Actions Speak Louder than Words:
The Kansas Supreme Court Finds FedEx Drivers are Employees Not Independent Contractors
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In a groundbreaking decision, the Kansas Supreme Court recently ruled that FedEx Ground drivers are employees, not independent contractors, under Kansas law. In an extensive opinion authored *per curiam*, the Court answered a certified question from the U.S. Court of Appeals for the Seventh Circuit, asking whether FedEx drivers are employees under the Kansas Wage Payment Act ("KWPA"). The Kansas Supreme Court answered in the affirmative.

This ruling comes as a major blow to FedEx.   Over the past several years, numerous lawsuits have been filed throughout the country by former and current FedEx drivers who contend that they are employees – not independent contractors as claimed by FedEx – and consequently, are entitled to the protections and benefits of state and federal employment law. These cases were consolidated into a class action lawsuit with a certified class of full-time FedEx drivers. The drivers are seeking repayment of costs, expenses, and overtime wages from FedEx. In Kansas alone, roughly 479 FedEx drivers have alleged that they are improperly classified as independent contractors under the KWPA.

Ultimately the Kansas Supreme Court determined that FedEx's right to control and supervise its drivers lead to the conclusion that the drivers are employees rather than independent contractors. Most importantly, the court found that FedEx retained the right to direct its drivers in the performance of their work, which points to an employer/employee relationship.   In particular, FedEx assigned its drivers their routes and told the drivers where and how to deliver the packages. In addition, FedEx controlled the appearance of its drivers and their trucks, and implemented several oversight procedures that could lead to a driver's termination.

FedEx refuted that its drivers were employees, and pointed out that its drivers sign an operating agreement specially classifying the drivers as "independent contractors." FedEx structured its drivers' operating agreements in this manner in order to avoid additional costs associated with employees. But the Kansas Supreme Court gave no credence to that argument, concluding that "if a worker is hired like an employee, dressed like an employee, supervised like an employee, compensated like an employee, and terminated like an employee, words in an operating agreement cannot transform that worker's status into that of an independent contractor."

So what does this mean for Kansas employers? The biggest takeaway is that Kansas law continues to crack down on employee misclassification. The Kansas courts will not allow an employer to simply classify a worker as an "independent contractor" if the worker is actually treated like an employee. In other words, the *FedEx* case reaffirms that an employer's conduct speaks louder than words.

Moreover, the *FedEx* case confirms that the Kansas courts will use a 20-factor test to determine whether an employer/employee relationship exists under the KWPA. But when considering factors that cut both ways, the Kansas courts will put particular emphasis on the company's right to control the worker. Ultimately, the right to control the manner and means of the workers' conduct will tip the scales in favor of an employer/employee relationship.

Worker misclassification is a serious problem. As noted by the Kansas Department of Labor, it harms Kansas workers, the business community, and Kansas taxpayers. A Kansas employer who misclassifies an employee as an independent contractor is subject to civil and criminal penalties and fines. Moreover, the employer may be subject to back pay and attorney's fees. If there is any doubt at all about a worker's status, an employer should err on the side of classifying the person as an employee.

If you have any questions concerning worker classification, please contact the employment law attorneys at Martin, Pringle, Oliver, Wallace & Bauer, L.L.P. for assistance.