# 9th Cir. Finds FedEx Delivery Drivers Are Employees, Not Contractors

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Last week, the 9th Circuit held in two related cases from California and Oregon that FedEx misclassified approximately 2,600 delivery truck drivers as independent contractors, rather than as employees. The cases—*Alexander v. FedEx* and *Slayman v. FedEx*—are an important reminder for employers that reality matters more than labels when it comes to classifying workers.

On that note, the most succinct (and most memorable) summary of the rulings appears in Judge Trott's short concurrence in *Alexander*:

> "Abraham Lincoln reportedly asked, 'If you call a dog's tail a leg, how many legs does a dog have?' His answer was, 'Four. Calling a dog's tail a leg does not make it a leg.' . . . Labeling the drivers 'independent contractors' in FedEx's Operating Agreement does not conclusively make them so . . . ."

The two cases dealt with virtually identical facts. FedEx's Operating Agreement ("OA"), which principally governed its business relationships with the 2,300 California drivers and 363 Oregon drivers in each class, contained several generalized clauses that suggested the drivers were independent contractors. For example, the OAs provided that "the manner and means of reaching [the parties' "mutual business objectives"] are within the discretion of the [driver], and no officer or employee of FedEx . . . shall have the authority to impose any term or condition on the driver . . . which is contrary to this understanding." The two opinions noted, however, that neither California nor Oregon law views a contract's description of a worker as an independent contractor as dispositive of the worker's true status.

The OAs went on to impose a litany of specific requirements that led to the court to conclude, in *Slayman*'s words, that "[t]he OA and FedEx's policies and procedures unambiguously allow FedEx to exercise a great deal of control over the manner in which its drivers do their jobs," and thus that the drivers were employees under both California and Oregon law. The court seized on three categories of requirements in particular:

- "[T]he appearance of [FedEx's] drivers and their vehicles. FedEx controls its drivers' clothing from their hats down to their shoes and socks. . . . FedEx's detailed appearance requirements clearly constitute control over its drivers."
- "[T]he times [FedEx's] drivers can work. . . . FedEx structures drivers' workloads so that they

have to work 9.5 to 11 hours every working day. . . . The combined effect of these requirements is substantially to define and constrain the hours that FedEx's drivers can work."
- "[A]spects of how and when drivers deliver their packages. [FedEx] assigns each driver a specific service area, which it 'may, in its sole discretion, reconfigure.' It tells drivers what packages they must deliver and when. It negotiates the delivery window for packages directly with its customers."

The opinions also rejected two key arguments in FedEx's defense: (1) that FedEx exercised control only over the "results" it seeks from drivers, and (2) that the drivers enjoyed "entrepreneurial opportunities" such that they should be classified as independent contractors. Regarding FedEx's "results" argument, the court disagreed with FedEx on the facts: "no reasonable jury could find that the 'result' sought by FedEx includes 'every exquisite detail' of the delivery driver's fashion choices and grooming." For its "entrepreneurial" argument, FedEx relied on *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009), which, for the purposes of federal law, "shift[ed the] emphasis away from the unwieldy control inquiry," and asked instead "whether the putative independent contractors have significant opportunity for gain or loss." Likewise, FedEx argued, its drivers have similar opportunities in that they may take on multiple routes or hire "third party helpers" to assist them. The opinions flatly rejected that argument, noting that neither California nor Oregon has adopted the "entrepreneurial opportunities" test or anything like it.

*Alexander* and *Slayman* should remind employers of the importance of properly classifying workers and drafting agreements that accurately reflect the reality of each worker's day-to-day responsibilities. It may be, as Judge Trott's concurrence in *Alexander* suggested, that a company and its workers "believed [the workers] were becoming true independent contractors" at the time they began their relationship, but that "reality" proves to be quite different once work actually begins.

Tags: California, Circuit, FLSA, Ninth, Oregon, employee, independent contractor, laws, misclassify, wage

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