



FedEx Ground Must Face NY Drivers' Misclassification Suit

By **Linda Chiem**

Law360, New York (December 6, 2016, 6:40 PM EST) -- FedEx Ground Package System Inc. must face a proposed class action alleging it shorted New York delivery drivers on pay by misclassifying them as independent contractors, a federal judge ruled Monday, saying the drivers have plausibly alleged they fit the bill for being labeled as employees.

Chief U.S. District Judge Frank P. Geraci Jr. rejected FedEx's motion to dismiss a proposed class action filed by five FedEx Ground delivery and pick-up drivers in New York accusing the company of taking illegal deductions from their pay by misclassifying them as independent contractors. Those deductions purportedly covered things like the use of a FedEx scanner, the cost of FedEx uniforms, liability and workers' compensation insurance, various performance-based penalties, and lease payments on drivers' trucks, according to the order.

Judge Geraci said the drivers have sufficiently alleged that FedEx Ground dictated a lot of their working conditions, so they should be considered employees, even though they contracted with FedEx Ground under operating agreements labeling them as independent contractors. At this stage of the case, dismissal isn't warranted and the drivers' claims under the Fair Play Act, New York common law and unjust enrichment can forge ahead, according to the order.

The Fair Play Act, which became effective in New York in April 2014, creates a presumption that any person "performing commercial goods transportation services for a commercial goods transportation contractor" is an employee of that contractor.

Judge Geraci smacked down FedEx Ground's argument that it is not a "commercial goods transportation contractor" under the Fair Play Act because pursuant to the operating agreements, FedEx Ground did not pay the plaintiffs directly, but rather paid "the companies they drove for."

"If any business could avoid the Fair Play Act by simply classifying their workers as independent contractors and compensating them through corporations rather than paying them directly, the Fair Play Act would be rendered useless," the judge said.

Judge Geraci also said the plaintiffs — drivers Jeffrey Padovano, Thomas Werndle, Chris Arber, Michael Tuttle and Andrew Mitrano — have plausibly alleged that they were employees under the New York common law test because they laid out a number of allegations pointing to the level of control FedEx asserted over how the drivers operated when delivering or picking up packages.

Specifically, the drivers allege that they were supervised by and required to coordinate vacations and days off with FedEx Ground managers; that they were required to comply with detailed policies, procedures and directives promulgated by FedEx Ground; and that they were required to attend meetings with their FedEx Ground station manager or assistant manager.

They also allege that FedEx Ground required them to use specific FedEx signage and logos on their trucks and uniforms, preventing them from using those trucks and uniforms to offer services to the general public. Furthermore, the company set the price at which it charges customers for pick up and delivery of packages, and FedEx Ground determined the number of packages that each driver would deliver, according to the order.

"At this stage of the litigation, these factual allegations are more than sufficient to state a plausible claim for relief," the judge said.

The company had also tried to get the court to toss the drivers' unjust enrichment claim on grounds that the relationship between the plaintiffs and FedEx Ground is governed by the operating agreements.

"Although FedEx Ground is correct that unjust enrichment is a quasi-contractual claim that applies in the absence of a contract between the parties, it would be improper for the court to decide at this stage of the litigation that the relationship between plaintiffs and FedEx Ground is 'governed by the operating agreement,'" Judge Geraci wrote. "Under New York law, a worker can state a claim for unjust enrichment even if the existence of a contract might ultimately preclude recovery on that claim."

FedEx has argued that the propriety of deductions and expenses remains strictly a matter between the companies and FedEx Ground per the terms of the operating agreements, and has nothing to do with the plaintiffs' status as employees, according to the company's motion to dismiss.

It firmly stood its ground on Tuesday, saying in a statement that anyone providing transportation services for service providers under contract with FedEx Ground is an employee of that incorporated service provider, and not FedEx Ground.

"At this preliminary stage of the case, the court has found plaintiffs' misclassification allegations sufficient to avoid dismissal," the company said. "We respectfully disagree and look forward to further explaining the nature of FedEx Ground's business relationship with its service providers as the case proceeds."

Harold L. Lichten of Lichten & Liss-Riordan PC, one of the lead attorneys for the plaintiffs, told Law360 on Tuesday that he was pleased the court rejected FedEx's novel argument that it only contracted with the corporations formed by the drivers, and not the drivers themselves.

"FedEx made a clever argument of 'well, look we made these people form corporations and we didn't contract with Joe Jones, we contracted with Joe Jones Trucking Co. Inc. so we had no relationship with Joe Jones so how can we be responsible,'" Lichten said. "The judge made a very interesting comment that if companies were able to get around [the law] just by saying it contracted with these corporations, it would make a mockery of the wage laws and that's a really important holding."

According to Lichten, the instant suit covers hundreds of FedEx drivers in New York who began driving for FedEx Ground after 2007 and 2008, and were not included in the massive \$240 million settlement that FedEx Ground **reached in June** to settle class actions by delivery drivers in 20 states who said they were misclassified as independent contractors and shorted on wages.

The drivers are represented by Harold L. Lichten, Shannon Liss-Riordan and Matthew Thomson of Lichten & Liss-Riordan PC; Pete Winebrake, R. Andrew Santillo and Mark J. Gottesfeld of Winebrake & Santillo LLC; and Samuel Alba and Robert Friedman of Friedman & Ranzenhofer PC.

FedEx is represented in-house by Joseph P. McHugh and by Susan C. Roney of Nixon Peabody LLP.

The case is Padovano et al. v. FedEx Ground Package System Inc., case number 1:16-cv-00017, in the U.S. District Court for the Western District of New York.

--Editing by Catherine Sum.