



# Ninth Circuit Holds that FedEx Drivers Are Employees - Not Independent Contractors

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The Ninth Circuit recently addressed the nearly decade long misclassification dispute between FedEx and its drivers, holding that drivers in California (as well as in Oregon) are FedEx employees, not independent contractors. *Alexander et al. v. FedEx Ground Package Sys., Inc.* (California); *Slayman et al. v. FedEx Ground Package Sys., Inc.* (Oregon).

In December 2010, the Northern District of Indiana issued a summary judgment opinion, evaluating the standards for independent contractor misclassification under multiple laws across 26 states, including California. It ruled that FedEx drivers were independent contractors in 23 of the states – including California and Oregon – and employees in three states.

In reversing the Indiana District Court's decision as to FedEx drivers in California and Oregon and holding that the drivers were in fact employees, the Ninth Circuit placed heavy emphasis on the Operating Agreement that governed the relationship between FedEx and the drivers. The Operating Agreement provided: (1) FedEx retained the right to control the physical appearance of drivers, including hair and facial hair requirements; (2) vehicle equipment and appearance requirements, including the color, logo, and internal shelf arrangements; (3) the drivers use their vehicles when not delivering FedEx packages; (4) the drivers' workloads, which defined and constrained the hours the drivers worked; and (5) the reconfiguration of drivers' territories. Although the Court conceded that there were other factors that weighed in favor of independent contractor classification, the Court decided that under both California and Oregon law, the rights that FedEx retained under the Operating Agreement to control multiple aspects of the drivers' work were sufficient to render the drivers as employees under the applicable California and Oregon tests.

With respect to California, the Ninth Circuit applied the multi-factor *S.G. Borello*\* test with its primary right-to-control factors and its list of secondary indicia. With respect to Oregon, the Ninth Circuit applied Oregon's state law version of the right-to-control test for illegal wage deduction claims and a separate economic-

realities test for unpaid overtime claims.

The Ninth Circuit decision is a reminder to all employers that any workers treated as independent contractors are open to challenge. The decision is a wake-up call to conduct internal audits regarding worker classification.

\**S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341.