



## 'Independent contractor' litigation heats up

By Nora Lockwood Toohar  
Staff Writer  
Published: April 7, 2008

After he retired, Robert V. Williams thought that getting a job as a FedEx driver would be a good way to stay busy and pick up some extra money.

Williams, 71, of Berlin, Mass., had worked for several other delivery services as a manager; FedEx seemed like the perfect fit.

"They paint you a very rosy picture," he said.

But it all went downhill.

Williams joined FedEx in April 2001, and stayed until December 2005, when he was fired after injuring his back unloading packages.

"They gave me two or three days and let me go," he said. "In FedEx, if they claim you are an independent contractor, you have to cover your route. If you don't have anybody to cover your route, they terminate you."

Williams is one of about 25,000 current and former drivers suing FedEx Ground Package System, a unit of air express giant FedEx. The drivers claim FedEx violated the Fair Labor Standards Act by failing to classify them as employees. As a result, they say, they were cheated out of overtime pay, benefits and eligibility for workers' compensation and unemployment insurance.

After the state of Massachusetts determined that he was an employee, Williams was awarded unemployment benefits. A supporter of unionization efforts, Williams was among five Massachusetts FedEx drivers who recently settled unfair labor charges brought by the National Labor Relations Board against the company.

So far, 57 lawsuits have been filed, including 40 class actions (two of them nationwide overtime cases) in 38 states.

Williams filed suit in Massachusetts, claiming that FedEx violated state discrimination laws by firing him because of an injury he suffered on the job. His state court case has been stayed, pending pre-trial proceedings that have been consolidated for federal multi-district litigation in the Northern District of Indiana. (His lawyer indicates that Williams' case may not become part of the federal MDL, however.)

Last month, the judge in the MDL certified a nationwide ERISA class as well as statewide claims in Kansas.

Cathy Ruckelshaus, litigation director of the National Employment Law Project, a New York labor group, said an increasing number of employers are classifying workers as "independent contractors" in an attempt to skirt federal labor laws.

"It's becoming more and more prevalent in the guise of paying people off the books," she said. "In certain sectors like delivery and construction, it's become the norm."

"It's a huge issue," agreed Shannon Liss-Riordan, a partner at Pyle, Rome, Lichten, Ehrenberg & Liss-Riordan in Boston, who is representing Williams.

"Employers are trying to figure out how to cut their costs, and one way they seem to think they can get away with it is pretending their employees are not employees and creating these sham relationships," she said.

'A way to avoid liabilities'

FedEx Ground currently has about 15,000 drivers who are paid as independent contractors. The drivers can own multiple routes and hire other drivers to deliver packages. Wall Street likes the model, because it keeps costs low, enabling FedEx to compete better against its main rival, United Parcel Service.

But adverse court rulings would slam the brakes on the way FedEx categorizes its drivers, and force the company to start paying pension, overtime, health care and other costs.

FedEx has already been dealt several blows:

- In December 2007, the Internal Revenue Service determined that FedEx Ground independent contractors should be reclassified as employees for tax purposes, and ordered the company to pay more than \$319 million in back taxes and penalties for 2002.
- A California appeals court last year upheld a trial court's ruling that FedEx Ground drivers were entitled to reimbursement for work-related expenses, and awarded \$11 million in damages (*Estrada v. FedEx Ground Package System*, 154 Cal.App.4th 1).
- Massachusetts' attorney general in December 2007 fined FedEx Ground more than \$190,000 for intentionally misclassifying 13 drivers as independent contractors rather than employees.

Henry W. Sledz Jr., an employment lawyer and partner at Schiff Hardin's Chicago office, said the independent

contractor issue has been percolating since the mid-1990s.

"Employers saw this as a way to avoid liabilities under various employment statutes, and possibly avoid unionization," he said.

In 1996 the 9th Circuit held that a group of Microsoft workers were employees and not independent contractors, even though the software giant had required them to sign agreements acknowledging their independent contractor status and waiving their claims to company benefits. (*Vizcaino v. Microsoft Corp.*, 97 F.3d 1187).

"Since then, this has been an issue we see quite often," Sledz said. "As FedEx tried to do, it's a way to pass on the operating costs – like insurance – to the independent contractors. If the person is truly an independent contractor, you're not liable for withholding and unemployment taxes. And you won't have to worry about covering them for workers' compensation and unemployment insurance. Also, they wouldn't be covered by the various benefit plans."

But Sledz said employers have to be careful not to miscategorize workers.

The IRS and various courts have established criteria to gauge whether a worker is an independent contractor or an employee. Most of the standards center on the amount of control the employer exercises over the workers, such as instructions on how, when or where to do the work and what equipment to use.

Ruckelshaus's organization successfully challenged the independent contractor status of grocery and drug store drivers in New York, claiming they were owed unpaid wages and overtime, and winning more than \$6 million in damages (*Ansoumana v. Gristedes*, 255 F.Supp.2d 184 (S.D.N.Y. 2003)).

In a similar case, Massachusetts's highest court held that Coverall, a large building services cleaning company, was liable for contributions to the state's unemployment fund for the reported earnings of a franchisee who claimed she was an employee. (*Coverall North America v. Commissioner of the Division of Unemployment Assistance*, 857 N.E.2d 1083 (2006).)

The court found that Coverall could not establish the three factors listed in the state's unemployment compensation statute as necessary for an individual to be deemed an "independent contractor."

Massachusetts Gov. Deval Patrick launched an initiative in March aimed at cracking down on business owners who dodge taxes and other costs by paying workers in cash or misclassifying them as independent contractors.

"There has been an increased focus on this by a lot of states, as well as a lot of litigation," Liss-Riordan said.

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