FedEx's New "Employees": Their Disgruntled Independent Contractors

Todd D. Saveland*

INTRODUCTION

For someone who has dreamed of running their own business and has an entrepreneurial spirit, the prospect of being an independent contractor sounds appealing enough.[1] Purchase and maintain your own delivery van, contract with one of the largest and most successful expedited package delivery companies in the United States, put in an honest day's work, and watch the money pour in. The relationship sounds like it would be win-win: the independent contractor has the freedom to run his business as he sees fit, setting his own hours, delivery schedules and whether to take on more business and employees; while the delivery company gets their packages delivered in a timely manner without having to invest the capital into the purchase and maintenance of a fleet of trucks and drivers. As envisioned, it is symbiotic.

* BA, Criminology and Law, Carleton University, Ottawa, Canada; Master of Industrial Relations, Queens University, Kingston, Canada; J.D. Candidate 2010, University of Denver Sturm College of Law. The author is indebted to James C. Hardman, Esq., for his helpful guidance in the preparation and research of this article. Mr. Saveland is a Labor-Management Relations Examiner with the National Labor Relations Board, in Denver, Colorado and is the President of the National Labor Relations Board Union, Local 27. The views expressed are those of the author and in now way reflect those of the NLRB or the NLRBU.

1. *See* FedEx Ground, FedEx Ground and FedEx Home Delivery Independent Contractor Opportunity Search, https://www.fedex.com/grd/indcontr/ICLanding.do (last visited Mar. 22, 2009).

Often enough, however, the two parties do not enter into the arrangement and live happily ever after. One party feels he is working too hard, not making enough money, and not living the dream he had envisioned from the advertisements. The other party feels taken advantage of since there was full agreement on all terms in the contract, and it just would not be fair to change the rules half way through the game. One party files suit, and the relationship may be forever changed.

Independent contractors, as business owners, are supposed to be exempt from most labor and employment laws. If one is actually engaged in running his own business, this makes sense—an owner is not an employee. However, if the independent contractor signs on with a company that exercises significant control over every aspect of his work, he is little different than any other employee, and should be afforded the same basic protections. Thus, if the independent contractor is not, in practice, performing services free from the direction and supervision of the contracted-with company, the classification of a worker as "independent" may only be a means to deny that person rights to unionize, unemployment benefits, workers compensation, as well as exclusion from the Americans with Disabilities Act and other modern benefits which many workers may take for granted. One would think that savvy business owners, whether a one-man operation or billion dollar business, would look at all the pros and cons to entering into a business relationship prior to taking the plunge. However, more frequently, litigation arises where the one-man operation is trying to convert his status from "contractor" to "employee."

FedEx Ground ("FedEx"), since its inception, has had great success in the use of independent contractors to perform package deliveries. While the company has enjoyed huge growth and extraordinary revenues, it has also experienced an onslaught of litigation as a number of current and former driver-contractors have challenged FedEx's classification that the drivers are independent contractors and not employees. Are these just the ramblings of disgruntled workers? Or was this a systematic attempt by a multi-billion dollar company to accrue the benefits of employee labor, without the legal and financial liability?

In looking at a sampling of the recent lawsuits filed against FedEx challenging the corporation's independent contractor classification of many of their drivers, this paper will highlight the issues surrounding the independent contractor model, and argue for a change to a definition of "employee" and "independent contractor" that are both clearly defined. Thus, even though both parties willingly entered into a contract for services where the driver would be considered an independent contractor, the issues and problems go far deeper than the parties' intent, which were clearly manifested in the parties' contract.

The applicable statutory and common laws do not provide any meaningful guidance to workers, employers, unions, or even the government agencies charged with enforcement. This leaves businesses particularly vulnerable, unable to engage in any meaningful long-term business planning, since their contractual relationships may be subject to immediate dismantling by an administrative agency or trial court. The prolific use of independent contractors will undoubtedly continue, especially with their widespread use in the trucking industry, so regulation on the federal level may be the only means to provide stability to an industry which relies heavily on the use of independent contractors to move freight across the country.

THE FEDEX INDEPENDENT CONTRACTOR

FedEx Ground system began in 1998, after taking over Roadway Package System ("RPS").[2] FedEx would be a major non-union competitor to the heavily unionized United Parcel Service ("UPS"). Though the two companies are in the same business of picking up, transporting, and delivering small packages, the manner in which FedEx Ground would accomplish this would be far different than UPS. Rather than manage a fleet of trucks, a complement of mechanics to maintain those trucks, and a group of drivers to operate those trucks, FedEx would contract all of those responsibilities to a collection of small business owners: the FedEx independent contractors.[3]

FedEx is a hugely successful company, not just in the United States, but worldwide. It had revenues in 2008 of $38 billion, has more than 290,000 employees (and contractors) worldwide, and ships on average more than 7.5 million packages per day.[4] In order to deliver these millions of packages, in the United States at least, FedEx contracts with small business owners, usually a one-driver/one-truck operation, to carry out the task. Here begins our look into the FedEx "independent contractor."

Each contractor, prior to beginning operations with FedEx, must pass a physical and drug test, have a good driving record, and purchase or rent a vehicle meeting the specifications for FedEx use.[5] These vehicles,

2. FedEx, FedEx History, http://about.fedex.designcdt.com/our_company/company_information/fedex_history (last visited Mar. 22, 2009).

3. FedEx Ground, Independent Contractors, https://www.fedex.com/grd/indcontr/ShowEntry.do (last visited Mar. 22, 2009).

4. FedEx, About FedEx, http://about.fedex.designcdt.com/our_company/company_information/fedex_corporation (last visited Mar. 22, 2009).

5. *In re* FedEx Home Delivery & Truck Drivers Union, Local 170, Int'l Bhd. of Teamsters, N.L.R.B., Case 1-RC-21966, 2006 WL 897609, at 3 (Jan. 24, 2006) [hereinafter Local 170].

if purchased new, can range in price from $20,000 to $37,000.[6] Thereafter, the driver must sign an "Operating Agreement" ("Agreement") with FedEx, detailing each parties' rights and responsibilities.[7] Drivers cannot negotiate any of the terms of the Agreement, essentially signing the contract on a take it or leave it basis.[8]

The background statement in the Agreement provides:

> FedEx Ground is a duly licensed motor carrier engaged in providing a small package information, transportation and delivery service throughout the United States, with connecting international service. The Contractor is an owner-operator of one or more pieces of trucking equipment suitable for use in such a service. Contractor wants to make this equipment available, together with a qualified operator for each piece of equipment, to provide daily pick-up and delivery service on behalf of FedEx Ground. FedEx Ground wants to provide for package pick-up and delivery services through a network of independent contractors, and, subject to the number of packages tendered to FedEx Ground for shipment, will seek to manage its business so that it can provide sufficient volume of packages to Contractor to make full use of Contractor's equipment. Contractor wants the advantage of operating within a system that will provide access to national accounts and the benefits of added revenues associated with shipments picked up and delivered by other contractors throughout the FedEx Ground system. In order to get that advantage, Contractor is willing to commit to provide daily pick-up and delivery service, and to conduct his/her business so that it can be identified as being a part of the FedEx Ground system. Both FedEx Ground and Contractor intend that Contractor will provide these services strictly as an independent contractor and not as an employee of FedEx Ground for any purpose. Therefore, this Agreement will set forth the mutual business objectives of the two parties intended to be served by this Agreement—which are the results the Contractor agrees to seek to achieve—but the manner and means of reaching these results are within the discretion of the Contractor, and no officer or employee of FedEx Ground shall have the authority to impose any term or condition on Contractor or on Contractor's continued operation which is contrary to this understanding.[9]

The agreement seems straightforward enough – both parties agree that the driver will operate as an independent contractor and not an employee for any purpose. However, the last sentence, that the contractor has the discretion to determine the manner in which he achieves his goals, is greatly restricted by other provisions of the contract, which set standards for the drivers' appearance and maintenance of their vehicles.[10]

---

6. *Id.*

7. *In re* FedEx Ground Package Sys., Inc. & Local 177, Int'l Bhd. of Teamsters, N.L.R.B., Case 22-RC-12508, at 9 (Nov. 2, 2004) [hereinafter Local 177].

8. *Id.*

9. *Id.* at 9-10.

10. *Id.* at 12-14.

Drivers must wear a FedEx uniform in "good condition," may not have any visible tattoos or earrings, and must not have their "hair falling below the middle of the ear" or a moustache protruding "beyond the corners of the mouth."[11] The drivers' trucks must be "free from body damage and extraneous markings," and if the driver is in violation of this standard, FedEx may prohibit the driver from working on that particular day.[12]

Once the Agreement is signed, the driver will then determine whether to purchase optional services from FedEx, such as a "Business Support Package" that provides the necessary equipment to comply with other provisions in the Agreement—including truck cleaning, uniforms, and most importantly, a scanner which tracks and confirms deliveries.[13] According to the Agreement, FedEx does not have the authority to prescribe hours of work; what routes the drivers follow; or other details of the manner in which they perform their work.[14] Drivers will generally work a Tuesday through Saturday schedule, and work upwards of 60 hours per week;[15] the upper limit provided by Department of Transportation regulations, which effectively precludes them from moonlighting elsewhere.[16] The drivers also must successfully complete a training course run by FedEx,[17] which consists of eight days of classroom work, one day of driving with another contractor-driver, and five days of driving with a FedEx manager.[18] During training, a manager will train the driver in procedures for making efficient deliveries, how to load packages on the van, and where to leave packages if nobody is home.[19] FedEx maintains that the procedures and techniques reviewed during training are "merely suggestions which did not have to be followed," but the FedEx manual given to new drivers and the training videos do not make this point clear.[20]

Once the driver has successfully passed the training he will be assigned a "primary service area," typically one or more zip codes as the geographic location to which they will make deliveries.[21] The Agreement gives FedEx the ability to reconfigure the drivers' "primary service area"

11. *Id.* at 12-13.

12. *Id.* at 13-14.

13. *Id.* at 37-38.

14. Local 170, *supra* note 5, at 6.

15. *Id.* at 7.

16. 49 C.F.R. § 395.3(b)(1) (2007).

17. Local 170, *supra* note 5, at 3.

18. FedEx Ground Package Sys., Inc. & FXG-HD Drivers Ass'n, N.L.R.B., Case 4-RC-20974, at 4 (June 1, 2005) [hereinafter FXG-HD].

19. *Id.*

20. *Id.*

21. *Id.* at 6.

by giving the driver five days notice.[22] If there is a significant loss in package volume because of the change in service area, there is a provision in the Agreement that will calculate a monetary offset that goes from the driver who gained work to the driver who lost work.[23] FedEx will sometimes hire temporary employees to assist drivers if, in FedEx's assessment, the package volume is too high for the driver to handle.[24] This employee would be a "helper" who would perform the deliveries while the driver stayed in the vehicle.[25]

Department of Transportation regulations prohibit the operator of a vehicle leased to a regulated carrier (here, FedEx) from simultaneously transporting the goods of another regulated carrier.[26] This regulation "effectively precludes Contractors from working for two package delivery services at the same time."[27] Expanding on this rule, FedEx does not permit drivers to use their vehicles for any other purpose while in the service of FedEx, though a driver may use the vehicle afterhours for other personal or business use, so long as the company logo is removed or covered.[28]

The driver is responsible for hiring a substitute if he takes any time off—from a vacation day, or afternoon, to absence due to injury.[29] If the driver wants to expand the business to the point where he can no longer service the route by himself in one vehicle, he may rent another vehicle and hire another employee.[30] These drivers are called "multiple route contractors," and they set the terms and conditions of employment of those they hire.[31] The driver is paid by a weekly "settlement check" under a formula based primarily on the number of stops made, packages delivered, deliveries requiring appointments or signatures, and number of hours worked.[32] The rates as of 2004 were $1.24 per stop, 22 cents per package, $6.50 for deliveries made by appointment, $2.75 for evening deliveries, and 50 cents for deliveries requiring a customer signature.[33] In addition, drivers are paid a daily van availability rate, bonuses for safety, and a core zone density payment, which goes higher as the driver's pri-

22. Local 170, *supra* note 5, at 6.
23. *Id.*
24. FXG-HD, *supra* note 18, at 7.
25. Local 170, *supra* note 5, at 11.
26. *See* 49 C.F.R. § 376.12(c)(1) (2001).
27. FXG-HD, *supra* note 18, at 13.
28. *Id.*
29. *Id.* at 7.
30. *Id.*
31. *Id.* at 12.
32. Local 170, *supra* note 5, at 8.
33. *Id.*

mary service area is less densely populated.[34]

But Now I Want to be an Employee!

Evidencing some discontent with their working conditions, drivers at several FedEx terminals have sought representation from the Teamsters Union, or have even created their own drivers association.[35] The protections of the National Labor Relations Act (NLRA), however, do not apply to all paid workers. Specifically, the NLRA only covers "employees" and excludes all others.[36] The term "employee"—while defined in the statute—lends only minimal guidance, and is somewhat outdated since its initial adoption in 1935. The term "employee" specifically excludes "any individual having the status of an independent contractor" but the Act does not define what that means.[37] Thus, FedEx drivers seeking representation must prove that they are in fact employees, and these drivers, attorneys, and academics must turn to the common law tests of agency to determine who qualifies as an independent contractor.

The National Labor Relations Board ("NLRB") in *Argix Direct, Inc.*,[38] adopted the multifactor test set forth in the Restatement (Second) of Agency, §220.[39] The determination obviously requires a fact intensive inquiry by examining:

> (1) the control that the employing entity exercises over the details of the work; (2) whether the individual is engaged in a distinct occupation or work; (3) the kind of occupation, including whether, in the locality in question, the work is usually done under the employer's direction or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time the individual is employed; (7) the method of payment, whether by the time or by the job; (8) whether the work in question is part of the employer's regular business; (9) whether the parties believe they are creating an em-

34. *Id.*

35. *See* FXG-HD, *supra* note 18, at 18-20.

36. *See* National Labor Relations Act, 29 U.S.C. §§ 157-158 (1974) (the Act is codified at 29 U.S.C. §§ 151-169).

37. *Id.* §152(3) ("The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.").

38. Argix Direct, Inc., 343 N.L.R.B. 1017 (Dec. 2004).

39. Restatement (Second) of Agency §220 (1958).

ployment relationship; and (10) whether the principal is in the business.[40]

The independent contractor versus employee issue is not a new one for the NLRB, and it has in fact been addressed three times with FedEx Ground's predecessor, Roadway Package Systems. In each case—*Roadway Package Systems (Roadway I)*,[41] *Roadway Package Systems (Roadway II)*,[42] and *Roadway Package Systems (Roadway III)*[43]—the Board found the drivers not to be independent contractors, but rather, employees. Based upon these cases, five decisions issued by Regional Directors of the NLRB have found FedEx drivers to be employees, with one finding that they were independent contractors.[44] Neither party requested review of the of the independent contractor decision, giving it no precedential value.

Parties will disagree as to how the NLRB should apply the common law agency test. Thus, the petitioning union may suggest that no single factor of the ten should be given priority, while the employer could suggest that the manner and means of accomplishing the end result or opportunity for profit and loss are the most important factors. The United States Supreme Court has held that in determining employee status under common law agency principles, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[45] If this test were not already unclear, the Board has further muddled it, stating:

> Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in

40. Argix, *supra* note 38, at 1020 n.13.

41. Roadway Package Sys., 288 N.L.R.B. 196, 199 (1988) [hereinafter Roadway I].

42. Roadway Package Sys., 292 N.L.R.B. 376, 378 (1989), *aff'd*, 902 F.2d 34 (6th Cir. 1990) [hereinafter Roadway II].

43. Roadway Package Sys., 326 N.L.R.B. 842, 842 (1998) [hereinafter Roadway III].

44. The five decisions finding employee status are: FedEx Home Delivery & Int'l Bhd. of Teamsters, Local Union No. 671, Decision on Objections, N.L.R.B., Case 34-RC-2205, at 1 & 5 (Aug. 2, 2007); FedEx Home Delivery & Int'l Bhd. of Teamsters, Local Union 25, N.L.R.B., Case 1-RC-22034 & 1-RC-22035, at 18 (Sept. 20, 2006); Local 170, *supra* note 5, at 2; FXG-HD, *supra* note 18, at 17; Local 177, *supra* note 7, at 91 & 95. The single case finding independent contractor status is: *In re* RPS, Inc., & Teamsters Local Union No. 355, Int'l Bhd. of Teamsters, AFL-CIO, N.L.R.B., Case 5-RC-14905, at 63 (Aug. 3, 2000) [hereinafter Local 355]. The board denied review in all cases where employee status was found.

45. Roadway III, *supra* note 43, at 850 (citing N.L.R.B. v. United Ins. Co. of America, 390 U.S. 254, 258 (1968); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 752 (1989); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992)).

one case than in the other.[46]

Based upon this rather malleable precept, the Board and Regional Decisions go through the facts established at a hearing and make their decisions according to applicable law. The burden of establishing independent contractor status is upon the party asserting it, here FedEx.[47] Using the common law test, the decisions apply the facts to the applicable factors, but there is no indication if greater weight is accorded to one over another. Moreover, each of the factors are inextricably intertwined—each one having commonalities with another. The factors are broken down as follows.

CONTROL

The decisions have found that FedEx exercises substantial control over the details of the driver's performance.[48] Examples of this are that the drivers had to provide daily service Tuesday through Saturday; deliver all packages assigned to them the day they are received in the terminal; "deliver all packages for destinations outside their route" that are assigned to them by the terminal manager; scan all packages with the FedEx scanner when the packages are loaded onto their vehicle, and then again when the packages are delivered; leave the terminal only after they are permitted by the terminal manager; "use certain approved vehicles" for their deliveries; wear FedEx uniforms and FedEx identification badges; "maintain their vehicles in a clean and presentable fashion," free of damage and markings, and prominently displaying the FedEx logo and colors; "purchase insurance in types and amounts" specified by FedEx; allow FedEx managers "to ride along with them several times annually;" and follow FedEx's policies and practices on how to deliver packages.[49] Further, even though the Agreement allows drivers to "set their own work schedules" (start time, break and lunch times, and end time), the control that FedEx has over the number of packages assigned, the requirement that they are delivered the day they are received, as well as certain specific delivery appointments, make it difficult for the driver to start work late in the day, or put off some package deliveries until the following day.[50]

46. Austin Tupler Trucking, Inc., 261 N.L.R.B. 183, 184 (1982), *cited in* Roadway III, *supra* note 43, at 850.

47. *See* Argix, *supra* note 38, at 1020.

48. *See* FXG-HD, *supra* note 18, at 15.

49. FedEx Home Delivery & Int'l Bhd. of Teamsters, Local Union No. 671, N.L.R.B., Case 34-RC-2205, at 28 (Apr. 11, 2007) [hereinafter Local 671].

50. FXG-HD, *supra* note 18, at 15.

Distinct Occupation

The recent Regional Director's decisions found that FedEx drivers are not engaged in a distinct occupation citing evidence that FedEx will hire temporary employees as drivers to make deliveries on routes that are "not yet permanently assigned to a contract driver."[51] Once the route is assigned, the driver must deliver packages in the same manner as any temporary driver, and "that can be identified as being part of the [FedEx] system."[52] That is distinct from other employees at FedEx, in the sense that they do not work alongside other FedEx drivers that the company considers to be employees. The decisions did not address the fact that these drivers have a different skill set than a regular driver-employee, since the FedEx drivers have to perform the daily deliveries and run the business end of the operation—essentially acting as driver, laborer, mechanic, accountant, and any other administrative task that invariably comes up.

Kind of Occupation

The decisions seem to gloss over this factor, but it seems apparent that the drivers are engaged in an occupation that is usually done under the employer's direction. This is evidenced by the fact that FedEx hires temporary drivers when a contract route has not been filled, the drivers receive minimal training, and are not considered specialists in their line of work.[53] As indicated elsewhere, FedEx exercises substantial control over how drivers carry out their daily assignments.

Skill

The drivers do not need any significant skill or experience to perform the delivery functions. Rather FedEx requires only some driving experience and a brief training course provided by the company.[54] The drivers receive some training on how to safely operate their vehicles, and how to perform package deliveries in accordance with FedEx policy.[55] Here again, the decisions do not address the additional business skills required of the driver-contractors to successfully run a profitable business—which is far different than a driver who has none of the additional responsibilities other than making his daily deliveries.

51. Local 671, *supra* note 49, at 29.
52. *Id.*
53. *See* Local 671, *supra* note 49, at 29-30.
54. *Id.* at 30.
55. Local 170, *supra* note 5, at 3.

WHO SUPPLIES THE TOOLS AND PLACE OF WORK

Other than drivers providing their own delivery vehicle, FedEx provides the necessary instrumentalities, tools, and support to carry out their business—such as general liability insurance and turn by turn directions for the deliveries on their routes.[56] The drivers are encouraged to, and almost universally do, sign up for the "Business Support Package" which provides the scanners, badges, uniforms, and truck washings that are required by the Agreement.[57]

LENGTH OF TIME THE DRIVERS ARE EMPLOYED

Drivers can contract with FedEx for successive one-year terms, but this agreement can be terminated by either side with 30 days notice.[58] Although one decision indicated that there is 'considerable turnover' among the drivers,[59] and another found the average length of time to be eight years,[60] the average nationwide length of employment is unclear. FedEx has argued that—given that some drivers choose to stay with FedEx for many years, this shows that their independent contractor model is positive and workable, and that a few unhappy drivers should not be able to alter the entire model system-wide.[61]

METHOD OF PAYMENT – BY TIME OR BY THE JOB

FedEx unilaterally determines compensation rates for all drivers, and this is not subject to negotiation.[62] Thus, even though FedEx looks for drivers with an "entrepreneurial spirit," the drivers actual compensation is more determined by the number of packages they are assigned by the terminal manager on any given day, rather than any personal effort on their part or entrepreneurial ingenuity.[63] Furthermore, FedEx provides minimum compensation to the drivers with a "vehicle availability" payment to provide drivers more stable incomes during reductions in deliv-

56. *See id.* at 13.

57. *See* Laura Mahoney, *BNA Dailey Labor Report: $9.1 Million Owed to Misclassified FedEx Ground Drivers*, TEAMSTERS FOR A DEMOCRATIC UNION, Oct. 22, 2008, http://www.tdu.org/node/2445.

58. *See* Local 170, *supra* note 5, at 5; FXG-HD, *supra* note 18, at 5.

59. *See* FXG-HD, *supra* note 18, at 16.

60. Estrada v. FedEx Ground Package Sys., Inc., 64 Cal. Rptr. 3d 327, 333 (Cal. Ct. App. 2007) [hereinafter *Estrada III*].

61. Combined Reply Brief and Cross-Appeal Brief of Appellant and Cross-Respondent FedEx Ground Package Sys., Inc. at 24, *Estrada III*, 64 Cal. Rptr. 3d 327 (No. B189031), 2006 WL 3915532.

62. *See* Local 170, *supra* note 5, at 4.

63. *See* Megan Tady, *FedEx Drivers Fight for 'Employee' Status, Rights*, THE NEW-STANDARD, July, 18, 2006, http://icontract.com/news_industry/FedEx%20to%20Pay%20EDD%20$7.8M.pdf.

eries.[64] The driver must work a minimum of seven hours in order to receive another settlement payment called a zone density payment, and anything less is prorated.[65] Thus the driver, like many in the motor carrier industry, is paid both by time and by the job, since they are paid for every delivery they make, and extras like appointment deliveries and signature required service.[66] While "piece rate" compensation from package deliveries comprises the majority of most driver income, they can "derive as much as 40 percent to 50 percent of their income" from their guaranteed minimum payments.[67]

PART OF THE EMPLOYER'S REGULAR BUSINESS?

The drivers are performing a function that is a "regular and essential" part of FedEx's principal business, essentially the service paid for by customers—package delivery. The drivers must wear FedEx uniforms and adorn their vehicles with FedEx logos in the trademarked colors.[68] And, while they have the right to use their vehicles for other private or business purposes when not working for FedEx, the practical reality is that this is not possible.[69] Thus, the drivers must remove the FedEx logo, and determine when to find these other business opportunities, given that they must work for FedEx Tuesday through Saturday.[70] The drivers' main task is providing the essential service that FedEx sells. In contrast, in *Dial-a-Mattress Operating Corp.*, the customers paid primarily for the mattresses, not the delivery services, and consequently the drivers were found to be independent contractors.[71]

INTENT OF THE PARTIES

One would think that this factor would be accorded more weight than the others, since the parties' intent is often a cornerstone of contract interpretation.[72] However, this factor is accorded no greater weight than the others. This is the only factor that is specifically addressed in the agreement signed by a driver and a FedEx representative, where the intent is made clear: "[b]oth FedEx Ground and Contractor intend that Contractor will provide these services strictly as an independent contrac-

64. *See* FXG-HD, *supra* note 18, at 16.
65. *See* Local 170, *supra* note 5, at 8.
66. *Id.*
67. *See* FXG-HD, *supra* note 18, at 16.
68. *See* Local 170, *supra* note 5, at 12.
69. *Id.* at 13.
70. *Id.*
71. Dial-A-Mattress Operating Corp., 326 N.L.R.B. 884, 894 (1998).
72. *See generally,* RESTATEMENT (SECOND) OF CONTRACTS §2 (1981).

tor and not as an employee of FedEx Ground for any purpose."[73] The drivers certainly do have some indicia of independent contractor status: they own or lease their own delivery vehicle, may schedule their own start and end times, are free to determine the sequence of package delivery, may take breaks at their discretion, do not receive benefits, do not have taxes withheld, and are not subject to ordinary discipline.[74] With the exception of the Region Five decision from 2000, all of these decisions and the *Roadway I-III* trilogy of cases seem to allow the drivers to void this provision of their agreement, without affecting the other terms.

INDEPENDENT ONE DAY, EMPLOYEE THE NEXT

The decisions do not address in any serious manner many cogent arguments that FedEx advanced at any of the hearings where employee status was found. In their brief to the District of Columbia Circuit Court of Appeals, which has jurisdiction over the refusal to bargain and "test of certification" case,[75] FedEx goes into great detail on how the Regional Director's decision does not accurately apply the common law or Board precedent to these fact situations.[76] FedEx's main argument is that significant changes in their business operations have occurred since the decade-old *Roadway* cases were decided, and, based on these changes, the status of its drivers has changed as well—*back* to independent contractors.[77]

FedEx's argument finds support in the Region Five decision from 2000, which found that the FedEx drivers were independent contractors and *not* employees.[78] In that case, the Regional Director accepted evidence on the changed operations that had occurred in the time between the *Roadway* trilogy of cases were decided, and the time that FedEx took

73. Local 177, *supra* note 7, at 10.

74. *See* Local 170, *supra* note 5, at 14.

75. A "test of certification" case, commonly referred to as 'test of cert,' is the only way that a party can seek review in a Federal Circuit Court of Appeals. After a union is elected to represent certain employees at a facility, as was done here in Wilmington, Massachusetts, the employer will refuse to bargain with the union, and admit as much in its answer to a subsequent investigation by the NLRB. The Board will then enter a finding of a violation of the National Labor Relations Act, and the Employer can then seek review of that unfair labor practice determination, as well as the underlying unit determination by the Board. Representation case determinations are otherwise unreviewable by Circuit Courts. For a discussion of the congressional rationale behind this rather circuitous process. *See* Boire v. Greyhound Corp., 376 U.S. 473, 477-78 (1964).

76. *See* Brief of Petitioner/Cross-Respondent at 17-18, FedEx Home Delivery, Inc. v. NLRB, Nos. 07-1391 & 07-1436, (D.C. Cir. Mar. 17, 2008), *available at* http://fedexwatch.bluestatedigital.com/sync/files/FDXHDLU25_USCDCPetitionerBrief20080318.pdf [hereinafter D.C. Cir. Brief].

77. *Id.* at 18.

78. Local 355, *supra* note 44, at 63.

over the operations.[79] This is significant. FedEx was thus entitled to show, using the Board's decisions in the *Roadway* cases as benchmarks, how the operation in the year 2000 was different than the operations in the 1990s when the operation was under the Roadway banner. Thus, FedEx presented system-wide evidence that a significant number of drivers—1,300 or about 19% of its national driver workforce—now incorporate their businesses, even though at the Bridgeville, Maryland facility at issue, only *one driver* elected to incorporate.[80] Further, FedEx was able to introduce evidence that nearly half of its nationwide driver workforce uses their vehicles for outside commercial undertakings, even though there were *no drivers* at the Bridgeville terminal.[81] The decision also relied on the ability of drivers to buy and sell routes, the proprietary interest each driver has in his route and truck, the opportunity for both profit and loss, as well as the ability to assign another driver to the delivery route, and not show up for work on any given day.[82]

FedEx further relied on the fact that all contractors have the *right* to hire other drivers and helpers, even if they do not exercise that right.[83] The Directors' decision concludes that these are unrealistic opportunities.[84] FedEx, however, points out that the records in the decisions show that drivers *did* engage in outside business ventures, even if they were not sizeable ones—such as using their delivery "vehicle[s] to deliver equipment for a repair company, . . . operate a magazine distribution business, . . . run a landscape construction business, and to sell shrimp."[85] Similarly, any reliance on the restriction in the "manner and means" of performance of the drivers, which occur as a result of governmental regulations that FedEx and the drivers must comply with—such as Department of Transportation Hours of Service Rules, and leasing requirements restricting what the drivers can carry—cannot establish evidence of an employee relationship.[86]

The decisions finding FedEx drivers to be employees all rest on a similar assumption: that the first decision to find employee status issued by Region Four in Philadelphia in 2005 applied the correct standards to a full accounting of the facts, and was the proper determination of the employee status issue. And, any decision to the contrary, like the Region Five decision issued in 2000, was dismissed out of hand by means of a

79. *Id.* at 56.
80. *Id.*
81. *Id.*
82. *Id.* at 62.
83. D.C. Cir. Brief, *supra* note 77, at 32
84. *See* Local 170, *supra* note 5, at 14.
85. D.C. Cir. Brief, *supra* note 77, at 33.
86. *Id.* at 52 n.26.

footnote.[87] Thus, the Region One decision takes administrative notice of the fact that unreviewed decisions have no precedential value, and declines to review the Region Five decision and record in making its determination, while taking administrative notice of the fact that the Region Four decision was declined review by the Board, and relies upon that decision and record in making its determination.[88] Such arbitrary evidentiary decisions make it appear that the battle was over before it had begun.

Having found the drivers to be independent contractors and not protected by the National Labor Relations Act, the Director for Region Five dismissed the union's representation petition.[89] Having won their case, FedEx did not seek a review by the Board (neither did the Union), which had the unfortunate effect—for FedEx—of not giving the decision any precedential value to later Regional Director's Decisions.[90] Had the Board reviewed and upheld the Region Five decision, the issues raised would have been *res judicata* and been binding on later Regional decisions, unless sufficient evidence was presented which would distinguish the cases—since a party can always present evidence that the National Labor Relations Board now has jurisdiction over a particular employer or a particular group of employees.

After the decisions finding employee status were handed down, the drivers still had a long way to go in order to have a union represent them. In 2005, Teamsters Local 170 filed a representation petition with the NLRB to represent twenty-one drivers at the FedEx Home Delivery terminal near Worcester, Massachusetts.[91] After the Director issued her decision finding the single route drivers (contrasted with multi-route drivers who themselves have two or more routes and drivers) to be employees, the union filed several unfair labor practice ("ULP") charges against FedEx.[92] These charges alleged that FedEx, among other things: committed interrogations, made threats to close the terminal, imposed onerous working conditions, monitored union activities, created the impression of surveillance of union activities, made beneficial promises to drivers who voted against union representation, and terminated five employees.[93]

87. *See,* Local 170, *supra* note 5, at 1 n.7.

88. *See id.* at 1, n.7.

89. Local 355, *supra* note 44, at 63.

90. Local 170, *supra* note 5, at 1 n.7.

91. *See id.* at 2.

92. Order Consolidating Cases, Consolidated Complaint and Notice Hearing, *In re* FedEx Home Delivery, Inc. & Truck Drivers Union, Local 170, Int'l Bhd. of Teamsters, N.L.R.B., Cases 1-CA-42984, 1-CA-42985, 1-CA-43043, 1-CA-43070, 1-CA-43084, & 1-CA-43283 (Mar. 30, 2007), *available at* http://fedexwatch.bluestatedigital.com/sync/files/FXH_MANorthboro_Complaint 20070402.pdf [hereinafter Region One Consolidated Cases].

93. *Id.* at 5-9.

More than two years from the filing of the initial representation petition, the matter was settled with FedEx paying more than $253,000 to the five affected employees.[94] The settlement paved the way for the organizing election to go ahead in February 2008. However, one week prior to the vote the union withdrew the petition and cancelled the vote, which effectively prevented the union from returning for at least six months.[95] In one of the cases where the union was successful, FedEx has refused to bargain with the union, challenging the Board's employee status determination in the D.C. Circuit Court of Appeals.[96]

The decisions reflect the inability of parties to contract out of the National Labor Relations Act, or other state and federal statutes. There has been much litigation in the seventy plus years of the NLRB's existence on the issue of who, or what, constitutes a "supervisor," and simply labeling a person as such does not make it so.[97] The same can be said about independent contractors.

A Common Trend

The issues presented in the recent wave of litigation in NLRB proceedings are indicative of a trend of litigation in recent years by drivers challenging their status as independent contractors—apparently feeling that they were somehow duped into a bargain that was not as good as promised. The common issue is that the drivers, who freely entered into a bargain with FedEx to work as independent contractors, now want to be reclassified as "employees," and thus become entitled to the benefits that such status confers.

There has been an abundance of state agency litigation on the status of FedEx drivers who find themselves out of work and ineligible for state unemployment benefits. In many cases, the administrative referee has found employee status. This has occurred in part because in order to overcome the presumption of employee status, FedEx would have to defend every action filed by a former driver. In Oregon, for instance, the statute presumes that an individual who performs services for wages is an employee and not an independent contractor, and the determination of the existence of employee status is a question of law determined on the facts of each case.[98] Even though claimants had not reported any wages

94. Martin Luttrell, *Union Cancels Election; FedEx Victory Involves Drivers*, Worcester Tel. & Gazette, Jan. 30, 2008, *available at* http://www.telegram.com/article/20080130/NEWS/801300333/1002/BUSINESS.

95. *Id.*

96. FedEx Home Delivery, Inc., & Local 25, Int'l Bhd. of Teamsters, 351 N.L.R.B. No. 16, 2007 WL 2858933, at 1 (Sept. 28, 2007) [hereinafter Local 25]; D.C. Cir. Brief, *supra* note 77, at 2.

97. *See* Nat'l Labor Relations Bd. v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 708 (2001).

98. Or. Rev. Stat. § 657.040 (2005); Or. Rev. Stat. 670.600 (2005).

whatsoever in the previous base year, the Oregon Employment Department granted benefits—resting their decision on facts similar to those found in the NLRB's decisions.[99] Similar decisions have been handed down in other states.[100]

Other than the obvious problems that the drivers run into when they are denied unemployment benefits, the company itself is setting itself up for serious liabilities by misclassifying the drives. For instance in California, the Unemployment Insurance Appeals Board found in 2006, that FedEx owed the state over $7,000,000 in unpaid unemployment insurance taxes, disability, and personal income taxes for the drivers between 2001 and 2004.[101] The drivers in that case established facts similar to those developed in NLRB proceedings, and the California Board rested their decision on state and federal common law principles to find that the drivers were actually employees of FedEx, and not independent contractors as FedEx maintained.

These unemployment compensation cases are only a drop in the bucket of ongoing FedEx litigation. In California, state employment laws compel an employer to pay all necessary expenses accrued while employees are discharging their duties.[102] Taking the language of this statute, and the many previous decisions that have found both FedEx and its predecessor, Roadway Package Systems' drivers to be employees, FedEx drivers once again sought an employee status determination. In a class action lawsuit, seen in *Estrada v. RPS, Inc.* (*Estrada I*)[103] and *Estrada v.*

99. Final Order at 21, *In re* Unknown, Employment Dep't, Office of Admin. Hearings of Or., U17066 (Dec. 1, 2005), *available at* http://fedexwatch.bluestatedigital.com/sync/files/OR_UI17066FinalOrder2006.pdf.

100. Appeal Results at 6, Robert V. Williams & FedEx Ground Package Sys., Mass. Dep't of Workforce Dev., Docket 444088 (Aug. 15, 2006), *available at* http://www.prle.com/pdfs/Massachusetts%20Division%20of%20Unemployment%20Assistance%20ruling%20(Williams).pdf; Referee's Decision/Order, Michael E. Washington, Unemployment Comp. Bd. of Review, Dep't of Labor & Indus. Commonwealth of Penn., Appeal No. 07-09-E-1699-R (May 11, 2005), *available at* http://fedexwatch.bluestatedigital.com/sync/files/PA_WASHINGTONuc_.pdf; Field Representative's Report, FedEx Ground Package Sys. Inc. & Keith J. Ignasiak, Employment Sec. Div., Conn. Dep't of Labor, Reg. No. 92-271-15 (June 18, 2007), *available at* http://www.fedexdriverslawsuit.com/CaseOverview/Administrative/Conn.%20U%20E%20%20decision%2004-02-07.pdf.

101. Decision, Fed Ex Ground Package Sys. Inc., & Employment Dev. Dep't, Cal. Unemployment Ins. Appeals Bd., Case No. 1485551 (T) (Nov. 22, 2008), *available at* http://www.fedexdriverslawsuit.com/CaseOverview/Administrative/CA%20UE%20Bd%20DecisionFedEx11-22-06.pdf.

102. CAL. LAB. CODE § 2802(a) (2000) ("An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.").

103. Estrada v. RPS, Inc., 23 Cal. Rptr. 3d 261 (Cal. Ct. App. 2005) [hereinafter *Estrada I*]. In *Estrada II* the California Court of Appeals resolved the employment issues in favor of FedEx.

FedEx Ground Package System, Inc. (*Estrada III*),[104] the California state court determined that single work area drivers were employees. In the *Estrada III* decision the court wryly concluded "if it looks like a duck, walks like a duck, swims like a duck, and quacks like a duck, it is a duck."[105]

Given that the drivers in *Estrada III* had the same indicia as the earlier discussed cases, and had signed the same operating agreement; the court stated that the parties label of "independent contractor" is not dispositive, and will be ignored if their actual conduct establishes a different relationship.[106] The test used in the California courts is essentially the same as the agency test used by the NLRB, and likewise led to the same finding of employee status.[107]

The effect of finding employee status in this case has had and will have far reaching consequences. Though the case is still winding its way through the appeals process, the decision for these drivers entitles them to reimbursement for the majority of their operating expenses, with the exception of the purchase price of their vehicle.[108] Thus, the expenses that were transferred from FedEx onto the drivers—the uniforms, scanners, fuel and maintenance costs of their vehicles—are being assessed back onto the company. The trial court awarded the *Estrada* class participants over $600,000 in operating costs, and $12 million in attorneys' fees.[109] The attorneys' fee award was overturned and remanded on appeal, but the finding that FedEx owes the drivers for their operating expenses was upheld, and was surely something that FedEx had not ever considered as a possibility.[110] FedEx contended that, given that their pay structure was reflective of the cost of a driver's services as well as vehicle

---

Estrada v. FedEx Ground Package Sys., Inc., No. BC210130, 2006 WL 3378246 (Cal. Ct. App. Nov. 22, 2006).

104. Estrada v. FedEx Ground Package Sys., Inc., 64 Cal. Rptr. 3d 327 (Cal. Ct. App. 2007) (*Estrada III*).

105. *Id.* at 335.

106. *Id.* at 335.

107. *Id.* The court describes the test as "control of details" test. The test looks to whether the principal has the right to control the manner and means by which the worker accomplishes the work—but there are a number of additional factors in the modern equation, including "(1) whether the worker is engaged in a distinct occupation or business, (2) whether, considering the kind of occupation and locality, the work is usually done under the principal's direction or by a specialist without supervision, (3) the skill required, (4) whether the principal or worker supplies the instrumentalities, tools, and place of work, (5) the length of time for which the services are to be performed, (6) the method of payment, whether by time or by job, (7) whether the work is part of the principal's regular business, and (8) whether the parties believe they are creating an employer-employee relationship." *Id.*

108. *Id.* at 347-48.

109. *Id.* at 340.

110. *Id.* at 348.

operating costs, it had already paid the drivers expenses.[111] FedEx argued that even Plaintiff's own witnesses testified "that the payments he got from [FedEx] were only for his services and he was never *told* that they were intended to cover expenses."[112] The court rejected FedEx's argument, giving the plaintiffs a large, and seemingly undeserved, windfall.[113]

Reviewing what other delivery drivers are paid demonstrates that FedEx driver-contractors have annual gross revenues in excess of a similarly situated company driver. For instance, gross annual revenues of fourteen FedEx drivers who worked at the Worcester terminal ranged from $69,000 to $82,000—with two drivers making less than $22,000.[114] In 2004, a UPS delivery driver would make between $13.50 and $19.80 hourly, depending on length of service.[115] This works out to $28,080 to $41,184 annually, based on a 40-hour workweek. Clearly, FedEx is compensating their drivers in excess of the market rate (if the Union negotiated rates at UPS can be termed such), which indeed allows for the drivers to cover their expenses in addition to what the driver wants to take home as a living wage.

Since the *Estrada III* decision only affected "single work area" ("SWA") drivers—those that operate only one route, usually their own—FedEx decided in late 2007 that it would be moving to an all "multi-work area" ("MWA") business model in California, and will thus not renew the contracts of more than 1,000 single work area contractors.[116] The "California Transition program" provides certain financial incentives, between $25,000 to $81,000 to SWA drivers to either become MWA operators or leave FedEx altogether.[117] FedEx acknowledged that it was taking this action in part because of the *Estrada III* decision, but it would not move forward with such a plan nationwide.[118] If the plan was applicable nationwide, it could affect as many as 9,000 SWA drivers.[119]

With the initial success of the *Estrada* class action lawsuit in the trial court, other lawsuits sprang up around the country. Given the common

111. *Id.* at 339.

112. Combined Reply Brief and Cross-Appeal Brief of Appellant and Cross-Respondent FedEx Ground Package Sys., Inc. at 35, *Estrada III*, 64 Cal. Rptr. 3d 327 (No. B189031), 2006 WL 3915532.

113. *Estrada III*, 64 Cal. Rptr. 3d at 340.

114. Local 170, *supra* note 5, at 8.

115. National Master United Parcel Service Agreement For the Period: December, 2007 through July 31, 2013, UPS Info for UPSers, art. 40, *available at* http://www.browncafe.com/ups_national_master_agreement.html2 (last visited Mar. 24, 2009).

116. *In re* FedEx Ground Package Sys., Inc., Employment Practices Litig., No. 3:06-CV-528 RM (MDL-1700), 2007 WL 3036891, at 1 (N.D. Ind. Oct. 12, 2007).

117. *Id.* at 1-2.

118. *Id.* at 2.

119. *Id.*

issue to be addressed—whether these drivers are independent contractors or employees—FedEx removed the lawsuits under the Class Action Fairness Act, avoiding the common litigation issues in different venues across the country.[120] The Judicial Panel on Multi-District Litigation created a consolidated docket, which includes at least fifty-six cases which will be heard in the Northern District of Indiana.[121] Their causes of action range from Employee Retirement Income Security Act (ERISA)[122] claims for benefit contributions to state wage and hour claims.[123]

Like the *Estrada* cases, which had far reaching consequences in California, this case, or series of cases, will have wide-ranging effects on FedEx nationwide. The plaintiffs in the class were granted class-certification, for the following class of persons:

> All persons who: 1) entered or will enter into a FXG Ground or FXG Home Delivery form Operating Agreement (now known as form OP-149 and form OP-149 RES); 2) drove or will drive a vehicle on a full-time basis (meaning exclusive of time off for commonly excused employment absences) [during the class period] to provide package pick-up and delivery services pursuant to the Operating Agreement; and 3) were eligible for ERISA plan benefits, absent their mischaracterization as independent contractors.[124]

Unlike *Estrada*, the class certification order granted in the multi-district litigation grants prospective relief to the drivers, by allowing drivers who "will enter into" a FedEx agreement to be part of the class, which could have far reaching ramifications for FedEx long term.

What's Next for this Business Model?

Interest in the independent contractor model has been keen in the motor carrier industry for decades, since this industry in particular sees their widespread use. In 1966 and again in 1989, Transportation Attorney James Hardman undertook a review of Board and other decisions which had questioned the legitimacy of the independent contractor model.[125] Hardman argued that motor carrier companies using independent con-

120. Class Action Fairness Act of 2005, (CAFA), Pub. L. No. 109-02, 119 Stat. 4; Hart v. FedEx Ground Package Sys. Inc., 457 F.3d 675 (7th Cir. 2006) (en banc).

121. *In re* FedEx Ground Package Sys., Inc., Employment Practices Litig., No. 3:05-MD-527 RM (MDL-1700), 2007 WL 3027405, at 1 (N.D. Ind. Oct. 15, 2007).

122. Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829.

123. *See Employment Practices Litig.*, No. 3:05-MD-527 RM (MDL-1700), 2007 WL 3027405, at 1 (N.D. Ind. Oct. 15, 2007).

124. *Id.* at 22.

125. James C. Hardman, *Administrative Bulls in the Delicate China Shop of Motor Carrier Operations—Revisited*, 18 Transp. L.J. 115, 116 (1989) [hereinafter *Administrative Bulls Revisited*]; Charles W. Singer & James C. Hardman, *Administrative "Bulls" in the Delicate China Shop of Motor Carrier Operations, The Status of Owner-Operators*, 17 Lab. L.J. 584, 584-85 (1966) [hereinafter *Administrative Bulls*].

tractors should be aware that the classification draws close scrutiny from state and federal agencies.[126] He suggested that carriers appoint an internal auditor whose function would be to ensure that the company is in compliance with applicable employment and labor laws regarding independent contractors, and function as a liaison with legal counsel.[127] Since it is usually upon the party asserting independent contractor status to provide sufficient evidence to support it, the transportation attorney's job essentially was to ensure that the drivers in their daily activities would meet the common law definition.[128] The auditor function seems like a wise idea, but this function was likely a suggestion for smaller carriers that were unaware of the nuances that the independent contractor status could bring. Obviously, FedEx being a multi-billion dollar a year business has a whole cadre of auditors, managers, contractor-relations personnel, and attorneys to help with this type of work. However, even a well funded company like FedEx is seemingly losing this battle. In addition to the NLRB decision, unemployment agency decisions, the *Estrada* cases, and the pending class action suit in Indiana, the Internal Revenue Service assessed FedEx with a $319 million judgment in unpaid taxes.[129] Again, the issue was whether FedEx had misclassified their drivers as independent contractors rather than employees.[130] Further, governors from Michigan and New Jersey have created task forces to look into the issue, not just with FedEx, but with all companies using the independent contractor model.[131]

The decisions reviewed have consistently found that the control that FedEx exercises over their drivers is a significant factor in the determination of employee status. It is highly unlikely that FedEx wants to relinquish this control, since it is imperative that they maintain their brand image with consistent enforcement of company policies.[132] Thus far, FedEx has shown that it is amenable to some change, as indicated by the move in California to eliminate the single work area contractors in favor of a multi-work area contractor model. Those moving to the MWA model can expect incentives of "between $5,000 and $26,000, depending

126. Hardman, *Administrative Bulls Revisited*, *supra* note 126, at 131.

127. *Id.* at 130-31.

128. *Id.* at 122.

129. CNNMoney.com, *FedEx Hit with $319 Million Tax Hit*, Dec. 21, 2007, http://money.cnn.com/2007/12/21/news/companies/fedex/?postversion=2007122119 [hereinafter CNNMoney].

130. *Id.*

131. 2008 Mich. Legis. Serv. Exec. Ord. 2008-1 (West); Press Release, State of N.J. Dep't of Labor and Workforce Dev., Update on Governor Corzine's Worker Misclassification Initiative (2006), *available at* http://lwd.dol.state.nj.us/labor/lwdhome/press/2006/0719WorkerMisclassification. .html.

132. *In re* FedEx Ground Package Sys., Inc., Employment Practices Litig., No. 3:05-MD-527 RM (MDL-1700), 2007 WL 3027405, at 17 (N.D. Ind. Oct. 15, 2007).

on how many routes a contractor takes on."[133] While this model may reduce control that FedEx has over their drivers, it could be significant enough to show that the drivers are independent contractors. Should the drivers be found to be employees, they would likely be found to be employees of the MWA contractor. In the NLRB decisions, the MWA contractors were consistently excluded, since they were found to be employers in their own right, and exercised enough control over their subordinate drivers to be "supervisors" within the meaning of the NLRA.[134]

However, the MWA contractor model might not fare any better in complying with the law than the SWA model. The Indiana Federal Court handling the multi-district litigation indicated that the MWA model does not change the control that the company exercises over the MWA contractors—they would still have to perform the same tasks, abide by the same policies, and display the same company colors.[135] Further, the MWA contractor would have to sign a "Compliance Disclosure Addendum" which is to "validate compliance with applicable laws."[136] All MWAs must sign the addendum as a condition of continued employment (or, business), and the contractor thereby agrees to waive all their legal claims against FedEx.[137] Courts could still invalidate such an agreement, finding it to be "unconscionable" or a contract of adhesion, and FedEx could still be liable if a court or agency were to find that FedEx, along with the MWA contractor, were joint employers of drivers.

To be sure, FedEx was not intending to commit some unlawful act. A company that uses tax and labor laws to its advantage is not evidence itself of culpable conduct. FedEx has a complement of highly skilled attorneys at their disposal, and these attorneys were not intentionally leading the company down the garden path into a litany of lawsuits. Part of the problem is that, even though FedEx had the intent to shift some of the capital costs and financial burdens to its drivers, the company and its attorneys were not provided with much guidance by the laws regulating independent contractors.

The common law tests are essentially "totality of the circumstances" tests, which permit a result-oriented approach.[138] As indicated in the recent NLRB decisions, there is a trend to find these drivers to be employ-

133. *In re* FedEx Ground Package Sys., Inc., Employment Practices Litig., No. 3:06-CV-528 RM (MDL-1700), 2007 WL 3036891, at 3 (N.D. Ind. Oct. 12, 2007).

134. 29 U.S.C. § 152(11) (1978).

135. *Employment Practices Litig.*, No. 3:06-CV-528 RM (MDL-1700), 2007 WL 3036891, at 3 (N.D. Ind. Oct. 12, 2007).

136. *Id.* at 4.

137. *Id.* at 5.

138. N.L.R.B v. Friendly Cab Co., 183 L.R.R.M. (BNA) 2385, 2388-89 (9th Cir. 2008).

ees, even though one decision from 2000 found the drivers to be independent contractors.[139] Similarly, the IRS in 1995 made the determinations that RPS drivers—working under the 1994 operating agreement, which has remained substantially the same—were independent contractors.[140] Thereafter, the IRS changed its mind and declared FedEx to be in violation.[141]

There has to be legislation—primarily in the federal sphere—that will provide guidance to companies, workers, courts, and administrative agencies that are making these important determinations every day.[142] The tests that allow a worker to be an employee one day and an independent contractor on another have clearly outlived their utility. The changes that keep taking place do not provide the financial and workforce stability that is necessary for any successful business. Furthermore, once appropriate legislation is passed, with an actual bright-line rule for what an independent contractor is, any agency that makes the determination that a group of workers fits this definition must be bound by its decision for a certain length of time. Obviously, an IRS determination that took place in 1995 does not have to be binding forever, but a company should be entitled to some reliance on this federal agency's determination for a pre-determined number of years.

It has been argued elsewhere that a state agency could regulate employee status, but this would only apply to benefits provided by the states, such as unemployment insurance, workers compensation, and the like.[143] The suggestion that independent contractors receive collective bargaining rights is not one that a large company like FedEx would likely support.[144] A federal agency, however, would be able to make the employee status determination for all questions of federal law and liability. A new agency could be charged with such determinations, or it could be bestowed on an agency that is commonly faced with the issue involving any employer that

139. Local 355, *supra* note 44, at 63.

140. *See* Roadway III, *supra* note 43, 854 n.46.

141. CNNMoney, *supra* note 130.

142. Previous attempts to amend the tax code to have a clearer definition of independent contractor have failed. "To amend the Internal Revenue Code of 1986 to clarify the standards for determining whether an employer-employee relationship exists." 143 Cong. Rec. H 8727 (Oct. 8, 1997) (by Rep. Visclosky). Even President Barak Obama was trying to make changes to the tax code when he was a Senator with The Obama-Durbin Independent Contractor Proper Classification Act of 2007 (The ICPC ACT of 2007). *See* Posting of Elesha, *Obama Introduces Pro-Labor Legislation Today*, Unions for Change Blog, Barack Obama and Joe Biden: The Change We Need, Sept. 12, 2007, http://my.barackobama.com/page/community/post/unionsforchange/CczH.

143. Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors,"* 26 BERKELEY J. EMP. & LAB. L. 143, 161 (2005).

144. As evidenced by their repeated refusals to bargain with one of the first certified Teamster units. *See* Local 25, *supra* note 97, at 2.

is engaged in interstate commerce: the NLRB.[145] Agreement from the states to respect the agency's determination, along with federal preemption, would prohibit states from creating their own definitions of independent contractor, thus avoiding a patchwork of legal authority nationwide.[146] Funding could come from companies who choose to use independent contractors, recognizing that these companies do enjoy many tax savings that companies using the traditional employer-employee relationship do not.

Further, if a party, worker, company or administrative agency wanted to challenge such determinations, it should be for prospective relief only. The *Estrada* case, NLRB decisions, and the potential liability in the federal multi-district class action litigation demonstrate that these lawsuits can result in millions of dollars of unexpected retroactive liability, and a group of workers that is suddenly subject to labor laws with many new rights. If a company could plan ahead, knowing that their workers' independent contractor status would expire on a certain date, it could maintain or introduce new controls in the workplace to keep the status alive. Thus, much of the litigation could be avoided by precluding the introduction of changed circumstances which may tend to show employee status.

The IRS has a "safe harbor" provision in Section 530, which allows companies who have a *reasonable basis* to treat its workers as independent contractors.[147] Even if, under the common law test, the worker *could* be found to be an employee, so long as there is an objectively reasonable basis for the company's determination that the workers are *not employees*, then the company will be absolved from tax liability for those years.[148] Among the factors that an employer is permitted to rely on is industry practice—which is evident in the trucking industry—making such a provision especially helpful in the FedEx situation.[149] While various courts and tribunals have ruled against FedEx of late, the company's treatment of their delivery drivers as independent contractors *cannot be unreasonable*: the IRS determined that RPS' treatment of the drivers as independent contractors was reasonable, and the 2000 NLRB Region

145. The jurisdiction would need to comply with the commerce clause. U.S. CONST. art. I, § 8, cl. 3. But, it could be quite broad. *See* N.L.R.B. v. Jones & Laughlin Steel Corp., 301 US 1, 31 (1937) (finding the NLRA to be constitutional, which gives the Board jurisdiction over the majority of private employers in the United States).

146. This could be accomplished by some federal "arm twisting" like withholding highway funds from states that do not agree. South Dakota v. Dole, 483 U.S. 203, 206-207 (1987).

147. 26 U.S.C. § 3401 note (2008); Rev. Rul. 87-41, 1987-1 C.B. 296.

148. James J. Jurinski, Annotation, *Eligibility for Relief from Federal Employment Taxes under § 530 of Internal Revenue Code* (26 U.S.C.A. § 3401 note), 149 A.L.R. FED. 627 (1998).

149. *Id.* at § 10[b] (citing Sanderson v. United States, 862 F. Supp. 196, 198 (N.D. Ohio 1994), *vacated*, 876 F. Supp. 938 (N.D. Ohio 1995)).

Five decision *found* the drivers to be independent contractors.[150] A unified approach and a one-shot determination of the independent contractor status would thus serve to eliminate the back and forth decisions being handed down by various federal and state agencies.

In the short term, however, the only bullet-proof method to avoid the repeated claims on employee status would be for FedEx to make all of their drivers "employees." Of course, this could bring on different litigation that has been partially avoided by having the drivers focus their attention on the employee status issue. Newly minted employees would not be able to challenge claims under FMLA,[151] ADA,[152] Title VII,[153] ADEA,[154] as well as other labor and employment statutes. Former FedEx drivers are already bringing such challenges to company policies designed to increase worker performance, alleging that they violate the ADEA by favoring younger workers over older ones.[155]

Truly, no matter what direction FedEx decides to move in they will not be immune from suit. But in the absence of legislation providing proper guidance, it is perhaps time to change a business model that has plagued the company in recent years. At the very least, FedEx needs to reexamine and rewrite their operating agreement, to show that it is making material changes in order to address the issues that the various courts and administrative agencies have found determinative of employee status. Such changes would permit the company to focus more on maintaining and increasing their share of the package delivery market, rather than their share of lawsuits and payouts to their newest "employees."

150. *See* Roadway III, *supra* note 43, 854 n.46.

151. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified in scattered sections of 26 U.S.C.).

152. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.).

153. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1991).

154. Age Discrimination in Employment Act, 29 U.S.C. § 621 (1967).

155. Fed. Express Corp. v. Holowecki, 128 S.Ct. 1147, 1152-1153 (2008).