Employment Law—FedEx Delivery Drivers Improperly Classified as Independent Contractors Rather than Employees—*Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014)

Employment law cases often present one particularly vexing issue: whether a worker should be classified as an employee or an independent contractor.[1] Under California law, this determination relies primarily on the common-law "right-to-control" test along with several secondary factors.[2] In *Alexander v. FedEx Ground Package System, Inc.*,[3] the Ninth Circuit Court of Appeals considered whether FedEx delivery drivers were misclassified as independent contractors under California's multi-factor right-to-control test.[4] A three-judge panel of the Ninth Circuit concluded that FedEx drivers should have been classified as employees.[5]

The relationship between FedEx and its delivery drivers is set forth within FedEx's Operating Agreement (OA).[6] The "Background Statement" of the OA expressly states that "the manner and means" through which drivers carry out their duties is left to the drivers and that no FedEx employee may "impose any term or condition on" the drivers.[7] Nevertheless, the OA goes on to specify extensive terms and conditions that the drivers must meet.[8] While the OA permitted drivers to operate multiple vehicles with FedEx's consent, it also allowed FedEx managers to conduct "four ride-along performance evaluations" annually, during which the managers recorded details as minute as whether drivers placed their keys on the pinky finger of their nonwriting hand when

1. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (dismissing ERISA's definition of employee as "completely circular and explain[ing] nothing"); FedEx Home Delivery v. NLRB, 563 F.3d 492, 497 (D.C. Cir. 2009) (describing common-law agency test as "unwieldy"); Griffin Toronjo Pivateau, *Rethinking the Worker Classification Test: Employees, Entrepreneurship, and Empowerment*, 34 N. ILL. U. L. REV. 67, 76, 84-94 (2013) (examining wide variety of legal tests used to classify workers).

2. *See* S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 404 (Cal. 1989) (recognizing primacy of right-to-control test and additional secondary factors).

3. 765 F.3d 981 (9th Cir. 2014).

4. *See id*. at 988 (noting parties agreed California's multi-factor test governed their relationship).

5. *See id*. at 988, 997 (holding employment status without disputed facts is question of law).

6. *See id*. at 984. Both FedEx and the drivers agreed that the OA governed the relationship between them; therefore, the court analyzed their relationship based on the terms of the OA, considering extrinsic evidence only in the limited number of areas where the OA was ambiguous. *See id.* at 988.

7. *See* 765 F.3d at 984 (quoting FedEx OA). The language in the "Background Statement" is supplemented by an additional provision unambiguously entitled "Discretion of Contractor to Determine Method and Means of Meeting Business Objectives." *Id*. (quotation marks omitted).

8. *See id*. at 984-87 (discussing additional terms and conditions imposed upon drivers). FedEx drivers are required to—among other things—deliver packages within a FedEx-negotiated window of time, paint their vehicles in a specific shade of "FedEx white," comply with comprehensive shelving dimensions within their vehicles, wear FedEx-designated uniforms, and remain clean shaven and free of body odor. *Id*.

delivering packages.[9] FedEx also retained the ability to unilaterally reconfigure the drivers' delivery route with five days' notice.[10]

A class of 2,300 FedEx drivers filed suit in California Superior Court alleging that FedEx misclassified them as independent contractors and they were thus entitled to unpaid wages and expenses associated with their work as employees.[11] FedEx removed the case to federal court, and the case was consolidated into multidistrict litigation (MDL) proceedings.[12] Following the drivers' motion for summary judgment to establish their employee status, the MDL court ruled that the drivers were independent contractors as a matter of law.[13] On appeal, the Ninth Circuit reversed the MDL court, holding instead that FedEx's extensive control over its drivers' work weighed in favor of the drivers' contention that they were employees.[14]

Despite the inherent need to properly classify workers in all industries—not only the delivery industry—courts and litigants are forced to apply a multitude of tests depending on the context and jurisdiction of the case at hand.[15] These tests range from the rigid and overly simplified "ABC test" used in

9. *See id*. at 985 (characterizing performance evaluations conducted by FedEx managers). While the FedEx manager would provide recommendations to the drivers immediately following the evaluations, FedEx argued that the drivers were free to "follow or disregard" the suggestions. *Id*.

10. *See id*. at 985 (describing FedEx's control over delivery routes). Although, pursuant to the OA, a driver could propose a plan to prevent reconfiguration, FedEx retained sole discretion in accepting or rejecting the driver's proposal. *Id*. Furthermore, in the event that a driver gained customers during reconfiguration, FedEx could "reduce that driver's pay to compensate" drivers who lost customers. *Id*. (outlining FedEx's power to alter pay following reconfiguration).

11. 765 F.3d at 984, 987. The drivers also included claims asserting that FedEx violated the federal Family and Medical Leave Act (FMLA). *Id*. at 987. Although the FMLA claims also included a question regarding the drivers' employment classification, those claims were settled and will not be discussed here. *See id*.

12. *Id*. at 987 (describing procedural history).

13. *Id*. (stating holding at MDL court).

14. *Id*. at 994, 997 (highlighting holding on appeal).

15. *See* Renee Inomata, *Perils of Misclassification of Workers as Independent Contractors*, *in* COMPLYING WITH EMPLOYMENT REGULATIONS: LEADING LAWYERS ON ANALYZING LEGISLATION AND ADAPTING TO THE CHANGING STATE OF EMPLOYMENT LAW, at *1-3 (2012 ed.), *available at* 2012 WL 3279180 (discussing importance and difficulties of properly classifying employees); Karen R. Harned et al., *Creating a Workable Legal Standard for Defining an Independent Contractor*, 4 J. BUS. ENTREPRENEURSHIP & L. 93, 99-104 (2010) (outlining various tests for employment classification); Marc R. Poulos et al., *Employees or Independent Contractors? A New Test for the Construction Industry*, 96 ILL. B.J. 206, 211 (2008) (concluding inconsistent laws make it difficult for employers and workers to classify employment relationship); Cliff E. Spencer, Comment, *Oregon's Independent Contractor Statute: A Legislative Placebo for Employers*, 31 WILLAMETTE L. REV. 647, 660-63 (1995) (describing challenges of creating uniform test in Oregon). Examples of the various tests include the right-to-control test, the economic-realities test, the "ABC test," the twenty-factor test applied by the Internal Revenue Service, and a hybrid of the common-law and economic realities test. *See* Harned et al., *supra*, at 100-04. Furthermore, classification of workers touches many different areas of employment law beyond minimum wage and overtime protection. *See* Inomata, *supra*, at *1. A worker's classification implicates whether an employer must pay payroll taxes, participate in workers' compensation and unemployment insurance, and provide a worker with benefits equal to those of other employees. *See id*. at *1-3. It also plays a role in determining whether safety and discrimination laws will protect the worker. *See id*. at *1.

Massachusetts and other jurisdictions to the unwieldy twenty-part test used by the Internal Revenue Service.[16] Nevertheless, most employment classification tests are still centered on the common-law right-to-control test.[17]

Under California law, the right-to-control test is employed, and the primary factor used to determine a worker's status hinges on "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired."[18] This test looks only to the employer's right to exercise control over the worker, and it does not take the employer's actual control into account.[19] Furthermore, contractual labels have no bearing on the worker's classification if the labels do not accurately represent the true relationship between the parties.[20]

After reviewing the relationship through the lens of the right-to-control test, California courts then consider several secondary factors.[21] While one or more

16. *Compare* MASS. GEN. LAWS ANN. ch. 149, § 148B (West 2014) (adopting three-part test to determine employment status), *with* Rev. Rul. 87-41, 1987-1 C.B. 296 (listing twenty-part classification test used by IRS). Each of the following three prongs of the "ABC Test" must be met for a worker to be classified as an independent contractor under Massachusetts law: the worker must be "free from control and direction" in the performance of a service, the service must be outside of the employer's "usual course of . . . business," and the worker must "customarily engage[] in an independently established trade, occupation, profession[,] or business of the same nature" as the service performed. MASS. GEN. LAWS ANN. ch. 149, § 148B(a). The IRS's twenty-factor test, on the other hand, calls for a varying degree of importance to be given to each factor "depending on the occupation and the factual context" of the service performed. Rev. Rul. 87-41, 1987-1 C.B. 296, at *4.

17. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (applying common-law test to ERISA's circular definition of employee); Jeffrey M. Hirsch, *Employee or Entrepreneur?*, 68 WASH. & LEE L. REV. 353, 354-55 (2011) (criticizing entrepreneurial-opportunities test as "rogue" approach compared to "long history" of common-law test); Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws To Include Independent Contractors*, 38 B.C. L. REV. 239, 252-53 (1997) (pointing to resurgence of common-law test in Title VII and ADEA cases); Pivateau, *supra* note 1, at 76 (commenting on widespread use of right-to-control analysis).

18. Tieberg v. Unemployment Ins. Appeals Bd., 471 P.2d 975, 977 (Cal. 1970) (explaining "principal test of an employment relationship"); *see also* S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 404 (Cal. 1989) (upholding common law right-to-control test used in *Tieberg*).

19. *See* Empire Star Mines Co. v. Cal. Emp't Comm'n, 168 P.2d 686, 692 (Cal. 1946) (highlighting authority to exercise control, not actual control, as indicative of employment), *overruled on other grounds by* People v. Sims, 651 P.2d 321 (Cal. 1982); *see also* RESTATEMENT (SECOND) OF AGENCY § 220(1) (1958) (emphasis added) (defining servant as worker subject to another's "control or *right* to control").

20. *See* S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 403 (Cal. 1989) (describing parties' labels as not dispositive); Kowalski v. Shell Oil Co., 588 P.2d 811, 815-16 (Cal. 1979) (rejecting terminology used in parties' contract as inconclusive); Estrada v. FedEx Ground Package Sys., Inc., 64 Cal. Rptr. 3d 327, 336 (Ct. App. 2007) (stressing contractual labels ignored if not emblematic of actual relationship); Truesdale v. Workers' Comp. Appeals Bd., 235 Cal. Rptr. 754, 759 (Ct. App. 1987) (rejecting labels used by parties).

21. *See* Tieberg v. Unemployment Ins. Appeals Bd., 471 P.2d 975, 979 (Cal. 1970) (discussing secondary factors used to determine employment relationship). These factors include:

> (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be

of these factors may lean in favor of one party over the other, none of the factors are singularly dispositive.[22] Notably absent from both the secondary factors and the primary right-to-control test is consideration of "entrepreneurial opportunity."[23]

In *Alexander*, the Ninth Circuit applied the traditional right-to-control test and secondary factors to the undisputed facts before it.[24] The court observed that the OA "unambiguously allow[ed] FedEx to exercise a great deal of control over the manner in which its drivers do their jobs," despite labels and contractual terms to the contrary.[25] The court went on to review the secondary factors, but it held that the secondary factors were outweighed by the primary right-to-control analysis.[26] Even viewing the secondary factors in the light most favorable to FedEx, the court held that the drivers were employees because of the amount of control FedEx had over them.[27]

The Ninth Circuit Court also rejected the entrepreneurial-opportunity test accepted by the D.C. Circuit and proffered by FedEx.[28] It noted that this test was not applicable in its jurisdiction and that, even if applied, entrepreneurial opportunity did not exist because FedEx had the absolute right to approve or reject any third party hired by one of the drivers.[29] Given the extensive amount

> performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.

Id.; *see also* RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958) (outlining secondary factors).

22. *See* Germann v. Workers' Comp. Appeals Bd., 176 Cal. Rptr. 868, 871 (Ct. App. 1981) (observing secondary factors not of equal weight and not applied mechanically).

23. *Compare* FedEx Home Delivery v. NLRB, 563 F.3d 492, 497 (D.C. Cir. 2009) (favoring test focused on "entrepreneurial opportunity for gain or loss" over common-law test), *with* 765 F.3d at 993 (rejecting entrepreneurial-opportunity test), *and* FedEx Home Delivery, 361 N.L.R.B. No. 55, at *1 (Sept. 30, 2014) (declining to treat entrepreneurial opportunity as "animating principal" of inquiry).

24. *See* 765 F.3d at 988-89 (considering California's common-law test in light of undisputed facts).

25. *Id*. at 989. The court noted that FedEx held substantial control over "the appearance of its drivers and their vehicles," the times its drivers worked, and the manner drivers delivered their packages. *Id*. at 989-90.

26. *See id*. at 994 (holding "powerful evidence" of FedEx's right to control its drivers outweighed secondary factors). The court went through an extensive, though somewhat perfunctory, analysis of the secondary factors to ultimately conclude that they did not strongly favor either party. *See id*. at 994-97.

27. *See id*. at 988 (concluding evidence supported drivers when viewing it in "light most favorable to FedEx").

28. *See* 765 F.3d at 993 (indicating entrepreneurial-opportunity test did not replace right-to-control test); Estrada v. FedEx Ground Package Sys., Inc., 64 Cal. Rptr. 3d 327, 337 (Ct. App. 2007) (rejecting FedEx's emphasis of entrepreneurial opportunities). Indeed, in *Estrada*, the California Court of Appeals analyzed the exact same OA that was at issue in *Alexander*, ultimately concluding that FedEx controlled "every exquisite detail of the drivers' performance." Estrada v. FedEx Ground Package Sys., Inc., 64 Cal. Rptr. 3d 327, 336 (Ct. App. 2007).

29. *See* 765 F.3d at 993-94 (declining to follow D.C. Circuit's use of entrepreneurial-opportunity test); *see also* Arzate v. Bridge Terminal Transp., Inc., 121 Cal. Rptr. 3d 400, 405-06 (Ct. App. 2011) (observing ability to hire additional drivers as not dispositive); *cf.* Ruiz v. Affinity Logistics Corp., 754 F.3d 1093, 1102-03 (9th Cir.) (emphasis added) (enunciating "*unrestricted* right to choose" additional drivers may evince independent contractor status), *cert. denied*, 135 S. Ct. 877 (2014).

of control granted to FedEx in the OA, the court appropriately rejected the OA's language classifying the drivers as independent contractors and correctly held that the drivers were employees under California law.[30]

Notwithstanding the use of different tests in other jurisdictions and contexts, the Ninth Circuit properly applied California's longstanding right-to-control test.[31] Through the OA, FedEx controls its drivers' appearance, vehicle, time and place of doing business, and delivery of packages from the truck to the customer.[32] Furthermore, the OA only allowed drivers to hire third parties with FedEx's consent and on the condition that the third-party drivers be "fully trained" and comply with the terms set forth in the OA.[33]

Setting aside the baseline requirements that FedEx drivers be able to operate a motor vehicle and deliver packages, the OA flatly provides FedEx with the right to control the manner and means with which its drivers carry out their work.[34] Furthermore, the OA's contractual labels and the secondary right-to-control factors are unavailing in the situation at hand.[35] Although the OA indicates that the drivers are independent contractors, the labels used in the OA are not dispositive, and the court appropriately ignored them in light of

30. *See* 765 F.3d at 989, 997 (rejecting label placed on drivers in OA and holding in favor of drivers).

31. *See* S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 404 (Cal. 1989) (affirming right-to-control test used in *Tieberg*); Tieberg v. Unemployment Ins. Appeals Bd., 471 P.2d 975, 977 (Cal. 1970) (employing right-to-control test used in *Empire Star*); Empire Star Mines Co. v. Cal. Emp't Comm'n, 168 P.2d 686, 692 (Cal. 1946) (setting forth right-to-control as primary factor over half century ago), *overruled on other grounds by* People v. Sims, 651 P.2d 321 (Cal. 1982); Estrada v. FedEx Ground Package Sys., Inc., 64 Cal. Rptr. 3d 327, 335 (Ct. App. 2007) (upholding standard right-to-control analysis as recently as 2007).

32. *See* 765 F.3d at 989-90 (describing OA's terms). With regard to appearance, the OA requires that drivers be "free of body odor," and it specifies the uniform—from head to toe—that drivers must wear, leading the Ninth Circuit to conclude that "FedEx's detailed appearance requirements clearly constitute control over its drivers." *Id*. at 989. The court further noted that FedEx's vehicular requirements went "well beyond those imposed by federal regulations," requiring that the vehicle be free from damage, have particular shelving dimensions, and be a "specific shade of white." *Id*. FedEx also had substantial control over the time in which packages were loaded onto the vehicle and when the packages were delivered to customers. *Id*. at 984-85. FedEx's managers were enabled to enforce these requirements and prevent a driver from working if the driver was not in compliance. *Id*. at 989. Although suggestions made during ride-along evaluations were not binding on the drivers, inspections so exacting that they focus upon where drivers place their keys when delivering a package evince a significant degree of control, especially when considering FedEx's carte blanche ability to reconfigure a driver's route. *Id*. at 985, 990.

33. *See id*. at 985-86 (discussing drivers' ability to hire third parties).

34. *See id*. at 997 (holding FedEx had "broad right" over manner and means of performance); Estrada v. FedEx Ground Package Sys., Inc., 64 Cal. Rptr. 3d 327, 336 (Ct. App. 2007) (holding "every exquisite detail" controlled by FedEx). In *Estrada*, the appellate court accepted the trial court's finding that FedEx's control over its drivers was nearly absolute. Estrada v. FedEx Ground Package Sys., Inc., 64 Cal. Rptr. 3d 327, 334 (Ct. App. 2007).

35. *See* 765 F.3d at 996-97 (rejecting express contractual labels and placing greatest emphasis upon "most important" right-to-control factor). In his concurring opinion, Judge Trott also noted that FedEx added to the difficulty of analyzing the contractual labels and secondary factors because FedEx's brief quoted part, but not all, of an admission by the drivers, presenting "a rosier picture of the drivers' state of mind than the record supports." *Id*. at 997 (Trott, J., concurring).

additional terms that gave FedEx broad control over the drivers' performance.[36] Similarly, the secondary factors did not weigh heavily in favor of either party, drawing the court back to the primary right-to-control factor, which strongly favored the drivers.[37] Without disputed facts or secondary factors that substantially favored FedEx, the Ninth Circuit correctly held that the drivers were employees as a matter of law.[38]

The Ninth Circuit was also correct in rejecting the entrepreneurial-opportunities test embraced by the D.C. Circuit.[39] Despite the D.C. Circuit's exhortation that the entrepreneurial-opportunities test was a "subtle refinement" of the common-law test, accepting this change in approach would represent a seismic shift in California law.[40] California's courts have consistently applied the traditional right-to-control test without incorporating entrepreneurial opportunity as a factor, let alone the primary factor used in the court's analysis.[41] Although the D.C. Circuit's attempt to provide a bright-line rule may be laudable to a certain extent, its jurisdiction is limited; and its proffered test does not align with the analysis traditionally used by California's courts.[42]

It is often difficult to determine whether a worker is an independent contractor or an employee given the wide variety of tests used by courts and administrative bodies. In California, however, the traditional right-to-control test has a long history and has consistently been applied for over half a century. The Ninth Circuit Court of Appeals correctly applied this test when it held that FedEx drivers were employees of FedEx, and it properly ignored the OA's contractual labels to the contrary.

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36. *See id*. at 996 (majority opinion) (declining to accept label used in OA where "disclaimer is belied by [other] provisions").

37. *See id*. at 994, 997 (observing right-to-control outweighs secondary factors). Of the nine secondary factors, the court held that three factors favored FedEx, five favored the drivers, and one factor—method of payment—was neutral, with each factor garnering varying degrees of favorability. *Id*. at 994-97.

38. *See id*. at 997 (holding drivers employees as matter of law).

39. *Compare* 765 F.3d at 993 (reaffirming California's use of traditional common-law test), *with* FedEx Home Delivery v. NLRB, 563 F.3d 492, 497 (D.C. Cir. 2009) (creating test focused upon entrepreneurial opportunity for gain or loss).

40. *Compare* FedEx Home Delivery v. NLRB, 563 F.3d 492, 497 (D.C. Cir. 2009) (characterizing emphasis of entrepreneurial opportunities as minimal), *with* Hirsch, *supra* note 17, at 355 (condemning D.C. Circuit's characterization of its shift in approach as "unwarranted understatement").

41. *See* 765 F.3d at 993 (highlighting California's continued use of right-to-control test without shift to entrepreneurial-opportunities test).

42. *See* FedEx Home Delivery v. NLRB, 563 F.3d 492, 508 (D.C. Cir. 2009) (Garland, J., dissenting) (stressing majority's reliance on single case within its circuit to support entrepreneurial-opportunities test).