice (www.WoodLLP.com). The author of more than 30 books including "Taxation of Damage Awards & Settlement Payments" (4th Ed. 2009 With 2012 Supplement www.taxinstitute.com), he can be reached at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.