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## From Corporate Express to FedEx Home Delivery: A New Hurdle for Employees Seeking the Protections of the National Labor Relations Act in the D.C. Circuit

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FROM *CORPORATE EXPRESS* TO *FEDEX HOME DELIVERY*:  
A NEW HURDLE FOR EMPLOYEES  
SEEKING THE PROTECTIONS OF THE  
NATIONAL LABOR RELATIONS ACT  
IN THE D.C. CIRCUIT

JAMISON F. GRELLA \*

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\* J.D. Candidate, May 2011, American University, Washington College of Law; B.F.A. 2007, New York University, Tisch School of the Arts. Thank you to my editor, Catie Hinckley, and my mentor, B. Cory Schwartz, for your patience and guidance; to the Journal staff, for your hard work in preparing this article; to Professor Susan Carle, for your insight, encouragement, and wisdom, without which this article would not have been possible; to Professor Harold Datz for your expertise; to Joseph M. Boddicker, for all the encouragement and commiseration; and a special thanks to my family, especially my mother, Debbie Petersen, and my sister and brother, Ashley and Chip, for all the love and support. This article is dedicated in loving memory to my father, James F. Petersen, who continues to challenge me to try harder even though he is gone.

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## I. INTRODUCTION

Beware the next time you open the door of your home and sign for a package; the person before you, despite her uniform and van adorned with the familiar “FedEx” logo, is as much an employee of the shipping conglomerate as you are. At least, that is the opinion of the United States Court of Appeals for the District of Columbia Circuit.<sup>1</sup>

In 1935, Congress passed the National Labor Relations Act<sup>2</sup> (“Act” or “NLRA”) to combat economic pressures in the American workplace and to allow American workers to accrue the benefits inherent in collective bargaining.<sup>3</sup> Since 1947, the jurisdictional question of whether workers receive federal protection from the National Labor Relations Board (“Board” or “NLRB”) for their concerted and union activity has turned, in part, on whether workers are “employees” under section 2(3) of the NLRA.<sup>4</sup> In *FedEx Ground & Home Delivery v. NLRB*, the D.C. Circuit withheld the right to join a union and bargain collectively, both guaranteed

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1. See *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 503-04 (D.C. Cir. 2009) (holding that FedEx delivery drivers are “independent contractors” and not “employees” because of their personal, substantial, entrepreneurial opportunity for gain and loss).

2. National Labor Relations (Wagner) Act, Pub. L. No. 198, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-53, 157, 159-61, 163, 165-67 (2006)).

3. See Anne Marie Lofaso, *Toward a Foundational Theory of Workers’ Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1, 58 (2007) (espousing the NLRA as a free-market solution to market failures that occur in the absence of collectivized bargaining).

4. See Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended in 29 U.S.C. § 152 (2006)) (stating that “independent contractors” and “supervisors” are exempt from NLRB’s jurisdiction).

by section 7 of the NLRA, from persons who deliver packages for FedEx Home Delivery in Wilmington, Massachusetts.<sup>5</sup> The D.C. Circuit's interpretation of the Act's definition of "employee" led to the conclusion that the delivery drivers were "independent contractors." As such, the drivers were barred from the Act's protections, which would have provided for NLRB enforcement of the collective bargaining process between the drivers' elected union and FedEx.<sup>6</sup> In September 2009, the D.C. Circuit denied the NLRB's petition for rehearing that urged the court to correct its actions in *FedEx* and avoid a split among the circuit courts.<sup>7</sup>

This Comment argues that the D.C. Circuit erroneously shifted the determination of employee status under the NLRA away from the common law of agency by making a putative employee's "significant entrepreneurial opportunity" dispositive, contrary to clear congressional intent and Supreme Court precedent.<sup>8</sup> Part II of this Comment reviews the development of the common law right-to-control test for determining an employee's status under the Act.<sup>9</sup> Part II also examines the development of the right-to-control test in the D.C. Circuit and other federal courts of appeal, and explores the underlying facts and the court's opinion in *FedEx*.<sup>10</sup> Part III demonstrates how the D.C. Circuit's opinion, which resulted in a split in authority among the circuit courts, creates conflict with Supreme Court precedent.<sup>11</sup> Part IV argues that the D.C. Circuit's ruling will have deleterious effects on the authority of the NLRB to effectuate the Act and that it has likely shut the door to union representation for American

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5. See 563 F.3d at 497 (couching the decision that delivery drivers fall under the statutory exemption of "independent contractors" by emphasizing the drivers' "significant entrepreneurial opportunity for gain or loss" within the context of their relationship with FedEx, over common law agency factors); see also *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002) (shifting the emphasis from the traditional common law right-to-control test factors to entrepreneurial opportunity as a more accurate reflection of employment status under the NLRA).

6. See *FedEx Home Delivery*, 563 F.3d at 504 (vacating the NLRB's cease-and-desist order against FedEx for failing to engage in collective bargaining with the union in violation of the NLRA).

7. See Posting of Jeffrey M. Hirsch to Workplace Prof Blog, [http://lawprofessors.typepad.com/laborprof\\_blog/2009/week37/index.html](http://lawprofessors.typepad.com/laborprof_blog/2009/week37/index.html) (Sept. 10, 2009) (noting that the court had created a test "that relied almost exclusively on the workers' entrepreneurial opportunity rather than the typical Darden factors" to determine their agency status).

8. See *Petition for Rehearing and Suggestion for Rehearing En Banc on Behalf of the National Labor Relations Board at 1, FedEx Home Delivery v. NLRB* (D.C. Cir. June 4, 2009) (No. 07-1391) [hereinafter *Petition for Rehearing*] (arguing that the D.C. Circuit in *FedEx* did not follow D.C. Circuit and Supreme Court precedent).

9. See *infra* Part II.A-D (detailing the treatment of statutory "employees" under the Act by the Supreme Court after the passage of the Taft-Hartley Amendments).

10. See *infra* Part II.E-F (chronicling the jurisprudence regarding employee status under the NLRA).

11. See *infra* Part III (criticizing the D.C. Circuit's attempts to ignore congressional intent by over-emphasizing a factor not present in the common law of agency).

workers who need it the most.<sup>12</sup> Finally, Part V concludes that the Supreme Court should once again clarify the test used to determine whether someone is an employee for purposes of the NLRA and resolve the circuit split.<sup>13</sup>

## II. BACKGROUND

### *A. The National Labor Relations Act*

In 1935, Congress passed the National Labor Relations Act.<sup>14</sup> One principal goal of the NLRA, as outlined in section 7 of the Act, is to give employees the right to be free from discrimination and coercion in employment on the basis of their concerted and union activity.<sup>15</sup> Though the rights inured to employees under section 7 are often interpreted broadly, their most prevalent application, as a practical matter, is to preserve and protect the collective bargaining process that allows employees, through their elected union representatives, to have sufficient bargaining power with their employers to affect the terms and conditions of their employment.<sup>16</sup>

The rights guaranteed by section 7 of the Act have an important limitation: only “employees” within the meaning of section 2(3) of the Act are protected.<sup>17</sup> In 1944, the Supreme Court first defined the test to determine if someone was an employee under the NLRA.<sup>18</sup> In *NLRB v. Hearst Publications*, the Court decided that using common law principles to identify employees for purposes of the NLRA would prove cumbersome and yield results that were discordant with the affirmative, protective intent embodied in the Act.<sup>19</sup> The Court instead applied a test that hinged on the

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12. *See infra* Part IV (explaining that since the D.C. Circuit has jurisdiction to review any decision of the NLRB in representation determinations, a narrower view of the Section 2(3) definition of “employee” will have an almost immediate negative effect on workers’ ability to obtain union representation).

13. *See infra* Part V (urging the NLRB to seek certiorari to rectify the circuit split created by *FedEx*).

14. National Labor Relations (Wagner) Act, Pub. L. No.198, 49 Stat. 449 (1935) (codified at 29 U.S.C. § 151 et seq. (2006)) (granting employees federal protection for their union activities).

15. *See* 29 U.S.C. § 157 (2006) (stating that employers who interfere with section 7 rights commit unfair labor practices).

16. *See* § 158(a)(5) (making a refusal to bargain with an elected union representative an unfair labor practice subject to remedy by the NLRB).

17. *See* § 152 (withholding section 7 rights from supervisors, agricultural workers, and independent contractors).

18. *See* *NLRB v. Hearst Pub.*, 322 U.S. 111, 124 (1944) (holding that Congress intended to cover a wider range of employees for NLRA purposes than the traditional master-servant relationship would allow).

19. *See id.* at 122-23 (stating that leaving the jurisdictional question of “employee”

economic realities of the work relationship to better fulfill the intention of Congress in favor of granting American workers the right to unionize.<sup>20</sup> Under the economic realities test, the Court upheld the finding that the newsboys at issue in *Hearst Publications* were employees under the NLRA because the newsboys provided an integral part of the employer's business: the distribution of newspapers.<sup>21</sup> The Court did so even though the employer had little control over the work performance of the newsboys, reasoning that the relationship between their jobs and the employer's core business was more important than the common law agency principles that bound the two together.<sup>22</sup>

### B. The Taft-Hartley Amendments

Three years after *Hearst Publications*, Congress responded to the Supreme Court's broad definition of "employees" under the Act by expressly excluding "independent contractors" from the NLRB's jurisdiction.<sup>23</sup> Through the 1947 Taft-Hartley Amendments to the NLRA, Congress went a step further than merely spelling out statutory exclusions to the definition of "employee" in section 2(3) of the Act; it expressly overruled the Supreme Court's economic realities test in favor of the common law principles of agency.<sup>24</sup> Congress's preference for the principles of agency law is also manifest in section 2(13) of the NLRA, which holds employers liable for the unfair labor practices committed by their agents.<sup>25</sup> Meanwhile, the Court began to deviate from the principles it laid out in *Hearst Publications* by applying the economic realities test as only one factor within the common law test for agency (the "right-to-control test").<sup>26</sup>

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status under the Act to the common law test for master-servant would yield results contrary to Congress's intent of broad labor reform).

20. *See id.* at 127–28 (finding that employee status should turn on the characteristics of a given industry in light of the vast differences between the industries subject to the NLRA).

21. *See id.* at 131–32 (discussing the NLRB's rationale for including the newsboys as consistent with the purpose of the NLRA).

22. *Id.* at 131.

23. *See* Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 137 (1947); *see also* 29 U.S.C. § 152(11) (2006) (excluding supervisors from the Act).

24. *See* 80 CONG. REC. S6136 (daily ed. June 5, 1947) (statement of Sen. Taft) (reading into the record that "the general principles of the law of agency" are intended to determine section 2(3) "employees" under the amendments to the NLRA).

25. *See* § 152(13) (stating that principles of authorization or ratification shall not be controlling when determining if someone is acting as an agent of another, so as to make the direct actor responsible for committing unfair labor practices on behalf of her employer).

26. *See* *United States v. Silk*, 331 U.S. 704, 719 (1947) (holding that the traditional right-to-control test must be examined in conjunction with the economic realities of the

*C. The Common Law Right-to-Control Test*

The right-to-control test originated in England during the mid-nineteenth century before taking root in the United States in 1857.<sup>27</sup> It inquires whether the person in question was under the control of another to such a sufficient degree to allow the latter to be held accountable for the torts of the former.<sup>28</sup> The right-to-control test was used as a means of assigning tort liability to agents outside the traditional master-servant dichotomy during the Industrial Revolution through the doctrine of *respondeat superior*.<sup>29</sup> The test adopts the notion that the relationship between master and servant is constrained by the amount of control exerted on the servant by the master.<sup>30</sup>

American courts have compiled a non-exhaustive list of factors to determine whether a master-servant relationship exists.<sup>31</sup> These factors are:

- (1) the agreed upon control that the employer may exercise over the putative employee in the details of the work to be performed;
- (2) whether the putative employee is engaged in a distinct business or occupation;
- (3) the type of occupation and whether it is usually performed under the direction of an employer or by a non-supervised specialist;
- (4) the degree of skill necessary to perform the given tasks;
- (5) whether the employer supplies the instrumentalities, tools, and the workplace;
- (6) the temporal duration of the employment relationship between the parties;
- (7) whether payment is rendered by time worked or by task performed;
- (8) whether the work performed is part of the regular business of the employer;
- (9) whether the parties believe that an employer-employee relationship exists between them; and
- (10) whether the putative employee does business with other

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situation).

27. *See* *Boswell v. Laird*, 8 Cal. 469, 489-90 (1857) (applying English common law, which holds a master vicariously liable for the torts of his servant under the theory of *respondeat superior*).

28. *See id.* at 493 (holding that actual employer control over an employee is what binds the employer in liability for actions undertaken within the scope of employment).

29. *See* John Bruntz, *The Employee/Independent Contractor Dichotomy: A Rose Is Not Always a Rose*, 8 HOFSTRA LAB. & EMP. L.J. 337, 339-41 (1991) (detailing the evolution of the law to cope with new torts in the evolving industrial context of the second half of the nineteenth century).

30. *See generally* RESTATEMENT (SECOND) OF AGENCY § 2 (1958) (noting that the control of a master differentiates a servant from an independent contractor); RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (abandoning the master/servant language in favor of principal and agent).

31. *See, e.g.,* *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

employers.<sup>32</sup>

The ad hoc, fact-specific nature of the test ensures that no one factor is dispositive.<sup>33</sup>

When all the factors relevant to the factual context of a specific work relationship between an employer and a putative employee are considered, the right-to-control test determines who controls the manner and means of work performance; if the employer retains control, then the person in question is an employee.<sup>34</sup> In recognition of the importance of the multifactor right-to-control analysis as a matter of agency law, the Supreme Court in *Nationwide Mutual Insurance Co. v. Darden* expressly held that where Congress is silent on the definition of the term “employee” in federal labor and employment legislation, then the multifactor right-to-control test was the test Congress intended to be used.<sup>35</sup>

#### *D. The Right-to-Control Test and Section 2(3) of the Act*

After the Taft-Hartley Amendments, the Supreme Court first revisited the definition of “employee” under Section 2(3) of the Act in *NLRB v. United Insurance Co. of America*.<sup>36</sup> The Court affirmed the congressional intent that the right-to-control test be used to determine who is covered under the Act.<sup>37</sup> Additionally, the Court noted that when faced with two conflicting views, a circuit court should not displace the NLRB’s determination of an individual’s eligibility under the NLRA, even if the court would have reached a different opinion if the issue were presented *de novo*.<sup>38</sup> In *NLRB v. Town & Country Electric*, the Court reiterated its support for a broad interpretation of section 2(3)’s definition of “employee”

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32. See RESTATEMENT (SECOND) OF AGENCY § 220(2) (1957) (listing the factors considered in determining whether one acting on behalf of another is a servant or independent contractor); *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 496 (D.C. Cir. 2009) (quoting the Second Restatement of Agency as the source for the non-exhaustive, ten-factor test used to make employee determinations under the NLRA).

33. See *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968) (holding that a proper application of the right-to-control test assesses all of the incidents of the work relationship and gives no one factor decisive weight).

34. See generally RESTATEMENT (THIRD) OF AGENCY §1.01.

35. See 503 U.S. 318, 323-25 (1992) (adopting the factors outlined at Restatement (Second) of Agency § 220 as consistent with the agency principles Congress sought to apply for purposes of ERISA and other federal statutes).

36. See 390 U.S. at 260 (holding that the NLRB’s determination that insurance agents were “employees” was appropriate where the NLRB established all the facts and reviewed them in light of the common law principles of agency).

37. See *id.* at 256 (declaring that the passage of the Taft-Hartley Amendments showed Congress’s disapproval of the Court’s approach in *Hearst Publications* and its preference for the fact-specific common law test for “employee” under general principles of agency).

38. See *id.* at 260 (instructing deference to the NLRB’s decision-making on contentious issues such as “employee” coverage under the NLRA).

as consistent with the congressional intent of the NLRA.<sup>39</sup> The NLRB has consistently applied the common law right-to-control test for agency and conceded that it is beyond the Board's power to deviate from that test in determining whether someone is covered by the Act.<sup>40</sup> In addition to the common law factors, the Board often includes one more factor when examining that factual context of the employment relationship in applying of the right-to-control test: whether the putative employee has an opportunity for entrepreneurial gain or loss.<sup>41</sup> This factor has been met with uniform approval by all of the circuit courts when reviewing the Board's determination of an individual's status under section 2(3) of the NLRA.<sup>42</sup>

### *E. Employees Under the NLRA in the Circuit Courts*

#### *1. The D.C. Circuit*

In determining whether an individual is an employee under the NLRA, the D.C. Circuit has traditionally applied the right-to-control test's factual analysis as to who controls the manner and means of work performance in determining whether someone is an employee under the NLRA following the Supreme Court's decision in *United Insurance*.<sup>43</sup> In addition to the traditional common law factors, the D.C. Circuit's cases have also discussed whether entrepreneurial opportunities are available to the putative employees in its analysis of the factual context underlying the work relationship.<sup>44</sup> At first blush, the following cab and truck driver cases seem to yield perverse and often baffling results in light of the inclusion of the entrepreneurial opportunities factor.

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39. See 516 U.S. 85, 94-95 (1995) (approving the NLRB's broad definition of employee when it makes the determination utilizing law of agency principles).

40. See *Dial-A-Mattress Operating Corp.*, 326 N.L.R.B. 884, 890-91 (1998) (finding that the Supreme Court-approved right-to-control test, steeped in the common law of agency, is the only test the NLRB may apply when examining the reach of section 2(3)).

41. See, e.g., *St. Joseph News-Press*, 345 N.L.R.B. 474, 479 (2005) (delineating that the amount of control which the employer retains over entrepreneurial opportunities aids the right-to-control test analysis).

42. See, e.g., *C.C. Eastern v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995) (noting that a driver's retention of significant entrepreneurial opportunities tends to support a finding of independent contractor status).

43. See, e.g., *Local 777, Democratic Union Org. Comm., Seafarers Int'l Union of N. Am. v. NLRB*, 603 F.2d 863, 874 (D.C. Cir. 1978) (explaining that all of the circumstances of the work relationship, including the manner and means of work performance, must be weighed when determining employee status under the right-to-control test).

44. See *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366, 381 (D.C. Cir. 1983) (noting that strong entrepreneurial freedom should be considered when applying the right-to-control test).

a. Local 777 to C.C. Eastern

In *Local 777, Democratic Union Organizing Committee, Seafarers International Union of North America v. NLRB* (“*Local 777*”), the D.C. Circuit first tackled the difficult distinction between independent contractors and employees arising in the context of taxicab, delivery, and freight drivers.<sup>45</sup> The *Local 777* court affirmed the Board’s finding that the taxicab drivers at issue were independent contractors because the business owner retained little control over the manner and means of performance of work.<sup>46</sup> The court emphasized that the right-to-control test is the appropriate test for examining the factual context underlying an NLRB representational determination.<sup>47</sup> In applying the non-exhaustive list of common law factors, the court found that the drivers’ putative employer retained virtually no day-to-day control over the drivers.<sup>48</sup>

In *City Cab Co. of Orlando v. NLRB* (“*Orlando*”), however, the D.C. Circuit affirmed the NLRB’s holding that the taxicab drivers at issue were employees under the NLRA and distinguished *Local 777*.<sup>49</sup> In *Orlando*, the employer required detailed trip sheets documenting all the fares a driver picked up; significantly regulated the hours that drivers could work; substantially controlled passenger selection via contract with the municipal airport; inured no entrepreneurial opportunities to their drivers to incentivize making larger profits; and prescribed an extensive dress code for its drivers.<sup>50</sup> The court concluded that these five factors tipped the balance in favor of employee status because it indicated that the employer had sufficient control over the manner and means of work performance to render the drivers “employees” as a matter of the law of agency.<sup>51</sup>

Three years later, in *Yellow Taxi Co. of Minneapolis v. NLRB*, the D.C. Circuit denied enforcement of an unfair labor practice remedy on the grounds that the NLRB incorrectly found that the drivers at issue were employees.<sup>52</sup> The court noted that although the NLRB justified its finding

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45. See 603 F.2d at 869-70 (observing that the NLRB’s own ad hoc determination of employee status for drivers has produced inconsistent judgments).

46. See *id.* at 875 (finding that the drivers at issue were only constrained by municipal regulations, not employer limitations).

47. See *id.* at 874 (describing that when an employer retains control over the result of the work and the details of carrying it out, the individual at issue will be an employee).

48. See *id.* (adopting the section 220(2)’s list of non-exhaustive factors as the relevant factors for distinguishing between employees and independent contractors).

49. See 628 F.2d 261, 262 (D.C. Cir. 1980) (finding that the NLRB had effectively weighed all the incidents of the work relationship pursuant to *United Insurance*).

50. See *id.* at 264-65 (observing that the five factors present in *Orlando* were the precise factors missing in *Local 777*).

51. *Id.* at 265.

52. See 721 F.2d 366, 381 (D.C. Cir. 1983) (criticizing the NLRB’s finding as not

of employee status by relying on several of the factors present in *Orlando*, it had neglected to consider that the drivers were free to conduct ninety-five percent of their business absent any significant control from Yellow Taxi.<sup>53</sup> The court specifically noted that contractual controls were insignificant in the face of the substantial absence of day-to-day control over the drivers.<sup>54</sup> The court further chastised the NLRB's determination as being contrary to law under the right-to-control test.<sup>55</sup>

In *North American Van Lines v. NLRB* ("NAV<sup>L</sup>"), the D.C. Circuit once again overturned the Board's finding that drivers were employees for purposes of the NLRA.<sup>56</sup> The NAV<sup>L</sup> court, in applying the right-to-control test, found that the freight drivers retained control over the manner and means of performance.<sup>57</sup> The court focused its inquiry on three specific facts which were dispositive in this particular case: the drivers' near absolute control over their performance and appearance while driving, the equity interest that the drivers held in the vehicles they leased or owned, and the entrepreneurial opportunities, which had previously been referred to as "good will," afforded to the drivers who controlled when and how often they would work.<sup>58</sup>

In contrast to the D.C. Circuit's critical view of the NLRB in both NAV<sup>L</sup> and *Yellow Taxi*, the D.C. Circuit commended the NLRB for its application of the right-to-control test in *Construction Employees Union, Local No. 221 v. NLRB* ("Local 221").<sup>59</sup> There, the court affirmed the Board's finding that truck drivers were independent contractors because, in applying the right-to-control test's fact-driven analysis, the Board held that no one factor was decisive and instead focused on all the circumstances of the employment relationship.<sup>60</sup> The Local 221 court noted that the drivers' ability to choose the days and hours they worked and their right even to abandon jobs they had commenced, without fear of discipline, strongly

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supported by evidence).

53. *See id.* at 381 (noting that the NLRB's statement that the drivers did not own their vehicles did not demonstrate that the drivers were under employer-control).

54. *See id.* at 378 (noting that for each instance of control, under the factors deemed relevant in *Orlando*, the NLRB had no support in the record).

55. *See id.* at 381-82 (admonishing the NLRB for not following binding precedent in the D.C. Circuit).

56. 869 F.2d 596, 600 (D.C. Cir. 1989).

57. *Id.* at 599-600.

58. *See id.* at 600 (observing that the NLRB was confusing the employer's control over the ends achieved with the manner and means to achieve them).

59. *See* 899 F.2d 1238, 1242 (D.C. Cir. 1990) (applauding the NLRB's review of all of the circumstances of the employment relationship as being consistent with Supreme Court precedent).

60. *See id.* (noting that a proper inquiry under the right-to-control test will look beyond the actual supervision that an employer exerts if the control is necessary under the circumstances).

supported the Board's conclusion that the drivers were statutorily exempt from the NLRA.<sup>61</sup>

In 1995, the D.C. Circuit overturned the NLRB's decision that truck drivers were statutory employees in *C.C. Eastern v. NLRB*.<sup>62</sup> The *C.C. Eastern* court found that the Board's application of the right-to-control test was inherently flawed because it failed to significantly weigh all of the factors underlying the relationship between the company and its workers.<sup>63</sup> The court reversed the NLRB's determination because the company did not retain control over the hours drivers worked, mandate dress or appearance requirements, or impose a conventional disciplinary system on its drivers.<sup>64</sup> Common to all of the D.C. Circuit decisions up to this point was a reliance on the multifactor, common law, right-to-control test, with entrepreneurial opportunity being but one of the many factors considered in determining an individual's status for the purpose of the NLRA.<sup>65</sup>

#### b. Corporate Express

In *Corporate Express Delivery Systems v. NLRB*, the D.C. Circuit abruptly took a new direction in determining whether drivers who delivered packages and owned their own vehicles were employees for purposes of the NLRA.<sup>66</sup> There, the court affirmed an NLRB decision that Corporate Express violated the NLRA by firing, threatening, and monitoring employees who were engaged in organizing a union among its owner-operator drivers, but did so on grounds other than the NLRB's application of the right-to-control test.<sup>67</sup> Under the analysis mandated by the right-to-control test, the Board found that the owner-operators were employees because drivers could not deviate from their employer's set delivery route or schedule, all drivers were required to wear pagers so they could be

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61. *See id.* at 1242-43 (finding support in the record for the proposition that the drivers worked at their whim).

62. *See* 60 F.3d 855, 857 (D.C. Cir. 1995) (relying on the employer's minimal supervision of the manner and means of performance in pronouncing the drivers independent contractors).

63. *See id.* at 860 (pointing out the NLRB's apparent confusion of company efforts to monitor and improve results of employee performance as equivalent to employer control over the manner and means of performance).

64. *See id.* at 858 (noting that these facts point to independent contractor status under the right-to-control test).

65. *Cf.* *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 508 (D.C. Cir. 2009) (Garland, J., dissenting) (noting that the only case in *any* circuit court that emphasizes entrepreneurial opportunity *over* the right-to-control test is *Corporate Express*).

66. *See* 292 F.3d 777, 780 (D.C. Cir. 2002) (declining to analyze the factual underpinnings of the work relationship under the right-to-control test's manner and means inquiry).

67. *See id.* at 781 (affirming the NLRB's holding that the firing of the drivers at issue was in retaliation for their union activities).

reached at all times for scheduling changes, and a dress code was imposed on all drivers.<sup>68</sup>

Yet in affirming the NLRB's decision, the D.C. Circuit declined to base its analysis on the traditional inquiry into who controls the manner and means of work performance.<sup>69</sup> Instead, the D.C. Circuit, while supporting the NLRB's decision, shifted its emphasis to hinge upon whether the putative independent contractors had significant entrepreneurial opportunity for gain or loss.<sup>70</sup> Curiously, the D.C. Circuit's claim that the shift in emphasis to entrepreneurial opportunity came at the NLRB's suggestion is not reflected in either the NLRB's reported decision or the NLRB's brief before the D.C. Circuit.<sup>71</sup>

## 2. Section 2(3) in the Other Circuits

Like the D.C. Circuit until its decision in *Corporate Express*, all of the other federal appellate courts applied the multi-factor common law right-to-control test analysis when determining employee status for purposes of the NLRA.<sup>72</sup> Despite citing to the D.C. Circuit's decision in *Corporate Express*, both the Sixth and the Ninth Circuits still went on to hold that the right-to-control test's analysis of who controls the manner and means of work performance is the appropriate test for determining whether an individual is an employee and therefore covered by the protections of the NLRA for his union activity.<sup>73</sup>

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68. See *id.* at 780 (assessing that the substantial evidence of control could be used to support the NLRB's finding under the right-to-control test).

69. But see *id.* (noting that the NLRB's analysis of the factual context under the right-to-control test in *Corporate Express* was well within the discretion afforded the NLRB in making its choice between two fairly conflicting views on employee status).

70. See *id.* (holding that because the drivers had virtually all entrepreneurial opportunities withheld from them, they were employees).

71. Compare *id.* (declaring that the Board urged the shift in focus away from control over the manner and means of performance to entrepreneurial opportunity), with *Corporate Express Delivery Sys.*, 332 N.L.R.B. 1522 (2000) (affirming the Administrative Law Judge's determination that the employees demonstrated all the indicia of employee status under the right-to-control test, including entrepreneurial opportunity), and Brief of Respondent at 39, *Corporate Express Delivery Sys. v. NLRB*, No. 01-1058 (D.C. Cir. Nov. 16, 2001) (urging the D.C. Circuit to reexamine its own precedent and "give appropriate weight to all of the factors in the common-law agency test" in light of Supreme Court precedent affirming the right-to-control test).

72. See, e.g., *Hilton Int'l Co. v. NLRB*, 690 F.2d 318, 321 (2d Cir. 1982) (holding that band members were independent contractors under the right-to-control test); *Collegiate Basketball Officials Ass'n v. NLRB*, 836 F.2d 143, 145 (3d Cir. 1987) (holding that basketball referees were independent contractors because they retain control over the manner and means of their performance); *NLRB v. O'Hare-Midway Limousine Serv.*, 924 F.2d 692, 694-95 (7th Cir. 1991) (finding ample support in the evidence to conclude that a limousine driver was a statutory employee under the right-to-control test).

73. See *Time Auto Transp., Inc. v. NLRB*, 377 F.3d 496, 499 (6th Cir. 2004) (holding that the right-to-control test's inquiry into all the circumstances of the work

In 2004, the Sixth Circuit affirmed a judgment of the NLRB that long-haul delivery drivers were statutory employees in *Time Auto Transportation, Inc. v. NLRB*.<sup>74</sup> The Sixth Circuit held, under its application of the right-to-control test, that the NLRB had correctly identified the drivers as employees under the right-to-control test.<sup>75</sup> Even though the drivers had substantial investments in their lease agreements with Time Auto and were individually incorporated, the court pointed out that Time Auto could terminate its drivers for refusing or failing to make assigned deliveries.<sup>76</sup>

In 2008, the Ninth Circuit, in *NLRB v. Friendly Cab Co.*, upheld the NLRB's ruling that taxicab drivers constituted employees under the NLRA and that their employer, Friendly Cab, committed unfair labor practices by refusing to bargain with their elected union representative.<sup>77</sup> The court ruled that Friendly's drivers were employees because the drivers were unable to develop independent business relationships, were subject to a strict disciplinary regime aimed at controlling their performance on a day-to-day basis, and were forced to abide by a mandatory, extensive dress code.<sup>78</sup> Additionally, Friendly required its drivers to carry advertisements on their cabs that would sometimes result in the loss of a potential fare; in light of this fact, the Ninth Circuit noted that the drivers had limited entrepreneurial opportunities.<sup>79</sup> By the time that *FedEx Home Delivery* was argued in the D.C. Circuit in 2009, it was apparent that all of the other federal appellate courts were still faithfully applying the right-to-control test.

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relationship is used for the employee status determination under the NLRA); *see also* *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1096-97 (9th Cir. 2008) (expressing no doubt that the right-to-control test's totality of the circumstances inquiry is the correct standard for purposes of section 2(3)).

74. *See Time Auto Transp.*, 377 F.3d at 500 (upholding the NLRB's determination that Time Auto had violated the NLRA by firing two drivers engaged in union organizing activities).

75. *See id.* at 499 (emphasizing that no one factor tips the balance under the right-to-control test and that all incidents of the work relationship require evaluation to ensure that no one factor is decisive).

76. *See id.* at 498 (identifying that the ability to unilaterally terminate drivers creates a heavy inference of employee status).

77. *See* 512 F.3d at 1096-97 (reviewing the NLRB's decision under the manner and means analysis of the right-to-control test).

78. *See id.* at 1100-01 (stating that, ultimately, no one factor is dispositive in the application of the right-to-control test and the inquiry mandates an exploration into the totality of the circumstances involved in the relationship between the putative employee and her employer).

79. *See id.* (finding that a constraint on the ability of drivers to exercise their limited entrepreneurial opportunity is weighed like any other factor in favor of employee status under the right-to-control analysis).

*F. FedEx Home Delivery v. NLRB*

In 1998, FedEx Corporation acquired Roadway Package Systems, Inc.<sup>80</sup> The new entity, FedEx Home Delivery, employs almost 4,000 drivers who deliver packages on 5,049 routes based out of over 500 terminals nationwide.<sup>81</sup> The underlying NLRB representational decision that gave rise to *FedEx Home Delivery v. NLRB* concerned two terminals in Wilmington, Massachusetts, consisting of thirty-three single route drivers.<sup>82</sup> FedEx, in contesting a union representation election sought by its delivery drivers, asserted the affirmative defense that the delivery drivers were independent contractors, not statutory employees, and that they were thereby excluded from a statutorily mandated election administered by the NLRB.<sup>83</sup>

*1. The Representation Decision*

In 2006, the NLRB's Regional Director certified the thirty-three single route delivery drivers as employees under the NLRA for the purpose of the representational election, but excluded, as statutory supervisors, the delivery drivers who had contracted for multiple routes.<sup>84</sup> In making her determination that the single-route delivery drivers were employees under section 2(3) of the NLRA, the Regional Director relied on the facts that FedEx had appearance requirements for drivers and vehicles that exceed requirements dictated by federal statute and that the drivers performed a regular and essential function of FedEx Home's normal operations.<sup>85</sup> The Regional Director also noted that FedEx placed contractual restraints on the drivers' pursuit of outside entrepreneurial opportunities; retained the ability to unilaterally alter or terminate drivers' routes; mandated drivers to provide a FedEx-approved vehicle and driver for delivery assignments from Tuesday through Saturday; and provided incentives for drivers to comply with company policies.<sup>86</sup>

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80. FedEx Home Delivery, N.L.R.B. Cases 1-RC-22034, 1-RC-22035, at 6 (Sept. 20, 2006).

81. *Id.* at 6-7 n.9.

82. *See id.* at 7 (explaining the exclusion of the drivers with multiple routes from the bargaining unit, as they were considered statutory supervisors pursuant to 29 U.S.C. § 152(11) (2006)).

83. *See* FedEx Home Delivery, 351 N.L.R.B. No. 16, 2007 WL 2858933, at \*1 (Sept. 28, 2007) (urging the Board to vacate the Administrative Law Judge's refusal to bargain remedy in favor of the drivers).

84. *See* FedEx Home Delivery, N.L.R.B. Cases 1-RC-22034, 1-RC-22035, at 46-47 (Sept. 20, 2006) (finding that the multiple route drivers exerted control over other hired drivers for the benefit of FedEx).

85. *See id.* at 38-39 (noting that drivers did not substantially pursue outside business interests while working for FedEx).

86. *See id.* at 39-40 (explaining that the factors which supported FedEx's claim that

Additionally, the Regional Director found several factors that supported FedEx's contention that the drivers were independent contractors, including the drivers' ability to hire substitutes that met FedEx approval, ownership of their own vehicles, and the words of the contract which described the drivers as independent contractors.<sup>87</sup> The Regional Director, however, concluded that any apparent freedom the drivers had to set their own schedules and hire substitutes was substantially limited by time constraints placed on the drivers' workday and by the fact that drivers were unable to refuse to make deliveries without being disciplined by FedEx.<sup>88</sup> In applying the right-to-control test pursuant to NLRB precedent, the Regional Director was ultimately not persuaded that the evidence favoring independent contractor status—including the unique feature of the drivers' contracts that allowed them to assign their contractual rights to a route to a person that met FedEx's approval—countervailed the evidence in favor of employee status.<sup>89</sup>

The International Brotherhood of Teamsters, Local 25, subsequently won the election at the two FedEx Home terminals and the Regional Director certified the election results.<sup>90</sup> FedEx, however, did not fulfill its statutory obligation to bargain with the newly elected union.<sup>91</sup> In 2007, the NLRB ruled that FedEx committed unfair labor practices in violation of its duty to bargain in good faith by refusing to bargain with the union.<sup>92</sup> At the unfair labor practice proceeding, FedEx admitted that it had refused to bargain with the union, but again offered the affirmative defense that the drivers were not statutory employees, but independent contractors.<sup>93</sup> The NLRB did not allow FedEx to submit new evidence of nationwide data of drivers who had profited from the sales of their routes because it could have been provided during the initial representational proceeding and was

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the drivers were independent contractors were mitigated by the substantial control that FedEx exerted over its drivers).

87. *See id.* at 11, 13, 28 (detailing the methods that delivery drivers use to acquire vans pursuant to FedEx's requirements and with FedEx's direct assistance, but noting that FedEx does not grant loans to purchase or lease vans nor does it directly supply them to drivers).

88. *See id.* at 39-40 (concluding that FedEx's ultimate control gives the relationship between FedEx and the drivers the necessary indicia that the drivers are statutory "employees" within the meaning of section 2(3) of the NLRA).

89. *See id.* at 44 (noting that these very factors favoring contractor status have been present in prior case law, but were deemed insufficient, in light of other factors favoring employee status, to carry the day).

90. FedEx Home Delivery, 351 N.L.R.B. No. 16, 2007 WL 2858933, at \*2 (Sept. 28, 2007).

91. *See id.* (highlighting that FedEx expressly refused to bargain with the union in two separate letters because it challenged the Regional Director's determination).

92. *See id.* at \*1 (granting the NLRB's General Counsel's motion for summary judgment).

93. *Id.*

immaterial to the determination of employee status under the right-to-control test.<sup>94</sup> Accordingly, the Board ordered FedEx to bargain with the delivery drivers' elected union; FedEx appealed that order to the D.C. Circuit.<sup>95</sup>

## 2. *The D.C. Circuit's Holding*

The D.C. Circuit vacated the decision of the NLRB and agreed with FedEx that the drivers were statutorily exempt from coverage by the Act and, therefore, that FedEx did not commit an unfair labor practice in refusing to bargain with the union.<sup>96</sup> The court based its decision on the "significant entrepreneurial opportunity for gain or loss," as opposed to the traditional common law right-to-control test analysis, in deciding that the delivery drivers were independent contractors.<sup>97</sup> In applying this test, the court pointed out that drivers were free to use their vehicles for personal business ventures on the two days when they were not delivering packages for FedEx, were free to hire substitutes that met FedEx's approval, and that the drivers could sell their routes at a profit without FedEx's involvement in the sale price.<sup>98</sup> The D.C. Circuit stated unequivocally that its analysis would no longer hinge on the cumbersome totality of the circumstances inquiry mandated under the right-to-control test.<sup>99</sup> Instead, it crafted something akin to a bright-line test that turned on entrepreneurial opportunities afforded to putative employees, marking a distinct departure from D.C. Circuit precedent and that of the other federal circuits.<sup>100</sup>

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94. *See id.* (forestalling FedEx from introducing new, previously available evidence).

95. *See id.* at \*3 (ordering FedEx to recognize and bargain with the union in good faith at the union's request).

96. *See FedEx Home Delivery v. NLRB*, 563 F.3d 492, 503-04 (D.C. Cir. 2009) (holding that the evidence in the record supported a finding that drivers were independent contractors and thus, not reaching the question of whether FedEx had committed any unfair labor practices).

97. *See id.* at 497 n.3 (shifting the emphasis of the common law control test to entrepreneurial opportunity on the grounds that the latter provides a more qualitative assessment of the relationship between the parties through which to evaluate the factors of the common law test). *Compare C.C. Eastern v. NLRB*, 60 F.3d 855, 858 (D.C. Cir. 1995) (holding that drivers who retained the right to hire their own employees were essentially independent contractors), *with Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002) (holding that a driver's inability to hire others did not constitute indicia of any entrepreneurial opportunity and that the drivers were therefore employees under section 2(3) of the NLRA).

98. *See FedEx Home Delivery*, 563 F.3d at 498-500 (underscoring that the driver's ability to reap additional profits without consent from FedEx was "no small thing in evaluating 'entrepreneurial opportunity'").

99. *See id.* at 497 (noting that a test hinging on entrepreneurialism would not lend itself to "purely mechanical" application).

100. *See id.* (criticizing the common law test for not being amenable to a bright-line rule).

### III. ANALYSIS

#### *A. The D.C. Circuit Erred by Departing from the Right-to-Control Test*

When the D.C. Circuit decided to emphasize a putative employee's "significant entrepreneurial opportunity" over the traditional control that an employer exerts over the "manner and means" that are used in the performance of work tasks, the court shifted the emphasis under the Act away from the general principles of agency law.<sup>101</sup> At the heart of the law of agency is a determination of the degree to which a principal exerts control over the actions of its agents; therefore, a test that fails to look to the degree of control exerted by an employer over putative employees is out of step with this basic principle.<sup>102</sup> Although the court proclaimed that this shift was logical and in accord with precedent, the actual effect contravenes clear congressional intent, Supreme Court precedent, and well-settled NLRB law that expressly instruct that principles of agency law should be used for the employee status determination.<sup>103</sup> The D.C. Circuit, therefore, by shifting emphasis away from the right-to-control test and instead relying on entrepreneurialism, erred in interpreting the definition of statutory employees under the Act because all factors incident to the work relationship, including but not limited to entrepreneurialism, are given equal weight under the right-to-control test which Congress specifically endorsed in the Taft-Hartley Act.<sup>104</sup>

Many of the right-to-control test factors that had previously been found sufficient by the D.C. Circuit to sustain a finding of employee status, such as the stringent appearance requirements in *Orlando*, were present in

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101. *See id.* at 501 (claiming the court's decision in *Corporate Express* interpreting section 2(3) of the NLRA represented a conscious shift to entrepreneurialism); *see also* *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780-81 (D.C. Cir. 2002) (holding that a complete lack of entrepreneurial opportunity was sufficient to create a presumption of employee status under the Act).

102. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (stating that an agency relationship is defined and constrained by the control exacted by a principal); *see also* *N. Am. Van Lines v. NLRB*, 869 F.2d 596, 600 (D.C. Cir. 1989) (criticizing the NLRB for confusing control of the manner and means performance with control that an employer might exert over the end product or service).

103. *See Fed Ex Home Delivery*, 563 F.3d at 508 (Garland, J., dissenting) (noting that of the circuit court opinions which attempt to stray from longstanding agency law principles, the majority only cited *Corporate Express*); *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968) (reiterating the congressional preference for using general principles of agency law to determine the NLRB's jurisdiction over employees).

104. *Contra FedEx Home Delivery*, 563 F.3d at 504 (Brown, J.) (finding that the factors supporting employee status under the Act pursuant to the right-to-control test were "clearly outweighed" by the drivers' entrepreneurial opportunities).

*FedEx*.<sup>105</sup> The D.C. Circuit, however, chose to rely substantially on its holding in *Corporate Express* in vacating the Board's decision that the drivers were statutory employees under the Act.<sup>106</sup> The court determined that the Board had erred by not giving appropriate weight to evidence that the delivery drivers could additionally profit from their positions, either by having more than one route or by selling the contractual rights to their route.<sup>107</sup>

*Corporate Express*, however, does not support a conclusive shift in emphasis of the employee determination away from the common law factors, because in that case, the entrepreneurial opportunity that the employees lacked related to scheduling, as opposed to discrete opportunities to profit from one's position.<sup>108</sup> In *FedEx*, the delivery drivers equally lacked entrepreneurial opportunity as it was defined in *Corporate Express* due to the substantial amount of control that FedEx exercised over the timing of driver deliveries.<sup>109</sup> Put simply, *Corporate Express* stands for the proposition that an entrepreneurial opportunity inhering in the manner and means of the performance of work tasks is an aspect of, but does not take the place of, the right-to-control test.<sup>110</sup> In contrast, the *FedEx* court read *Corporate Express* to explicitly shift the emphasis of the employee determination away from a test that hinges on an employer's control over the manner and means of work performance.<sup>111</sup>

Under the right-to-control test, the ten factors listed in the Restatement are non-exhaustive and no single factor is determinative.<sup>112</sup> Therefore, factors that may be very important in one case may be less important or

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105. *Compare City Cab Co. of Orlando v. NLRB*, 628 F.2d 261, 266 (D.C. Cir. 1980) (citing extensive appearance requirements as a strong indicium of employee status), with *FedEx Home Delivery*, 563 F.3d at 500 (regarding stringent appearance requirements as unpersuasive under a test that favors entrepreneurialism).

106. *See FedEx Home Delivery*, 563 F.3d at 497 (stating that the "unwieldy" nature of the control inquiry justified the shift to entrepreneurial opportunity as a proxy for the right-to-control test).

107. *Id.* at 501.

108. *See id.* at 508 (Garland, J., dissenting) (arguing that *Corporate Express* does not stand for the broad shift claimed by the majority).

109. *See id.* at 499 n.5 (Brown, J.) (noting that FedEx mandates that drivers provide service five days a week and leave their vans overnight to be stocked with packages). *But cf.* *N. Am. Van Lines v. NLRB*, 869 F.2d 596, 600 (D.C. Cir. 1989) (finding that a driver's complete control over her appearance indicated that she was an independent contractor).

110. *See Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777, 779-80 (D.C. Cir. 2002) (analyzing the common law factors indicating control over the manner and means of work performance before discussing entrepreneurialism).

111. *See FedEx Home Delivery*, 563 F.3d at 501 (positing that the shift to entrepreneurialism is an evolution from the common law right-to-control test).

112. *See NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968) (declaring that there is no short-hand formula for determining employee status for purposes of the NLRA and all incidences of the relationship must be weighed).

even non-existent in another context.<sup>113</sup> Moreover, both the Supreme Court and the Board have emphasized the Board's lack of power to change the right-to-control test.<sup>114</sup> Even if, as the D.C. Circuit suggests, the Board urged a shift in emphasis away from the right-to-control test towards entrepreneurialism in *Corporate Express*, it did so erroneously because the Board would not be undertaking the central inquiry into control that forms the core of the law of agency.<sup>115</sup>

According to the *FedEx* court, a substantial showing of entrepreneurial opportunity on the part of a putative employee will outweigh a strong showing of employer control under the right-to-control test.<sup>116</sup> As demonstrated by the adverse congressional response to *Hearst Publications* in the Taft-Hartley Amendments, reemphasizing the employee determination under the NLRA away from the control inquiry at the core of agency law is contrary to express congressional intent.<sup>117</sup> The effect of such a shift by the D.C. Circuit away from common law agency principles effectively removes persons that Congress considered to be employees from the protections of the NLRA.<sup>118</sup>

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113. See *Dial-A-Mattress Operating Corp.*, 326 N.L.R.B. 884, 891 (1998) (holding that not all factors will present themselves in every case under the common law right-to-control test).

114. See *NLRB v. Town & Country Elec.*, 516 U.S. 85, 94 (1995) (holding that courts must review the Board with careful scrutiny when it appears they have deviated from the common law principles of agency); see also *Dial-A-Mattress Operating Corp.*, 326 N.L.R.B. at 894 (noting, in the wake of *Town & Country Electric*, that the NLRB is powerless to deviate from the common law principles of agency law for determining the NLRB's jurisdictional authority).

115. See *St. Joseph News-Press*, 345 N.L.R.B. 474, 477-78 (2005) (remarking that Supreme Court precedent has long held that the common law right-to-control test is not only the test to determine employee status for purposes of the NLRA, but that the NLRB is not capable of deviating from that test); see also *FedEx Home Delivery*, 563 F.3d at 510 (Garland, J., dissenting) (stating that pursuant to *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), only the NLRB or the Supreme Court has the authority to change the emphasis of the test used to determine employee status for purposes of the NLRA).

116. See *FedEx Home Delivery*, 563 F.3d at 503 (Brown, J.) (holding that even barring the common law factors, the entrepreneurial opportunity afforded delivery drivers makes the case "particularly straightforward").

117. See *United Ins. Co. of Am.*, 390 U.S. at 256 (noting that after *NLRB v. Hearst Publications, Inc.*, Congress passed the Taft-Hartley Amendments to the NLRA to expressly instruct courts and the NLRB to apply the common law principles of agency).

118. See *Town & Country Elec.*, 516 U.S. at 94 (favoring a broad interpretation of the term employee for the purposes of the NLRA); see also 29 U.S.C. § 152(3) (2006) (making very few exclusions from the understanding of "employees" under the NLRA).

*B. The Employee Determination Is Best Left to the Right-to-Control Test's Analysis of the Manner and Means of an Employee's Work Performance*

Although neither appellate courts nor the NLRB may necessarily shift the employee determination towards a test that eschews the common law right-to-control inquiry, entrepreneurial opportunity for gain or loss is still a factor within the context of the control test.<sup>119</sup> Since the dispositive question under the right-to-control test asks who controls the manner and means of work performance, an individual who possesses an entrepreneurial stake in that performance is more likely to be considered an independent contractor than an employee.<sup>120</sup> The D.C. Circuit erred in deciding that the entrepreneurial opportunity afforded FedEx's delivery drivers was determinative because those opportunities were not tied to the manner and means of work performance, but rather to contractual rights governing the employee-employer relationship.

Entrepreneurial opportunity aids the employee determination under the NLRA within the multifactor right-to-control test when the principal thrust of the test is preserved.<sup>121</sup> The twin criteria, which strike at the heart of who controls the manner and means of performance, are: (1) whether the putative employee is in fact a separate and distinct entity from the employer; and (2) whether the putative employee has the opportunity to work smarter, rather than harder, to increase her compensation.<sup>122</sup>

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119. *See Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002) (interpreting the right-to-control test to encompass entrepreneurialism); *accord N. Am. Van Lines v. NLRB*, 869 F.2d 596, 599-600 (D.C. Cir. 1989) (noting that an examination of entrepreneurialism aids the employee determination under the right-to-control test).

120. *Compare C.C. Eastern v. NLRB*, 60 F.3d 855, 858 (D.C. Cir. 1995) (citing *Local 777, Democratic Union Org. Comm. Seafarers Int'l Union of N. Am. v. NLRB*, 603 F.2d 863, 873 (D.C. Cir. 1978)) (stating that the extent of supervision over the manner and means of the workers' performance is the most important element to be considered), *with N. Am. Van Lines*, 869 F.2d at 599-600 (vacating the NLRB's finding of employee status, in part, because of the significant entrepreneurial risks assumed by the putative employees over the exercise of the manner and means of performance).

121. *See Town & Country Elec.*, 516 U.S. at 94 (holding that considerable deference is given to the NLRB when interpreting the statutory context of the NLRA according to the principles of agency law); *see also NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968) (affirming that Congress intended for the NLRB to make employee status determinations in accordance with the principles of agency law).

122. *See generally* RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006) (noting that employee status accrues when the "principal controls or has the right to control the manner and means of the agent's performance of work"); *see also* RESTATEMENT (THIRD) OF EMP. LAW § 1.01 cmt. a (2009) (Second Tentative Draft) (noting that the Supreme Court has held on many occasions that the right-to-control test seeks to determine whether an individual is providing services as an independent business).

*1. An Individual Who Holds Herself out as a Separate and Distinct Business Entity Is Inherently an Independent Contractor*

When the D.C. Circuit turned away from the right-to-control test in favor of entrepreneurialism, the court did so without regard for one of the basic purposes behind the test: if the employer relinquishes enough control to classify an individual as an independent contractor, that individual most likely will be a separate and distinct entity from the employer.<sup>123</sup> D.C. Circuit jurisprudence has traditionally hinged on the independence of the workers in question when applying the right-to-control test.<sup>124</sup> As the D.C. Circuit noted in both *Local 221* and *C.C. Eastern*, the core of the independent contractor analysis focuses on whether the individual is actually independent from the employer during their employment.<sup>125</sup> Unlike the drivers in *FedEx*, the drivers in *Local 221* were free to choose whether they would provide or even complete their services on any given day without fear of reprisal.<sup>126</sup> Furthermore, in *C.C. Eastern*, neither the drivers nor their machines were governed by any meaningful appearance requirement to identify them as C.C. Eastern employees.<sup>127</sup> However, in *FedEx*, the D.C. Circuit failed to consider that it was precisely their FedEx emblazoned uniforms and heavily trademarked vehicles that would distinguish the delivery drivers in the eyes of the public.<sup>128</sup> FedEx also contractually mandated that the drivers provide vehicles and work performance five days a week—the equivalent length of the standard work

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123. See RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958) (listing various factors to consider in determining whether an individual is an independent contractor); RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. f (2006) (observing that an agent engaged in a distinct business or occupation provides indicia of independent contractor status); see also RESTATEMENT (THIRD) OF EMP. LAW § 1.01 (2009) (Second Tentative Draft) (stating that when one renders services outside the employer’s “entrepreneurial control over the manner and means by which the services are performed,” she lacks indicia of employee status).

124. See, e.g., *C.C. Eastern*, 60 F.3d at 858 (declaring that the right-to-control test is largely a function of the amount of supervision exercised by the employer over the means and manner of work performance and that steps to “monitor, evaluate, and improve the results” of work fall outside the scope of true supervision).

125. See *Town & Country Elec.*, 516 U.S. at 94 (holding that “moonlighting,” or performing another job outside the hours of normal employment, in no way weighs upon the employer-employee analysis for purposes of the NLRA).

126. See *Construction Employees Union, Local 221 v. NLRB*, 899 F.2d 1238, 1242 (D.C. Cir. 1990) (emphasizing that the drivers’ complete independence to choose when and if they would work was an important part of the court’s right-to-control analysis).

127. See *C.C. Eastern*, 60 F.3d at 858 (finding this factor—a general lack of uniformity—influential in the right-to-control analysis because it indicated independence).

128. Compare *N. Am. Van Lines v. NLRB*, 869 F.2d 596, 600 (D.C. Cir. 1989) (finding that the lack of appearance requirements to identify the cabs weighed in favor of independent contractor status), with *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 500 (D.C. Cir. 2009) (mentioning, in passing, the appearance requirements for “man and machine” to display FedEx’s logo as specified per the contract).

week.<sup>129</sup>

Independence from the principal is one of the primary concerns of agency law; therefore any inquiry must uncover how independent an individual truly is from her principal to sustain her designation as an independent contractor.<sup>130</sup> The agency concept of apparent authority envisions those instances when an agent's actions will incur liability for her principal.<sup>131</sup> Thus, the less independent the agent appears, the more she will engender reliance in third parties that her actions are on behalf of her apparent principal.<sup>132</sup> The D.C. Circuit failed to consider that a shift towards entrepreneurialism, on its own, does not account for the independence inquiry mandated under agency law.<sup>133</sup>

Furthermore, workers who have no independent control over the manner and means of their performance are likely not distinct or separate enough from their principal to be considered independent contractors.<sup>134</sup> As the D.C. Circuit correctly noted, even though FedEx does not designate its delivery drivers' routes, it does assign packages to be delivered and gives only limited opportunities for drivers to deviate from their scheduled deliveries on a daily basis.<sup>135</sup>

Finally, FedEx maintains ultimate control over almost all of the avenues through which its delivery drivers may exercise their purported entrepreneurial interest.<sup>136</sup> Though drivers may arrange for substitutes and

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129. See *FedEx Home Delivery*, 563 F.3d at 499 n.5 (noting that drivers were "only obligated" to provide their services to FedEx five days a week, leaving them open, in the off time, to engage in other delivery activities).

130. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006).

131. See *id.* § 3.03 (stating that apparent authority is created when a third party reasonably believes the agent to be authorized to bind the principal).

132. See *id.* § 7.07 cmt. c (defining independent courses of conduct outside of employment as being outside an employer's liability).

133. See *C.C. Eastern v. NLRB*, 60 F.3d 855, 858, 860 (D.C. Cir. 1995) (delving into the intricate analysis of supervision required under the right-to-control test by, for example, distinguishing incentive programs geared to motivate workers and increase overall quality from genuine supervision over how one's tasks are accomplished).

134. See *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366, 381 (D.C. Cir. 1983) (deciding that cab drivers were independent contractors, even though they had no equity stake in their vehicles or contracts, because they were left to conduct ninety-five percent of their business independently of their putative employer).

135. Compare *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 500-01 (D.C. Cir. 2009) (noting that FedEx not only controlled how many packages each delivery driver would be responsible for daily, but also that drivers could only refuse packages in two specific circumstances limited by FedEx's discretion), with *N. Am. Van Lines v. NLRB*, 869 F.2d 596, 597-98 (D.C. Cir. 1989) (holding that delivery truck drivers were independent contractors, in part, because they had no set load and the drivers had to be convinced through use of "threats and promises of benefits" to carry particular loads).

136. See *FedEx Home Delivery*, 563 F.3d at 499 (stating that replacement drivers may be installed, but only so as long as they are "qualified" pursuant to FedEx's standard).

may even sell their routes, FedEx still holds substitutes to the same basic performance standards to which it holds its delivery drivers.<sup>137</sup> This veto power leaves little room for the drivers to exercise their replacement opportunities independently.

Since independence goes hand-in-hand with independent contractor status, the D.C. Circuit substantially strayed from this central tenet of agency law by focusing instead on entrepreneurialism, which on its own does not account for the independence inquiry envisioned by Congress and affirmed by decades of precedent.<sup>138</sup> FedEx does not give drivers the opportunity to increase their daily compensation because it controls the manner and means of employment.<sup>139</sup> Only those individuals who have an entrepreneurial opportunity stemming from their independence should have the protections of the NLRA withheld from them.

## *2. Entrepreneurial Opportunity Attaches to Employees Who Are Afforded the Right to Work Smarter—Not Harder—to Increase Compensation*

Another critical distinction between employees and independent contractors under the right-to-control test is that independent contractors may increase their compensation by working smarter, not just harder.<sup>140</sup> The D.C. Circuit crafted and struggled to apply this distinction in both *Corporate Express* and *FedEx*.<sup>141</sup> The delivery drivers at issue in *FedEx*, however, have no entrepreneurial interest in the manner and means of their performance and, thus, are only afforded the opportunity to work harder for increased compensation by delivering more packages in the same amount of time they are allotted to deliver their normal load.<sup>142</sup>

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137. See *FedEx Home Delivery*, N.L.R.B. Cases 1-RC-22034, 1-RC-22035, at 32 (Sept. 20, 2006) (dictating that replacement drivers must meet standards outlined by FedEx pursuant to the operating agreement with the delivery drivers).

138. See *FedEx Home Delivery*, 563 F.3d at 517 (Garland, J., dissenting) (observing that neither *Corporate Express* nor *C.C. Eastern* used entrepreneurialism to shift emphasis fundamentally away from the right-to-control test's independence inquiry).

139. See *id.* at 500-01 (Brown, J.) (conceding, through a recitation of factors that favor employee status under the manner and means inquiry, that FedEx's business model is distinguishable from other delivery driver cases where employee status was not found to exist by the NLRB).

140. See *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002) (observing that an entrepreneur is afforded the opportunity to take advantage of their independence from their principal to practice ingenuity in the economic risks they take).

141. See *FedEx Home Delivery*, 563 F.3d at 503 (suggesting that applying the concept of working smarter, not harder is consistent with *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254 (1968)).

142. See *FedEx Home Delivery*, 563 F.3d at 515-16 (Garland, J., dissenting) (noting that FedEx constrains their delivery driver's entrepreneurial opportunity to assign the contractual rights of their routes to others); see also *C.C. Eastern v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995) (holding that workers' theoretical rights for entrepreneurialism do not add weight to their status as independent contractors).

Like individuals who are paid per piece they produce, or “piece-rate,” the FedEx drivers are only accorded the opportunity to work harder, not smarter to increase their compensation.<sup>143</sup> Piece-rate work has long been recognized as supporting an individual’s status as an employee under the NLRA.<sup>144</sup> The question therefore turns to the means by which individuals can increase piece-rate production and, in turn, compensation.<sup>145</sup>

FedEx controls the number of packages that drivers may deliver in one day.<sup>146</sup> Even during peak season, when drivers typically hire helpers to assist in delivering their extra package load, their compensation is not necessarily increased despite the increased cost of the hired helper.<sup>147</sup> The D.C. Circuit may have articulated one way to consider entrepreneurialism, however, the court failed to apply this distinction to the only actual means by which drivers may increase their compensation: delivering additional packages.<sup>148</sup> Instead, the D.C. Circuit analyzed the ability of the delivery drivers to either expand their contractually covered routes or sell their vehicles and contracts to another individual, even though these actions have no impact on how many packages they can deliver, and thus, their compensation.<sup>149</sup> In failing to focus on the actual performance of work tasks, the D.C. Circuit did not engage in the central analysis needed for jurisdictional purposes of the NLRA: whether the ability to work smarter, rather than harder, is retained by the drivers through their control over the manner and means of work performance.<sup>150</sup>

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143. See *FedEx Home Delivery*, N.L.R.B. Cases 1-RC-22034, 1-RC-22035, at 21-22 (Sept. 20, 2006) (detailing how delivery drivers are paid per stop and per package delivered).

144. See *Scotfield v. NLRB*, 394 U.S. 423, 435 (1969) (ruling that a union committed an unfair labor practice by bargaining for higher piece-rate compensation for bargaining unit employees); see also *Bethlehem Steel Co. v. NLRB*, 120 F.2d 641, 654 (D.C. Cir. 1941) (sustaining an NLRB remedial order for unfair labor practices committed against piece-rate employees).

145. See *Coronet Casuals, Inc.*, 207 N.L.R.B. 304, 323 (1973) (holding that piece-rate work is a mandatory subject of bargaining because it affects the terms and conditions of employment).

146. See *FedEx Home Delivery*, 563 F.3d at 512 (Garland, J., dissenting) (reiterating the NLRB Regional Director’s findings that FedEx not only fixes the routes and packages which the delivery drivers are responsible for, but also retains the contractual right to unilaterally reconfigure a driver’s territory).

147. See *FedEx Home Delivery*, Cases 1-RC-22034, 1-RC-22035, at 28-29 (noting that drivers usually make use of FedEx’s temporary driver service when finding replacements or supplemental drivers and, further, that supplemental drivers are hired when the volume of packages each driver is expected to deliver per day increases during the Christmas holiday season).

148. See *id.* at 19, 21-24 (stating that drivers may request to deliver more packages from FedEx, after which FedEx can reconfigure the drivers’ routes).

149. See *FedEx Home Delivery*, 563 F.3d at 499-500 (finding that drivers’ option to service additional routes, even if unexercised, was more substantial than the control that FedEx exerted over the drivers).

150. See *id.* at 500 (emphasizing the “novel” opportunity for drivers to legally assign

*C. The NLRB Should Be Afforded the Most Deference when It Has Chosen Between Two Fairly Conflicting Viewpoints and Applied Well-Settled Law*

The Supreme Court has long held that appellate courts should grant the NLRB considerable deference when interpreting the NLRA as long as the NLRB has chosen between two fairly conflicting views and has properly applied the law.<sup>151</sup> The D.C. Circuit, however, set aside the NLRB's determination that FedEx's delivery drivers are statutory employees for two reasons. First, the D.C. Circuit held that pursuant to *Corporate Express*, the NLRB was required to emphasize the delivery drivers' entrepreneurial opportunities.<sup>152</sup> Second, the D.C. Circuit found that the NLRB erred by not allowing FedEx to introduce evidence that would speak to system-wide opportunities for entrepreneurialism.<sup>153</sup> Both the decision to exclude evidence and the NLRB's application of the right-to-control test are well within the broad range of authority granted to the NLRB for the purposes of effectuating the NLRA.<sup>154</sup> Furthermore, because the evidence considered properly spoke to the manner and means of performance work tasks, the NLRB rightly came to the conclusion that the driver's entrepreneurial opportunity, in terms of the transferability of their employment contracts, did not render them independent contractors.<sup>155</sup> Finally, the D.C. Circuit's rationale in *Corporate Express*, namely the "shift" to entrepreneurialism, was not relied upon at the agency level. This brings the decision into direct conflict with the rule commanding that "in dealing with a determination or judgment which an administrative agency alone is authorized to make," a reviewing court "must judge the propriety of such action solely by the grounds invoked by the agency."<sup>156</sup>

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their contractual rights to service a particular route for FedEx over the traditional manner and means inquiry).

151. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (withholding from appellate courts the ability to review NLRB orders *de novo*, even if the reviewing court would have reached a different conclusion).

152. See *FedEx Home Delivery*, 563 F.3d at 503 (holding that *Corporate Express* explicitly shifted the test for employee status to one favoring entrepreneurial opportunity for gain or loss).

153. See *id.* at 504 (finding that the NLRB's failure to consider nationwide data of FedEx delivery drivers' sale of route contracts warranted reversal of the employee status determination).

154. See *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324 (1994) (holding that the NLRB's views are entitled to the greatest deference); see also *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (holding that courts and agencies alike must yield to the intent of Congress when it has unambiguously expressed its intent).

155. See *NLRB v. Town & Country Elec.*, 516 U.S. 85, 94 (1995) (asserting that broad interpretation of the term employee is favored for purposes of the NLRA consistent with common law of agency); see also *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (granting great deference to the NLRB for purposes of defining an employee).

156. See *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947) (holding that an

Since the Board has no specialty in agency law that a federal appellate court lacks, a reviewing circuit court is required to give the NLRB deference to the extent that the NLRB has chosen between two fairly conflicting views.<sup>157</sup> However, when the D.C. Circuit failed to give the Board deference in its finding that FedEx had committed unfair labor practices, the court employed its own test for employee status that did not comport with agency principles.<sup>158</sup> Therefore, the D.C. Circuit erred in reversing the NLRB's determination without fully explaining why the NLRB's application of the right-to-control test was unreasonable.<sup>159</sup>

Additionally, the Supreme Court has favored a broad interpretation of the term employee for purposes of the NLRA.<sup>160</sup> Accordingly, the Court has mandated that only if the NLRB's decision is not based upon the principles of agency law do appellate courts examine the NLRB's determination of employee status.<sup>161</sup>

When the NLRB did not allow FedEx to introduce nationwide evidence of drivers exercising entrepreneurial opportunities through the transfer of their employment contract to a third party, they did so properly because the evidence had no bearing on the manner and means of work performance.<sup>162</sup> The evidence excluded by the NLRB was irrelevant to the representational decision under the principles of the law of agency; the D.C. Circuit, as a

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executive agency's decision may only be judged on the basis of the rationale contained within that decision and that a court may not substitute its own wisdom, out of respect for separation of powers); *see also* Corp. Express Delivery Sys., 332 N.L.R.B. 1522, 1522 (2000) (finding that the individuals at issue were employees for purposes of section 2(3) after applying the common law right-to-control test).

157. *Cf.* N. Am. Van Lines v. NLRB, 869 F.2d 596, 599 (D.C. Cir. 1989) (stating that the D.C. Circuit will not grant the NLRB great, or even normal, deference).

158. *See* FedEx Home Delivery v. NLRB, 563 F.3d 492, 509 (D.C. Cir. 2009) (Garland, J., dissenting) (proposing that the NLRB has consistently fulfilled its statutory obligation for employee determination by utilizing the right-to-control test and not a test that favors entrepreneurialism).

159. *See id.* at 500-01 (majority opinion) (ignoring vast factual findings by the NLRB's Regional Director to hold that FedEx control over the manner and means of work performance is insufficient to override the evidence that delivery drivers may sell their route contracts to a third party at a profit).

160. *See, e.g.,* *Sure-Tan, Inc.*, 467 U.S. at 891 (stating that the NLRB is the agency chosen by Congress to administer the NLRA and to define its scope through its interpretation of the term employee).

161. *See* NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968) (acknowledging the deference given to the NLRB's construction of the term employee under the NLRA, so long as that construction has its foundation in the principles of the common law of agency).

162. *See* FedEx Home Delivery, N.L.R.B. Cases 1-RC-22034, 1-RC-22035 at 40, 44 (Sept. 20, 2006) (noting that contractual rights to sell a delivery route are not sufficient to establish independent contractor status); *accord* Roadway Package Sys., Inc., 326 N.L.R.B. 842, 846-47 (1998) (holding that the right of a person to sell her contractual rights pertaining to providing service for the putative employer does not bear on the employer's control of the individual).

practical matter, owed the NLRB's decision considerable deference.<sup>163</sup>

*D. The D.C. Circuit Has Created a Substantial Circuit Split in Applying Section 2(3)*

With the exception of the D.C. Circuit, the other courts of appeals continue to apply the multi-factor analysis mandated under the right-to-control test to determine employee status under the NLRA.<sup>164</sup> Both the Ninth and the Sixth Circuits, which have both heard cases relating to employee status after the D.C. Circuit's decision in *Corporate Express*, chose not to shift their analysis to entrepreneurialism.<sup>165</sup> In both those cases, a shift to entrepreneurialism could have affected the outcome.<sup>166</sup> Since *FedEx* expressly shifted the analysis of the factual context of employment away from the right-to-control test toward entrepreneurial opportunity, the D.C. Circuit has created a circuit split under which individuals could be independent contractors in one circuit, but employees in another.<sup>167</sup>

Both *Time Auto* and *Friendly Cab* had several elements in common with *FedEx*, including the contractual label of "independent contractor" assigned to the drivers; however only the D.C. Circuit used such elements to shift its emphasis toward entrepreneurialism by making it dispositive.<sup>168</sup> Like their counterparts in *FedEx*, the drivers in *Time Auto* not only had the ability to hire substitutes to work on their behalf, but they could even take the extra

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163. See *NLRB v. Town & Country Elec.*, 516 U.S. 85, 94 (1995) (maintaining that the NLRB receives considerable deference for its interpretation of the outer limits of the term employee).

164. See, e.g., *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1096-97 (9th Cir. 2008) (reaffirming the Supreme Court's preference for the right-to-control test for purposes of the NLRA).

165. See *id.* at 1099-1101 (continuing to look to all the incidences of the work relationship, including entrepreneurial opportunities); *Time Auto Transp. v. NLRB*, 377 F.3d 496, 499-500 (6th Cir. 2004) (continuing to apply the right-to-control test's multifactor analysis).

166. Compare *Friendly Cab Co.*, 512 F.3d at 1097-98 (noting that the fact that drivers were able to keep all fares and tips in exchange for a flat rental for their vehicles created a strong inference of independent contractor status that overcame the drivers' lack of control in other respects), with *FedEx Home Delivery v. NLRB*, 563 F.3d 498-500 (D.C. Cir. 2009) (observing that the ability of drivers to expand and assign their rights and duties under their contract with FedEx demonstrated that the drivers were independent contractors regardless of factors under the right-to-control test).

167. See *Petition for Rehearing*, *supra* note 8, at 7 (urging the D.C. Circuit to avoid a circuit split that was inconsistent with Supreme Court authority by rehearing *FedEx*).

168. Compare *FedEx Home Delivery*, 563 F.3d at 499 (declaring that the ability to hire substitutes was a significant factor in validating a shift towards entrepreneurialism), with *Time Auto Transp.*, 377 F.3d at 499 (declining to focus on the drivers' ability to hire substitutes in favor of the other factors present under the right-to-control test).

step of independently incorporating.<sup>169</sup> However, in both *Time Auto* and *Friendly Cab*, the courts were more concerned with applying the principles of agency under the right-to-control test, which includes an inquiry into the entrepreneurial opportunities for gain or loss, rather than shifting their emphasis towards entrepreneurialism alone.<sup>170</sup> Significantly, when the *Friendly Cab* court undertook its entrepreneurialism analysis, it relied heavily on the D.C. Circuit's decision in *Corporate Express*, but still did not go as far as shifting away from an inquiry into who controls the manner and means of work performance.<sup>171</sup>

In their application of the facts to law, both the *Time Auto* and *Friendly Cab* courts reached conclusions contrary to decisions they might have made had they focused on entrepreneurialism like the *FedEx* court. The factors that the D.C. Circuit found unpersuasive under their entrepreneurial opportunities test tipped the balance for both the Ninth and Sixth Circuits in determining that the NLRB had correctly designated the drivers as employees under the traditional right-to-control test.<sup>172</sup> In *FedEx*, *Time Auto*, and *Friendly Cab*, the respective companies had strict appearance requirements, disciplinary regimes to promote drivers' performance, and the ability to unilaterally terminate their relationships with the drivers for poor performance.<sup>173</sup> However, in none of these cases did the employer set a route or dictate the way that driving would be performed.<sup>174</sup> In all three cases, the employer had ultimate control over the amount of work performed in a given day and, therefore, over the amount of compensation each driver could expect to receive for a given day's work.<sup>175</sup>

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169. See *Time Auto Transp.*, 377 F.3d at 499-500 (noting that the elements of control that Time Auto exercised over its drivers warranted a finding of employee status, despite the presence of some hallmarks of entrepreneurialism).

170. See *id.* at 499 (relying on *United Insurance Co. of Am.* as the basis for applying the right-to-control test); see also *Friendly Cab Co.*, 512 F.3d at 1095-96 (upholding the NLRB because it properly applied the law of agency in making the determination).

171. See *Friendly Cab Co.*, 512 F.3d at 1097-98 (understanding the analysis of entrepreneurialism as one additional factor under the right-to-control test of *Corporate Express*).

172. See, e.g., *FedEx Home Delivery*, 563 F.3d at 500-01 (passing over strict appearance requirements as furthering customer service goals rather than demonstrating control over the manner and means of performance).

173. See *Time Auto Transp.* 377 F.3d at 498 (finding that the drivers were terminable at will for poor performance and that drivers could be "starved out" by the company if they were unsatisfied with their performance); *Friendly Cab Co.*, 512 F.3d at 1101 (evaluating the extensive, mandatory dress code for drivers as evidence of employer control over the manner and means of performance).

174. See, e.g., *Time Auto Transp.*, 377 F.3d at 498 (observing that drivers were told when to drive, not how to drive).

175. Compare *FedEx Home Delivery*, N.L.R.B. Cases 1-RC-22034, 1-RC-22035, at 21-22, 40 (Sept. 20, 2006) (explaining that the drivers are paid by package delivered and that FedEx does not determine the size of their load), with *Time Auto Transp.*, 377 F.3d at 498 (finding the fact that drivers were forced to wait around for assignments

The only cognizable difference between *FedEx*, *Time Auto*, and *Friendly Cab* is the ability that FedEx's drivers had to transfer the contractual rights to their routes.<sup>176</sup> Even though FedEx provided evidence that its drivers had profited from such sales, the company still retained ultimate control to ratify or not ratify such transfers.<sup>177</sup> Because of the striking similarities between the factual context of *FedEx*, *Time Auto*, and *Friendly Cab*, it is likely that the other circuit courts would have achieved a different result under the right-to-control test and concluded that FedEx delivery drivers were statutory employees, protected for their union and concerted activities.<sup>178</sup>

#### IV. POLICY IMPLICATIONS AND SUGGESTIONS

The D.C. Circuit's decision in *FedEx* puts workers who are in the most danger of not receiving the protection of the NLRA at risk because NLRB classifications are not directly appealable under the NLRA to federal courts and because employers essentially now have a choice of law when defending unfair labor practices on the grounds of employee status under the NLRA.<sup>179</sup> In the best case scenario, this will prevent workers who would otherwise be classified under the NLRA as employees from enjoying protection for their union activity and attempts at collective bargaining.<sup>180</sup> In the worst case, this decision will encourage employers to preemptively engage in unfair labor practices against their "employees" in hopes of using their status as independent contractors under the NLRA as an affirmative defense on appeal in the D.C. Circuit, which always has jurisdiction over appeals from NLRB decisions.<sup>181</sup>

Common carriers—namely freight, delivery, and taxi drivers—have had the most trouble receiving protection under the NLRA.<sup>182</sup> Therefore, a test

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indicative of their employee status).

176. See *FedEx Home Delivery*, 563 F.3d at 500 (recognizing the novelty of contractual assignment of the employment contract under D.C. Circuit precedent).

177. See *FedEx Home Delivery*, Cases 1-RC-22034, 1-RC-22035, at 33 (constraining the ability to freely sell routes by virtue of the fact that FedEx must be willing to enter into a contract with the purchaser).

178. See *FedEx Home Delivery*, 563 F.3d at 502-03 (reemphasizing the shift towards entrepreneurial opportunities begun in *Corporate Express* to erase any doubt about the state of the law in the D.C. Circuit).

179. See 29 U.S.C. § 160(e) (2006) (stating that the NLRB's unfair labor practice proceedings may be reviewed by any of the United States Courts of Appeals or the Supreme Court).

180. See § 152(3) (excluding independent contractors from the rights guaranteed under section 7 of the NLRA).

181. See § 160(f) (allowing, in the alternative, review by the United States Court of Appeals for the circuit in which the alleged unfair labor practice occurred).

182. See *N. Am. Van Lines v. NLRB*, 869 F.2d 596, 601 (D.C. Cir. 1989) (defining truck drivers as exempt from the NLRA due to their independence); *Yellow Taxi Co.*

that hinges upon entrepreneurialism has the potential to be broadly cast and to further exclude these individuals who have struggled the most to find protection for their concerted activity and right to collectively bargain.<sup>183</sup> Moreover, whereas *FedEx* arose out of a refusal to bargain with the elected union representative, the whole gamut of unfair labor practices are susceptible to the affirmative defense that the aggrieved individuals are not actually employees.<sup>184</sup>

Additionally, FedEx's novel business plan comprises a nationwide network of almost 4,000 delivery drivers.<sup>185</sup> Because the D.C. Circuit always has jurisdiction over appeals of NLRB remedial orders for unfair labor practices, the *FedEx* decision has effectively prevented the unionization of more than just the delivery drivers at issue in *FedEx*.<sup>186</sup> In effect, the D.C. Circuit has created a precedent saying that the entire FedEx Home Delivery Corporation is free to carry on its principal task of delivering packages without hiring a single "employee."<sup>187</sup>

Furthermore, employees represented by unions may lawfully employ a far greater variety of tactics when bargaining with an employer, such as staging a strike, which an association of independent contractors could not do.<sup>188</sup> This is because independent contractors are not necessarily immune to antitrust laws like their employee counterparts, which limits the ability of FedEx's delivery drivers to negotiate over the terms and conditions of

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of *Minneapolis v. NLRB*, 721 F.2d 366, 384 (D.C. Cir. 1983) (holding taxi drivers to be independent contractors, even though they have no equity in their vehicles, due to lack of substantial employer control and driver control over the manner and means of performance). Compare *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780-81 (D.C. Cir. 2002) (holding that delivery drivers are statutory employees, in part, because of their lack of any significant entrepreneurial opportunity), with *FedEx Home Delivery*, 563 F.3d at 504 (ignoring the right-to-control test factors and deciding that delivery drivers are independent contractors due to their significant entrepreneurial opportunity with regards to the transferability of their employment contracts).

183. See *FedEx Home Delivery*, 563 F.3d at 516 (Garland, J., dissenting) (describing the majority's attempt to apply a test based on entrepreneurial opportunity as nothing more than a factual disagreement with the NLRB).

184. See *Time Auto Transp. v. NLRB*, 377 F.3d 496, 487 (6th Cir. 2004) (observing that the drivers were terminated for attempting to organize at union amongst themselves); *Corp. Express Delivery Sys.*, 292 F.3d at 780 (detailing that the order the NLRB sought to enforce was the reinstatement of drivers fired for the union activity).

185. *FedEx Home Delivery*, N.L.R.B. Cases 1-RC-22034, 1-RC-22035, at 6-8 (Sept. 20, 2006).

186. See 29 U.S.C. § 160(f) (2006) (granting employers the right to bring any unfair labor practice remedial order issued by the NLRB before the D.C. Circuit and use entrepreneurial opportunities as an affirmative defense to decertify the bargaining unit).

187. See *FedEx Home Delivery*, 563 F.3d at 503, 592 (holding that FedEx drivers, an essential part of the FedEx Home Delivery's normal operations, are not employees under the NLRA).

188. See generally §§ 157, 158(4) (granting employees the ability to act collectively to affect the terms and conditions of their employment without fear of discriminatory retaliation).

employment—a central protection afforded to individuals covered by the NLRA.<sup>189</sup>

The D.C. Circuit has fundamentally changed the focus of the employee determination under the NLRA from the expressly stated analytical framework espoused through passage of the Taft-Hartley Amendments.<sup>190</sup> Though the long-term effects are unknown, the short term effects have removed from almost 4,000 hard-working “employees,” duped into becoming entrepreneurs, the ability to seek the right to collectively bargain for the terms and conditions of their employment and any protection for their concerted activities to meet those ends.<sup>191</sup>

## V. CONCLUSION

The D.C. Circuit’s *FedEx* decision marks a shift away from the principles of the law of agency which have been used to determine who is covered by the NLRA since 1947.<sup>192</sup> The D.C. Circuit’s reliance on entrepreneurialism at the expense of the other factors considered under the common law right-to-control test is not only incorrect in light of the principles of the common law of agency, but also runs contrary to Supreme Court precedent. Accordingly, the Supreme Court should intervene to restore the test used for section 2(3) to the analytical framework that Congress intended and that courts have time and again approved.<sup>193</sup> Only when the Supreme Court chooses to address this issue will it have the opportunity to mitigate the fallout created by this fundamental shift away from the traditional interpretation of statutory employees under the NLRA and bring D.C. Circuit law into accord with the other circuits.<sup>194</sup> If not, the D.C. Circuit will continue to endorse the proposition that an employee in another circuit court is not necessarily an employee before the D.C. Circuit.

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189. See § 105 (exempting employees engaged in collective bargaining through an NLRB-certified labor union for liability under antitrust law).

190. See 93 CONG. REC. S6436, 6441-42 (daily ed. June 5, 1947) (statement of Sen. Taft) (indicating the Congressional intent to use the law of agency to determine the NLRB’s jurisdiction over employees).

191. See Todd D. Saveland, *FedEx’s New “Employees”: Their Disgruntled Independent Contractors*, 36 TRANSP. L.J. 95, 110-11 (2009) (suggesting that the onslaught of litigation undertaken by FedEx delivery drivers seeking representation before the NLRB is evidence of the drivers’ dissatisfaction with the terms and conditions of their employment).

192. See *FedEx Home Delivery*, 563 F.3d at 497 n.3 (marking a shift toward entrepreneurialism, away from the right to control the manner and means of work performance).

193. See, e.g., *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1096-97 (9th Cir. 2008) (holding that that the right-to-control test is *the* test to determine employee status for purposes of the NLRA).

194. See Petition for Rehearing, *supra* note 8, at 7 (noting that *FedEx* marks a departure from both Supreme Court precedent and circuit law).