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FedEx Ground Drivers Will Appeal Adverse Decision Finding Kansas Drivers to be Independent Contractors, and not Employees; MDL Court Also Sends All Non-Class Cases Back to Their Home Courts

August, 2010. Last Thursday, a federal judge in Indiana threw an obstacle in the way of a lawsuit by FedEx Ground drivers who believe that they are entitled to all legal rights and benefits of employees. In the 5-year long case, the drivers have put forward evidence of employee status, including company requirements of uniform, vehicles, dozens of delivery rules and other evidence of micro-management. But last week, U.S. District Court Judge Robert Miller concluded that FedEx Ground drivers in Kansas were independent contractors and not employees. Contrary to this ruling, the same judge found some Illinois drivers to be employees in May.

The Court, in its 103-page opinion, found that FedEx Ground drivers in Kansas are independent contractors under Kansas law. The case was one of many class action lawsuits that were consolidated before Judge Miller, challenging FedEx Ground's classification of its drivers as independent contractors. The outcome of the other 27 class action cases remains in doubt, including the California case which follows a court decision there finding that the drivers are employees as a matter of California law. The Court said that FedEx Ground did not retain the "right to control" its drivers, a key aspect of the legal test for employment status, because FedEx only offers "suggestions and best practices" but does not dictate delivery requirements. The decision analyzed FedEx's contract and written policies, but refused to consider FedEx's business records showing the drivers' experiences with FedEx management.

"We are surprised and dismayed by this opinion," said Lynn Faris, lead counsel for the drivers. "The drivers know that what FedEx may call a "suggestion" is, in reality a mandate, because not following it leads to termination. Plaintiffs presented reams of documents and testimony that demonstrated constant micro-management of drivers by FedEx. There is no doubt in my mind – or the drivers' minds – that they are required to do what they are told and are, therefore, employees," she added. "At the very least, there is ample evidence of employment status that warrants a trial." The Court's opinion is at odds with the California appellate decision in *Estrada v. FedEx Ground*, which held that the drivers were employees as a matter of law, and many recent decisions of state tax agencies. "Plaintiffs will certainly appeal this decision. Recently, both the Eight and Ninth Circuit Courts have reversed very similar trial court rulings finding that delivery drivers were independent contractors as a matter of law," said Faris.

This week, Judge Miller also send 16 cases back to their original courts (in Colorado, Connecticut, Illinois, Massachusetts, Michigan, Mississippi, Missouri, Montana, South Dakota, Vermont and Virginia), declining to rule on the drivers' summary adjudication motions in those cases. Some of those cases, Judge Miller acknowledged, were governed by laws which create a presumption of

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employments status. “The upshot of these two rulings means that drivers in some places will be legally employees and in other places, if the decision is not reversed, the drivers will be considered independent contractors. This is a result which, I think, neither side expected or wanted,” said Faris.

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VIEWED 03-04-2011