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4 The NLRA's Restrictions on Coverage: Constricting Eligibility for Legal Protection of the Right to Organize

Labor Law Reforms Needed[1]

Ensuring that employees are not misclassified as independent contractors and denied protections of the NLRA.

Ensuring that employees are not denied protections of the NLRA by being wrongly classified as supervisors.

Preventing the misclassification of workers.

Protecting employees who have multiple employers.

* * *

One way that the National Labor Relations Act (NLRA) facilitates employer resistance to the representational aspirations of millions of nonunion workers who want unionization and the benefits of collective bargaining is to constrict the supply of the potentially organized. The NLRA creates the right to "exercise [the] full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment and other mutual aid or protection," but it extends that right only to "employees" as defined by the NLRA itself.[2] Tens of millions of workers do not qualify as NLRA "employees" because they fall within one of the several categories of workers that it excludes from coverage.[3] These exclusions from the definition of "employee" range from domestic workers and farm workers to tens of thousands of truck drivers and to charge nurses, who primarily perform normal patient-care nursing duties but incidentally also assign tasks to direct lower-skilled nurses, such as licensed practical nurses (LPNs). These millions of excluded workers are defenseless in the face of employer reprisals if they attempt to exercise associational choice by forming a union and demanding collective

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bargaining, by striking, or by otherwise joining with coworkers to protest objectionable conditions of employment. Constricting coverage of the NLRA also affects union strength: a union is in a better position to strike effectively when all (or nearly all) of those qualified to perform bargaining unit work are in the bargaining unit. In particular, the removal of workers with critical skills from the bargaining unit weakens the union's collective voice.[4]

Those who are not labor relations law specialists often miss the significance of the fact that the NLRA's protection of "concerted" employee activity is not restricted to unionized work places. The NLRA also protects nonunion employees from employer recriminations when they act in concert with other workers.[5] For example, one ruling found that "employees in nonunion workplaces have a right protected by the NLRA to request the presence of a coworker in an investigatory interview which the employee reasonably believes could result in disciplinary action[:] an employee's right to assistance emanates from § 7 of the NLRA, rather than from [an employee's right to union representation]."[6] And, by further example, employee-to-employee communications on a social network platform such as Facebook regarding the conditions of employment constitute concerted activity that the NLRA may also protect from employer retaliation.[7] However, these protections of concerted activity by nonunion workers apply only with respect to those who are "employees" within the meaning of the NLRA, not to those who are statutorily exempted from the definition of "employee."

As originally enacted in 1935, the NLRA excluded from its protections agricultural workers and domestic workers. Racial and gender discrimination "played a significant role in the [initial] exclusion[s]" because agriculture work and domestic service in private homes were sectors predominated by people of color and women. The enactment of New Deal legislation required excluding these groups of employees in order to gain the support of Southern members of Congress whose economies relied on the "exploitation of Black workers for agriculture, service, and domestic work."[8] The legacy of racism undergirding the NLRA's original exclusions continues to the present. The degraded working conditions for those excluded from NLRA's protections have disproportionately impacted immigrant workers, Black workers, other workers of color, and women workers and thereby have exacerbated racial and gender inequalities.[9]

For example, home care workers, those who assist elderly and disabled clients in their homes with basic activities such as dressing, bathing, toileting,

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and eating, are "one of the fastest growing sectors of the labor market," estimated to number in the range from 700,000 to nearly 1.5 million. "The great majority of home care workers are women and people of color, and most are able to secure only intermittent and part-time employment [with] the mean annual wage [of] $17,710, and [are rarely provided] health insurance, retirement, and related benefits."[10] A substantial and growing number of home care workers are employees of their elderly and disabled clients are thus are excluded from the NLRA's coverage because the Act excludes from its coverage any individual employed "in the domestic service of any family or person at his home." As Professor Benjamin Sachs (2007) explained, "these home care workers [have] little hope of [NLRA] coverage, leaving this large and growing sector of the labor force without protection from traditional labor law."[11]

The 1947 Taft-Hartley Act's amendments to the NLRA added two important additional exclusion categories: independent contractors and supervisors.[12] The exclusion of independent contractors also creates racial disparities. As Professor Sachs has demonstrated, "[t]he picture for [the estimated 1.8 million] home-based child care providers, who offer child care services in their own or their clients' homes, is much the same [as with home care workers]. An estimated] 94% of the child care workforce in the United States is female, more than 30% is African American and Latino, . . . the work is poorly compensated, [and as] with home care workers, home-based child care providers are without NLRA protection, primarily by virtue of the statute's exclusion of independent contractors."[13]

In addition to the racial disparities created by the independent contractor exclusion, the misclassification of an employee as an independent contractor is a wide-ranging and serious problem.[14] According to Compa (2000), "Congressional and administrative hearings have produced abundant evidence that many employers deliberately misclassify workers as independent contractors, confident that few workers will mount a challenge due to fear of lost income and the stress of legal action. One [early] study estimated that the number of misclassified workers [would] exceed five million by the year 2005."[15] Currently, the NLRA creates no disincentive to employers who find it advantageous to misidentify employees by, for example, falsely classifying NLRA-covered employees as independent contractors. In 2019, during President Donald Trump's administration, the National Labor Relations Board (NLRB) held that nothing in the NLRA prohibits employers from

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engaging in such misclassification, notwithstanding that misclassification falsely communicates to employees that they do not have rights under the NLRA and their organizing activities are futile.[16]

To address these deficiencies, NLRA reform is needed to (1) tighten the definitions of both "independent contractor" and "supervisor" and (2) ban misclassifying employees as either independent contractors or supervisors by making it an unfair labor practice to misrepresent to an employee that such employees are excluded from the definition of "employee" under § 2(3) of the NLRA.

Tightening the NLRA Definition of "Independent Contractor"

SuperShuttle International has developed proprietary software to administer a shared-ride shuttle van transportation system.[17] SuperShuttle Dallas–Fort Worth (DFW) maintains a license agreement with SuperShuttle International for the right to use the SuperShuttle trademark and its transportation and reservation/dispatch system in the Dallas–Fort Worth area. Before 2005, DFW hired drivers whom it designated as employees. During that period, these drivers earned hourly wages, and DFW assigned drivers to regularly scheduled shifts picking up customers in company-owned shuttle vans. In 2005, DFW restructured and classified its driver-employees as franchisees.

When the Amalgamated Transit Union filed a representation petition with the NLRB in an effort to unionize the DFW drivers, the company moved to dismiss the petition on the ground that the drivers were independent contractors and thus exempt from the protections of the NLRA.

The DFW reclassification effort, purporting to convert driver-employees into NLRA-exempt independent contractors, deployed a conversion structure used by other companies.[18] Following the reclassification of their drivers as independent contractors, DFW retained most of the indicia of control that are normal in an employer-employee relationship.[19] For example, the standard Unit Franchise Agreement (UFA) that DFW required each individual driver to sign was not subject to negotiation and could be unilaterally modified by DFW. By the terms of the UFA, drivers were required to state that they were nonemployee franchisees who operated independent businesses, and yet the UFA controlled many of the most important aspects of the drivers' work lives: for example, drivers were barred from engaging in *any* business activity that DFW deemed to conflict with their obligations under

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the UFA, which included a noncompete provision barring them from providing services for a DFW competitor and any involvement with another business that provided transportation services. The van that the drivers were required to purchase or lease must meet detailed specifications (make, model, color, size, age, and mechanical condition). DFW drivers must complete thirty-four hours of preliminary training and eighteen hours of on-the-job training. Among other things, this included training related to "disciplinary guidelines, dress standards, [and] customer service."[20] In addition, it entailed "training in [SuperShuttle's] brand standards and the operation of its communication systems—subjects that the UFA describes as 'unique to the SuperShuttle system.'"[21] Drivers who worked for DFW were required to use the Nextel cell-phone trip-generating system, which includes a pager, a two-way radio, and a global-positioning navigation system—all owned by DFW. Drivers were barred from using dispatch and reservation equipment outside the SuperShuttle system. Franchisees could use only equipment, signs, uniforms, and services approved by SuperShuttle.

With respect to compensation, DFW, not the drivers, set the fares and, as mentioned, drivers who wished to work for DFW had to do so exclusively for DFW and were barred from any involvement with another business that provided transportation services. DFW did not set drivers' work schedules, routes, or assignments, but the Nextel trip-generating system created job "bids." While drivers ostensibly were free to accept or decline a bid, testimony before the NLRB explained that drivers had been disciplined (i.e., fined) for declining bids.[22]

Moreover, DFW shifted to the franchisee-drivers most of the risk associated with a downturn of share-ride business at the airports because for the right to utilize the SuperShuttle trademarked name and its Nextel cell-phone dispatch and reservation apparatus, drivers paid DFW an initial $500 franchise fee (if providing transportation to and from both Dallas–Fort Worth and Love Field airports), paid DFW a flat weekly $575 fee for a Dallas–Fort Worth Airport franchise, and an additional $100 per-week contribution to reimburse DFW for its payment of certain driving-related fees. These weekly flat fees paid to DFW were required regardless of the amount of business that a franchisee generated in any given week.

Franchisees worked when and as much as they chose and were compensated by retaining the money they earned for completing the assignments that they selected. As a practical matter, the hefty weekly fixed payment

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paid by the drivers to DFW locked them in: they had to work a certain number of hours per week in order to earn sufficient money to make the obligatory weekly $675 payments to DTW. While the UFA permitted a driver to use a substitute or relief driver, such other driver must be approved by DFW, following successful completion of DFW's course of required training. At the time of the hearing before the NLRB, only one of eighty-eight drivers employed a relief driver.[23]

As is normal today among many companies, DFW's reclassification of employees resulted in workers "inhabit[ing] a gray area of independent contracting and traditional employment."[24] Lead companies reconfigure work so that it contains characteristics of independent contracting—for instance, franchisees at DFW worked when and as much as they chose, were compensated by retaining the money they earned for completing the assignments that they selected, provided their own vans, could employ relief drivers to operate their vans, and paid their own expenses. Meanwhile, the franchisor company maintains tight controls over the drivers that are typical of an employer's controls over its employees—for example, DFW prescribed limits on the apparel that workers could wear, the prices charged, equipment required to be used, training that must be satisfied, and through an obligatory noncompete agreement, banned *any* involvement with another business that provides transportation services. In other words, as Weil (2019) describes, franchisor firms attempt to have it both ways: they "benefit from work executed in strict compliance with central corporate objectives [and standards of performance] and [yet are] not . . . required to treat workers who do [the work] as [its] employees with the obligations that [the employer-employee] relationship holds."[25]

DRW successfully walked that line when it converted its employees to franchisees: the Trump NLRB ruled (2–1) that the DFW drivers were independent contractors and thus not entitled to the protection of the NLRA. Accordingly, the NLRB dismissed the union's representation petition.[26] The Board's reasoning is discussed later in this chapter.

According to the 2017 Contingent Worker Survey conducted by the US Bureau of Labor Statistics, 10.6 million workers are classified as independent contractors in the US—6.9 percent of total employment.[27] David Weil makes a convincing case that the Contingent Worker Survey actually understates the incidence of independent contracting in the US because "a growing body of evidence indicates that workers often incorrectly classify themselves as employees when they are not being treated that way by the organizations

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for whom they work." For example, these organizations often fail to comply with the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA), applicable only to "employees"; or they refuse to provide these workers the safety net of protective labor legislation such as workers' compensation and unemployment compensation insurance.[28] Weil conservatively estimates that the true incidence of employers treating workers as independent contractors could be nearly twice the 10.6 million (6.9 percent of total employment) estimated in the Contingent Worker Survey.[29]

Whatever the actual current number of workers being denied the legal status of an "employee" and instead being characterized as an independent contractor—10 million, 15 million, or 20 million—that figure is certain to rise significantly in the near future. The reason is that major companies have confronted increased pressure from investors (public and private) to improve financial performance and have responded to this pressure by "fissuring," as Weil (2019) has described the response by companies to these financial performance pressures.[30] Fissuring entails corporations splitting off certain core functions that previously had been managed internally.[31] Corporations engage in fissuring by "focusing their businesses on core competences—that is, activities that provide the greatest value to their consumers and [profit to their] investors—and by shedding less essential activities."[32] Accordingly, today a corporation (the "lead business") will routinely outsource its payroll, data entry, accounting, customer contact, labor relations, janitorial, maintenance, and security functions in various ways. For example, many hotels outsource the cleaning of rooms, restaurants do the same for the tasks performed by kitchen crews, and distribution centers (warehouses) do the same for the work on a loading dock.

Outsourcing by the lead business can occur in several ways. One is by contracting with a staffing agency (temp agency) to provide temporary workers to perform the outsourced functions under the supervision of the lead company's management. Another is by hiring a management company to come in, manage the outsourced function itself, and oversee leased employees who perform the outsourced functions. Outsourcing saves money: corporations benefit from the services of the temporary or leased workers, but they claim that they have no responsibility under labor laws to those who provide these services because they are the employees of the staffing agencies, not the lead corporations. Corporations make no contributions to Social Security or Medicare for these workers and claim no responsibility, for example, if workers

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performing outsourced work are not paid the minimum wage or properly compensated for working overtime, or if they claim employment discrimination or seek to recover under workers' compensation laws if they are injured on the job. Further, such outsourcing provides the lead companies with the argument that they need not recognize a union that seeks to represent workers performing outsourced functions because these workers are not the lead companies' employees. The question of whether a lead company and a company that provides the workers from outside are "joint employers" who must recognize a union representing the workers is discussed later in this chapter.

In addition to contracting with third-party staffing and management agencies to provide workers to perform outsourced functions, corporations that fissure split off certain core functions that previously had been managed internally by contracting those functions to subcontractors or franchisees. This was the model deployed by DFW. Cleaning companies, for example, may contract with the owners of office buildings, hotels, and other businesses such as grocery stores to perform janitorial services, but then they may "hire smaller businesses to provide workers for specific facilities or shifts."[33] In one case, a commercial office building owner in Seattle contracted with a large cleaning company. The cleaning company then turned around and franchised parts of the work to different groups of workers, mostly Central American and Asian immigrants. The cleaning company asserted that these franchisee workers were considered independent contractors who cannot claim the protections of the NLRA should they desire union representation to bargain with the cleaning company for better terms and conditions of employment. Moreover, the cleaning company/franchisor was able to disclaim all responsibility for payment of minimum wage and overtime, as well as Social Security, workers' compensation, and unemployment compensation because those performing the cleaning were not the cleaning company/franchisor's employees, as already discussed.[34]

In other examples, in 2000, 70 percent of guards and 45 percent of janitors were employed as contractors.[35] Since deregulation, tens of thousands of truck drivers have been reclassified as independent contractors. Typically, a trucking company may maintain a small office staff, but rather than employing drivers, the trucking company instead contracts with individual owner-operators to deliver goods from the nation's shipping ports to nearby warehouses for transfer to long-haul delivery trucks or to deliver products from a warehouse directly to an end user.[36] Classified as independent contractors

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exempt from labor law coverage, many drivers are not free to contract their services to the highest bidder because trucking companies require them to sign exclusive contracts that ban such contracting with others.[37] When companies shift employees to independent contractor status, workers are suddenly more vulnerable to costs that they did not face before. For example, truck drivers injured on the job previously had been covered by workers' compensation protection as employees. But as independent contractors, they must carry their own health insurance, a protection that many may forgo as too expensive or beyond their reach for other reasons. Meanwhile, trucking firms escape any obligation to maintain workers' compensation for injured drivers who have been reclassified as independent contractors.

At "'platform economy' companies," as Brishen Rogers (2016) has termed them, firms such as Uber, Lyft, TaskRabbit, Postmates, and Handy "provide online platforms that match consumers with workers for short-term tasks."[38] Platform economy companies deny that those workers who are matched with consumers, such as an Uber driver matched with a consumer requiring driving services, a plumber booked by Handy to repair a homeowner's burst pipe, or a SuperShuttle van driver picking up passengers at an airport—are employees of the platform company; rather, they are independent contractors. Amazon, for example, might use its own employees to deliver a package from an Amazon distribution center, or it might hire subcontractors to do this. Then, if the drivers attempt to unionize, Amazon can claim that they are independent contractors excluded from NLRA coverage. Or a package delivery company such as FedEx might conclude that the core competency that it controls is the application of specialized technology for routing packages most efficiently from one place to another, and it will outsource to subcontractors the actual delivery of the packages.[39]

Shifting work from a firm's employees to subcontractors (or franchisees) changes both the nature of employment and wage structures. With fissuring, wage setting devolves into a task of pricing the commodity of labor in the open market, resulting in depressed wages. For example, Amazon structured a package home delivery system named Amazon Flex. After being vetted by satisfactory completion of a multistep online course, individuals bid for deliveries using a proprietary app created by Amazon Flex. Using the worker's own vehicle, drivers must complete deliveries according to a tight schedule set by Amazon. Investment advisor A/B Bernstein analyzed the average earnings of a typical Flex driver, taking into consideration vehicle fuel, insurance,

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maintenance, amortization, tolls, and other related costs, and concluded that drivers received net earnings of $5.30 per hour. This is less than the US minimum wage of $7.25 per hour at the time of the survey and compares unfavorably with average hourly earnings of $23.10 for UPS drivers and $14.40 for FedEx drivers.[40] Workers generally suffer a wage penalty when work is moved from a firm's regular employees to subcontractors. For example, there is an estimated 15 percent decrease in earnings for janitors and 17 percent earnings decrease for guards following their reclassification from employees to independent contractors. In one large study of food service, cleaning, security, and logistics workers, the impact of subcontracting was a wage penalty of between 10 percent and 15 percent.[41]

In many ways, it is advantageous for companies to deploy reclassification models that blur the boundaries of what constitutes employment versus independent contracting because the ambiguity provides the lead companies with maximum control over workers performing outsourced functions, while at the same time providing creative opportunities for lead companies and their attorneys to assemble arguments that persuade business-oriented administrative agencies and courts that these workers are independent contractors who are ineligible to receive the benefits of protective labor legislation. Yet the workers excluded from coverage of labor and employment laws typically lack the bargaining power to protect themselves—and thus are the very workers who need legislative protection.

A recurring source of litigation before the NLRB entails a lead company refusing to recognize and bargain with the union chosen by its workers, claiming that the workers are independent contractors excluded from NLRA coverage. Currently, to determine whether a worker should be classified under the NLRA as an employee or an independent contractor, the NLRB and the courts apply the common-law agency test.[42] The Restatement (Second) of Agency contains a nonexhaustive ten-factor test that is not especially amenable to any sort of bright-line rule.[43] The factors that comprise the so-called common law right to control test were developed to establish vicarious liability in tort law, but they are not particularly useful for identifying which workers are so economically dependent on their employers that they need, and ought to be provided, the social and economic protections of New Deal and civil rights legislation.[44]

There is near-universal agreement, except among certain employer groups, that the nonexhaustive ten-factor common law test for distinguishing

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between employees and independent contractors is seriously flawed. It lacks predictability, and the common law's ambiguous factors invite manipulation that would permit a court or administrative agency to achieve any desired outcome, for reasons that remain unarticulated, in many cases. The fluidity of the common law factors, moreover, creates incentives for companies that fissure to misclassify employees as independent contractors in the hope (or perhaps expectation) that with quality professional guidance from experienced lawyers and careful planning, the corporations will be able to lower their wage costs and accountability under labor and employment laws because workers are misclassified as independent contractors while the companies retain their essential and traditional employee-employer control over the day-to-day activities of those who perform core outsourced functions.[45]

The indeterminate nature of the common law test for distinguishing employees from independent contractors has reached crisis proportions at the NLRB. The NLRB's independent contractor doctrine is in disarray.

In 2009, the D.C. Circuit Court of Appeals decided a case involving FedEx Home Delivery (*FedEx I*). That case constituted a major defeat for the NLRB.[46] In *FedEx I*, the D.C. Circuit, purporting to apply the common law factors, ruled that when attempting to "identify the essential quantum of independence that separates a contractor from an employee," control or lack of it by the lead company is critical but "'[c]ontrol' [does] not mean all kinds of controls, but only certain kinds [and] some controls were more equal than others." From these premises, the D.C. Circuit concluded: "Thus, while all the considerations at common law remain in play, an important *animating principle* by which to evaluate those factors in cases where some factors cut one way and some the other [which they always do] is whether the position *presents* the opportunities and risks inherent in entrepreneurialism."[47] This approach for defining "independent contractor" status that the D.C. Circuit adopted in *FedEx I* is calculated to increase the number of employees whom a corporation will be able to legally reclassify as independent contractors. Concomitantly, the approach to defining independent contractor approved by the D.C. Circuit will decrease the number of workers who are adjudged to be employees covered by the protections of the NLRA and other protective labor legislation. First, when entrepreneurial opportunity becomes the "animating principle" in the debate, what becomes secondary are the myriad of reserved controls and the extensive degree of supervision and oversight retained by the lead company to control the day-to-day activities of those

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doing outsourced work. Moreover, and critically, the inquiry as adopted by the D.C. Circuit is whether the scheme devised by the employer "*presents opportunities*" for profit, not whether the employees in fact have ever been able to benefit from such profit "opportunities." In the D.C. Circuit case of *FedEx I*, the record demonstrated that "contractors perform a function that is a regular and essential part of FedEx Home's normal operations, the delivery of packages, and that few have seized any of the alleged entrepreneurial opportunities." The court demurred, stating that "failure to take advantage of an opportunity is beside the point. [O]pportunities cannot be ignored unless they are the sort workers cannot realistically take, and even *one instance* of a driver using such an opportunity can be sufficient. . . . [I]t is the worker's retention of the right to engage in entrepreneurial activity rather than his regular exercise of that right that is most relevant for the purpose of determining whether he is an independent contractor."[48] In short, for the D.C. Circuit in *FedEx I*, the "animating principle" to determine "independent contractor" status is evidence of the worker's retention of some theoretical right to engage in entrepreneurial activity, not evidence that this theoretical opportunity has in fact ever benefited any of the workers. Any management labor lawyer who cannot devise a reclassification structure that meets that test ought to be fired.

Following this 2009 decision by the D.C. Circuit, the NLRB in 2014 attempted to reset the focus of the independent contractor inquiry and retreat from *FedEx I*, which had made entrepreneurial opportunity the litmus test. The Board in 2014 retained entrepreneurial opportunity as a factor to consider, but it also rejected making that factor the "animating principle." Instead, the Board in 2014 focused extensively on the control retained by the lead company. The Board held that entrepreneurial opportunity "represents [but] one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, rendering services *as part of an independent business*."[49] This focus on inquiring into the presence or absence of an "independent business" by the putative contractor inevitably shifted away from theoretical entrepreneurial opportunities for profit or loss that might be embedded within a corporation's reclassification scheme, but which few (if any) workers take advantage of. A focus on identifying if a worker in fact is "rendering services as part of an independent business" examines closely the common law factors of a corporation's reserved control over workers who are performing outsourced functions in order to

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exclude from the status of independent contractor workers who are economically dependent on the employer and need and will benefit from labor and employment law protections.

In 2016, the D.C. Circuit heard arguments on a challenge to the NLRB's 2014 *FedEx* opinion and denied enforcement (*FedEx II*).[50] In *FedEx II*, the court held that the D.C. Circuit's 2009 decision in *FedEx I* was the "law of the circuit," and the Board's 2014 decision had failed to make entrepreneurial opportunity the animating principle in an independent contractor analysis. Accordingly, the Board's 2014 decision was found to be inconsistent with the rule in the D.C. Circuit.

Two additional developments have added to the chaos that surrounds the NLRB's independent contractor rules and reinforce the need to provide a legislative solution. First, in *Alexander v. FedEx Ground Package System, Inc.*,[51] on facts highly similar to those in *FedEx I*, the Ninth Circuit Court of Appeals heard a claim by FedEx package delivery drivers who were asserting rights under state law for employment expenses and unpaid wages on the ground that the company had improperly classified them as independent contractors. Although *Alexander* was decided by applying California common law principles, those principles are not significantly dissimilar from the Restatement (Second) of Agency factors, and the Ninth Circuit found that the drivers were employees as a matter of law, reversing the lower court because it had improperly focused on entrepreneurial opportunity. The Ninth Circuit noted that the decision in *FedEx I* had placed primary emphasis on "entrepreneurial opportunity," but it ruled that under California common law, the focus needs to be on the degree that a company has reserved control over the workers' day-to-day activities—exactly what the NLRB had held in 2014 was the proper focus in NLRA cases.

The second development of significance is that in 2019, the Trump NLRB, in a 2–1 decision, reversed the 2014 NLRB *FedEx* decision. In *SuperShuttle DFW, Inc. (Amalgamated Transit Union, Local No. 1338)*,[52] the NLRB adopted the D.C. Circuit's rule in *FedEx I* that gives entrepreneurial opportunity heightened significance in determining "independent contractor" status. The majority in *SuperShuttle DFW* did not adopt from *FedEx I* the phrase that entrepreneurial opportunity is the "animating principle" to be considered. Instead, it held that, no matter how limited, "entrepreneurial opportunity . . . has always been at the *core of the common law test*."[53] In *SuperShuttle DFW*, the NLRB held that the drivers had entrepreneurial opportunities for increased

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profits because they owned their own vans, could work as many hours as they chose, could hire relief drivers (although at the time of trial at the NLRB, only one such driver was employed), and could sell their franchises. Relegated to subordinate significance was the evidence in the record that the drivers were not engaged in their own independent businesses and, in fact, their work was an integral part of the regular business of the employer, SuperShuttle, and was overwhelmingly controlled by SuperShuttle.[54]

In 2021, in *The Atlanta Opera, Inc.*,[55] the Biden NLRB issued an "Invitation to File Briefs" with respect to the following questions: (1) should the board adhere to the independent contractor standard in *SuperShuttle DFW, Inc.*, or (2) if not, what standard should replace it? Should the Board return to the standard in *FedEx Home Delivery (2014)*? Whatever the Biden NLRB decides, it is unworkable to continue to determine "independent contractor" status by which political party has won the most recent presidential election. Both workers and companies deserve a greater measure of predictability than is provided by the current state of the law. Plus, "the lack of predictability invites abuse and may enable employers to misclassify employees as independent contractors"[56]

Reform is needed both to enhance predictability and to provide a fair balance of the competing legitimate interests at stake. One approach is known as the "ABC test." As of 2020, the ABC test had been adopted by seventeen states (plus Puerto Rico and the Virgin Islands).[57] As articulated in the Protecting the Right to Organize Act (PRO Act), for example, the ABC test provides:

> The definition of "employee" under Section 2(3) of the NLRA is amended to clarify that an individual performing any service is an employee and not an independent contractor unless
>
> (A) the individual is free from the employer's control in connection with the performance of the service, both under the contract for the performance of service and in fact; and
>
> (B) the service is performed outside the usual course of the business of the employer; and
>
> (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

The structure of the ABC test for identifying independent contractors is one of its most important features. It creates a rebuttable presumption that a worker is an "employee" and then sets forth a *conjunctive* three-part test to

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rebut that presumption. A worker is presumed to be an employee unless the hiring party that is asserting "independent contractor" status for him or her can carry the burden of showing that *each* of the factors in the test for defining an independent contractor is satisfied for that worker.[58]

Perhaps the most significant adoption of the ABC test was its 2020 codification into California law with passage of Assembly Bill 5 (known as AB 5).[59] Because the test creates a rebuttable presumption of employee status and avoids a totality-of-factors approach, its virtues are, among other things, (1) predictability, (2) ease of administration, and (3) reduction of disputes. The test has attracted broad-based support because its virtues benefit workers, employers, and enforcement agencies. In addition, Goldman and Weil (2021) argue that "[b]ecause it would be easier for enforcement agencies and private parties to challenge illegal business models, employers would have less incentive to misclassify workers than they do now."[60]

The first factor in the ABC test examines the worker's actual freedom from control by the employer, both under the terms of a contract for the performance of service and in fact. The control factor examines both actual and unexercised, but retained, control. Control in fact thus remains an important consideration. But the absence of employer control is not determinative of independent contractor status because the remaining two prongs (B and C) must also be met to classify a worker as an independent contractor. Sprague (2020) argues that "it is perhaps this shift away from the control factor that has caused platform-based enterprises . . . to consider . . . adoption of [the ABC test] to be an existential threat. For example, soon after the California legislature adopted the ABC test, California courts almost immediately began reevaluating employee-independent contractor classification for platform-based businesses [such as Uber and Lyft]."[61]

With the ABC test, courts are often able to avoid contentious and time-consuming litigation over employer control in independent contractor disputes because of the second conjunctive factor: whether the service is performed outside the usual course of the business of the employer. This inquiry is designed to deny independent contractor status to arrangements where the work performed is integral to the normal operations of the employer. For example, in litigation in California involving allegations that Uber and Lyft had misclassified drivers as independent contractors, the court was able to bypass the need to adjudicate the contentious issue of the degree of these companies' control over drivers (part A), as well as the need to determine

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whether the drivers were independently engaged in an established trade, occupation, or business (part C). Litigation was simplified because the court focused solely on part B of the ABC test: whether the service is performed outside the usual course of the business of the employer.[62]

Of course, disputes inevitably arise with respect to what constitutes an employer's usual course of business—especially in litigation involving a firm that has fissured, such as platform economy companies. For example, home delivery might be considered integral to the normal operations of FedEx unless a court is prepared to conclude that a highly fissured FedEx corporation is not a delivery company at all; rather, it is a technology company whose normal operations are limited to connecting persons who want packages delivered and those who desire to receive them. Is SuperShuttle DFW a ride-share company whose normal operations entail providing ground transportation to and from airports in the Dallas–Fort Worth area, or is it a software company that provides technology to drivers to assist them in connecting with customers who desire their ride-share services? In litigation in California involving Uber and Lyft, the companies argued that they were not transportation companies. Rather, they merely provided a "multi-sided platform" that served as a "matchmaker" to facilitate transactions between drivers and passengers. Rejecting this characterization, the California court concluded that Uber's and Lyft's "entire business [entails] transporting passengers for compensation," and thus when drivers transport customers for compensation, that work is an "integral part" of Uber's and Lyft's business.[63] The point is not that this second factor will eliminate all controversy, but rather that it will focus controversy where it matters—on those issues that are easiest to resolve and those considerations that will most likely uncover which workers are economically dependent on the employer and most need the protections of labor and employment laws.

The final part of the ABC test is whether the worker classified as an independent contractor is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed. Evaluation of this third factor includes inquiry into any bona fide entrepreneurial opportunity for profit or loss based on managerial skill—not just on the person's willingness to work harder. In addition, this factor evaluates other indices of a truly independent business, such as the extent of relative investments of the employer and the worker and whether the work performed requires special skills and initiative.[64]

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In short, the adoption of the ABC test offers a welcome solution to an issue that has plagued labor relations law for nearly seventy-five years and is becoming more contentious as companies increasingly engage in fissuring. By jettisoning the multifactor common law agency test, which was never developed to isolate those who are economically dependent on an employer, the ABC test will add predictability, reduce litigation, and increase the likelihood that the protections of workplace legislation will reach those workers for whom it was intended.

Tightening the NLRA Definition of "Supervisor"

The1947 Taft-Hartley amendments also denied supervisors the protections of the act by excluding them from the definition of "employee." The term "supervisor" is defined in § 2(11) of the NLRA.[65] Three preconditions must be proved for one to be a supervisor under the NLRA. First, one must have authority that is exercised "in the interest of the employer." That authority must consist of the power "to hire, transfer, suspend, lay off, recall, promote, discharge, *assign*, reward, [or] discipline other employees, *or responsibly to direct* [employees] or to adjust their grievances, or effectivity to recommend such action." Finally, "the exercise of such authority [must] not [be] of a merely routine or clerical nature, but require the use of independent judgment."[66]

To avoid employees being wrongly classified as supervisors, two changes to the NLRA are needed, each amending the definition of "supervisor" as set forth in § 2(11) of the NLRA. First, the definition of "supervisor" in § 2(11) needs to be clarified to require that in order to be classified as a supervisor, the individual's supervisory activities must be executed for a majority of the individual's work time. Second, the list of activities that are indicia of supervisory status needs to be amended by removing the putative supervisor's authority to "assign" or the "responsibly to direct" employees.[67]

A quick review of the history of the status of supervisors under the NLRA assists in understanding why these reforms are needed. The 1935 NLRA made no reference to supervisors. But well before the addition of the 1947 supervisor exclusion in the Taft-Hartley Act, the NLRB was required to define "supervisor" because the Board had concluded that when supervisors organized, they needed to be placed in bargaining units separate from nonsupervisors. Accordingly, prior to 1947, the Board had held that to be a supervisor, one needed to both direct the work of employees *and* "have the authority to

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hire, promote, discharge, discipline, or otherwise effect changes in the status of such employees."[68] Note that the indicia of the supervisor developed by the NLRB prior to 1947 did not include "assigning" employees. Neither was directing employees, alone, sufficient to establish one as a supervisor; one also must have the authority to "effect changes in the status of employees," such as the authority to hire, fire, promote, discipline, and other regulatory activities.[69]

The Taft-Hartley Act added "assign" and "responsibly to direct [employees]" to the authority over others that is independently sufficient to establish supervisory status. It is these 1947 additions that have caused considerable difficulty and that have unjustly excluded many workers from the protections of the act.

One major source of difficulty arises because the addition of "assign" and "responsibly to direct [employees]" creates an overlap between the definition of "supervisor" (an excluded category of worker) and "professional employee" (an included category of worker). Section 2(12) of the NLRA defines "professional employees" in a way that requires inquiry into whether work "involve[es] the consistent exercise of discretion and judgment in its performance." However, as others have pointed out, "most professionals (and many technical and other skilled employees) who also exercise independent judgment in their jobs routinely give assignments to [i.e., they "assign"] and direct other employees [i.e., they "responsibly direct"] in order to accomplish their professional duties."[70] For example, think of a lawyer who routinely assigns research projects to a law clerk and directs completion of the assignment. In the new digital economy, as was discussed in chapter 3, jobs increasingly entail work by professionals whose work "involve[s] the consistent exercise of discretion and judgment in its performance," and this work is performed by those who, for some portion of their workday, give routine assignments to and/or otherwise direct lower-skilled coworkers. But these professionals are not part of management in any realistic sense: they have no authority to affect the job status of coworkers, such as effectively recommending discipline. This overlap between the post-Taft-Hartley definition of "supervisor" and the protected status of professional employees threatens to sweep millions of professional employees into the classification of "supervisor." As Richardson (1994) points out, "Particularly as expert systems are used to take over more 'routine' problems, the number of non-supervisors who

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are members of the union or available to organize drops precipitously."[71] It is useful to recall that the Supreme Court has cautioned decision-makers to "take care to assure that exemptions from [the NLRA's] coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach [such as professional employees]"[72] The proposed clarification of the definition of "supervisor" discussed here responds to that admonition.

A second source of difficulty created by the 1947 addition of "assign" and "responsibly to direct [employees]" to the definition of "supervisor" is that these changes threaten to thwart Congress's intent that low-level, minor supervisors should not be exempted from the protections of the NLRA. Congress recognized that "certain employees with minor supervisory duties have [workplace] problems which may justify their inclusion in th[e] Act. [Congress] has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action."[73] Yet, other than carving out workers whose exercise of supervisory authority is "merely routine or clerical [in] nature," nothing in the language of § 2(11)'s definition of "supervisor" reflects Congress's intent not to classify as an excluded "supervisor" the "minor supervisory employees" whom Congress intended to include as NLRA-protected employees.

Litigation over the past twenty years with respect to nurses points out quite well the problems created by the Taft-Hartley Act changing § 2(11) to add the words "assign" and "responsibly direct" as independent indicia of supervisory status.

In an early effort, the NLRB attempted to distinguish those registered nurses (RNs) who truly are part of management—"nurse supervisors"—from other professional RNs who primarily perform nursing functions but who, incidental to their exercise of professional or technical judgment, occasionally make patient care decisions that require them to make assignments, or otherwise direct, less skilled workers, such as licensed practical nurses (LPNs) or nurse assistants. The NLRB held that these incidental patient care assignments given by RNs to less-skilled employees do not result in RNs being properly classified as "supervisors" because these actions are in the interest of patient care, not "in the interest of the employer" as required by § 2(11) for one to be classified as a supervisor. The Supreme Court disagreed, holding that all

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on-the-job, work-related, professional decisions are made "in the interest of the employer" and that, in effect, the Board had made a special exception for nurses, contrary to congressional intent.[74]

Subsequently, again in an attempt to prevent the supervisor exclusion from consuming the protection of the NLRA that Congress intended for professional employees such as nurses, the NLRB narrowly defined the third element of the § 2(11) definition of supervisor. The NLRB held that the RNs' incidental assigning of tasks, or otherwise directing LPNs and nurse assistants, as part of routine patient care is not the exercise of "independent judgment" as defined in § 2(11), but rather is conduct that is "informed by professional or technical training and experience."[75] Accordingly, such assigning and directing by RNs does not deny them the protections of the NLRA by placing them in the category of a "supervisor." Again, the Supreme Court disagreed. In *NLRB v. Kentucky River Community Care, Inc.*, in a 5–4 decision written by Justice Antonin Scalia, the Supreme Court was unwilling to defer to the NLRB in its effort to harmonize the language of § 2(11) with the stated goal of the NLRA to include professional employees such as RNs within the act's protection and by recognizing that professional employees periodically need to make assignments and direct lower-skilled workers incidental to their exercise of ordinary professional judgment. The effect of the decision in *Kentucky River* was to create a "barrier to unionization [of RN nurses] in almost all cases" and to provide health-care industry employers "essentially uncontrolled discretion to fire nurses who oppose the[] laudable goals [of] fight[ing] to improve nursing ratios and patient care."[76]

Following the Court's *Kentucky River* decision, the NLRB under President George W. Bush, in *Oakwood Health Care, Inc.*, added "charge nurses" to the growing list of "supervisors" who are denied the NLRA's protections. Charge nurses primarily engage in the normal patient-care professional functions of an RN—caring for sick, disabled, or elderly patients—but occasionally, for only a fraction of their shift, "assign other RNs, . . . LPNs, nurs[e] assistants, technicians, and paramedics to their shifts."[77] The Bush NLRB held that this slight degree of "assigning" and "directing" was sufficient for charge nurses to be designated as supervisors. As the NLRB general counsel summarized the Board's decision in *Oakwood Health Care*, the Board's view is that one is a supervisor when a person, using independent judgment, designates a lower-skilled worker to a place to work (e.g., a particular work location) or a time to work (e.g., a particular shift), or otherwise assigns "significant overall

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duties, *i.e.*, tasks, to an employee." Such assigning constitutes a supervisory function, so long as the assigning is more than an "*ad hoc* instruction that the employee perform some discrete task (such as a one-time instruction to empty a bedpan or give a particular patient a pill."[78] Even a slight portion of a person's workday devoted to such assigning or directing of others qualifies the person possessing such oversight as a "supervisor." The NLRB general counsel explained that "individuals have been found to be supervisors where they have [engaged in assigning or directing others] for as little as 10–15 percent of [a person's] total work time"[79] (i.e., as little as one hour or less per eight-hour work shift).

The criteria for determining supervisory status, as articulated in *Oakwood Health Care*, has had the effect of removing much of the nursing profession from the protection of the NLRA.[80] It is hard to disagree with the dissenters in *Oakwood Health Care,* who concluded that the Board's decision had far-reaching negative implications for many professional employees whose responsibilities include directing the work of lesser-skilled employees. The dissenters concluded that the decision had "created a new class of workers under Federal labor law: workers who have neither the genuine prerogatives of management nor the statutory rights of ordinary employees. Into that category may fall most professionals (among many other workers)." The dissenters in *Oakwood Health Care* estimated that as early as 2012, the NLRB's expansive definition of "supervisor" could result in excluding nearly thirty-four million professionals and others, accounting for 23.3 percent of the workforce.[81] RNs, for example, comprise one of the largest segments of the US workforce. Currently, there are more than 3.8 million RNs nationwide, 84.5 percent of whom are employed in various aspects of the healhcare profession. Through 2026, the number of RNs is projected to grow by more than 200,000 new positions annually, a growth rate of 15 percent.[82] Nurses in nursing homes, in particular, are undercompensated and require the benefits of collective bargaining. Nationwide, according to the Bureau of Labor Statistics, RNs in the US who are union members "can earn an average of $200–$400 more per week than non-unionized nurses."[83]

But it is not just the millions of nurses who are harmed by the expansive definition of "supervisor." It has been estimated that "thirty percent of workers in at least twenty-four professions could be severely affected by [*Oakwood Healthcare*]. . . . Essentially, the Board's rulings permit employers to make a supervisor out of any employee who uses independent judgment or

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has authority to assign or direct other employees."[84] One exhaustive study concluded that "especially [for] low-level supervisors who themselves often suffer low pay and poor working conditions, [misclassification of employees as supervisors] is part of a 'divide-and-conquer' strategy to weaken workers' bargaining power."[85]

A legislative solution is needed because the NLRB and the courts are not likely over time to consistently limit the scope of the terms "assign" and "responsibly to direct" in NLRA § 2(11). The proposed changes to the NLRA's definition of "supervisor," as set forth in this discussion, return the definition to its pre-1947 meaning by eliminating "assign" and "responsibly to direct" from the indicia found in § 2(11) for independently and sufficiently determining who is a supervisor.

Moreover, as stated here, the historical purpose of the supervisor exclusion was that those excluded as supervisors should *not* include straw bosses, leadmen, set-up men, and other minor supervisory employees. Rather, it should be limited to those persons, like foremen, whose primary function is directing the work of others on an ongoing basis rather than doing the work themselves. For a short period, the NLRB had respected this congressional distinction by *not* excluding as supervisors those "whose primary function is physical participation in the production or operating processes of their employers' plants and who [only] incidentally direct the movements and operations of less skilled subordinate employees [in the performance of that person's own nonsupervisory functions]"[86] Since its decision in *Oakwood Health Care*, the NLRB has lost sight of the historical purpose of the supervisor exclusion since now millions of workers, such as charge nurses, are viewed as supervisors by the NLRB, notwithstanding the fact that their "primary function is physical participation in the . . . operating processes of their employers' [business] and . . . [only] incidentally direct the movements and operations of less skilled subordinate employees." Accordingly, the definition of "supervisor" in § 2(11) needs to be amended to require that to be classified as a "supervisor," the individual's supervisory activities must be executed for a majority of the individual's work time. This change will go a long way to limit the exclusion to those whom Congress intended to define as "supervisors" in 1947—those who have authority to exercise a broad, managerial type of direction requiring most of the person's work time.

In combination, the independent contractor and the supervisor exclusions, as the NLRB and the courts have interpreted them, have "withered the number of workers eligible for [inclusion in] bargaining units that function

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as sources of countervailing power."[87] Adoption of these changes addresses these deficiencies.

Preventing the Misclassification of Workers

The NLRA also needs to be clarified to provide that an employer violates the NLRA by misclassifying an employee. Reforming the NLRA in this way will overturn the NLRB's 2019 decision in *Velox Express*,[88] which held that misclassification is not a violation of the NLRA.

Two arguments dominate the view that an employer's misclassification of its employees as independent contractors, standing alone, violates § 8(a)(1) of the NLRA. The first is the reality that by misclassifying employees as independent contractors, an employer, regardless of its motive or intent, inherently interferes with, restrains, and coerces those employees in the exercise of their § 7 rights because the employer effectively conveys that the misclassified employees do not have any rights or protections under the act when in fact they do.[89] Relatedly, misclassification can be understood as interfering with employees' rights of self-organization protected by the NLRA because misclassification effectively conveys to employees that engaging in union or other protected activities is futile[90] and preemptively prevents the misclassified employees from engaging in § 7 activity.[91]

The NLRB majority in *Velox Express* rejected all these arguments, concluding that they are grounded in the proposition that the misclassification of employees as independent contractors is inherently coercive. As the Board majority stated:[92]

> An employer's mere communication to its workers that they are classified as independent contractors does not expressly invoke the Act. It does not prohibit the workers from engaging in Section 7 activity. It does not threaten them with adverse consequences for doing so, or promise them benefits if they refrain from doing so. . . . If the employer responds with threats, promises, interrogations, and so forth, then it will have violated Section 8(a)(1), but not before.

In short, the majority viewed misclassification as no more than the employer's communication of its "legal opinion" that its workers are independent contractors, an "opinion" whose expression the majority views as a protected free speech right.

The dissent in *Velox Express* focused on the facts of the case. It explained that the employer in that case imposed a contract on its drivers that contains a clause that "acknowledges that [the driver] is an independent contractor

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and is not an employee of Company." By requiring employees to sign this contract, the employer conveyed to Velox drivers that they had no rights under the NLRA when, in fact, the drivers were employees who possessed NLRA rights. By forcing employees with rights to sign a document stating that they had no such rights, the employer was not simply expressing a legal opinion, but rather was unlawfully coercing its employees. These actions by the employer, the dissent argued, had a predictable "chilling effect" on employees by incorrectly communicating to them that because they had no NLRA rights, any attempts to exercise such rights would be futile. Section 1 of the NLRA declares that the policy of the US is to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." The dissent argued that "taking the proper statutory perspective—by focusing on the rights Congress gave employees—reveals the defects in the majority's position."[93] There is support for the dissent's view in the academic literature,[94] and in the PRO Act.[95]

Protecting Employees Who Have Multiple Employers

An important change to the NLRA, which is particularly needed because of changes to the modern workplace, is to provide that two or more persons shall be employers under the act if each codetermines or shares control over the employees' essential terms and conditions of employment. In applying this standard, the NLRB or a court would be required to consider as relevant direct control, indirect control, reserved authority to control, and control exercised in fact. This approach to defining joint employers codifies the joint employer standard that the Board adopted in its 2015 *Browning-Ferris* decision,[96] which was overturned by the Trump NLRB in 2020 through rulemaking.[97]

For the nonlabor law specialist, it is all too easy to overlook the significance of a reform that expands the criteria for establishing the joint employer status of two companies that share control over employees' essential terms and conditions of employment. Yet, in the modern digital economy, with an increasing number of workers being contingent employees, expanding the criteria for establishing the joint employer status of two companies removes one of the most important barriers that denies employees their aspiration to obtain the benefits of collective bargaining.

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Earlier, this chapter discussed companies that engage in fissuring—outsourcing by a lead company by contracting with a staffing agency to provide workers to perform the outsourced functions or by hiring a management company to provide and oversee leased employees. Such outsourcing excuses the lead company from many legal and financial obligations, such as making contributions to Social Security and Medicare, purchasing workers' compensation insurance, paying minimum wage and premium pay for overtime, and incurring liability arising from claims of employment discrimination. Employers typically also deny contracted workers health insurance, pensions, and other benefits that are available to its regular full-time employees. In addition, such outsourcing has provided lead companies the argument that they may refuse to recognize a union that seeks to represent the workers performing outsourced work, even when this work is done at the premises of the lead company, because these workers are not the lead company's employees but rather are the employees of a staffing agency. If, however, the lead company and the staffing agency are "joint employers," then both companies are considered the employer of those performing the outsourced work. This precludes the lead company from validly claiming no responsibilities under the labor and employment laws for these employees.

It is a mistake to view the "temporary employees" (temps) whom a staffing agency provides to a company as simply workers whose tenure with a host company is for a short term. Indeed, many temps who are referred by staffing agencies have worked for the same company for many years.[98] In February 2021, the Labor Department reported that employers in the US employed 3.7 million such "temporary" employees, an increase of 1 million just since 2010. Temporary employees are becoming a dominant force in the US economy. The number doubled between 2000 and 2008, fell during the 2008–2010 Great Recession, and then doubled again between 2010 and 2020. The increase in the number of temps since 2010 represents a 4 percent annualized increase, twice the 2 percent annual rate of increase for all employment during that period.[99]

It also is a mistake to think of temps as day laborers looking for an odd job from a passing contractor or the occasional office help associated with the Kelly Girl image from the past. As one commentator has explained:[100]

> The overwhelming majority of th[e] growth [in temps] has come in blue-collar work in factories and warehouses. . . . [M]ore than one in every 20 blue-collar workers [is] a temp. . . . They are regular employees . . . working in the supply chain of many

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> of America's largest companies—Walmart, Macy's, Nike, Frito-Lay. They make our frozen pizzas, sort the recycling from our trash, cut our vegetables and clean our imported fish. They unload clothing and toys made overseas and pack them to fill our store shelves. They are as important to the global economy as shipping containers and Asian garment workers.

The highest utilization rates of temps are in the manufacturing and transportation and utilities industries and, of these, the largest industry share of temps is concentrated in manufacturing.[101]

For the millions of temps to obtain union representation and effective access to the benefits of collective bargaining, it is necessary for temps to be classified as employees of the host employer (i.e., the lead company that contracts for their services with a staffing agency). Theoretically, the temps could organize the staffing agency, but that would not be effective because the host employer could simply contract with a different, nonunionized staffing agency to secure its needed temps. Moreover, organizing the staffing agency's employees is unrealistic in most cases because those employees typically work for a variety of different employers at different places, have different types of work assignments, and most likely possess a variety of skill and work experiences. Consequently, all the temps employed by a staffing agency are unlikely to share a community of interest needed for effective union organization.

There is no theoretical barrier to two employers being viewed as joint employers of a single group of employees. The Supreme Court recognized this possibility more than half a century ago.[102] In the first decade after the enactment of the NLRA, the NLRB expansively construed its "joint employer" doctrine, finding that two companies were joint employers even when only one in practice controlled the employees' conditions of employment, so long as the other company possessed the authority to do so, even if that authority in fact had been unexercised.[103]

By 1984, however, the Board had developed a much more constricted view of the test for the creation of joint-employer relationships—one that limited joint employer status to business relationships where each employer in practice exercised actual significant control over the same employees. As the Board would later explain in *Airborne Express*, "[t]he essential element in [the] analysis is whether a putative joint employer's control over employment matters is direct and immediate."[104]

In short, beginning in 1984, a joint employer relationship depended on evidence of direct and immediate control over key employment terms,

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control that was actually exercised. Indirect control alone, an unexercised potential right to control, or the "limited and routine" control inherent in a service arrangement was insufficient. This approach to joint employer status made it easy for a company to contract with a staffing agency, prescribe the wages to be paid, and set other basic conditions of employment, but turn over all day-to-day supervision of the temps to the staffing agency and then claim that it, the host company, did not employ any of the temps as a joint employer because it did not exercise direct, day-to-day control over them.

Browning-Ferris Industries of California, Inc.[105] is a good example of a triangular structure, in which a host company contracts with a staffing agency to hire temps, with the host company substantially controlling the economic realities but doing so indirectly to avoid being viewed as a joint employer with the staffing agency and thus being subject to union organizing of its temp workers.

"The facts of BFI [*Browning-Ferris Industries*] are fairly representative of joint-employer cases brought before the Board from across the American economy [where] the companies tr[y] to construct an invisible wall between each other ensuring that [the host company] retain[s] no direct control over [the staffing agency's] employees even while employees of each company worked side by side."[106] In *Browning-Ferris Industries*, a recycling facility contracted with a staffing agency, Leadpoint, to provide screen cleaners, housekeepers, and most recycled material sorters who worked at the same facility as BFI's own full-time employees. The details of the arrangement were set forth in a "temporary labor services agreement." Leadpoint's own managers supervised the workers that it provided to BFI, exercising "the sole responsibility to counsel, discipline, review, evaluate, determine pay rates, and terminate" these employees. But the temporary labor services agreement reserved considerable indirect control over the economic realities of the arrangement. The agreement provided that Leadpoint was required to screen those it hired to ensure that the employees that Leadpoint provided were free from the effects of alcohol and illegal drug use on the job. In addition, BFI reserved the right to reject or request the termination of the temp workers "for any or no reason," and indeed did on occasion influence the terminations of some. Moreover, the agreement between BFI and Leadpoint included a rate schedule that provides that Leadpoint "solely determines the pay rates paid to its Personnel," but without BFI's approval, Leadpoint was prohibited from "pay[ing] a pay rate in excess of the pay rate for full-time employees of [BFI] who perform

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similar tasks." BFI set the hours of operations and shifts, decided when the production line would continue running for overtime purposes, and determined when breaks occurred. As stated by Van Wagtendonk (2018), "Taken together, Browning-Ferris exerted substantial control over the employees, albeit always with a Leadpoint supervisor as an intermediary."[107]

A local of the Teamsters Union filed a representation petition to represent a bargaining unit consisting of 240 "full-time and regular part-time employees" who were "employed by [Leadpoint] and [BFI], joint employers." Both BFI and Leadpoint sought dismissal of the petition on the ground that they were not joint employers of those whom Leadpoint referred to work at the BFI facility, because BFI had no direct control over the substantial terms and conditions of the employees that Leadpoint referred to it. Under the standards in place since 1984, BFI, as well as dozens of other employers and staffing agencies with functionally similar arrangements, had a strong argument.

However, the NLRB changed direction in its 2015 *Browning-Ferris Industries of California, Inc.* decision.[108] The NLRB concluded that BFI and Leadpoint were joint employers and that the union's representation petition sought an election in an appropriate bargaining unit. In so finding, the Board relied, among other things, on BFI's possession of control over those whom Leadpoint may hire to work at its facility; BFI's direct *and* indirect control over work processes and task assignments; and BFI's significant role in determining employees' wages. In concluding that BFI and Leadpoint were joint employers, the NLRB held that the issue is whether a putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining. The Board held that it no longer will require that a joint employer must not only *possess* the authority to control employees' terms and conditions of employment, but also must *exercise* that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is now relevant to the joint-employment inquiry. The Board also held that control that is exercised indirectly—such as through an intermediary—may now establish joint-employer status.

The D.C. Circuit Court of Appeals enforced the board's decision in *Browning-Ferris Industries of California, Inc.* with respect to its determination that both reserved authority to control and indirect control are relevant factors in the joint-employer analysis.[109] The D.C. Circuit reasoned that the "common-law element of control is the principal guidepost" for determining whether an entity is an employer of another and at common law the

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relevant inquiry is whether the servant "is controlled or is subject to the right to control by the master." In addition, "[t]raditional common-law principles of agency do not require that 'control . . . be exercised directly and immediately' to be relevant to the joint-employer inquiry. . . . In fact, the National Labor Relations Act itself expressly recognizes that agents acting 'indirectly' on behalf of an employer could also count as employers."[110] Thus, the act indicates that the NLRB is to examine all indicia of employer status, whether that status is exercised directly or indirectly.

According to Warner (2019), the Board's *Browning-Ferris* decision does not specify a test to determine whether an employer exercised *sufficient* indirect control for a joint employer relationship to be established, leaving room "for arguments to be made in the future disputing whether joint-employer status exists in particular situations."[111] What is clear is that the changes made in *Browning-Ferris* enable hundreds of thousands of temporary employees who are provided to a company by a temporary staffing agency to have an enhanced opportunity to secure union representation and the benefits of collective bargaining.

However, four years after the *Browning-Ferris* decision, in a 3–2 decision in *Hy-Brand Industrial Contractor's, LTD.*, the Trump NLRB overruled *Browning-Ferris* and returned to the pre–*Browning Ferris* standard for making joint employer determinations—namely, requiring proof that a company actually exercise some "direct and immediate control" over the essential employment terms of another company's employees.[112] In a vigorous dissent, two Board members argued that

> [t]ellingly absent from the majority's endless recitation of potential hardships for employers [especially the alleged absence of predictable results] is any mention of the concern that should undoubtedly be foremost: ensuring that the statutory promise of collective bargaining extends to as many workplaces and working arrangements as the Act contemplates. . . . The predictability that the majority achieves here is a one-sided assurance to employers that, by retaining a nominal distance from the supervision of workers, they can exert control and still avoid statutory bargaining obligations.

The NLRB subsequently vacated its decision in *Hy-Brand* because a Board member voting with the 3–2 majority was disqualified from participating in the case.[113] However, *Hy-Brand* and its dissenting opinions are discussed here because *Browning-Ferris* was overturned in 2020 by the Trump NLRB through rulemaking that adopted the majority's position in *Hy-Brand*.[114] The

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reasoning of the *Hy-Brand* dissent, quoted here, remains relevant both with respect to deficiencies in the Trump NLRB's administrative rule and because in September 2022, the NLRB issued a Notice of Proposed Rulemaking, which would rescind the joint-employer rule issued in 2020 by the Trump NLRB and replace it with a rule that provides that an employer is a joint employer of particular employees if the employer has an employment relationship with those employees under established common-law agency principles and the employer shares or codetermines those matters governing at least one of the employees' essential terms and conditions of employment.[115]

The NLRA should be amended to adopt the *Browning-Ferris* standards for determining joint employer status. It is unseemly for the US to proclaim in the NLRA that the national labor policy is to encourage the practice and procedure of collective bargaining, and at the same time adopt joint employer standards that permit—indeed invite—employers to avoid statutory bargaining obligations over workers whom they control by adopting the subterfuge of retaining a nominal distance from the supervision of workers. There already are an estimated 3.7 million "temporary" employees, an increase of 1 million just since 2010. With the prediction that this number will continue to increase faster than the overall growth of the workforce, it is time to incorporate the *Browning-Ferris* standards into the NLRA.[116] Otherwise, labor relations law will continue to vacillate with presidential politics, and millions of "temporary" workers will be denied the opportunity to choose collective bargaining.[117]

In summary, studies repeatedly show that a majority of nonunion workers desire unionization and the benefits of collective bargaining, but their desire remains unsatisfied. There are many reasons for this unsatisfied demand, and subsequent chapters will detail more of them. But one important explanation is inherent in the structure of the NLRA itself as interpreted by the NLRB and the courts: the exclusion of millions of workers who are classified as independent contractors and low-level supervisors, combined with the effective exclusion of millions of temporary employees who work for two employers (e.g., a staffing agency and its host employer client). By one estimate, for example, "more than half of women workers are excluded from coverage under the . . . NLRA [and thus are] stripped of the right granted under the [A]ct to choose independent workplace representation."[118] Just widening the range of workers permitted the legal protection of efforts to achieve collective representation would go a long way toward bringing the promise of industrial democracy to millions of American workers.

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Fulfilling the Pledge

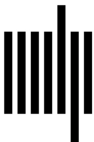
Securing Industrial Democracy for American Workers in a Digital Economy

By: Roger C. Hartley

Citation:

Fulfilling the Pledge: Securing Industrial Democracy for American Workers in a Digital Economy
By: Roger C. Hartley
DOI: 10.7551/mitpress/15128.001.0001
ISBN (electronic): 9780262377348
Publisher: The MIT Press
Published: 2024

The open access edition of this book was made possible by generous funding and support from MIT Press Direct to Open



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The MIT Press would like to thank the anonymous peer reviewers who provided comments on drafts of this book. The generous work of academic experts is essential for establishing the authority and quality of our publications. We acknowledge with gratitude the contributions of these otherwise uncredited readers.

This book was set in Stone Serif and Stone Sans by Westchester Publishing Services.

Library of Congress Cataloging-in-Publication Data

Names: Hartley, Roger C., author.
Title: Fulfilling the pledge : securing industrial democracy for American workers in a digital economy / Roger C. Hartley.
Description: Cambridge, Massachusetts : The MIT Press, [2024] | Includes bibliographical references and index.
Identifiers: LCCN 2022061533 (print) | LCCN 2022061534 (ebook) | ISBN 9780262547130 (paperback) | ISBN 9780262377355 (epub) | ISBN 9780262377348 (pdf)
Subjects: LCSH: Collective bargaining—United States. | Labor unions—United States. | Industrial relations—United States. | Labor laws and legislation—United States.
Classification: LCC HD6508 .H295 2024 (print) | LCC HD6508 (ebook) | DDC 331.890973—dc23/eng/20230112
LC record available at https://lccn.loc.gov/2022061533
LC ebook record available at https://lccn.loc.gov/2022061534

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