

## **FedEx Driver Found to be Employee – Not Independent Contractor**

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Under federal and state wage and hour law, a company must pay its employees wages for all hours worked, maintain records of hours worked and wages paid, and pay overtime for non-exempt employees for hours they work over 40 in a workweek. A company need not maintain the records on or pay overtime to independent contractors. Nor must a company withhold for income tax or payments or contribute to Social Security, Medicaid, Medicare, unemployment compensation, workers' compensation or any other benefit program with true independent contractors. With this real cost savings, some companies attempt to classify certain parts of their workforce as independent contractors. That can lead to trouble when those individuals file suit seeking to have themselves reclassified as employees. This happened recently to a well-known nationwide delivery company in *Anfinson v. FedEx Ground*, 159 Wn. App. 35 (2010).

In *Anfinson*, pickup and delivery drivers working for FedEx filed a class action on behalf of 320 drivers seeking four years of wages, including overtime, 12% prejudgment interest, double damages and attorneys' fees. FedEx, which has faced similar challenges nationwide, fought the delivery drivers and won at trial. Its victory did not last. On appeal the *Anfinson* Court of Appeals reversed the jury verdict on a technical basis: the legal instructions given to the jury as to the definition of "employer" were incorrect. FedEx submitted that an "employee" is one who has the right to control the details of the performance of the work – which clearly the drivers had – versus the drivers' definition which was that an "employee" is any person acting directly or indirectly in the interest of the company – which clearly the drivers did. Thus, whatever definition the appellate court adopted would determine the outcome. The *Anfinson* court adopted

the drivers' definition that whether a worker is an employee or independent contractor is a matter of the "economic realities." If a worker is dependent on the business to which he renders service, he is an employee. The *Anfinson* court found that FedEx's proposed definition – a right to control – is for tort liability such as a car crash or other employee-inflicted injury. The "economic realities" test analyzes the permanence of the working relationship, the degree of skill the work entails, the worker's investment in equipment or materials, the worker's opportunity for profit or loss, the degree of control over the worker, and whether the service rendered by the worker is integral to the company's business. A classic example of an independent contractor is the plumber who purchases his tools, has a high degree of skill, works for various customers, can make or lose money based on how much time he invests in the job, works on the pipes without the customer's direction, and is not integral to the business' operations.

In an interesting twist, FedEx pointed out that the drivers had asserted the common law right to control test in order to certify the class and then changed its position on the proper employee test only a few months before trial. FedEx asserted that this change from right to control to economic realities was inconsistent and that the doctrine of judicial estoppel precluded them from challenging the jury instruction. The *Anfinson* court rejected this argument, noting that parties can change their legal positions as long as the trial court does not.

There are several takeaways from *Anfinson*. First, companies must be cognizant that Washington's public policy strongly favors finding that workers are employees so that they are paid overtime, have withholdings made, ensure payment to governmental insurance programs, and receive benefits. The proverbial cards are stacked against a company that attempts to classify its workers as independent contractors. Even if the company and the worker believe that there is an independent contractor relationship, the *Anfinson* court makes it clear that later, the worker

(and a class of hundreds) can seek to reclassify that status and expose the company to claims of overtime, double damages, attorneys' fees and prejudgment interest. The *Anfinson* court also makes it clear that by adopting the economic realities test, workers will rarely be found to be independent contractors unless they meet the strict standard of the economic realities. The *Anfinson* court ignored other judicial decisions in sister states which dealt directly with FedEx drivers in trailblazing its own adoption of the federal economic realities test. Therefore, the ultimate takeaway from *Anfinson* is that employers would be in a better position to protect themselves if, in most cases, they classified their workers as employees.