A SPECIFIC DILEMMA: NEGATIVELY DEFINING EMPLOYEE TO INCREASE
EMPLOYEE PROTECTION

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I. INTRODUCTION

I didn’t like the control that they had over my route and was constantly threatened about job stability. Do it their way or be terminated. It was not my own business as it was presented to me when I accepted the route.¹

When I was diagnosed with ovarian cancer in August 2004, I asked FedEx to let me take the medical leave I needed and return to my route when I was better. However, FedEx just told me that if I took a medical leave, I would lose my route. Sure enough, while I was off work to undergo surgery and other cancer treatments, they terminated my contract.²

These two workers, Ron and Joan, had delivery routes with FedEx Ground. FedEx requires drivers to enter into contracts for routes and considers the drivers independent contractors. However, the drivers end up being treated as something in between an employee and independent contractor. Their work is controlled by FedEx, but they are given no outright protection as employees. These two FedEx drivers illustrate the frustrations that many workers have when misclassified as independent contractors. A General Accountability Office report found that States uncovered approximately 150,000 workers misclassified as independent contractors in 2007.³ Additionally, the Bureau of Labor Statistics found that there were approximately 10.3 million workers classified as independent contractors.⁴ It is uncertain how

¹ Quote from Ron Smith, Sacramento, CA; a FedEx driver involved in the FedEx class action lawsuit. http://www.fedexdriverslawsuit.com/driverprofiles.html
² Quote from Joan Capobianco, Brockton, MA; a FedEx driver involved in the FedEx class action lawsuit. http://www.fedexdriverslawsuit.com/driverprofiles.html
many of these workers are misclassified. However, the GAO report estimates that over 3 million or around 30 percent may be misclassified.6

Employers misuse independent contractor status in order to avoid paying workers compensation, unemployment, Medicare taxes, social security taxes, and other statutory obligations.7 These economic incentives can then lead to other incentives to misclassify employees. The employer may also intentionally misclassify employees to limit liability under the many statutes created to protect employees. Misclassification deprives employees from receiving minimum wage and overtime, protection against race, age, sex, and disability discrimination, protection for reporting workplace hazards, and receiving retirement and health benefits equivalent to other co-workers.8 Additionally, by avoiding statutory requirements, employers can fraudulently lower costs and underbid competitors on private and government contracts.9 The number of misclassified employees identified by state audits rose nearly 50% from 2000 to 2007.10 The IRS estimated tax losses around $1.6 billion as a result of employee misclassification.11 In addition to employers intentionally misclassifying employees as

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8 Planmatics, Inc. for the U.S. Department of Labor, Independent Contractors, Prevalence and Implications for Unemployment Insurance Programs, 75-76 (Feb. 2000).
independent contractors, the federal courts’ interpretation of employee status has also encouraged employers to push the legal limits of independent contractor status.

Who is an employee can often be difficult to determine. Since the term employee is not explicitly defined in any federal labor and employment statute, the federal courts have used three tests for determining whether a worker is an employee or an independent contractor. All three tests have evolved from the agency control test. Because of this common origin, the tests severely overlap. To further confuse employee status, the federal courts have devolved the three tests back into the common law agency test. Additionally, the federal circuit courts are adding an element of “entrepreneurial spirit” into the mix. Another concern with current federal judicial interpretation is that the courts use a pick and choose method when applying the common law test. The non-specific control test allows courts to pick the factors that it believes are most relevant, which creates a varied interpretation of employee across circuits. The court’s use of the common law agency test needs to be re-defined to bring more certainty and protection to employee status.

To ensure that worker’s are protected, an employee should be defined by defining who is not an employee, e.g. who is an independent contractor. All other workers are employees within the employee/independent contractor context. Within the definition of independent contractor, the right to control will be considered, but control is not the sole consideration. Legal aspects of contract and whether the work is part of the regular business of the employer/client are also considered in this proposal. These factors are often overlooked or minimized by the federal courts when determining employee status. However, these additional factors help support the

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purposes of the federal labor and employment laws and go back to a traditional view of an independent contractor.

A negative definition of employee will be beneficial for employers and employees. Creating a more clearly defined definition lessens the uncertainty in determining employee status. While some costs for the employer may increase, employers have the ability to pass the cost on to its customers. In addition, some employers may reduce other transaction costs, such as litigation costs, by correctly classifying employees.

Employees will benefit because there is a clear definition that will be more difficult for an employer to abuse. Last, employees will be on a more level field with the employer because the focus is on the employer’s business, the worker’s work in relation to the business, bargaining power, and control. This is in contrast to many of the control elements that focus on the lopsided agreements drafted by the employer and in which the worker has no bargaining power to alter.

The scope of this paper is to assert that it is time to redefine employee status. From the control test to the multiple tests and then back to the control test the courts have given varying and confusing interpretations of employee status. With the addition of the entrepreneurial element and the ability to pick and choose factors, employee status is becoming more obscure. The courts are making it easier to misclassify employees. A clear, certain definition will help ensure employee protection.

This paper is set up into three parts. The first part will give a history of defining employee and the courts’ interpretation of employee status. This section will begin by covering the definitions of an employee in the labor and employment statutes along with some history of the legislative intent. This section will then discuss how the federal courts have interpreted the definition of employee by establishing multiple tests to satisfy the multiple purposes of the
statutes and how these tests have devolved back into the agency control test. The second section will review the current problems with how an employee is defined. This section will discuss the problems with the current interpretations of the common law test by giving examples of how the test has been used. This section will also discuss the use of an entrepreneurial element and how the various circuits have been applying the entrepreneurial element.

After discussing the problems with the judicial interpretation, the third section will propose to negatively define employee. This section will give an example of how the definition would be structured and the elements that the negative definition will consider. In addition, this section will reevaluate the cases discussed in the second section using the proposed definition. This section will also discuss why this is a better interpretation and how workers will be given more protection.

II. A HISTORY OF EMPLOYEE STATUS UNDER FEDERAL LAW, ABRIDGED

Federal labor and employment laws protect only employees. The statutes contain similar, circular definitions to define an employee. In addition, the statutes vary in scope and purpose. Because of the lack of clarity in defining an employee under the federal statutes, the federal courts adopted the common law agency test to determine employee status. The common law agency test, or the “right to control” test, is set up as a multi-factor test. This test has been used in various forms since the nineteenth century.\textsuperscript{14} However, it was typically used to determine employee status with regards to respondeat superior cases.\textsuperscript{15} With the addition of numerous labor and employment statutes during the twentieth century, the courts established multiple versions of the test depending upon the statute. However, the courts have slowly devolved the tests back to the one agency test.


\textsuperscript{15} Restatement (Third) of Employment Law, § 1.01 cmt. a. (2d tent. dft. 2009).
A. Defining Employee Under Federal Labor and Employment Laws

Various circular definitions are used to define an employee under the labor and employment statutes. Some statutes have adopted similar or the same definitions of employee, yet the scope and purpose of the statutes differ greatly. For example, under the Fair Labor Standards Act (FLSA), “the term “employee” means any individual employed by an employer.”\(^\text{16}\) This circular definition is not helped when one looks to the definition of “employ” or “employer.” To employ is defined as “to suffer or permit to work.”\(^\text{17}\) An employer “includes any person acting directly or indirectly in the interest of an employer in relation to an employee.”\(^\text{18}\) Although it was enacted fifty-five years after the FLSA, The Family and Medical Leave Act (FMLA) adopted the same definitions of employee, employ, and employer as used in the FLSA.\(^\text{19}\) Title VII also adopted the FLSA definition of employee.\(^\text{20}\)

The FLSA, adopted in 1938, was intended to help spur the United States out of the great depression. By requiring a decent livable wage, higher wage rates after 40 hours, and limiting child labor, the intent was to spur businesses to start hiring more people. The cost of paying the current workforce would be more expensive.\(^\text{21}\) With the FLSA, the expense of paying two people to work sixty hours per week would be equal to paying three people to work forty hours per week. With more people working, there would be more spending and the United States would lift itself out of the depression.

The NLRA definition is also similarly circular, yet slightly different. In addition, the purpose of the NLRA differs. Under the NLRA, “the term “employee” shall include any

\(^{16}\) 29 U.S.C. § 203 (e)(1).
\(^{17}\) 29 U.S.C. § 203 (g).
\(^{19}\) “The terms “employ”, “employee”, and “State” have the same meanings given such terms in subsections (c), (e), and (g) of section 203 of this title. 29 U.S.C. § 2611 (3) (FMLA).
employee, and shall not be limited to the employees of a particular employer.” The NLRA was enacted with the purpose of equaling bargaining power between companies and their employees, allowing for collective bargaining, and to protect employees that want to organize. Last the NLRA is the only federal statute that explicitly excludes independent contractors.

It is clear that the definition of who is an employee is unclear. With the vague definitions of employee, the federal courts have been left to interpret Congress’s intent. Congress has the authority to delegate to the federal courts. This delegation has left the federal courts with the job of not only judicial interpretation of similar definitions from varying congresses, but also with the ability to shape federal labor and employment policy.

B. Evolution of the Agency Control Test

The courts have used some form of the agency “control” test to determine the status of employees. Initially, the courts attempted to expand the legislative definitions, only to be later restricted by legislative changes to the labor and employment statutes in existence at the time. However, the latter part of the twentieth century brought an onslaught of additional employment protections for employees. With the increase in protective statutes, the federal courts developed variations of the common law agency test in an attempt to ensure the tests would parallel the

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26 The Legislature adopted the Taft Hartley Amendments in 1947 which explicitly excluded independent contractors and supervisors from coverage under the NLRA. The Federal Court’s interpreted this as the Legislature’s intent to use the common law agency definition of an employee for the NLRA.
multiple purposes of the statutes. Three tests have been used to determine employee status: the agency “right to control” test, the economic realities test, and a hybrid of the two tests.

The common law agency test, referred to as the “right to control” test, is set out as a multi-factor test to determine employee status. This test has been used in various forms since the nineteenth century. However, it was typically used to determine employee status with regards to respondeat superior cases. It was not until the 1930’s with the passage of the NLRA and the FLSA that the courts applied the test to federal labor and employment statutes. Some of the statutes that currently use the Right to Control Test are: the National Labor Relations Act and the Employment Retirement and Income Security Act.

The agency test is set up with multiple factors that a federal court will consider when determining employee status. In Waters v. Pioneer Fuel Co., the Court used the following as its factors for establishing employee status: the manner of payment, the continuity of the employment, the exclusivity of the employment relationship, the employer's control over the important aspects of the work, the worker's control over starting and stopping times, the contribution of equipment and resources to the job, the length of the employment, and a comparison of the employer's general treatment of the worker in comparison with other workers who were apparently regular employees. A recent example of the multiple factors used by the U.S. Supreme Court is:

[T]he hiring party's right to control the manner and means by which the product is accomplished Among the other factors

30 Restatement (Third) of Employment Law, § 1.01 cmt. a (2d tent. df. 2009).
relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.  

While the two cases are over 100 years apart, the lists are fairly similar. The federal and state courts have had difficulty in consistently applying this test. Even in Waters, the court admitted that there is no good definition of an employee and distinguishing an employee from an independent contractor is difficult for a court to determine.

It is not easy to frame a definition of the terms independent contractor that will satisfactorily meet the conditions of different cases as they arise, as each case must depend so largely upon its own facts. One text writer declares such contractor to be one who undertakes to do specific pieces of work for other persons, without submitting himself to their control in the details of the work . . . . So it is said [by another] that an independent contractor is one who exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer except as to the result of the work. 

Federal and state courts have frequently struggled with determining employee status. While some courts stuck with the agency test, other courts tried different approaches, including the economic realities test. The economic realities test is considered more expansive than the agency test. The test has been used primarily for statutes that are considered broad, remedial, and protective in nature. Some of the statutes that use the economic realities test are: the Fair Labor

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Standards Act, Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Occupational Safety and Health Act, and the Family and Medical Leave Act. The test is designed to look beyond mere control of the worker and work product but also to the economic conditions of the situation and economic dependence of the worker on the employer.

An early example of the economic realities test is seen in *National Labor Relations Board v. Hearst Publications*. In *Hearst*, the Court relied on the “economic facts of the relation” to show that economic dependence upon an employer may be considered in determining employee status. The Court, at the time of *Hearst*, read the NLRA broadly to ensure that the purpose of the statute was met. The economic realities test takes many forms,

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39 Heinemeier v. Chemetco, Inc., 246 F.3d 1078, 1082-83 (7th Cir. 2001)(stating that the Circuit looks at the economic realities when determining the employer-employee relationship for Title VII and ADEA cases).

40 Heinemeier v. Chemetco, Inc., 246 F.3d 1078, 1082-83 (7th Cir. 2001)(stating that the Circuit looks at the economic realities when determining the employer-employee relationship for Title VII and ADEA cases).


42 *Sec. of Labor v. Loomis Cabinet Co.*, 15 OSHC 1635, 8 (1992).

43 *Smith v. BellSouth Telecomms., Inc.* 273 F.3d 1303, 1308 (2001) citing *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (if Congress intentionally adopts sections of another statute, it is assumed that the federal courts will apply the same judicial interpretation of that section to the new statute). FMLA explicitly states that the definition of employee is to be the same as used in the Fair Labor Standards Act. 29 U.S.C. § 2611 (3).


47 *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 128 (1944); It is important to note that Congress did not approve of this broad reading of the NLRA. The Legislature passed the Taft-Hartley amendments which explicitly stated that independent contractors are not covered under the NLRA. The Legislature did not act to change the broad interpretation of employee under the FLSA.
from a general description of considering the economic realities of the situation to a multi-factor test that is similar to the common law agency test. The five factors most commonly used are:

1. the degree of control exercised by the employer over the workers, 2. the workers' opportunity for profit or loss and their investment in the business, 3. the degree of skill and independent initiative required to perform the work, 4. the permanence or duration of the working relationship, and 5. the extent to which the work is an integral part of the employer's business.

While the factors in the economic realities test differ from the control test, the factors in both tests consider many of the same subjects including an employer’s right to control the employee. In Secretary of Labor v. Loomis Cabinet Co., the OSHRC admits that the economic realities test is basically the same as the common law agency test established in Nationwide Mutual Insurance Company v. Darden. The OSHRC found that the employees in Loomis would be covered under either test.

If the Economic realities test and the common law agency test are so similar, it is difficult to image a hybrid test between the two. However, the courts did develop and have used a hybrid approach for several statutes including: Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. “Under the hybrid test, a court typically weighs the common-law factors listed in the Restatement and some additional factors related to the

48 Sec. of Labor v. Loomis Cabinet Co., 15 OSHC 1635, 8 (1992), (The OSHRC used the following factors for its “economic realities” test: “1) Whom do the workers consider their employer; 2) Who pays the workers' wages; 3) Who has the responsibility to control the workers; 4) Does the alleged employer have the power to control the workers; 5) Does the alleged employer have the power to fire, hire, or modify the employment condition of the workers; 6) Does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight; 7) How are the workers' wages established?”)
49 Brock v. Superior Care, Inc., 840 F.2d 1054, 1058-59 (2d Cir. 1988).
50 Sec. of Labor v. Loomis Cabinet Co., 15 OSHC 1635, 9-10 (1992); aff’d by Loomis Cabinet Co. v. OSHRC, 20 F.3d 938, 942 (9th Cir. 1994).
51 Sec. of Labor v. Loomis Cabinet Co., 15 OSHC 1635, 9-10 (1992), (despite citing the economic realities test as the controlling test, the OSHC admits that the “right to control” is one of the main considerations when determining employee status).
54 Trainor v. Apollo Metal Specialties, Inc., 318 F.3d 976, 980 (10th Cir. 2002).
worker's economic situation, like how the work relationship may be terminated, whether the worker receives yearly leave, whether the worker accrues retirement benefits, and whether the hiring party pays social security taxes.”

Multiple federal courts have stated that the Hybrid test is essentially, the common law agency test.

III. PROBLEMS WITH THE COURTS’ APPLICATION OF THE CONTROL TEST

The current system for determining who is an employee is in need of a makeover. Defining an employee and independent contractor rely heavily on judicial interpretation of vague statutory language. The courts have slowly redefined the tests, devolving the economic realities, hybrid, and “right to control” test into the agency “right to control” test. With this devolving definition of who is an employee, there is no guarantee that the federal courts will not chip away at the definition habitually or if they will later change the standards and once again broaden the definition of employee. To add to the confusion, the federal courts have considered factors outside of the control test. The constant, changing standards makes it difficult for employers and employees to determine an employee’s status. It also makes it easier for an employer to avoid its tax responsibilities by intentionally misclassifying employees as independent contractors.

A. The Courts’ Ability to Expand or Narrow the Definition of Employee

The common law test, the economic realities test, and the hybrid test severely overlap. All three tests use a multi-factored format with similar verbiage and with similar end results. In 1992, the United States Supreme Court declared in Darden, that where the federal statute is vague as to the definition of an employee, the federal courts are to use the common law agency

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55 Wilde v. Co. of Kandiyohi, 15 F.3d 103, 105 (8th Cir. 1994).
56 Frankel v. Bally, Inc., 987 F.2d 86, (2d Cir. 1993) (stating that the hybrid test in large part duplicates the common law agency test); Wilde, 15 F.3d at 106, (8th Cir. 1994) (finding that while many of the Circuits have adopted the hybrid test for Title VII cases, there is no significant difference between the common law test adopted in Darden and the Hybrid Test.)
The Supreme Court, in confirming the common law agency test, discussed *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). While the *Reid* case dealt with the definition of employee under the Copyright Act, the Court found the adoption of the common law agency test for labor and employment statutes persuasive. The Supreme Court adopted the common law agency test for purposes of ERISA in *Darden*, but the Court also pointed out that the FLSA uses a broad definition of employ which the majority of other labor and employment statutes do not use. This broad definition of employ allows FLSA to cover workers that may not be covered under the common law agency test.

Prior to *Darden*, the three tests overlapped, and many courts considered all three tests to be significantly the same. Since *Darden*, the federal courts have devolved all three tests to the common law agency test. The Tentative Draft Restatement of the Law Third, Employment law notes that the economic dependence test, “taken literally, would seem to include more service providers …because an independent business person can be economically dependent on other businesses.” Yet, the Restatement notes that “courts utilizing the economic-realities and right-to-control tests have tended to rely on the same factors and reach similar results.”

The common law agency test is now used across the board in labor and employment statutes. In *Slingluff v. Occupational Safety & Health Review Commission*, the Tenth Circuit found that the main factor in determining employee status was who had the right to control the work. The Court did state the factors that the Occupational Safety and Health Commission considers, but the court also pointed to the fact that the OSHRC also considers the *Darden* test.

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62 Restatement (Third) of Employment Law, § 1.01 cmt. a (2d tent. dft. 2009).
63 Restatement (Third) of Employment Law, § 1.01 cmt. a (2d tent. dft. 2009).
64 Slingluff v. OSHRC, 425 F.3d 861, 868 (10th Cir. 2005).
Prior to *Darden*, the federal courts often used the economic realities test with the OSHA.65

While the Supreme Court did allow for a broader reading of the FLSA in *Darden*, the Court did not endorse the economic realities test for the FLSA.66 This non-endorsement has allowed some Federal Court’s to begin reading the FLSA more narrowly in terms of employee protection. A recent case from the District of Oregon applied the right to control test in an FLSA case.68 The District Court did not state which test it was using, but only listed the factors that the court considered:

[(1)] the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the alleged employer's business.69

Not all of the factors listed in *Darden* are used by the district court. However, all of the district court’s factors are found within the *Darden* factors, including the “right to control.” Additionally, several other courts using the “economic realities” test for purposes of the FLSA, apply the test in a manner similar to the *Darden* “right to control” test.70 The courts’ use of multiple tests and their ability to refocus the tests back to the agency definition of employee creates confusion in determining employee status.

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65 *Slingluff v. OSHRC*, 425 F.3d 861, 867-68 (10th Cir. 2005).
70 *Baker v. Flint Engineering & Const. Co.*, 137 F.3d 1436, 1440-44 (10th Cir. 1998) (While the Court considered the economic realities, it also considered the amount of control the employer had over the workers); See also *Schultz v. Capital Intl. Sec., Inc.* 466 F.3d 298 (4th Cir. 2006).
The federal courts have also looked outside of the right of control factors in order to expand or contract the definition of employee. The courts are more frequently using an entrepreneurial element when determining employee status; the consideration of a worker’s entrepreneurial opportunity for monetary gain or loss.\textsuperscript{71} There may be merit to using an entrepreneurial element in determining independent contractor status. However, the circuits have taken different approaches in the application of the element, further muddling the definition of employee and lessening the rights of workers in the process.

The Circuit for the District of Columbia struggled with defining which acts constituted control under various circumstances.\textsuperscript{72} Because of this struggle, the Circuit explained that it adopted the use of the entrepreneurial opportunity as a better way of defining control.\textsuperscript{73} The adoption of the entrepreneurial opportunity was at the National Labor Relations Board’s urging. The entrepreneurial consideration is to aid in the qualitative analysis of the control factors and was defined as “whether the ‘putative independent contractors have significant entrepreneurial opportunity for gain or loss.’”\textsuperscript{74} However, the D.C. Circuit seems to be willing to accept any opportunity for gain or loss.\textsuperscript{75}

A recent example of the use of the entrepreneurial standard is found in \textit{FedEx Home Delivery, Inc. v. National Labor Relations Board}.\textsuperscript{76} The facts in \textit{FedEx} include that workers sign a Standard Contractor Operating Agreement.\textsuperscript{77} The operating agreement includes the following details: identifying the drivers as not employees, that FedEx may not prescribe hours of work,

\textsuperscript{71} \textit{Corporate Express Delivery Sys. v. NLRB}, 292 F.3d 777, 780 (D.C. Cir. 2002).
\textsuperscript{72} \textit{FedEx Home Delivery, Inc. v. N.L.R.B.}, 563 F.3d 492, 496-97 (D.C. Cir. 2009).
\textsuperscript{73} \textit{FedEx Home Delivery, Inc. v. N.L.R.B.}, 563 F.3d 492 (D.C. Cir. 2009).
\textsuperscript{75} \textit{FedEx Home Delivery, Inc. v. N.L.R.B.}, 563 F.3d 492, 502 (D.C. Cir. 2009) (stating that even one instance of a worker taking an opportunity may be sufficient to show independent contractor status).
\textsuperscript{76} \textit{FedEx Home Delivery, Inc. v. N.L.R.B.}, 563 F.3d 492 (D.C. Cir. 2009).
\textsuperscript{77} \textit{FedEx Home Delivery, Inc. v. N.L.R.B.}, 563 F.3d 492, 498 (D.C. Cir. 2009).
whether or when the contractors take breaks, what routes the drivers follow, that contractors are not subject to discipline, that contractors must provide their own vehicles, and that contractors are responsible for all costs associated with operating and maintaining their vehicles. Additionally, the Court looked at the opportunities that a few employees have taken advantage of, such as, the ability to use the vehicles for other commercial or personal use, the ability to independently incorporate, and that two in Wilmington, Maryland have incorporated, that one out of approximately 32 drivers was able to negotiate for higher fees, that contractors may hire their own employees, and the drivers’ ability to purchase and sell multiple routes. Some other facts that were considered were the intent of the parties in agreeing to the contract, that the drivers are only obligated to work five days a week (leaving two days to develop their own business), that drivers must hire other drivers to cover the five days if the driver cannot cover the route, that drivers wear a recognizable uniform, that drivers must complete a driving course conducted by FedEx, and that FedEx has the ability to reconfigure the routes unilaterally. While the Court considered the control that FedEx had over the drivers, the Court focused primarily on the fact that the contract provisions gave the contractors an entrepreneurial opportunity and the fact that a slim few were able to take advantage of the opportunities. The Court stated that it is the ability to engage in an entrepreneurial opportunity rather than the exercise of that opportunity that controls. In addition, the court found that even one incident of exercising the opportunity is evidence of independent contractor status. The Court’s application makes the entrepreneurial element a decisive factor in determining a worker’s status.

The Ninth Circuit also considered the entrepreneurial element recently in *National Labor Relations Board v. Friendly Cab Company*.\(^{84}\) In Friendly, the Court looked at the entrepreneurial element, but found that the drivers were employees. The Court looked at the entrepreneurial opportunity in the context of the control that the company exercised over the drivers. Additionally, employer control was still the dominant test,\(^{85}\) in contrast to the D.C. Court’s application *FedEx*. The drivers in *Friendly Cab Co.* sign taxicab leases (a standard operating agreement) providing that the drivers are not employees of Friendly Cab Co., that the company is not responsible for taxes or insurance for the drivers, and that cabs are rented for seven days, providing a driver with six days to drive the vehicle, but requiring that the cab undergo mandatory maintenance one day a week.\(^{86}\) Drivers pay a leasing fee ranging from $450 to $600 per week for use of a cab from Friendly Cab Co. Friendly Cab Co. retains the discretion to set the fee, taking into account the cab model as well as the individual’s driving and accident record.\(^{87}\) Friendly retains the right to assign drivers to different models and types of cabs, as well as assigning them to any of the seven companies controlled by the same owners.\(^{88}\) Additionally, the Company has a mandatory, detailed, dress code and company requirements for how to drive. Drivers are not allowed to use individual phone numbers or business cards, and the drivers are required to conduct all taxi business over telephones provided by Friendly. Drivers are not allowed to sublet the vehicles, and are required to carry advertisements on the taxis they lease.\(^{89}\)

In *Friendly Cab Co.*, the Court relied heavily on elements of control that the employer had over the taxi drivers such as the inability to sublet, the required dress code, and the ability to

\(84\) *N.L.R.B. v. Friendly Cab Co., Inc.*, 512 F.3d 1090, (9th Cir. 2008).

\(85\) *N.L.R.B. v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1096-97(9th Cir. 2008).

\(86\) *N.L.R.B. v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1093-94 (9th Cir. 2008).

\(87\) *N.L.R.B. v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1093-94 (9th Cir. 2008).

\(88\) *N.L.R.B. v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1093-94 (9th Cir. 2008).

\(89\) *N.L.R.B. v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1093-95 (9th Cir. 2008).
discipline employees. Additionally, the Court stated many of the control factors when considering the status of the drivers. The Court mentions the lack of investment in property; controlling the means of accomplishing the goal; the inability to hire employees or sublet the taxi; Friendly’s ability to assign dispatches, specific cars, and determine lease rates; and that the work is a regular part of the company’s business. The Court also considered the lack of entrepreneurial opportunity given to the drivers because of the inability to sublet or hire employees and the company’s control over the drivers’ ability to independently develop customers. The entrepreneurial elements were considered along with the control elements for the court to find that the drivers were employees.

The additional consideration by the courts of the entrepreneurial opportunities of the worker allows the courts another avenue to further expand or contract employee protection under federal labor and employment laws. As shown above, the D.C. Circuit used the entrepreneurial opportunity to narrowly define an employee, while the Ninth Circuit used the entrepreneurial opportunity to support employee status. The federal courts have slowly expanded and narrowed the standard for establishing employee status under the many labor and employment statutes. As such, this creates a moving target for employers, employees, and government agencies. The changing view of who is an employee creates uncertainty for employers and employees in determining employee status.

B. The Federal Courts’ Pick and Choose Method

In addition to the federal courts’ ability to expand or contract the definition of employee by considering elements outside of the “right to control” factors, the courts also pick and chose

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90 N.L.R.B. v. Friendly Cab Co., Inc., 512 F.3d 1090, 1093-95 (9th Cir. 2008).
91 N.L.R.B. v. Friendly Cab Co., Inc., 512 F.3d 1090, 1099-1101 (9th Cir. 2008).
92 N.L.R.B. v. Friendly Cab Co., Inc., 512 F.3d 1090, (9th Cir. 2008).
93 N.L.R.B. v. Friendly Cab Co., Inc., 512 F.3d 1090, 1103 (9th Cir. 2008).
which control factors to use. The ability to pick and choose is another way the courts can expand or contract the definition of employee. The federal courts have been instructed to use a totality of circumstances approach, and the Supreme Court has stated that “there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.” While the courts are to assess each case based on the specific circumstances, each court often relies heavily or discounts specific factors to help reach the decision that is wanted.

The Court in *FedEx* examined many of the control factors including that the workers were required to buy their own vehicles, the extent of the hired party’s discretion over when and how long to work, the ability to hire and pay assistants, the provision of benefits, and the tax treatment of the hired party. The Court gave more weight to those factors that supported entrepreneurial opportunity such as the fact that the drivers were required to purchase their own vehicles and that, in theory, the drivers had the ability to sell the routes for a profit. However, the court also considered, but discounted, the fact that the drivers were part of the regular business of the employee, because to consider that factor would mean that FedEx could never hire independent drivers. Additionally, the court discounted FedEx’s ability to unilaterally change the driver routes and the requirement of uniforms.

In contrast, the Ninth Circuit in *Friendly Cab Co.* credited the fact that the drivers were required to follow a strict dress code. The Court also noted that the drivers were engaged in the

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98 *N.L.R.B. v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1101 (9th Cir. 2008).
primary business of the employer. In addition, the court considered other control factors that were in favor of employee status including the control over accepting only fares through Friendly’s dispatch, Friendly’s prohibition on the development of personal business, and the inability of the drivers to sublet their vehicles. However, the court discounted the fact that the drivers have no set hours and do not have to account for any of their fares to Friendly Cab Co. The Court stated that normally, not accounting for fares creates a strong inference of independent contractor status (the ability to make a profit or loss), but the other factors discounted this factor.

Another case that discounts several factors of control is the FedEx Multidistrict Litigation Cases. The Northern District of Indiana recently considered the employee status of FedEx drivers in national class action suits. Because of the broad range of State and Federal claims brought in the class action cases, the Court stated that it could only consider the evidence that was common to all drivers when determining the drivers’ employee status. The only common evidence that could be considered was the Operating Agreement and the generally applicable Policies and Procedures. The Court did not consider particularized evidence of actual control between FedEx and the drivers. The Court admitted that “[t]hese cases might or might not come out differently under a different procedural posture allowing wider scope for review of

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99 *N.L.R.B. v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1098-99 (9th Cir. 2008).
100 *N.L.R.B. v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1098-99 (9th Cir. 2008).
101 *N.L.R.B. v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1097-98 (9th Cir. 2008).
102 *N.L.R.B. v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1097-98 (9th Cir. 2008). The Court stated that “[t]he payment by taxicab drivers of a fixed rental rate to an employer where drivers retain all fares collected without accounting to that employer typically creates a "strong inference" that the employer does not exert control over the means and manner of the drivers' performance. See *N.L.R.B. v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 924 (11th Cir. 1983).”
extrinsic and particularized evidence, but that situation is not before the court today.”  

The Court also found that “the intent factor weighed strongly because the intent expressed in the contracts was so clear.” The Court went on to declare that

most important under the common law and Restatement tests generally – is the right to control, which typically is the weightiest factor….This court held that there was no reasonable inference that FedEx retained the right to control the methods and means of the drivers’ work on a class-wide basis….This court held that the controls reserved to FedEx were results-oriented: FedEx provides work to and pays contractor-drivers to provide the specific result of timely and safely-delivered packages to FedEx customers. The totality of the circumstances and review of all the relevant facts and factors led to this results-oriented conclusion.

The Court further explained that it “found the drivers’ entrepreneurial opportunities to be highly probative of independent contractor status.” The Court used the entrepreneurial opportunity test and pick and choose to determine the drivers status under the limited evidence available. The Court considered that the drivers bought their own vehicles and that the Operating Agreement limited FedEx’s ability to determine how packages were delivered. The Court discounted the fact that the drivers form an integral part of FedEx’s business.

In looking at the FedEx and Friendly Cab Co. cases, both courts validated and discounted which factors were most important to the specific court in determining employee status. This application of the test may appear to support the case by case analysis required by the Supreme Court. However, the agency test and the methods used to apply the test create confusion for employers and employees alike when determining employee status.

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108 In re FedEx Ground Package Sys., 2010 U.S. Dist. LEXIS 134959, pg. 50 (N.D. Ind., December 13, 2010)
109 In re FedEx Ground Package Sys., 2010 U.S. Dist. LEXIS 134959, pg. 51 (N.D. Ind., December 13, 2010)
110 In re FedEx Ground Package Sys., 2010 U.S. Dist. LEXIS 134959, pg. 51 (N.D. Ind., December 13, 2010)
C. The Federal Courts’ Amorphous Definition Creates Problems for Employees and Employers

The moving target for defining an employee makes it difficult for employers to ensure that they are following the law. It also makes it easier for employers to attempt to evade the law by misclassifying employees as independent contractors. Employees are hurt by the uncertainty of their employee status and so are State Governments and the Federal Government.

Workers are harmed by misclassification as independent contractors by being denied protection from wage and overtime provisions, discrimination laws, health and safety provisions, the ability to collectively bargain, workers’ compensation, and unemployment.

States and the Federal Government are also hurt by misclassification. States and the Federal Government lose payroll and related taxes employers contribute on behalf of employees. For example, the General Accountability Office estimated that in 1984, approximately 3.4 million workers were misclassified which cost the government 1.6 billion dollars in lost revenue.\(^{111}\) Additionally, workers’ compensation programs are underfunded because employers are not contributing on behalf of their employees.

Finally, law-abiding businesses that do not misclassify their employees as independent contractors lose out, because they have to compete with employers that misclassify employees in order to save labor costs. This lowers wages and benefits for all workers as firms race to the bottom to underbid each other in today’s competitive economies.\(^{112}\) Businesses may also have increased costs as employers face increased litigation because of workers’ uncertainty in their employee status.

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\(^{111}\) General Accountability Office, Report, Findings

IV. DEFINING AN INDEPENDENT CONTRACTOR IN LIEU OF EMPLOYEE

The federal courts have great discretion in determining who is protected under the federal labor and employment laws. The agency control test, as applied by the courts, creates confusion for employers and employees. The confusion allows employers to manipulate the status of workers, to the detriment of the worker. A new test should be adopted that will bring clarity in defining employee status and broaden employee coverage for workers. The proposed test will negatively define employee by defining who is an independent contractor. The test has an exclusive set of factors to prevent the courts from reaching for other ways to evaluate the employment relationship. If all of the factors are not met, the worker is an employee. Additionally, by looking to state interpretations, the factors are read broadly to increase employee protection. Benefits will be realized by employees and employers.

A. Examining the Definition of an Independent Contractor

A new test will allow clarity in defining employees and broaden coverage for workers. The test negatively defines employee by defining who is an independent contractor. The test contains an exclusive set of factors. If all of the factors are not met, the worker is an employee. Using state interpretations for some factors will allow the test to be read broadly. The broad reading will benefit employees and employers.

While the gray area between independent contractor and employee causes much confusion, the likelihood of eliminating this problem is unlikely. The courts and the legislature do not want to stray far from the agency definition, but all three branches of government show a willingness to look at elements outside of the traditional agency test. As an alternative to using the traditional agency control test, a more specific test is used that includes the right to control,

113 The federal courts have considered the entrepreneurial opportunity of the workers and the legislature has not yet altered the courts’ ability to consider this element. See Friendly Cab Co. and FedEx Home Delivery, Infra. Additionally, the IRS’s use of a 20 factor test indicates a more comprehensive list than the traditional agency test.
but where the right to control is not controlling. The test will help clarify employee status and broaden protection of workers.

1. **Negatively Defining an Employee**

Taking into consideration the courts application of the agency test, the new test must address the ability of the courts to pick and choose the elements to consider. In addition, the test will limit the ability to bring in outside considerations. The two limiting considerations will bring clarity to determining who is an employee and who is an independent contractor. The proposed test includes an exhaustive list of factors to consider, including the right to control and whether the work is within the normal course of business of the employer, the test will also establish that if the worker does not meet all of the factors, the worker is deemed an employee under the applicable federal labor and employment laws.

As a starting point, a more specific test is currently pending in the Ohio Legislature. This definition requires that an employee is paid and then defines who is not an employee.

**DEFINITION OF WHO IS NOT AN EMPLOYEE**

(D)(1) "Employee" means an individual who performs services for compensation for an employer.

(2) "Employee" does not mean an individual who performs services for an employer and to whom all of the following conditions apply:

(a) The individual has been and continues to be free from control and direction in connection with the performance of the service.

(b) The individual customarily is engaged in an independently established trade, occupation, profession, or business of the same nature of the trade, occupation, profession, or business involved in the service performed.

(c) The individual is a separate and distinct business entity from the entity for which the service is being performed or if the individual is providing construction services and is a sole proprietorship or a partnership, the individual is a legitimate sole proprietorship or a partner in a legitimate partnership to which section 4175.04 of the Revised Code applies, as applicable.

(d) The individual incurs the main expenses and has continuing or recurring business liabilities related to the service performed.
(e) The individual is liable for breach of contract for failure to complete the service.
(f) An agreement, written or oral, express or implied, exists describing the service to be performed, the payment the individual will receive for performance of the service, and the time frame for completion of the service.
(g) The service performed by the individual is outside of the usual course of business of the employer.\textsuperscript{114}

The proposed test is exclusive in the factors considered. The test considers the “right to control,” but also requires the consideration and inclusion of factors independently from the right to control. The test also requires the consideration of elements traditionally related to independent contractor status, but that are not always considered by the courts such as factors (e) and (f). The factors of whether the worker is engaged in an independent trade, whether the worker incurs the main expenses, and whether the work performed is within the usual course of business are factors found in the agency control test.\textsuperscript{115} However, the independent trade and the usual course of business factors are often either discounted or ignored entirely by the courts.\textsuperscript{116}

The requirement that the court must consider whether the worker is engaged in an independent trade and whether the work is within the usual course of business has the ability to strengthen employee protection. Because the courts frequently disregard or discount these factors, it is important that the factors be considered separately from the right to control. When considering whether the work is within the usual course of business, the federal courts should apply the factor as it is applied in Illinois. While the right to control is significant, “[i]n determining whether a person is an agent or an independent contractor, a factor of great

\textsuperscript{114} H.B. No. 137, Section 4175.01 (D)(1)-(2); Ohio 129th General Assembly, Regular Session, 2011-2012; found at: http://www.legislature.state.oh.us/bills.cfm?ID=129\_HB\_137; S.B. No. 107, Section 4175.01 (D)(1)-(2); Ohio 129th Gen. Assembly, Reg. Session, 2011-2012; found at: http://www.legislature.state.oh.us/bills.cfm?ID=129\_SB\_107


\textsuperscript{116} See FedEx and Friendly Cab Co.
significance is the nature of the work performed in relation to the general business of the defendant.\textsuperscript{117} Illinois courts put the factor equal with the right to control.

Illinois considers the nature of the work performed under common tort law and under Illinois workers compensation law.\textsuperscript{118} In \textit{Sperl}, the Court found that the truck driver’s work was “closely aligned” with the transportation logistics company.\textsuperscript{119} The Court looked at the business of the transportation logistics company and found that the company could not operate without drivers.\textsuperscript{120} Additionally, the court considered the fact that the truck driver’s job was not unique and the job is directly related to the transportation industry.\textsuperscript{121}

Under the workmen’s compensation laws, Illinois courts consider the nature of the work performed by the alleged employee in relation to the general business of the employer.\textsuperscript{122} Illinois courts look to the statutory purpose of workmen’s compensation when determining the work of the employee in relation to the employer’s business. The theory of workmen’s compensation is to distribute the cost of industrial accidents to the consumer or customer as part of the cost of the product or service.\textsuperscript{123} As an example in application, in \textit{Ware}, the court found that the Plaintiff’s work was within the general business of the employer where even though he was incorporated, he had no customers of his own, he worked exclusively for the employer, served only the customers designated by the employer, and was paid based on the customers served.\textsuperscript{124} The

\textsuperscript{118} Sperl v. C.H. Robinson Worldwide, Inc., 2011 Ill. App. Lexis 307 (Ill. App. 3d Dist. March 30, 2011)(finding that a freight company was vicariously liable for the negligence of a truck driver in a wrongful death claim.);
\textit{Ware v. The Industrial Comm.}, 743 N.E.2d 579 (Ill. App. 1st Dist. 2000)(finding that a truck driver was an employee for purposes of workmen’s compensation).
\textsuperscript{122} Ware v. The Industrial Comm., 743 N.E.2d 579, 583 (Ill. App. 1st Dist. 2000).
\textsuperscript{123} Ware v. The Industrial Comm., 743 N.E.2d 579, 585 (Ill. App. 1st Dist. 2000).
\textsuperscript{124} Ware v. The Industrial Comm., 743 N.E.2d 579, 585 (Ill. App. 1st Dist. 2000).
Court found that the employer hauled freight for customers and that the plaintiff hauled freight for the employer’s customers.\textsuperscript{125}

A similar theory may be applied to the federal labor and employment laws to allow for broader protection as employees. Under the federal labor and employment laws, the courts should look at who is in a better position to pass any costs onto the customer, if there are increased costs to the worker by being classified as an independent contractor, is the worker able to pass those costs onto customers, or if the worker is classified as an employee, is the employer/client better able to pass the costs onto its customers?

The exclusive list of factors and using Illinois courts’ application of the nature of the work in relation to the general business of the employer limits the scope of who is not an employee. However, the test, as written, still leaves open the ability to exclude numbers of workers from protection by defining them as independent contractors. The ability to still misclassify workers stems from the fact that the test is not exclusive. Because of the lack of exclusiveness, the test should also state that if a person does not meet all of the conditions in (D)(2), the person is deemed an employee of that employer. The additional exclusivity requirement indicates that only those workers that meet all of the requirements may be deemed independent contractors. If some factors, but not all, are met, the worker is an employee. This addition will help eliminate much uncertainty by clearly defining who is not an employee. All others are employees if any of the conditions are not met.

2. \textit{Application of the Negatively Defined Employee}

The test, in theory, addresses the issues of the courts’ ability to manipulate the control factors and to pick and choose which factors to apply. Re-evaluating the two \textit{FedEx} cases discussed above and the \textit{Friendly Cab Co.} will show that the courts will have less opportunity to

\textsuperscript{125} \textit{Ware v. The Industrial Comm.}, 743 N.E.2d 579, 585 (Ill. App. 1st Dist. 2000).
manipulate employee status by picking and choosing which factors to consider. Additionally, the test will give broader employee coverage without making all workers per se employees.

Under the negative definition, *Friendly Cab Co.*, *FedEx*, and *In re FedEx* case would all have the same outcome: the drivers are employees. While the proposed test is more specific in its application, the test still gives courts leeway in determining each factor. For example, the first factor is the right to control: the individual has been and continues to be free from control and direction in connection with the performance of the service. In the *Friendly Cab Co.* case, the Court did examine many of the control factors and found that Friendly controlled the performance of the service. In contrast, the courts in *FedEx* and *In re FedEx* did not find employer control.

In *FedEx*, the court looked at the entrepreneurial opportunities available and that a few employees were able to take advantage of the opportunities to find that the workers were independent contractors. In *In re FedEx*, on the other hand, looked only to the Operating Agreement (because of the class status) when determining employee status. Both cases found that FedEx had no right to control the means and manner of the work. Under the proposed test, the Courts can use the same analysis and come to the same conclusion regarding control, but may not come to the same conclusion regarding employee status. While FedEx meets the first factor of the negative definition, FedEx must meet all of the factors in order for the drivers to be deemed not employees.

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126 Friendly retains the right to set the lease rate and to assign drivers to different models and types of cabs, as well as assigning them to any of the seven companies controlled by the same owners. The Company has a mandatory, detailed, dress code and requirements for how to drive. Drivers are prohibited from using individual phone numbers or business cards and are required to use telephones provided by Friendly. Drivers are not allowed to sublet the vehicles, and are required to carry advertisements on the taxis they lease in which the drivers receive no percentage of the advertising money. *N.L.R.B. v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1093-97 (9th Cir. 2008).
Under the next factor, the negative definition is personal and fact specific. The individual customarily is engaged in an independently established trade, occupation, profession, or business of the same nature of the trade, occupation, profession, or business involved in the service performed. Evaluating this factor requires not looking at the industry, but at the worker and the worker’s past practices. For example, a truck driver that has always worked directly for a vertical retailer\textsuperscript{129} should not be deemed as meeting this factor simply because he is a truck driver. Truck drivers, as an industry could be seen as an established trade. However, each truck driver may not be customarily engaged in an independently established trade. Because of the individual application of this factor and the necessity to look at each workers past practices, it is difficult to determine whether the workers in Friendly and FedEx meet this element. However, in FedEx, the Court could not apply the fact that two employees owned multiple routes and developed their own business to all of the other drivers. The two drivers with multiple routes would most likely meet this factor. Additionally, drivers that had worked as drivers for multiple clients previously would meet this factor. On the other hand, drivers that had an administrative or office job prior to becoming a driver may not meet this factor.

The next factor, whether an individual is a separate and distinct business entity from the entity for which the service is being performed, must be reviewed individually. This factor will also be difficult to determine from the facts given in the current cases. Some of the FedEx drivers did incorporate, but incorporation was not required.\textsuperscript{130} The drivers not incorporated not meet this factor while the two drivers that did incorporate would meet this factor. This element would be easy to overcome in practice. Employers/clients, such as FedEx, could require entity formation

\textsuperscript{129} A vertical retailer will own some or all of its downstream suppliers and its upstream buyers. This may include factories, warehouses, end consumer stores, and the transportation means for getting the goods from one location to the next.

\textsuperscript{130} \textit{FedEx Home Delivery, Inc. v. N.L.R.B.}, 563 F.3d 492, 495, 498-501 (D.C. Cir. 2009).
under the Operating Agreement. While this element does give a company leeway in avoiding employee status, there are also restrictions for the employer and the worker by requiring entity formation. The worker will need to undertake state filings and incur additional fees to maintain the entity, and therefore, the relationship with the employer.\textsuperscript{131} Additionally, statutes directly govern the running of the worker’s business and must be followed. This factor ensures that there is a clear picture of an independent contractor by requiring separate business entities.

The next factor, whether the individual incurs the main expenses and has continuing or recurring business liabilities related to the service performed, would also need to be evaluated individually. This factor, like the prior factor, may be satisfied by provisions in the operating agreement. The factor has two requirements: the worker must incur the main expenses and the worker must have recurring or continuing expenses. This factor is typically reviewed under the control test.\textsuperscript{132} By separating this factor from the control factor, the negative definition ensures that the court evaluates the issues. The courts in \textit{Friendly Cab Co.} and \textit{FedEx} can use the same application as used in the cases and may come to the same results. The Court in \textit{Friendly Cab Co.}, found that the worker’s incurred very few expenses because of the nature of the agreement.\textsuperscript{133} In contrast, in \textit{FedEx} and \textit{In re FedEx}, the operating agreement was written to ensure that the drivers incurred the main expenses, including the buying and maintenance of the vehicles.\textsuperscript{134} Recurring expenses such as gas, insurance, and maintenance were also required of the FedEx drivers.\textsuperscript{135}

\textsuperscript{131} For example, Illinois’ Corporation Act shows many of the fees required of corporations. 805 ILCS 5/15.05 FEES, FRANCHISE TAXES AND CHARGES
\textsuperscript{133} \textit{N.L.R.B. v. Friendly Cab Co., Inc.}, 512 F.3d 1090, 1093-97(9th Cir. 2008). The workers only leased the vehicles and were required to fill the tanks with gas. Most other expenses were paid by Friendly Cab Co.
\textsuperscript{134} \textit{FedEx Home Delivery, Inc. v. N.L.R.B.}, 563 F.3d 492, 502-03 (D.C. Cir. 2009).
\textsuperscript{135} \textit{FedEx Home Delivery, Inc. v. N.L.R.B.}, 563 F.3d 492, 502-03 (D.C. Cir. 2009).
The individual is liable for breach of contract for failure to complete the service. The ability to be liable for breach of contract is indicative of the parties entering into an agreement and having negotiated. This factor is met by the drivers in all three cases. The taxi drivers entered into lease agreements with Friendly Cab Co., and the FedEx drivers entered into operating agreements with FedEx. The agreements make both parties liable to each other for breach of contract. Additionally, the next factor, an agreement, written or oral, express or implied, exists describing the service to be performed, the payment the individual will receive for performance of the service, and the time frame for completion of the service, is met under all three cases. The factor does not consider the bargaining power of the parties, but only the contents of the agreements. The drivers in all three cases meet this factor because the drivers and companies used detailed contracts describing the relationship.\(^{136}\) Because both of these factors are not the only factors considered, the contract and its contents, by themselves, cannot establish independent contractor status.

The last factor, that the service performed by the individual is outside of the usual course of business of the employer, is one that is often ignored or discounted by the courts.\(^{137}\) However, this test will require the courts to consider the relationship between the work performed and the company’s business. Using the analysis that the Illinois courts use, the courts in all three cases would not meet this factor.

In light of the Illinois application discussed above, the drivers in \textit{Friendly Cab Co.} would not meet this factor. When determining whether the work is within the usual course of business it is important to not only look at the company’s business and the worker’s work in relation to that


business, but also to consider whether the worker or the company is in a better position to pass on costs to customers. Friendly Cab Co. is in the taxi cab business. Its business covers leasing cabs, dispatching, advertising, and customer development. The company has the ability to make additional profits from the advertising, corporate accounts, and its ability to determine the leasing rates. The drivers, on the other hand, only have the ability to make additional profits by taking more passengers. If the drivers passed on increased costs, the costs should be passed onto Friendly Cab Co., however the costs would most likely be absorbed by the drivers, since taxi fares cannot be increased by the drivers. Friendly can pass costs onto the advertisers buying ad space and to its corporate accounts. Under this analysis, the drivers’ service is not outside the normal course of business and the drivers are employees.

Likewise, in FedEx, the drivers’ service is not outside the normal course of FedEx’s business. The drivers deliver packages for FedEx to customers that use FedEx for package delivery. FedEx is a package delivery service that advertises, organizes the logistics, and ensures the drivers deliver the packages. When looking at the costs, there are little, if any costs that the drivers have the ability to pass on. The drivers absorb any additional costs incurred. FedEx, on the other hand, has the ability to determine the shipping rates and pass the costs onto the customers. This factor is reviewed individually and in light of who is in a better position to pass on costs. The courts should not view this factor in light of whether the drivers have any ability to pass costs on. If allowed to take this position, the court would likely find that because one or two drivers can pass increased costs to other customers, that all drivers have that ability.

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139 The fact that Friendly controls the dispatching, prohibited drivers from developing their own business, and established corporate accounts indicates that Friendly is interested in customer development.
142 Ware v. The Industrial Comm., 743 N.E.2d 579, 585 (Ill. App. 1st Dist. 2000). Looking at how the Illinois Court applied the test, they did not look to see if the worker could pass costs, but who had the best opportunity to pass costs to customers.
ability. Even in *In re FedEx*, the court would be able to determine that the costs incurred by the drivers as independent contractors would not be able to be passed onto its customers.

When reviewed in whole, the workers in all three cases would be employees. The test ensures employee protection by raising employer requirements in establishing agreements and prohibiting independent contractor status where the work performed is part of the business of the employer. However, not all situations will be within the scope of the employer’s business. An example is a plumber that has a contract with an apartment building. Even if the building is the only customer, the plumber may meet all of the requirements to be an independent contractor. Additionally, some drivers may be independent contractors. Where a taxi cab company leases cabs, and allows the drivers to develop their own business and the cab company’s profits stem from its leasing of cabs and not other means such as advertising or corporate clients, the drivers would be in a better position to pass or absorb costs.

This test lets the courts use some of the same standards and applications that the courts were already using, but adds restrictions. The additional requirements ensure that the court reviews the factors equally and if any are not met, the test fails. The test does not prohibit employers from establishing independent contractor relationships, but adds more structure to the requirements for establishing independent contractor status.

**B. Exclusively Defining an Independent Contractor will Benefit Employees and Employers**

A clearly defined test will aid employers in hiring, firing, and promotion of contingent workers. A clearly defined test may also eliminate or reduce transaction costs, saving an employer money. Additionally, an employer will have a brighter line for determining who is and is not an independent contractor. Employees will also benefit from a clearly defined definition. Employees will have a better idea of whether they are or are not an employee. Additionally,
employees should benefit from less intentional misclassification of employees as independent contractors.

Employers tend to resist any statutory limitations on their ability to conduct business as they want. This test will give employers will a clear framework for determining who is not an employee. The framework will help employers categorize their workforces. This simplification should help reduce transaction costs with human resources, legal counsel, and employee hiring decisions. It can also benefit employers by potentially reducing or limiting litigation because there is less gray area for an employer and the courts to play with. Transaction costs may also be reduced through uniformity in application of the test. The exclusive test should create more uniformity across circuits in determining employee status. The uniformity will aid employers by reducing the need to research the various laws and interpretations when conducting business in multiple jurisdictions or even when determining an employee’s status across multiple statutes.¹⁴³ Last, the test does not prevent employers from creating independent contractor relationships with workers. The test only adds more requirements for structuring those relationships. Uniform laws tend to benefit employers because they tend to not be overturned as quickly by special interest groups.¹⁴⁴ This will also help stabilize the law so that the employer will not have to spend time or money on following constant statutory changes. Additionally, the employer may be able to save money on future lobbying efforts.

Many of the benefits that employers will experience from a uniform definition will also be experienced by employees. Employees are often unaware of their rights or of their status as an employee changing from jurisdiction to jurisdiction. Since the workers are unaware of their

appropriate legal status, they are often taken advantage of in employment relationships. A specific test defining who is not an employee will help cement the worker’s status as an employee or an independent contractor. This will save employees transaction costs if they work in multiple jurisdictions or if litigation occurs. Additionally, the employees will save costs at the beginning of the employment relationship. Any contract negotiations or agreements entered into will be conducted with a firmer knowledge of whether the new worker is an employee or an independent contractor. From a civil rights perspective, employee protection will be stronger. The ability of employers to intentionally misclassify employees should be reduced since there will be less ambiguity in the definition of an employee.

V. CONCLUSION

"The advantages of being an independent contractor are setting your own hours, having several clients and negotiating your own pay[.]" "An independent contractor is totally responsible for the job and doesn't report to the company. Here, it looks like FedEx was calling the shots." Who is an employee can often be difficult to determine. Since the term employee is not explicitly defined in any federal labor and employment statute, the federal courts have used various forms of the agency “right to control” test since the nineteenth century. The various forms and applications of the control test have confused employee status. Additionally, the

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146 While part of this argument depends on how narrow or broad the definition of an employee is, even with a narrow definition of an employee, those workers that are considered employees will have a stronger argument to protect them from employer misclassification because the definition is clear.
federal circuit courts are adding an element of “entrepreneurial spirit” into the mix.\textsuperscript{150} Federal judicial interpretation also adds to the confusion because the courts use a pick and choose method when applying the common law test. The non-specific control test allows courts to pick the factors that it believes are most relevant, which creates a varied interpretation of employee across circuits. The court’s use of the common law agency test needs to be re-defined to bring certainty and protection to employee status.

Negatively defining an employee is a simple and specific way of clarifying employee status. By defining who is not an employee, it is easier to establish that all others are employees. Within the definition of who is not an employee, the right to control will be considered, but control is not the sole or controlling factor. The test considers the contract language, the entity status of the parties, and whether the work is part of the regular business of the employer/client. Consideration and the requirement of all of the factors will ensure that only those workers that are truly independent contractors will be given independent contractor status.

A negative definition of employee will benefit employers and employees. Creating a clearly defined test lessens the uncertainty in determining employee status. While some employer costs may increase, employers are better equipped to pass increased costs on to its customers. Employers may reduce other transaction costs, such as litigation or human resources costs, by correctly classifying employees.

Employees will benefit because there is a clear test that will be more difficult for an employer to abuse. Because the focus is on the employer’s business, the worker’s work in relation to the business, and control, workers will be in a better position to bargain and given more protection under the federal labor and employment statutes.