



# FEDEX DRIVERS IMPROPERLY CLASSIFIED AS INDEPENDENT CONTRACTORS

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In two companion decisions, the Ninth Circuit held that FedEx Ground Package System, Inc., improperly labeled its delivery drivers independent contractors rather than employees, illegally depriving them of certain benefits and rights. The rulings revive almost 2,700 class action claims brought by California and Oregon drivers as part of a federal MDL. Plaintiff attorneys said the decisions will affect other lawsuits pending against FedEx and also extend to other industries that rely on similar independent contractor business models. (*Alexander v. FedEx Ground Package Sys., Inc.*, 2014 WL 42111 07 (9th Cir. Aug. 27, 2014); *Slayman v. FedEx Ground Package Sys., Inc.*, 2014 WL 4211422 (9th Cir. Aug. 27, 2014).)

Thousands of full-time FedEx delivery drivers from 40 states filed lawsuits alleging the company classified them as independent contractors but treated them like employees. Because independent contractors are considered self-employed, they must purchase and maintain their own equipment, aren't protected by rules governing minimum wage and overtime pay, are not eligible for health and retirement benefits, and must pay both employer and employee payroll taxes. But the plaintiffs allege FedEx exerted extensive control over them, from strict uniform requirements to specifying what days they may deliver packages.

About 2,300 California plaintiffs originally filed their claims in state court before being removed to federal district court and consolidated as part of the MDL pending in the Northern District of Indiana. In *Slayman*, 363 Oregon plaintiffs filed in federal district court before being transferred to the MDL.

The MDL plaintiffs moved for class certification and for partial summary judgment, seeking to establish their employee status as a matter of law. FedEx cross-moved for summary judgment, and the district court granted nearly all FedEx's motions, ruling that the plaintiffs were independent contractors in each state where common-law agency principles govern employment status. The MDL court certified classes whose claims were based on

state law.

On appeal, the Ninth Circuit reversed the MDL court and directed it to enter summary judgment in the plaintiffs' favor on the employment status question. Based on the "right-to-control" tests under California and Oregon law, the court evaluated whether FedEx had the right to control the manner and means of the delivery drivers' work. FedEx argued its operating agreement treats the drivers as independent contractors, but the court concluded that FedEx exerts significant control over the drivers and their vehicles' appearance, the times they can work, and aspects of how and when drivers deliver their packages. "FedEx controls its drivers' clothing from their hats down to their shoes and socks," Judge William Fletcher wrote for both three-judge panels.

FedEx also claimed it offers the drivers "entrepreneurial opportunities"—the ability to take on multiple delivery routes, vehicles, and third-party assistants—which is inconsistent with employee status, but the court found this argument unavailing.

Judges Stephen Trott and Alfred Goodwin concurred, noting that the decision "substantially unravels FedEx's business model." Trott wrote, "Labeling the drivers 'independent contractors' in FedEx's operating agreement does not conclusively make them so."

FedEx is filing a petition for en banc review.

Portland attorney Mark Friel, who represents the *Slayman* plaintiffs, said that barring any further review, the Oregon and California cases will be remanded to their respective district courts for damages assessments, which could include overtime, back pay, and compensation for worker-provider equipment. "The Ninth Circuit held that the FedEx drivers in those cases are employees as a matter of law. That is huge, and the well-reasoned opinions could impact cases currently pending in other jurisdictions challenging FedEx's employment practices," he said.

The rulings could also affect "sharing economy" companies that provide ridesharing such as Uber Technologies, Inc., and Lyft, Inc.; food delivery and grocery shopping services; and trucking and delivery/shipping companies that follow a similar independent contractor business model.

"For companies that make it their core business to make deliveries, the decisions could have a great impact. A company like FedEx will have to decide how important controlling its drivers is to the quality of its product. If a high degree of control is necessary, then FedEx, UPS, or other such companies may have no other choice than to reclassify their drivers to employee status," said Los Angeles attorney Mikael Stahle, who represents employees in class actions.

Friel agreed. "These decisions send a strong message to all companies using or contemplating the use of independent contractors instead of employees: You can't have your cake and eat it, too. Employers who want control over how workers perform their jobs need to provide those workers with the benefits and protections afforded to all employees," he said.

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