

# **United Parcel Service-Federal Express-National Labor Relations Act-Railway Labor Act-Union Employee-Independent Contractor- FedEx-Current Developments of the Legal Status of FedEx Workers- and the Trend of Employers Classifying Employees as Independent Contractors**

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*UPS and FedEx are both package delivery services, however UPS workers are considered employees under the National Labor Relations Act and are represented by the Teamsters Union. FedEx, which began as an air delivery service is under the jurisdiction of the Railway Labor Act. In recent years, FedEx management has restructured its relationships with its workers in such a way as to classify them as independent contractors. Legislative actions on both the state and federal level have sought to impose stricter scrutiny on employers classifying their employees as independent contractors.*

## **INTRODUCTION**

The National Labor Relations Act (NLRA) was originally enacted in 1935. Since its original enactment the law has been amended twice, in 1947 with the enactment of the Taft-Hartley Act and again in 1959 with the enactment of the Landrum-Griffin Act. The basic philosophic underpinnings of the law is that it protects a worker's right to organize into labor Unions, and once organized workers can seek to be represented by a union through the election process administered by the NLRB. Once a union is chosen, the employer has a duty to engage in collective bargaining with the union elected by the employees.

In 1926 the Railway Labor Act was enacted originally to govern labor relations in the railway industry. The purpose behind the law was to ensure the smooth running of the railroads without labor disruptions particularly in times of war or other national crisis. In 1936 the law was amended to apply to the airline industry. The emphasis of the law is to minimize the possibility of strikes through bargaining between the parties, arbitration, and mediation as means of resolving labor disputes.

As a result of these two laws an anomaly in the parcel delivery business has resulted in that the unionized United Parcel Service is under the jurisdiction of the National Labor Relations Act and the non-unionized FedEx is under the jurisdiction of the Railway Labor Act.

The jurisdictional distinction between the two companies is a result of historical circumstances, UPS founded in 1907, before the advent of airlines, developed mainly as a trucking company while FedEx began primarily as a company that delivered packages by air. As one commentator has observed:

UPS is a trucking company that has become an airline, while FedEx is an airline that has become a trucking company. Trucking companies are easy to unionize, while airlines are

not. While 85% of FedEx parcels travel by air and 85% of UPS parcel travel by truck, the companies have basically become a mirror of each other. (1)

### **FedEx Classification of Employees as Independent Contractors**

Notwithstanding, the fact that FedEx is covered by the Railway Labor Act, FedEx management has classified its workers as independent contractors-which is of significant legal and economic significance to the company, FedEx to UPS its chief competitor, to state and federal governments and to the employees themselves.

Part of the reason FedEx evolved into the independent contractor model was a consequence of the UPS Teamsters strike in 1997. UPS laid off 10,000 workers when package volume decreased dramatically, to take advantage of the absence of UPS in the ground package delivery business. During the strike FedEx bought RPS (a ground package delivery service based in Pittsburgh). RPS was based on an independent contractor model. FedEx kept the RPS independent contractor model. Management used this model to cut costs and thereby achieving a competitive advantage over UPS (2) (Braun of Consulting News, 2004)

The business model of FedEx utilizing the independent contractor model has been described in the following terms:

It is estimated that most *FedEx Ground* contractors work 10 to 12 hour days, without overtime pay. They are paid on a complicated piece-rate formula based on how many deliveries they make, with bonuses for good service. Drivers can make \$40,000 to \$70,000 a year.

The drivers use trucks bearing *FedEx* colors and logos, wear *FedEx*-style uniforms and serve customers of *FedEx Ground*. However, they must pay for and maintain their own trucks, uniforms, supplies, gas, maintenance, and other costs. They get no company benefits.

A *FedEx* contract generally covers one route, but it is possible for one person to own up to four contracts, which can raise the earning potential to more than \$100,000 per year. Because of this, existing contracts have become a commodity in and of themselves...sometimes bought and sold like businesses for as much as \$30,000 plus.

Contract drivers go through an initial two-week training program and then are on their own. The company does not supervise their daily routines, but does conduct customer satisfaction surveys. The business is strictly results oriented...if the customers are happy that is all that counts. (3) (Braun Consulting News, 2004)

In contrast to the FedEx model, under the UPS model its drivers are classified as employees who are represented by the Teamsters Union. The UPS model has been described in the following terms:

*UPS* drivers are employees. One hundred percent of their health insurance premiums are paid, trucks, gas and supplies are all provided by the company. It can take from 4 to 12 years to move up to a driver job after starting at a lower-pay job such as a part-time package handler, and the average job tenure for a *UPS* driver is more than 16 years. They are rarely hired from outside the company.

At UPS drivers are subject to close scrutiny and management. Nearly every move can be important and considered fair game for boosting efficiency and productivity. For example, drivers are instructed to get the ignition key out and position it with the serrated edge down as they walk back to the truck...saving a second or two in starting the truck when they get back to it.

Full benefits and a complete benefits package are offered to employees...making for a more dedicated and reliable workforce, according to the company ideal. They feel this gives UPS a more long-term advantage in customer service and loyalty. (4)  
(In re FedEx Ground Packaging System, (2010))

### **Legal Distinction Between Employees and Independent Contractors**

In Re FedEx Ground Package System, Inc., Employment Practices Litigation the Federal Court in reviewing the facts of the FedEx case first reviewed the generally applicable law differentiating an independent contractor from an employee. In that opinion Judge Miller cited the following:

An independent contractor is generally described as one who... Contracts to do certain work according to his own methods, without being subject to the control of his employer, except to the results or product of his work” Wallis v. Secretary, 689 P.2d at 792. The primary test used in determining whether an employment relationship exists is “whether the employer has the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished.” Id. The existence of the right or authority to interfere or control by the employer, not the actual interference or exercise of control, renders one an employee rather than independent contractor. Id.; Hartford Underwriters, 32 P.3d at 1151.

The right to control the manner and methods of the worker is the single most important factor in determining a worker status, McCubbin v. Walker, 886 P.2d at 794, but isn’t an exclusive and other relevant factors should be considered. McDonnell v. Music Stand, Inc., 886 P.2d 895, 899 (Kan. Ct. App. 1994) (*citing Jones v. City of Dodge City*, 402 P.2d 108, 111 (Kan. 1965)). Other relevant factors include: whether there is an agreement to perform a certain kind of work for a definite period of time; whether the employer has the right to discharge the worker at any time; whether the worker must furnish necessary tools, supplies, and materials; whether the worker is paid by the hour or by the job; whether the work is part of the regular business of the employer; whether the worker's business is independent in nature; and whether the worker has the right to employee assistance and supervise their work. (5). McCubbin v. Walker, 886 P.2d at 794 (length of contract, independent nature of business, employment of assistants, furnishing equipment, method of payment, and regular part of business); Wallis v. Secretary, 689 P.2d at 792 (right to discharge, method of payment, furnishing equipment); McDonnell v. Music Stand, Inc., 886 P.2d 899 (length of agreement, power to terminate, and method of payment).

Other cases have relied on similar factors as set forth in the Restatement (Second) of Agency §220(2):

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in the distinct occupation or business;

- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, in the place of work for the person doing the work
- (f) the length of time which the person is employed;
- (g) the method of payment, whether by time or by the job;
- (h) whether or not the work is a part of the regular business of the employer
- (i) whether or not the parties believe they are creating the relation of master and servant
- (j) whether the principal is or is not in business (5) (In re FedEx Ground Packaging Systems, 2010)

### **The Estrada and In Re Ground Package System Inc.,-Employment Practices Litigation Cases**

From the perspective of an individual working under the classification as an independent contractor, their classification as independent contractors imposes a number of burdens on them and gives their employers a multitude of advantages. Specifically independent contractors are not entitled to overtime benefits, the expenses of equipment, uniforms etc. are borne by the independent contractors. The independent contractor does not get traditionally accepted employee benefits; the employer does not pay its share of social security and health insurance.

The legal contest over whether FedEx has improperly classified its employees as independent contractors began as a class-action suit by employees claiming FedEx by improperly classifying them as independent contractors had improperly denied them over time, expenses related to their job, Social Security contributions and other normally expected employee entitlements such as health insurance, (6) (Estrada v. Ground Package System Inc., 2007) This case arose out of a class action law suit filed in Los Angeles County Superior Court in 1999 alleging that single route FedEx ground delivery drivers were wrongfully classified as independent contractors and were unfairly required to foot the bill for millions of dollars in operating expenses including the cost of uniforms, fuel and maintenance for their delivery trucks and insurance. In December 2005, the California court ruled that FedEx exercised pervasive control over the drivers and their working conditions. The Court found that the company had engaged in unfair business practices and awarded the respondents \$5.3 million dollars in damages and additional \$12.3 million dollars in attorney's fees and costs. In October 2008 a specially appointed referee awarded the California FedEx drivers an additional \$9 million dollars in damages. (FedEx Ground Packaging System, 2010)

From the decision in the California court the issue has grown into a nationwide class-action lawsuit involving cases from 42 different states. The case was consolidated into a single class-action suit heard by a federal district judge in Indiana in the case of FedEx Ground Package System Inc. Employment Practices Litigation (Cause No. 305-MD-527 RM) December 13, 2010. (7) What had been successful litigation by FedEx drivers in California was now essentially reversed by the consolidated class action suit in the Indiana case. One of the major factors in deciding if an individual is an employer or independent contractor cases centers around the issue of the employer's "rights of control" of the "employees" work. In his decision in the FedEx case Judge Miller acknowledged that the "employers" right of control is the highest factor" in determining employee or independent contractor status and he did acknowledge in his decision that there were many controls over the drivers exercised by FedEx ground management. However, in his deciding in favor of FedEx he asserted that a distinction between an employee and an Independent Contractor could be made by, "distinguishing control of means from control of results." He went on to state, after review of relevant state law, that the control over the results does not indicate employee status whereas a control of means to achieve controlled for results does indicate employee status. The Court went on to state that "Bright-line rules prove elusive here [however] the controls reserved to FedEx were results oriented. FedEx provides work to and pays contractor-drivers to provide the specific results of timely and safely delivered packages to FedEx customers" (8)

The legal standard under which Judge Miller decided the case was based on the so-called “common-law” criteria to distinguish between an employee from an independent contractor: The “common-law” standard of what classifies an employee from an independent contractor is similar in most states, but significant differences exist between different states as to the interpretation of the common law standards so that the courts will have to evaluate like cases on the basis of each individual state’s law. (Judge Miller’s decision is subject to appeal to the Seventh Circuit Court of Appeals in Chicago) Judge Miller’s decision applied to 42 lawsuits concerning laws in 27 states. In 23 of the 27 states where suit was brought by the FedEx drivers Judge Miller found that they had not been improperly classified as Independent Contractors. In three of the states he found they had been improperly classified as independent contractors.

In rendering his decision Judge Miller relied on the following analysis:

The single most important factor in determining a worker's status as an employee or an independent contractor is whether the employee controls, or has the right to control, the manner and methods of the worker in doing the particular task. The court must determine whether FedEx has the right of control and supervision over the drivers work, and the right to direct the manner in which the work is performed, as well as the result that is accomplished.

When all reasonable inferences are drawn in the plaintiff's favor, the evidence is insufficient to show that FedEx retains the right to control the plaintiffs and direct the manner in which they performed their work

The evidence shows that FedEx retains the right to control the days of service, daily workload, and certain parameters when pickups or deliveries must be made. FedEx also retains the right to determine and enforce driver and vehicle appearance and vehicle suitability standards. FedEx offers training, supervises and monitors the drivers work, and suggest best practices to drivers to follow in the performance of their work. While these facts weigh in favor of employee status, they are insufficient to show the right to control the manner and means of the drivers work. FedEx can control the driver’s specific work schedule, and contractors can hire assistant replacement drivers to complete their assigned work, relieving them of any time or strict as workload requirements. The evidence doesn't establish that FedEx has a right to require drivers to follow it's suggested best practices; contractors can choose the best way to manage their routes as long as they are meeting the customer service obligations set forth in the Operating Agreement. FedEx's customer service departments focus on the results expected of contractors in performing their assigned work, not the means and methods of their performance. Control over the results of the work- telling the worker what must be accomplished- doesn't indicate employee status. McCubbin v. Walker, 886 P.2d at 799. Accordingly, while there are facts pointing to FedEx's right to control, they don't raise to the level of control necessary to show employee status.

Other Factors also weigh in favor of independent contractor status. Contractors have the ability to hire others to complete their work, which gives them more freedom in running their business. Contractors have a proprietary interest in their routes and can sell them to another qualified driver. If they become multiple area contractors, they can increase their entrepreneurial opportunities and ability to earn profits. Contractors are responsible for acquiring a vehicle and can use the vehicles for other commercial purposes. Finally, contractors aren't terminable at will; FedEx can only terminate for breach of the operating agreement after several layers of review by FedEx management, and contractors can assert claims of wrongful termination to arbitration.

Although the contractors' work is a regular and integral part of FedEx's business, the skills required for single area contractors isn't highly specialized, and FedEx's competitors generally use employees to complete pickup and delivery services, the other relevant factors favor independent contractor status. Accordingly the court holds that after considering all relevant factors, the drivers are independent contractors as a matter of law. Pursuant to the plaintiff's agreement during class certification, the court notes that it makes this finding based on a limited review of the evidence relevant to the right to control, not the actual exercise of control. (9)  
(In re FedEx Ground Packaging System, 2010)

### **Reliance by Plaintiffs on FedEx Independent Contractor Agreement and its Policies and Procedures**

The attorneys representing FedEx employees sought to establish that FedEx drivers were in fact employees not independent contractors as FedEx alleged. It was felt by the attorneys representing FedEx drivers, that the Operating Agreement between the drivers and FedEx in and of itself was sufficient evidence to establish that FedEx exercised the type of control over the drivers usually associated with employees, not independent contractors. Attorneys for the FedEx drivers could also have introduced so-called "anecdotal evidence" of alleged FedEx control over the drivers day-to-day work activities beyond the Operating Agreement, but did not do so. (10) Even though FedEx won the case, the decision in the case does not prevent FedEx drivers from bringing future misclassification lawsuits relying on "anecdotal evidence." In anticipation that this might happen FedEx has revised its Operating Agreements in many states.

One of the issues that have been raised in the FedEx Independent Contractor litigation is the distinction between FedEx drivers who only have one route and those who have multiple routes. Drivers with one route have been held to be employees because they do not have any supervisory responsibilities. FedEx changed how FedEx contractors in New Hampshire and Maryland operate (11) by requiring each independent contractor to manage multiple routes. The operators under the operating agreement with FedEx have people working under them, which when further litigation occurs will strengthen FedEx's argument that many operators are truly independent contractors running their own businesses and not merely employees. While FedEx continues to maintain that its drivers are employees it nevertheless is compelling its operators (those with more than one route) to treat their drivers as employees, presumably to avoid situations where states have made demands for workers compensation insurance and employment taxes.

The changes in the "operating agreements" between FedEx and its drivers which FedEx has mandated include the following:

1. they must establish themselves as corporations under state law, and not LLC's and LLP's, partnerships or sole proprietorships
2. they must be represented and in good standing with the state or states in which they do business
3. treat their own drivers (multiple route Independent Contractors) as employees
4. agree to provide proof of corporate status and regulatory compliance upon request
5. sign and submit an addendum that certifies compliance (12)

### **Federal Legislative Initiatives**

In response to the classification of workers as independent contractors by FedEx and other employer's efforts to classify workers as independent contractors rather than employees, lawmakers have introduced legislation making such classification illegal. Sen. Sherrod Brown of Ohio on April 22nd 2010 introduced a bill entitled the Employee Misclassification Prevention Act (EMPA) (2010) into Congress to amend the Fair Labor Standards Act of 1938 to require businesses to keep records of non-employees who perform labor for remuneration and to provide a special penalty for persons who misclassify employees as nonemployees, and/or other purposes. The bill has never been enacted into law. (13)

If the law were ever enacted its importance would be significant. The EMPA would create a federal offense not presently existing in the law, which would impose penalties for both intentional and unintentional misclassification of employees as independent contractors. Employee rights created by the law would empower the Department of Labor (DOL) to seek expanded monetary damages on behalf of employees.

Following up on the Employee Misclassification Prevention Act bill of 2010, which was introduced in the Senate, a bill was introduced in the house entitled the Payroll Fraud Prevention Act. (2010) (14) In addition to the provisions cited above, the bill would also establish a presumption that an individual is an employee under the FLSA and the bill would also amend the Social Security Act to require state unemployment insurance programs to implement investigative procedures and establish rules for misclassification.

The Taxpayer Responsibility, Accountability, and Consistency Act (2009) (15) was introduced by Senator Kerry of Massachusetts in 2009. Under the terms of the Act Section 530 of the Internal Revenue Code would be amended to modify the rules giving employers a “safe harbor” when they are misclassifying employees as independent contractors. The Act would also permit the IRS to issue guidelines on the subject. In addition to the above the Department of Labor (16) has developed an initiative to strengthen and coordinate efforts to deter employee misclassification. Among the enforcement measures used would be training programs for DOL investigators, additionally a \$25 million dollar fund in the federal budget for 2011 was allocated for the DOL’s Misclassification Initiative.

To encourage employers to come forward the IRS has launched a Voluntary Worker Classification Settlement Program whereby employers would be subject to small penalties, in return for coming forward and reclassifying their workers properly as employees (17)<sup>1</sup>

### **State Attorney General Litigation**

In addition to litigation by individuals and the Federal government state Attorney Generals have brought suit. Attorney Generals in Kentucky, Massachusetts, Montana, New York as well as other state Attorney Generals have brought suit against FedEx for misclassification of its ground division drivers as independent contractors. The New York lawsuit, New York State vs. FedEx Ground Package System Inc. (2010) (18) was filed in the New York State Supreme Court for New York County. The law suit alleged that FedEx by classifying its ground package systems drivers as independent contractors had violated state labor laws including-the payment by FedEx of state unemployment insurance, Worker's Compensation, wage payment and overtime laws. The complaint states that notwithstanding FedEx's assertions, FedEx has the power to control, and does in fact control, almost all aspects of its driver’s work including “hours, job duties, routes and even clothing” thus rendering their drivers as employees.

### **CONCLUSIONS AND OBSERVATIONS**

The practice of employers classifying workers as independent contractors rather than employees is becoming an increasingly common business practice not only with respect to FedEx but other industries as well. The consequences of this practice are significant not only for the affected employees, but for the collection of state and federal tax revenues from employers as well undermining the ability of employers who properly treat their workers as employees because of the difficulty with competing with employers who treat their workers improperly as independent contractors.

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A major bar to effective enforcement against independent contractor abuses is the safe harbor provision in the Internal Revenue Code, at Section 530 of the Revenue Act of 1978, 26 U.S.C §7436. Currently, employers decide what workers are employees or independent contractors with little scrutiny from the IRS and no consequences. Under current law, an employer who is found by the IRS to have misclassified its workers can have all employment tax obligations waived. Section 530 also prevents the IRS from requiring the employer to reclassify the workers as employees in the future. Among other factors, a business can rely on its belief that a significant segment of the industry treated workers as independent contractors, thereby perpetuating industry-wide noncompliance with the law

The National Employment Law Project has observed:

This practice as well as the related tactic of paying workers off the books, can save employers as much as 30% of payroll and related taxes otherwise paid by “employers”. If undetected employees miss out on unemployment insurance, workers compensation, fair pay and other workplace protections. Misclassification undercuts the competitiveness of law-abiding businesses

The improper classification is used “because employers can enjoy several benefits by classifying employees as independent contractors, if the classification is improperly used. In a true independent contractor relationship, an employer is not liable for FICA (Federal Insurance Contributions Act) Social Security or FUTA (Federal Unemployment Tax Act) unemployment compensation. Additional savings can also be employed as independent contractors do not participate in employee benefit plans and generally are not covered under workers compensation insurance policy. Both heavy expenses are also reduced because the employer is not required to withhold income and employment taxes for these workers (20) (National Employment Law Project, 2010)

One of the significant issues in the FedEx independent contractor cases that the courts have to address is the distinction between single route drivers and multiple drivers, because single route drivers have no supervisory authority over others while multi-route drivers engage in activities of a supervisory nature. The Teamsters union has attempted to organize single route contractors in the FedEx ground home delivery terminals in Boston and Wilmington, Massachusetts. The regional office of the NLRB, found the single route drivers to be employees and thereby able to unionize under the National Labor Relations Act. FedEx appealed the decision of the NLRB. The US Court of Appeals for the DC Circuit found in favor of FedEx.

The DC Circuit Court said that the opportunity to operate multiple routes, hire employees and sell routes without permission justifies FedEx classifying the drivers as independent contractors. (21) (Risher, 2009)

Judge Miller's decision discussed earlier in this paper is in the process of being appealed to the US Court of Appeals in Indianapolis and ultimately may be appealed to the US Supreme Court.

In McCubbin v. Walker, the criteria for distinguishing an employee from an independent contractor was defined in the following terms:

The single most important factor in determining a worker's status as an employee or independent contractor is whether the employer controls, and has the right to control the manner and method of the worker doing the particular tasks (22)

Judge Miller in the Illinois District Court decision while acknowledging there were many controls exercised by FedEx management on the work of the FedEx drivers, drew a distinction between the “control of means”, and the “control of results”. His basic premise was while the FedEx controlled the results it did not sufficiently control the means to achieve the desired results to render FedEx drivers as employees. In his decision Judge Miller states:

The evidence doesn't suggest that FedEx has the right to require drivers to follow its suggested best practices; contractors choose the best way to manage their work as long as they are meeting the customer service obligations set forth in the Operating Agreement. FedEx customer service requirements focus on the results expected of contractors to perform their specified work, not the means and methods of their performance. Control over the results of the work telling the worker what must be accomplished doesn't indicate employee status (23) (In re FedEx Packaging System, 2010)



Notwithstanding Judge Miller's assertion on this issue there is much evidence pointing to an employee-employer relationship with respect to FedEx drivers including the following:

1. FedEx drivers are a regular and integral part of FedEx's business
2. FedEx must approve contractual replacement drivers
3. Drivers must wear the FedEx uniform
4. FedEx drivers are required to provide service on the days FedEx is open for business
5. FedEx reviews driver's performance
6. Various provisions of the operating agreement authorize FedEx to control days of service, the contractors daily workload and certain times when pick-up and deliveries must be made
7. FedEx can terminate drivers
8. Control of the area each driver must service
9. The prices charged for services
10. Certain customer service standards
11. Contractor's limited ability to negotiate compensation rates
12. The absence of highly specialized skills by the drivers (24)  
(In re FedEx Ground Packaging System, 2010)

For drivers who have multiple routes FedEx's argument of independent contractor status does have some credibility in view of the following (1) the right to employee assistants (2) proprietary interest in business (3) furnishing necessary tools and supplies by drivers. (25)

Other factors supporting independent contractor status would be as Judge Miller stated in his decision:

Some contractors have their own businesses and contract with FedEx through sole proprietorships or corporations. Contractors can be employed in another organization especially if they choose to have assistance or replacement drivers to help run their routes. Contractors can use vehicles for other commercial or personal purposes when not actually carrying FedEx packages as long as identifying FedEx patches and logos are masked or removed (26) (In re FedEx Ground Packaging System, 2010)

While an argument can be made that FedEx's multiple route drivers who hire assistants and have managerial responsibilities with respect to their own employees are independent contractors FedEx's argument of independent contractor status for single route drivers is not justified by the evidence. Single route drivers engage in an activity that is not highly specialized, thus not qualifying them to be considered as being in a distinct occupation or business.

In addressing the analysis of the status of FedEx drivers as employees or independent contractors, distinct categories should be established by the courts.

- (1) Single route drivers should be considered as employees given the evidence, and should be treated as employees
- (2) Some multiple route drivers should be considered employees if there is limited evidence that they are performing managerial functions such as hiring drivers to work for them
- (3) Other multiple route drivers who engage in managerial functions generally associated with the status of independent contractors, should be recognized as such.

### **Wider Implications of the FedEx Cases**

The determination of whether FedEx drivers are employees or independent contractors will have a significant impact on the competitive model in the package delivery services industry as well as impacting on the ability of other employers in other industries to designate their employees as independent contractors.

It is argued that the ability of FedEx to categorize its employees as independent contractor gives them a competitive advantage over UPS since FedEx has less expenses particularly with respect to contributing

to worker's FICA taxes and FUTA taxes. Further the ability of FedEx to categorize drivers as independent contractors prevents the Teamsters and other unions from organizing under the NLRA, since only employees are allowed to organize under the Act.

Notwithstanding this restriction, if a new model develops of categorizing employees as independent contractors, there is nothing to preclude modification of the NLRA to allow persons whose employment constitutes an integral part of the employer's business, such as all FedEx drivers to engage in some form of collective bargaining or in "concerted activity" which is currently, a protected right for all workers, be they unionized or not.

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