

# Employee or Independent Contractor? Washington Supreme Court Changes the Rules

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In a case with potentially sweeping impact on many Washington enterprises, the Washington Supreme Court announced a new test for determining whether a worker is an employee entitled to minimum wage and overtime, or an independent contractor entitled only to compensation set by the parties. Under the “economic-dependence test,” the worker is an employee if “as a matter of economic reality,” the individual “is economically dependent upon the alleged employer or is instead in business for himself.” *Anfinson v. FedEx Ground Package Sys., Inc.* (click for separate [majority opinion](#) and [dissent](#))

Although the full consequences of the July 19 decision are not yet clear, many workers who have been treated as independent contractors may now have the right to minimum wage and overtime compensation, and businesses and government agencies can expect a flurry of new lawsuits, including class actions.

## The Lawsuit

Randy Anfinson, a delivery driver for FedEx Ground, was engaged as an independent contractor. Along with two other drivers, Anfinson filed a class action lawsuit seeking overtime wages under the Washington Minimum Wage Act. The case was certified as a class action that covered 320 current and former drivers.

After a four week trial, the jury found that the workers were independent contractors and therefore not entitled to overtime pay. The plaintiffs appealed. The Court of Appeals and Supreme Court found the jury instructions to be erroneous and prejudicial, and sent the case back for a new trial.

### **The Supreme Court's Analysis**

The Supreme Court rejected an eight-factor “right to control test” that formed the basis of the jury instructions. Under this test, the main issue was whether the enterprise controlled, or had the right to control, the details of the worker’s performance, and the eight factors were relevant only in deciding control or right to control.

According to the Supreme Court, the correct inquiry is “whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.” Unfortunately, the Court did not list the factors it would apply to the economic-dependence test, or suggest how to flesh out the general outlines of the test. The Court referred obliquely to “competing lists of nonexclusive factors” that some federal courts use.

The dissenting Supreme Court justices objected to the absence of a definite set of factors. They wrote that employee status under the Minimum Wage Act now is governed by a single determination – whether the worker is economically dependent upon the alleged employer – and any other factor will be relevant only in deciding economic dependence. The dissenting justices concluded that economic dependence focus potentially sweeps in almost any work done by one person on behalf of another.

For its part, the majority acknowledged that the economic-dependence test will result in “a more inclusive definition of employee than does the right-to-control test.” In other words, more workers will be considered employees under the economic-dependence test than under the right-to-control test.

### **Competing Standards**

Unfortunately, the determination in the Anfinson case applies only to the Washington Minimum Wage Act. Courts and agencies, such as the Internal Revenue Service, the Washington Department of Labor and Industries, and the Equal Employment Opportunity Commission, apply different formulations. Therefore, a worker could be considered either an employee or an independent contractor depending on the law or agency. For example, a worker who qualifies as an independent contractor for federal income tax purposes might be entitled to overtime pay as an employee under the Washington Minimum Wage Act.

### **Conclusion**

As noted above, the consequences of the Anfinson decision remains to be seen. We will continue to cover developments. If you have a question about avoiding liability for misclassifying employees as independent contractors, please contact the Foster Pepper Employment & Labor group.