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Focusing the Multifactor Tests for Employee Status; the Restatement's Entrepreneurial Formulation

Michael C. Harper¹

Introduction

The American Law Institute's twenty-first century mission to restate for the first time American employment law carried the responsibility to provide more clear guidance on the law's critical distinction between employees and independent contractors. This distinction delineates the scope not only of federal employee protection and benefit statutes, but also of employee protections and benefits conferred by state statutory and common law. Not surprisingly, the Reporters agreed to have the section addressing the distinction be the first in the volume, and it is indeed now included as § 1.01.²

A Restatement of Employment Law, however, like any Restatement, cannot formulate clearer or otherwise more desirable doctrine from the whole cloth of the views and values of the Reporters or the ALI membership. The Restatement could not offer a new rule of decision. It could only offer a better explanation of what has been the underlying basis of a majority of the better decisions limning

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² § 1.01 Conditions for Existence of Employment Relationship

- (1) Except as provided in § 1.02 and § 1.03, an individual renders services as an employee of an employer if (a) the individual acts, at least in part, to serve the interests of the employer, (b) the employer consents to receive the individual's services, and (c) the employer controls the manner and means by which the individual renders services, or the employer otherwise effectively prevents the individual from rendering services as an independent businessperson.
- (2) An individual renders services as an independent businessperson and not as an employee when the individual in his or her own interest exercises entrepreneurial control over important business decisions, including whether to hire and where to assign assistants, whether to purchase and where to deploy equipment, and whether and when to provide service to other customers.

the employee-employer distinction.³ Doing so, it was clear, required close examination of the various unstructured multifactor tests that had been used over the past several decades. The Restatement had to determine how and why the better decisions applied the right-to-control factor and the other factors listed among the various multifactor tests. What ultimately could be revealed by application of the tests? To what are the various factors, or at least the most critical factors, primarily relevant? Was it possible to articulate guiding principles to make the multifactor tests more acceptable and predictive?

Without focus multifactor tests alone seldom provide adequate rules of decision. Without structure provided by an ultimate question to be answered by application of the standards, such tests offer only minimally cabined judicial discretion. Factors can be tallied without regard to relative weight, or alternatively ranked in importance and subordinated, without the judge revealing what considerations are actually driving a decision.⁴ Thus, the Restatement needed to provide guiding principles to render the multifactor tests more focused and predictable.

II. The Multifactor Tests

A. Second Restatement of Agency Test

³ “In “cases of division of opinion a choice had to be made and naturally we chose the view we thought was right”. In judging what was “right”, a preponderating balance of authority would normally be given weight, as it no doubt would generally weigh with courts, but is has not been thought to be conclusive.” HERBERT WECHSLER, AMERICAN LAW INSTITUTE, REPORT OF THE DIRECTOR 6 (1966) (citation omitted).

⁴ Judge Posner indeed has argued that appellate judges devise multifactor tests for the purpose of providing discretion to trial judges on issues the appellate judges wish to avoid. See Richard Posner, *Reflections on Judging*, 86-87 (Harvard Univ. Press 2013).

The various multifactor tests for distinguishing employees from independent contractors that emerged after the Second Restatement of Agency's mid-twentieth century attempt to define servant status,⁵ primarily to delineate the scope of a principal's vicarious liability.⁶ The Second Restatement of Agency based its definition on the English and early American common law "right-to-control" test.⁷ Section 220(1) of this Restatement defined servant as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."⁸ The Second Restatement recognized, however, that the decisions could not be fully captured by so simple a formulation. A "full-time cook", "ship captains, "managers of great corporations," a "traveling salesman," and "skilled artisans ... with whose method of accomplishing results the employer has neither the knowledge nor the desire to interfere," all could be employees regardless of the attenuation of the employer's control.⁹

Section 220(2) thus supplemented the "right-to-control" test with a non-exclusive list of ten factors to determine "whether one acting for another is a servant or an independent contractor."¹⁰ Section 220, however, did not specify

⁵ The Restatement Second of Agency retained the historical terms "servant" and "master," now replaced by "employee" and "employer."

⁶ The law defining servant or employee status of course was originally developed to set the scope of a master or employer's vicarious or "respondeat superior" liability, an important topic for the law of agency.

⁷ See generally Marc Linder, *The Employment Relationship in Anglo-American Law: A Historical Perspective* (1989).

⁸ Restatement Second, Agency § 220(1).

⁹ *Id.* at § 220, Comments *a, e, i.*

¹⁰ "(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the places of work for the person doing work;

(f) the length of time for which the person is employed:

whether these factors were to be used to expand the scope of employee status beyond that indicated by the right-to-control test or rather were to be used in service to this test. The former seems suggested by inclusion, as the first of the ten listed factors, of “(a) the extent of control which, by the agreement, the master may exercise over the details of the work.” The Restatement Second of Agency thereby presented judges great discretion and lawyers great uncertainty.¹¹

B. The Supreme Court’s “Common Law” Default Test

The Supreme Court has followed a similar path, offering its own version of a “common-law” multifactor test to determine who qualifies as an employee protected by various federal laws that do not include an express meaningful definition. Most federal laws define employee in a circular fashion as “any individual employed by an employer.” In a case interpreting the phrase in the Copyright Act of 1976,¹² the Court concluded that Congress’ use of such a hollow definition expressed intent “to describe the conventional master-servant relationship as understood by common-law agency doctrine.”¹³ Rather than applying the specific common law of a particular state, however, the Court made its own attempt to formulate general common law doctrine in the manner of a Restatement. That formulation included consideration of “the hiring party’s right

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- (g) the method of payment, whether by the time or by the job;
 - (h) whether or not the work is a part of the regular business of the employer;
 - (i) whether or not the parties believe they are creating the relation of master and servant; and
 - (j) whether the principal is or is not in business.”

¹¹ The Restatement Third, Agency provided no real clarification. It adopted the “right-to-control” test in its § 7.07, but acknowledged that “[i]n some employment relationships, an employer’s right of control may be attenuated. For example, senior corporate officers, like captain of ships, may exercise discretion in performing their work.” §7.07, comment *f*.

¹² *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989) (interpreting § 101 of the Copyright Act of 1976, 17 U.S.C. § 101).

¹³ *Id.* at 751-752.

to control the manner and means by which the product is accomplished,” but also listed “[a]mong the other factors relevant to [the] inquiry” twelve other factors, including six that were at least similar to those in the § 220(2) list.¹⁴ The Court cited § 220 (2), but did not explain why it provided additional factors or declined to include others. It offered no guidance on the relative weight that is to be given to the factors, even declining to confirm a primary role for the “right-to-control” factor. It stated only, and unhelpfully, that “[n]o one of these factors is determinative.”¹⁵

Three years later in a case interpreting the same circular definition of employee in the Employment Retirement Income Security Act (ERISA) the Court confirmed that it would apply the same test in defining the scope of employee protection statutes.¹⁶ The Court again cited § 220(2) as well as an Internal Revenue Service ruling that sets forth “20 factors as guides in determining whether an individual qualifies as a common-law “employee” in various tax law contexts.”¹⁷ The Court, however, did not explain its choice of listed factors or their relevance to any essential difference between employees and independent contractors that relates to the general purpose of federal statutes that use employment status to define the scope of their protections or benefit conferral. The Court, like the Restatement Second of Agency, thus offered only an

¹⁴ “the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the p[arties]; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.” *Id.*

¹⁵ *Id.* at 752.

¹⁶ *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992).

¹⁷ *Id.* at 323-324 (citing Rev. Rul. 87-41, 1987-1 Cum. Bull. 296, 298-299).

unstructured multifactor test that confers great discretion on trial judges and presents only great uncertainty for lawyers.

C. The FLSA Test

One important federal employment statute, the Fair Labor Standards Act (FLSA),¹⁸ does supplement its circular definition of employee with a potentially more meaningful definition of “employ.” To “employ includes to suffer or permit to work.”¹⁹ Soon after passage of the FLSA, the Court described this definition as the “broadest” in any statute,²⁰ and the lower courts since have purported to interpret the scope of the FLSA protections more broadly than those of other statutes with only the circular definition of employee. They have done so, however, through consideration of multiple factors that mirror many of those included in both the § 220(2) list and the Court’s general common law list. For instance, the FLSA factors, like the factors of the other tests, include the employer’s control over the work, the degree of the employee’s investment in equipment and materials, whether the work requires special skill, and the degree of permanency or duration of the work.²¹

The claim of the lower courts that their interpretation of the FLSA definition of “employ” focuses on “economic realities” clarifies nothing and carries the absurd implication that the common law definitions of employee are based on economic fantasy.²² In fact, the FLSA multifactor test, whether or not applied to

¹⁸ 29 U.S.C. § 201 et seq.

¹⁹ 29 U.S.C. § 203(g).

²⁰ *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (quoting from Senator Hugo Black, 81 Cong. Rec. 7657).

²¹ See, e.g., *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1987).

²² *Id.* at 1539, 1540 (1987) (Easterbrook, J., concurring) (“This implies that the definition of “independent contractor” used in tort cases is inconsistent with “economic reality” but that the seven factors applied in FLSA

sweep more broadly than are the common law multifactor tests, is not more structured, focused, or clear.

II. The Restatement of Employment Law § 1.01 Test

A. Development of the § 1.01 Test

The generation of the Restatement of Employment Law required a protracted process, consuming well over a decade of the time of several reporters and many more advisors. The initial draft of § 1.01 in answering the questions in the last paragraph perhaps attempted to peel back one too many layers of the courts' surface rhetoric. The black letter in this draft attempted to focus on whether the putative employees were denied discretion to enhance their own returns from their service to the putative employer without further benefitting the putative employer by providing more or better service. This draft asserted that what ultimately was revealed by application of the multifactor tests was whether the putative employees retained discretion to seek their own profit independently rather than by sharing in an increased profit for the putative employer.

Although I still think this may be viewed as the ultimate touchstone in the employee versus independent contractor inquiry, I was convinced by others, including the astute Chief Reporter, Sam Estreicher, that the black letter should cleave more closely to the actual language used by the courts. We did so by describing as independent businesspersons those with retained discretion to enhance their independent returns. Truly independent businesspersons retain

cases capture that "reality." In which way did "economic reality" elude the American Law Institute and the courts of 50 states?").

discretion to enhance their returns or profits by making important business decisions in their own interest. These important decisions, the cases revealed, include the allocation of the labor of others, the allocation of capital, and the allocation of the service providers' own labor. Or, as we expressed it in the black letter of § 1.01(2), "whether to hire and where to assign assistants, whether to purchase and where to deploy equipment, and whether and when to provide service to other customers."²³

We found express support for our focus on a service provider's retained discretion to make important capital and labor allocation decisions "in his or her own interest" in decisions of several Courts of Appeals²⁴ that accepted a similar stress of the National Labor Relations Board (NLRB) on the presence or absence of "entrepreneurial opportunity" in determining employee status²⁵ under the National Labor Relations Act (NLRA).²⁶ The discretion to allocate capital and labor, including one's own labor, of course is at the core of entrepreneurial decision making. The NLRA cases were relevant to our statement of general common law because this statute offers protection to engage or refrain from

²³ See note 20 *supra*.

²⁴ See, e.g., *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1098 (9th Cir. 2008) ("The ability to operate an independent business and develop entrepreneurial opportunities is significant in any analysis of whether an individual is an 'employee' or an 'independent contractor' under the common law agency test."); *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. 2002) (upholding the "Board's decision . . . to focus not upon the employer's control of the means and manner of the work but instead upon whether the putative independent contractors have a 'significant entrepreneurial opportunity for gain or loss'" (quoting *Corp. Express Delivery Sys.*, 332 N.L.R.B. 1522, 1522 (2000))).

²⁵ The seminal Board cases setting forth this doctrine are *Dial-A-Mattress Operating Co.*, 326 N.L.R.B. 884 (1998) (finding independent contractor status) and *Roadway Package Sys., Inc.*, 326 N.L.R.B. 842 (1998) (finding employee status). See also, e.g., *St. Joseph News-Press*, 345 N.L.R.B. No. 31 (2005) (newspaper deliverers were like drivers in *Dial-A-Mattress* who could "impact their own income, thereby demonstrating the entrepreneurial nature of their employment"); *Corp. Express Delivery Sys.*, 332 N.L.R.B. 1522, 1522 ("[O]wner-operator drivers are employees" as they have no "significant opportunity for entrepreneurial gain or loss").

²⁶ 29 U.S.C. §§ 151-169.

engaging in collective bargaining or other concerted activity only to employees.²⁷ It does not define employee affirmatively, but expressly excludes from protection as an employee “any individual having the status of an independent contractor,”²⁸ a phrase it also does not define. Congress added the express exclusion of independent contractors “to demonstrate that the usual common-law principles were the keys to [the] meaning” of employee,²⁹ after the Court had first defined employee more broadly “in the light of the mischief to be corrected and the end to be attained” by the NLRA.³⁰ Since the addition of the exclusion, therefore, the general common law distinction of employees from independent contractors is to apply to the NLRA.³¹

B. § 1.01 Test Explains Multifactor Tests

More importantly, we found the most important factors in all of the multifactor tests to be relevant to the question of whether a service provider retains discretion to operate as an independent business person with entrepreneurial control over the allocation of capital and labor. For instance, the Court’s multifactor general common-law test, like the § 220(2) multifactor test and the FLSA “economic realities” test, considers whether the “hired party” supplies the capital of instrumentalities and tools. The Court’s general common-law test, like the “economic realities” test considers the role of “the hired party ... in hiring and paying assistants.” The Court’s common-law test also considers “the hired party’s discretion over when and how long to work,” i.e. whether the hired

²⁷ See 29 U.S.C. § 157.

²⁸ 29 U.S.C. § 152(3) (1947).

²⁹ *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 325 (1992).

³⁰ *NLRB v. Hearst Publ’ns., Inc.*, 322 U.S. 111, 124 (1944) (quoting *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 259 (1940)).

³¹ The Court accepted this application in *NLRB v. United Insurance Company of America*, 390 U.S. 254 (1968).

party has control over the allocation of his or her own labor. Section 220(2) more directly asks “whether or not the one employed is engaged in a distinct occupation or business,” and the “economic realities” test even expressly considers “the alleged employee’s opportunity for profit or loss depending upon his managerial skill.” Other factors included in the various tests are somewhat more indirectly related to the service provider’s retained entrepreneurial discretion³²; but few, if any, of the factors are unrelated.³³

Most importantly, the first factor in both the Court’s common law test and also the § 220(2) test, the hiring party’s control over “the manner and means by which the product is accomplished,” also can determine whether entrepreneurial discretion is retained. An employer that controls the manner and means by which an individual renders service effectively prevents the individual from exercising entrepreneurial discretion in his or her own interest and thus from operating an independent business. Controlled workers cannot schedule their own time or the time of assistants. They cannot determine their use of their own equipment or make their own investments in further equipment.

³² For instance, all of the multifactor tests list as a factor whether the work being done is part of the regular business of the hiring party. The more central to the hiring party’s business is the work being done, the less likely the hiring party will allow the workers any discretion to make any business decisions in their own interest. All of the multifactor tests also include as a factor the skill required to complete the work. Since highly skilled workers are less likely to be subject to an employer’s control, they may have more entrepreneurial opportunities; but as the employment of professionals and artisans illustrates, if they are denied those opportunities, they are employees. See the cases in note 34 *infra*. All of the multifactor tests also list the duration of the business relationship as relevant to whether it qualifies as one of employment. Work done by an independent businessperson is more likely to be of a shorter duration so that the businessperson has the flexibility to allocate labor and capital for his or her business. There are, however, many short term employment relationships between employers and employees with no discretion to make business decisions in their own interest.

³³ Section 220(2) lists as a factor whether or not the parties believe they are creating an employment relationship, while the Court’s common law test includes as a factor whether the hiring party provides employee benefits. Formal designations of the relationship should not negate underlying economic realities. See TAN 38 *infra*. Nevertheless, formal terms sometimes “may help determine the extent of control that can be exercised by a hiring party and whether the service provider is free to operate as an independent business person.” See Comment *g.*, § 1.01 Restatement of Employment Law.

C. Satisfying “Right-to-Control” Test Sufficient, But Not Necessary

We recognized, however, that satisfying the traditional “right-to-control” test was a sufficient, but not necessary, condition for employee status. This became a major point of clarification in § 1.01 of the Restatement of Employment Law. Section 1.01(1)(c) illuminates the relationship between the “right-to-control” test and the multifactor tests: when the former does not alone determine employee status, the other factors can do so if they establish that the hiring party “effectively prevents the individual from rendering the services as an independent businessperson” by effectively denying the individual entrepreneurial discretion.

This clarification explains why a wide range of service providers whose manner and means of work cannot be controlled effectively by a hiring party nonetheless may be employees of that party. This range of service providers may include the problematic cases noted in the Second Restatement of Agency, such as “full-time cooks” at high end restaurants, “ship captains,” “managers of great corporations,” “traveling salesm[e]n,” and “skilled artisans.”³⁴ It also may include professional or technical workers whose expertise cannot be controlled by a hiring party without similar expertise, or other mobile workers, like delivery persons or drivers, who may not work in the presence of supervisors.³⁵ All of

³⁴ See also Comment *f.*, § 7.07, Restatement Third, Agency: “In some employment relationships, an employer’s right of control may be attenuated. For example, senior corporate officers, like captains of ships, may exercise great discretion in operating the enterprises entrusted to them, just as skilled professionals exercise discretion in performing work.”

³⁵ For cases finding that physicians can be employees, despite the employer not having the right to control the details of patient care, see, e.g., *Cooper v. Binion*, 266 Ga. App. 709, 598 S.E.2d 6 (2004); *Clayton v. Harkey*, 826 So. 2d 1283 (Miss. 2002); *Knorp v. Albert*, 29 Kan. App. 2d 509, 28 P.3d 1024 (2001); *Crooks v. Keane*, 10 Mass. L. Rep. 56, 1999 Mass. Super. LEXIS 176 (1999). For other cases finding skilled workers to be employees, regardless of the employer’s ability to control their work, see, e.g., *RLI Ins. Co. v. Agency of Transp.*, 171 Vt. 553, 762 A.2d 475 (2000) (flight instructor); *In re Via Otto Ristorante, Inc.*, 55d1 N.Y.S.2d 630 (App. Div. 3d dept. 1990) (musicians); *Guepet v. Int’l TAO Sys., Inc.*, 443 N.Y.S.2d 321 (Sup. Ct. Nassau Cnty. 1981) (computer programmer); *In re Claim of Curto*, 486 N.Y.S.2d 425 (App. Div. 3d Dept. 1985).

these kinds of workers may be employees, regardless of their employer's lack of effective control over the details of their work, if the employer does not in practice allow them discretion to make the kind of labor and capital allocation decisions businesspersons can make to enhance their own returns independently from those of the employer.

III. Why § 1.01 Test Should Be Used by the Courts

A. A Policy-Based Default Rule

This is the law not only as it is, but also as it should be, at least for purposes of setting a presumptive default rule defining the scope of employee protection or benefit laws.³⁶ The economic relationship between two independent businesses is sufficiently distinct from the relationship of employment to vitiate the utility of a presumption of similar need. Independent businesspersons, especially ones whose business vitality is dependent on that of a second business, may need legal protections similar to those afforded employees, and sometimes are offered those protections by other laws.³⁷ Whether such protection should be extended, however, is a separate question of policy. The law, by contrast, usefully can presume that a service provider who does not have discretion to operate an independent business is in an economic relationship of sufficient dependence to require legal protections offered to other employees. Such a presumption of

³⁶ Arguably a narrower "right-to-control" test is more appropriate for determining the scope of an employer's vicarious liability. Perhaps we should not impute liability to a principal for acts of agents whom the principal is not able to control. On the other hand, if an agent has discretion to act only in the interest of the principal, requiring the principal to internalize the costs of the agent's actions may be efficient even when the principal has not chosen to ensure its control over those actions. Indeed, the use of the right-to-control test in early British and American decisions on vicarious liability can be interpreted to test whether the agent is operating an independent business. See the Reporters Notes to *comment d-e.*, § 1.01, Restatement of Employment Law.

³⁷ See, e.g., 42 U.S.C. § 1981 (guaranteeing all persons the same right "to make and enforce contracts . . . as is enjoyed by white citizens ...").

course is rebuttable and often is qualified in statutes, like the FLSA or the NLRA, that do not apply to classes of highly paid or skilled or employees with managerial responsibilities. But the presumption sets an efficient baseline from which the law can start.

No legal doctrine can make hard cases easy. Structuring the right-to-control and multifactor tests around the issue of entrepreneurial discretion only can set a more predictable baseline to guide judges and legal advocates. It cannot definitively determine how much discretion particular courts will find adequate for independent businessperson status. Nonetheless, § 1.01 does offer some guidance not only on the ultimate question to be addressed, the baseline inquiry, but also on how factors relevant to this inquiry should be weighted.

B. Minimal or Formal Discretion Not Sufficient for Independence

First, the purpose of the doctrine, a presumption for coverage of employee protection laws, should caution against finding minimal bits of discretion, such as the ability to choose a working shift on particular days or to use one's own hand tools or orchestral instruments, sufficient to define a service provider as an independent business person. Second, the doctrine should make clear, as do the cases, that the "underlying economic realities of the relationship, rather than any designation or characterization of the relationship in an agreement or employer policy statement, determine whether a particular individual is an employee."³⁸

A corollary of this last principle is that employers should not be able to avoid employment relationships defined by underlying economic realities by the formal delegation of discretion that is not generally able to be exercised. At least

³⁸ *Comment g.*, § 1.01, Restatement of Employment Law.

in my view, one of the Court of Appeals decisions that embraced the Labor Board's focus on "entrepreneurial opportunities" provides a good example of how the doctrine stated in § 1.01 can be misapplied by reliance on a formal delegation rather than what should be controlling economic realities. In this decision a panel of the District of Columbia Circuit reviewed the Labor Board's treatment of FedEx delivery drivers as employees.³⁹ The majority on the panel lauded the Board's shift of emphasis "away from the unwieldy control inquiry in favor of a more accurate proxy" of whether there is "significant entrepreneurial opportunity for gain or loss."⁴⁰ The court asserted that "while all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism."⁴¹ The court proceeded with that evaluation, finding the drivers' entrepreneurial status to be supported by their right to assign their routes to others without FedEx approval, by their ownership of and authority to use their trucks for other purposes when not required to be in use for FedEx, by FedEx's allowance of multiple routes, and by the drivers' authority to hire and negotiate the pay and benefits of subordinate and substitute drivers.⁴²

The court's conclusion, however, conflicted with the factual findings of the Board's Regional Director that the drivers in reality had little opportunity to influence their income from FedEx through entrepreneurial ingenuity because the

³⁹ FedEx Home Delivery v. NLRB, 563 F.3d 492, 504 (D.C. Cir. 2009).

⁴⁰ Id. at 497 (quoting Corporate Express Delivery Systems v. NLRB, 292 F.3d 777, 780 (D.C. Cir. 2002)).

⁴¹ Id. See also the court's assertion that it has "retained the common law test (as is required by the Court's decision in *United Insurance*), but merely 'shift[ed our] emphasis to entrepreneurialism,' using this 'emphasis' to evaluate common law factors such as whether the contractor 'supplies his own equipment.'" Id. at 503.

⁴² Id. at 498-500.

terminal manager determined how many deliveries they made, because FedEx could reconfigure their routes unilaterally, and because FedEx shielded the drivers from loss from unexpected expenses such as truck repairs and fuel price increases by means of special payments.⁴³ Moreover, the Regional Director had excluded the few multi-route drivers from coverage, no drivers seemed to be able to use their trucks, which had to carry large FedEx logos, for other business purposes, few seemed ever to hire their own substitute drivers, and none seemed to have been able to sell routes for a profit given FedEx's reconfiguration of old routes and grant of new routes without charge.⁴⁴

Given these facts, § 1.01 could have guided the court to support the Board's finding of employee status. Indeed, as Judge Garland argued in his dissent,⁴⁵ the company's close control of the drivers' actual service could have satisfied the traditional right-to-control the manner and means of service standard that § 1.01(1)(c)'s test adopts as a sufficient condition for employee status.⁴⁶

Conclusion

As explained above, the framing of § 1.01 indicates that the independent business person-entrepreneurial opportunities test that it derives from decisions applying multiple factors is to supplement rather than supplant a right-to-control

⁴³ FedEx Home Delivery, Nos. 1-RC-22034, 1-RC-22035, 2006 NLRB Reg. Dir. Dec. LEXIS 264 at *56–*57 (September 20, 2006).

⁴⁴ FedEx Home Delivery, 563 F.3d at 504, 512-16 (Garland, J. dissenting).

⁴⁵ *Id.* at 510-12.

⁴⁶ Judge Garland noted that “the court reject[ed] the import of the following requirements imposed by FedEx: that drivers wear a recognizable uniform; that vehicles be of a particular color and size range; that trucks display the FedEx logo in a size larger than Department of Transportation regulations require; that drivers complete a driving course if they do not have prior training; that drivers submit to two customer service rides per year to audit their performance; and that a truck and driver be available for deliveries every Tuesday through Saturday.” *Id.* at 511.

test. It is to explain how and why the other factors in the multifactor tests are to be used to ensure that workers prevented from pursuing their independent economic interests are presumed included within the protection of employment laws.