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Are Shuttle Drivers Franchisees or Employees? Ninth Circuit Wants Lower Court to Decide

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Air travelers are familiar with the ubiquitous blue vans bearing the SuperShuttle logo that whisk travelers to the local destinations of their choice. Since 2001, the drivers of those vans have been franchisees under unit franchise agreements. The parent entity leases the vans to the driver-franchisees, who operate the vans themselves or through their employees. Previously, this service was operated by employees of the parent entity, SuperShuttle International, Inc. (SSI) or a subsidiary. Under California licensing regulation, a subsidiary of SSI holds the passenger stage corporation certificates from the Public Utilities Commission (PUC) necessary to operate the vans on a for-hire basis.

The drivers filed a class action suit to be classified as employees, not independent contractors, for state law purposes. They argued unsuccessfully at the trial court that the franchises disguised employment relationships and they were entitled to benefits of employees under the California Labor Code. The putative franchisor was alleged to treat its driver franchisees not as independent business people, but as employees. According to the drivers, the franchisor controlled the geographic areas served by the drivers, set the fares they charged, and demanded that they obey detailed standards of behavior and appearance while at work. Under the rules of the PUC, certificate holders could engage non-employee drivers to operate under certificates so long as the drivers remain under the "complete supervision, direction and control" of the certificate holder. One may wonder how "independent" someone could be in reality if under the complete supervision, direction and control of another party or person. The drivers claimed that misclassification deprived them of overtime and minimum wages, reimbursement of business expenses and deductions, meal period pay and other benefits enjoyed by employees that an independent contractor absorbs or pays.

The district court deferred to the PUC, which has broad authority to decide such issues in the context of operating regulated transportation companies under state certificates and rules of operation. SSI's motion to dismiss the case was granted. *Kairy et al v. SuperShuttle International, Inc.*, 721 F. Supp. 2d 884(N.D. CA. 2009). On appeal to the U.S. Ninth Circuit Court of Appeals, SSI argued that the rules of PUC allow certificate holders to engage independent drivers but retain levels of control ordinarily exercised over employees. The PUC rules create an exception to the employee/independent contractor analysis performed in other employment law contexts, according to SSI. The drivers argued that the control elements could stop at safety and service related issues, well short of employment-type controls over the drivers. Regulation of the "minute details" of behavior and appearance, including the color of hosiery and facial hair length, goes beyond to employment level control.

The PUC itself, in its amicus brief, demurred to "traditional decision-makers" on the issue of whether drivers are independent or employees, not wishing to make law in this complex area. The Ninth Circuit rejected the arguments of SSI, and held that under the relevant California statutes, PUC does not regulate the question of whether drivers are employees or independent contractors. Using the decision of the PUC in *In Re Prime Time Shuttle International, Inc.*, 67 CPUC2d 437, 1996 WL 465519(Cal. PUC, Aug. 2, 1996), the court found that the control and supervision issues were indeed related only to health, safety and service reliability aspects, such as driver reliability, safety of operations, shift length, van inspections and passenger recourse. Employment-type control goes well beyond what the PUC rules contemplate. On remand, the district court was authorized to

determine whether the SuperShuttle drivers were employees or independent contractors. The PUC defers to courts on that important point and does not assert authority to decide employment law, per this Ninth Circuit decision. *Kairy v. SuperShuttle International, Inc.*, 2011 U.S. App. LEXIS 22161 (9th Cir. 2011).

As this matter plays out in the lower court, transportation operators considering franchising as a means of reducing direct labor costs and other risks may find no safe harbor on independent contractor status under public utility commission licensing and service rules similar to California's, despite the attempt to leverage health and safety controls into more comprehensive service model standards. Left out of the analysis by the Ninth Circuit, and awaiting more attention in the district court, is the dividing line between a franchise/independent contractor relationship and employment. Providers may take some comfort from the long-awaited decision in the FedEx driver litigation, in which the U.S. District Court for the Northern District of Indiana found the drivers to be independent contractors, not employees. (No.305-MD-527-RM, MDL 1700, Dec. 13, 2010). But state employment laws offer another hugely significant issue to consider in strategic evolution of multivehicle business models.