



FedUp

with FedEx:

**How FedEx Ground
Tramples Workers' Rights
and Civil Rights**

Fed Up with FedEx: How FedEx Ground Tramples the Civil Rights of Workers

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Executive Summary



America's workers

have fought long and hard for workplace dignity and a fair share of our nation's economic prosperity. With the help of leaders from the civil rights and labor movements, workers have achieved passage of vital workplace laws guaranteeing important rights such as the right to form a union and the right to equal opportunity. These laws have helped overcome workplace discrimination and to improve living standards, especially for women, minorities, and the working poor, thus making America a more equal society. Today some of America's most respected corporations have begun a sustained effort to exploit weaknesses in these laws and unravel much of the progress workers have made.

FedEx Corporation is a striking example of a company widely considered to be a pillar of American success and corporate responsibility. Unfortunately, FedEx is contributing to the deepening problem of inequality in our society. FedEx's troubling labor practices are masked by the company's globally-recognized brand name and its reputation for both getting the job done and being a great place to work. Most Americans remain unaware of what has become an insidious pattern of anti-union conduct and efforts to subvert labor and discrimination law that call FedEx's reputation into question.

The Leadership Conference on Civil Rights and American Rights at Work shed light on a disturbing pattern at the driver delivery section of FedEx Ground, a subsidiary of FedEx Corporation, in *Fed Up with FedEx: How FedEx Ground Tramples Workers' Rights and Civil Rights*. At the heart of this problem is the claim that FedEx Ground misclassified approximately 15,000 of its drivers as independent contractors, placing them outside the protection of numerous labor and employment laws.

Millions of Americans are classified as independent contractors but essentially work as employees. Under the law, true independent contractors are supposed to enjoy entrepreneurial control over the methods they use to do their work. But these misclassified

workers suffer the worst of both worlds: they are without meaningful control over their work and they are without the legal protections and benefits of employees. Nonetheless, employers persist in their misclassification, attempting to convince courts and other agencies that their workers are independent contractors in order to avoid their legal obligations to their workers.

Employee misclassification at FedEx Ground has thwarted workers' attempts to assert their workplace rights and significant violations of labor and employment laws have been alleged against FedEx Ground. Federal charges and workers' accounts reveal that when FedEx Ground drivers attempt to form unions, they are subject to intimidation, interrogation, and firings. Court cases filed by FedEx Ground drivers allege workplace discrimination and harassment, including ongoing racial and ethnic slurs. As purported independent contractors, and not employees, drivers must first undergo long, expensive, and arduous court processes to prove that they are in fact employees of FedEx Ground before they can begin to seek redress for violations of their civil or workers' rights.

This report exposes pernicious and widespread violations of workers' rights and civil rights at FedEx Ground, and makes recommendations for the redress and prevention of future violations, including:

1. Urge FedEx Corporation to comply in good faith with labor laws;
2. Increase public awareness to make corporations more accountable for undermining America's promise of equality and economic advancement;
3. Pass the Employee Free Choice Act to better protect the freedom to form unions;
4. Improve enforcement of existing laws, encourage federal and state legislatures and agencies to close loopholes, and enact strong new protections for workers;
5. Improve procedures and increase congressional oversight of the National Labor Relations Board.

Introduction



Fifty years ago, the nation's first modern civil rights act passed as a result of cooperative efforts between men and women of both the civil rights movement and America's labor organizations. This was neither the first nor the last time that civil rights advocates and labor activists would join together to right a grave wrong.

Working together, these movements helped pave the way to the enactment and enforcement of labor and employment laws that make society more equal. Unions have been instrumental in passing civil rights legislation and helping to monitor workplaces for discriminatory practices. Labor unions also raise the standards of living for women, racial and ethnic minorities, and the working poor. Meanwhile civil rights organizations have supported labor standards legislation and have been strong advocates for labor unions. As a result of this cooperation, more Americans enjoy a greater share of our nation's economic prosperity.

However, these important gains are now jeopardized by a new era of race-to-the-bottom policies and insidious corporate attacks on worker protections. Some of America's largest, most prominent companies maintain a sterling public

image despite their efforts to weaken unions and undercut worker benefits. Hiding behind a veneer of glossy logos and self-serving claims of employee-friendliness, many major American companies have suffered little public condemnation or government sanction for these efforts to undermine workers by exploiting weaknesses in our laws. As a result, American society has reversed course, moving away from greater upward mobility and economic parity and toward economic stratification and a widening gulf between the haves and have-nots.

The situation faced by drivers at FedEx Ground, a subsidiary of FedEx Corporation, brings together American Rights at Work and the Leadership Conference on Civil Rights to detail how a respected corporation like FedEx takes advantage of weaknesses in laws to undermine workplace protections. FedEx epitomizes an American corporation in good public standing, which nonetheless chooses to short change its workers through the use of dubious legal defenses and maneuvers.¹

In particular, this report investigates FedEx Ground's strategy of misclassifying its drivers as independent contractors, placing them outside the protection of most labor and employment laws. Independent contractors are, by most legal definitions, supposed to enjoy significant control over the methods

FedEx At a Glance

FedEx Corporation⁴

Federal Express was founded in 1971; the corporation was created in 1998, and rebranded as FedEx Corporation in 2000.

FY06 Revenue: \$32.6 billion

Workforce: More than 280,000 employees and contractors worldwide

FedEx Corporation	FedEx Kinko's
FedEx Express	FedEx Custom Critical
FedEx Ground and Home Delivery	FedEx Supply Chain
FedEx Freight	FedEx Trade Networks
	FedEx Services

Subsidiaries:

FedEx Ground and Home Delivery⁵

Founded in 1985 as RPS (Roadway Package System); rebranded as FedEx Ground in 2000.

FY07 Revenue: \$6.0 billion (includes FedEx SmartPost)

Workforce: More than 65,000 workers, nearly 15,000⁶ of which are drivers classified as independent contractors

Average Daily Volume: More than 3 million packages daily

Operating Facilities: 29 ground hubs; over 500 pickup/delivery terminals

FedEx Ground serves both residential and commercial customers with pick-up and delivery, Monday through Friday. FedEx Home Delivery, part of FedEx Ground, serves primarily residential customers Tuesday through Saturday.

by which they accomplish their assigned work. But many companies abuse the independent contractor label to deny the protection of workplace laws to workers who do not fit the definition. A class action suit against Microsoft thrust the misclassification issue into the media spotlight nearly a decade ago. The case resulted in a \$97 million settlement and Microsoft took voluntary steps to reform its system for classifying workers and compensating them for benefits lost.² The Microsoft suit involving 1,000 employees is dwarfed by the potential case of 15,000 drivers classified as independent contractors building against FedEx Ground.

Despite these allegations, FedEx Ground shows no signs of changing its course. FedEx Ground told *The New York Times* last year that its model “works for the company, the contractors and the customers.”³ Numerous courts and government agencies have ruled that FedEx Ground drivers are in fact employees, revealing that the company’s business model is a means to deny drivers their workplace rights.

One major concern is the effect of misclassification on drivers at FedEx Ground battling discrimination. Numerous cases against FedEx alleging racial and ethnic discrimination and harassment paint a disturbing picture. Arab-American drivers involved in a current Massachusetts case contend the company failed to act after managers assaulted and hurled ethnic slurs at them. These charges echo revelations from a similar case in California where the jury found FedEx Ground acted “with oppression and malice” in failing to stop managers’ excessive harassment of two Arab-American drivers. Before drivers can begin to seek redress for violations of their civil rights, they must undergo long, expensive, and arduous court proceedings to prove that they are in fact employees and not independent contractors.

Moreover, FedEx Ground has used misclassification along with other weaknesses in American labor laws to prevent workers from forming unions. Federal charges and workers' accounts reveal that when drivers attempt to form unions at FedEx Ground to have a say in their work lives, they are subject to an onslaught of retaliation: intimidation, bribery, interrogation, and even firings. Drivers who overcome these challenges are saddled with further complications on their path to forming a union—the company delays legal proceedings by arguing the drivers are independent contractors and ineligible to form unions.

Without a significant reform of labor law, FedEx Ground can continue to violate its drivers' civil and workplace rights with near impunity. Many drivers never realize that they may be entitled to legal protection because FedEx Ground tells them that they are independent contractors. Others lack the ability to engage in protracted litigation over their status. Meanwhile, union organizing drives are derailed as slow legal proceeding sap union momentum. With formidable financial and legal resources at its disposal, nearly 15,000 workers are left vulnerable by this corporate giant's policies.

Just as the civil rights and workers' rights communities came together in the past to fight workplace injustice, American Rights at Work and the Leadership Conference on Civil Rights are now joining together to right a grave wrong. We hope to call serious attention to employee misclassification, at FedEx Ground, and elsewhere. A number of well-respected companies, like United Parcel Service (UPS) and AT&T, not only talk the talk, but they walk the walk when it comes to sustainable business practices which respect workers' rights and civil rights. FedEx Ground has the opportunity to be true, business leader, the question is, will it?

The Growing Trend to Misclassify Employees as Independent Contractors



Americans love the idea of entrepreneurship—of being your own

boss and succeeding in business on individual merit and initiative. Independent contractors are meant to embody that ideal of small businesspeople. A report by the U.S. Chamber of Commerce touts the advantages of being an independent contractor, which include “the opportunity to be one’s own boss, exerting greater control over time and daily activities...and [having] the opportunity to grow and expand their businesses as they choose, ensuring greater financial security for themselves and their families.”⁷ And so these men and women trade the benefits and security of traditional employment for the freedom of being independent businesspeople.

In reality, there are millions of Americans classified as independent contractors by the companies they work for, but effectively working as employees. These workers suffer the worst of both worlds: they toil without the protections and benefits of employees, yet are without the control over their work that true independent contractors enjoy.

The Internal Revenue Service (IRS) uses several factors to test whether someone is an independent contractor. However, the general rule “is that an individual is an independent contractor if you, the person for whom the services are performed, have the right to control or direct only the result of the work and not the means and methods of accomplishing the result.”⁸ This general rule underlies most legal tests for independent contractor status. Given the exclusion of independent contractors from myriad federal and state employment laws, including those governing minimum wage, safety and health, discrimination, and freedom of association, the distinction between who is an employee and who is a contractor is crucial to determining a person’s legal rights.

In a 2006 report, the Government Accountability Office (GAO) warned that “employers have economic incentives to misclassify employees as independent contractors because employers are not obligated to make certain financial expenditures for independent contractors that they make for employees, such as paying certain taxes (Social Security, Medicare, and unemployment taxes), providing workers’ compensation insurance, paying minimum wage and overtime wages, or including independent contractors in employee benefit plans.”⁹ Misclassification can save employers upwards of 30 percent on payroll costs.¹⁰ According to a 2000 Department of Labor report, the number one reason employers misclassify employees as independent contractors is to save on workers’ compensation taxes and to avoid liability for workplace injury and disability claims.¹¹

Given these incentives, it is no surprise that the misclassification problem has worsened in recent years. In February 2005, the Department of Labor classified 10.3 million individuals as independent contractors, comprising 7.4 percent of the total workforce—an increase from 6.4 percent in 2001.¹² Hard data on misclassification is difficult to obtain, but in 1988, an IRS model estimated the number of misclassified independent contractors from 187,000 to as many as 1.6 million.¹³ In 1994, a Coopers & Lybrand (now PricewaterhouseCoopers) report used IRS data to project that the number of misclassified employees will have grown from 3.3 million in 1984 to 5 million by 2005.¹⁴ The 2000 Department of Labor report estimated that 10 to 30 percent of employers misclassify employees as contractors.¹⁵ And a 2002 audit by the department revealed a 42 percent increase in misclassification over the previous year.¹⁶ The 2000 Department of Labor report notes: “A new breed of accountants and attorneys has emerged to counsel employers on how to convert employees into [independent contractors] to reduce payroll costs and avoid complying with labor and workplace legislation.”¹⁷

One reason employers pull off such pervasive employee misclassification, according to Rebecca Smith of the National Employment Law Project, is because “under current law, there are only limited penalties, reporting requirements, and complaint procedures that regulate employers who hire independent contractors.”¹⁸ There are also significant loopholes in the laws that allow for such extensive misclassification. The IRS has a “safe harbor” provision which relieves offending employers from employment tax liability both retroactively and prospectively, and from paying penalties, if they meet certain requirements indicating that they “reasonably” misclassified their workers. If an employer is part of an industry where misclassification is common, they can use that practice as an excuse to qualify for this loophole. A lack of procedural rules and information sharing within and among government agencies allows companies to assert and reassert that their workers are independent contractors in different forums.

Those hit the hardest by misclassification are the workers themselves. Independent contractors are excluded from laws protecting employees from occupational hazards, minimum wage and overtime violations, discrimination, and sexual harassment. Without the right to form a union under federal law, independent contractors have little recourse to address their problems at work. Because they are ineligible for workers compensation, unemployment, and disability benefits, contractors work without a real safety net, and on top of this, they are rarely eligible for employer-provided health insurance or retirement plans.

Law-abiding businesses must compete with employers who misclassify their employees. John Kendzierski, President of Professional Drywall Construction Inc., testified before a recent House Committee hearing on how contractors who misclassify their employees avoid payroll expenses that “add over 25 percent to the cost of labor, putting us ‘legitimate’ contractors at a

competitive disadvantage when competing for the same work. This also causes insurance and other rates to rise because there is less money being contributed in total therefore burdening the contractor who pays the appropriate taxes and fees.”¹⁹

Such extensive misclassification also costs federal and state governments lost tax revenue. Coopers & Lybrand used data from the IRS and the Bureau of Labor Statistics to estimate that the proper classification of all misclassified employees would have yielded nearly \$35 billion in federal tax receipts from 1996 to 2004.²⁰ At the state level, a 2000 Department of Labor study estimated that misclassifying one percent of workers resulted in an average of \$198 million lost annually to state unemployment insurance funds.²¹

Independent contractors denied protections on the job

Americans may be surprised to learn that independent contractors are excluded from the protections offered by many federal laws—protections that are fundamental for everyone who works—including the following:

- National Labor Relations Act (*freedom of association*)
- Title VII of the Civil Rights Act of 1964 (*discrimination and harassment based on race, religion, sex, national origin and pregnancy*)
- Fair Labor Standards Act (*minimum wage, overtime*)
- Occupational Safety and Health Act
- Family and Medical Leave Act
- Age Discrimination in Employment Act
- Americans with Disabilities Act
- Uniformed Services Employment & Reemployment Rights

Independent Contracting at FedEx Ground



Labeling its drivers as independent contractors

has been an effective strategy for FedEx Corporation since it inherited the practice after purchasing RPS (Roadway Package Systems, later renamed FedEx Ground) in 1998. By classifying nearly 15,000 drivers as independent contractors rather than employees, FedEx Ground lowers its labor costs by avoiding payroll taxes and benefits. This practice gives it an unfair advantage over competitors UPS and DHL, which have costs associated with hiring employees to deliver packages. UPS employs drivers directly, and DHL uses subcontractors who then employ drivers. Drivers at both compa-

nies enjoy union representation with the International Brotherhood of Teamsters, along with paid vacation, health benefits, a pension, and overtime—none of which are provided to FedEx Ground drivers.

FedEx Ground entices people to deliver as independent contractors with a pitch that conjures up the American Dream: “Independent Contractors at FedEx Home Delivery own their own business and work in partnership with FedEx. This opportunity requires an entrepreneurial spirit.... Come build your business and be your own boss as you partner with FedEx Home Delivery.”²² Knowing that FedEx Ground will

“A tale of two drivers”

An *Orlando Sentinel* article profiled a FedEx Ground driver and a union-represented UPS driver, revealing stark differences between two similar jobs.

	FedEx Ground Driver	UPS Driver
Annual Earnings	Roughly \$50,000-60,000, paid per delivery	\$70,000, includes \$26.17/hour wage plus overtime
Job-related expenses	Fuel, maintenance, other supplies; cost of route/truck: \$30,000	None specified
Health care	Driver can opt into plan with some contribution from FedEx Ground	UPS covers full cost of family-covered health insurance*
Retirement	Driver can opt into plan with some contribution from FedEx Ground	UPS pays into a defined benefit pension plan*
Leave	Unpaid time off, based on availability of replacement	4 weeks paid vacation, 1 week paid for personal or sick leave
Job security	FedEx Ground can terminate driver’s contract at any time**	Union contract mandates UPS demonstrates “just cause” for dismissal*

Wessel, Harry. “Tale of 2 drivers,” *Orlando Sentinel*, 21 Dec. 2005: G1.

* “National Master United Parcel Service Agreement,” for the period of Aug. 1, 2002 through July 31, 2008.

** *Estrada v. FedEx Ground*, BC 210130 (CA Super. Ct. 2004).

not be providing benefits typically afforded to employees, the drivers interviewed in this report still enthusiastically signed up. Dave McMahon, a former driver, was “sold on the idea that he could grow his business, could expand his business, sell his business.”²³ Donna Eickhorst, a former driver, recalled how FedEx Ground sold the job to her: “You could make your own hours. You could make what you want when you want. It sounded perfect.”²⁴

It isn’t long before newly-retained drivers discover their lack of independence. From the start, they are unable to negotiate the terms of their work as they are all required to sign the Operating Agreement, which is “presented on a take-it-or-leave-it basis.”²⁵ FedEx Ground gives itself “unilateral control over the termination” of the Agreement.²⁶ Under the Agreement, drivers are given a Primary Service Area and must deliver all packages assigned to them within that area, as well as any other area the company assigns.²⁷ FedEx Ground has the right to reconfigure that route at any time.²⁸ This reconfiguring led Rudy Trbovich, a former driver, to

give up on his dreams for success at the company: “My goal was to buy other routes, hire drivers, and build a sizeable business for myself. After two and a half years there and [FedEx] changing my route once or twice, I said I’m not going to buy anymore.”²⁹ According to Bill Gardner, a current driver, the routes are worthless because drivers have no control over them. He quipped, “I suppose someone could sell you the Washington Monument.”³⁰

The Agreement details how drivers are compensated, which includes piece-rate payments based on the number of packages delivered, a “vehicle availability fee” for days they deliver, “core zone” payments based on the density of deliveries in the driver’s area, fuel supplements if the price of gas exceeds a certain amount, and various bonuses. These rates are unilaterally determined by the company, though drivers have the right to appeal the core zone payments.³¹ Because the majority of compensation is based on the number of deliveries made,³² FedEx Ground exerts enormous control over a driver’s income when assigning deliveries.

“Truths” in Advertising at FedEx Ground

A recruiting brochure used by FedEx Ground pledges that the job “requires a minimal investment with limited risk.”³³ However, drivers are required to purchase their vehicle, which must be approved by the company. In 2004, the typical delivery van cost drivers \$42,000.³⁴ Drivers are responsible for maintenance, repair, and fuel costs, though FedEx provides them with a minimal fuel supplement. They are also required to purchase and wear FedEx Ground uniforms and place logos on their trucks. One federal investigation found that drivers grossed \$45,000 to \$90,000—a solid income before expenses. Yet the investigation reported that after expenses, drivers’ tax returns indicated net incomes ranging from a loss of \$474 to a profit of \$22,902.³⁵ Drivers interviewed for this report netted \$30,000 to \$40,000 per year.



“We have to buy our own sweatshop.”

Bill Gardner, FedEx Ground driver in Wilmington, MA

Since drivers must deliver all assigned packages, they have little control over when and how much they work. Former driver Paul Infantino described the situation: “You can’t just leave when you want. You can’t say, ‘Ok, it’s my business. I’m going to shut down the shop for the day’...You can’t do it, because they’ll just terminate your contract.”³⁶ To Cathy Curran, a current driver, the requirement to deliver all the packages assigned has meant years of an excessive workload.³⁷ She reported working a minimum of 12 hours per day, five days a week on average, and 14 hours per day, six days a week during the busy holiday season—all without receiving overtime.

FedEx Ground also limits drivers when they want to take time off. They are responsible for finding a replacement to drive their route, and the company must approve that driver. When Bill Gardner’s son was involved in a serious accident, time spent visiting him in the hospital meant he wasn’t able to complete his deliveries on time, and he couldn’t hire his brother to take over the route for him because he was not a FedEx-approved driver. To Gardner, the excessive workload, coupled with the huge financial investment, makes FedEx Ground “a modern day sweatshop. But the older sweatshops...were better because you didn’t have to buy the sweatshop. We have to buy our own sweatshop.”³⁸

In defense of its contractor model, FedEx Ground cites the department it created called Contractor Relations, which is supposed to serve as a liaison between drivers and the company and reviews requests to terminate drivers’ contracts in case managers overstep any bounds.³⁹ Yet as one court ruling put it, Contractor Relations “is nothing more than a mere branch of management,” with any decision they make “subject to higher management’s approval or veto.”⁴⁰

Exposing the independent contractor “guise” at FedEx Ground

In recent years, courts and government agencies have debunked FedEx Ground’s misleading independent contractor model. In a major decision in 2004, the Los Angeles County Superior Court ruled in *Estrada v. FedEx Ground* that FedEx Ground drivers in California were employees, not contractors.⁴³ In 1999, California drivers filed a class action suit arguing that they were misclassified and that FedEx Ground owed them for the expenses they incurred as employees. The Court found that drivers operating single routes (excluding multiple route drivers) were employees, and in 2005, ordered FedEx Ground to reclassify all its single route drivers in California.

The judge who wrote the 2004 decision called the Operating Agreement “a brilliantly drafted contract creating the constraints of an employment relationship with [the drivers] in the guise of an independent contractor model.”⁴⁴ Among the reasons the Court determined the drivers were employees:

- the company has the sole right to interpret the Agreement;
- drivers’ routes can be reconfigured without drivers’ say;
- the work drivers perform is core to the company’s business;
- the company controls who drivers can hire; and
- the company can effectively terminate drivers “at will.”

Given all the evidence, the Court concluded that FedEx Ground “not only has the right to control, but has close to absolute actual control” over the drivers. In August 2007, the California Appeals court unanimously affirmed that decision.⁴⁵

FedEx Ground responded to the legal rulings against the contractor model in California by re-organizing its contractor workforce in that state in September 2007. Because the civil courts and state tax authorities have ruled repeatedly that single-route contractors are in fact employees, the company will terminate contracts with its 700 single-route drivers in California after June 2008.⁴⁶ These drivers will leave the company or will be re-hired only if the drivers take on additional routes and become multiple-route operators. It remains to be seen whether FedEx will give the new multiple-route operators the entrepreneurial freedom of true independent contractors or whether they will remain misclassified employees with neither that freedom nor workplace rights.


And it is unclear whether the drivers hired by the multiple-route operators will be treated as FedEx employees, or whether FedEx will seek to classify them as employees solely of the multiple-route operator and thereby deny them the wages and benefits enjoyed by other employees of FedEx.

FedEx announced no changes in its model in the rest of the country, though it is offering incentives to encourage drivers to take on more than one route.

In 2005, a U.S. District Court in Washington state found that two temporary drivers who filed federal and state wage and hour claims were in fact employees of both FedEx Ground and the drivers who hired them to work their

routes.⁴⁷ The Court corroborated the allegation that the workers were not contractors as it concluded: “The undisputed facts show that the Drivers were dependent on [the company] for virtually every aspect of their job.”⁴⁸

Government agencies have also weighed in on the issue. The National Labor Relations Board (NLRB) consistently rules that FedEx Ground drivers are employees. Since 2005, NLRB regional offices made such determinations for five different terminals, and upon FedEx’s appeals, the Board in Washington, DC, affirmed the rulings in all five cases.⁴⁹ And in the past year, the IRS has made at least two determinations that individual drivers were employees.⁵⁰



The judge who wrote a 2004 decision on misclassification at FedEx Ground called the Operating Agreement “a brilliantly drafted contract creating the constraints of an employment relationship with (the drivers) in the guise of an independent contractor model.”

States also continue to expose misclassification at FedEx Ground. A 2004 audit by the California Employment Development Department determined the company owed \$7.88 million in back taxes for misclassifying drivers over a two year period.⁵¹ When the company appealed the audit, the California Unemployment Insurance Appeals Board denied its appeal, writing, “The substantial control exercised by [the company] as a practical matter, its power to define satisfactory

performance, the fact that drivers are not a distinct occupation and their services are integral to the business favor finding an employment relationship.”⁵² State agencies in New Jersey, Massachusetts, Oregon, and Montana also recently determined that FedEx Ground drivers were employees.⁵³

Driver’s Contractor Status Adds to Widow’s Grief

On August 8, 2006, 36-year-old Tony Marcellino was killed in a traffic accident while delivering packages for FedEx Ground. Marcellino worked for 11 years at the Stockton, CA, terminal. In 2004, he testified before a California Superior Court judge about how he was misclassified by the company as an independent contractor, noting that the company would not let him wear an earring or ponytail, and that it reconfigured his route over his objections. He concluded that “it was obvious that I was not in control of my destiny.”⁴¹

Because FedEx Ground classified Marcellino as an independent contractor, his widow and two young children are not eligible to collect death benefits awarded to the families of employees killed on the job through California Workers’ Compensation Act. Instead, they receive half as much through the company’s Protective Insurance Work Accident policy. Marcellino’s widow, Terri, has taken their case before the Workers’ Compensation Appeals Board to plead that her husband was misclassified and is entitled to the state’s death benefit. She says that this ordeal has “caused me enormous stress and financial uncertainty.”⁴²

In what could be the largest case of misclassification in the country, FedEx Ground drivers from 30 states have joined together in a federal class action lawsuit, currently being litigated in the U.S. District Court in Indiana, where they claim the company misclassified them as independent contractors. The drivers demand that the company reimburse them for expenses and benefits wrongfully denied them under federal law, such as the Family and Medical Leave Act, and various state laws.⁵⁴

Despite the recent spate of rulings exposing FedEx Ground’s contractor model, shareholders may be unaware of the company’s potential liability. Brian Hamilton of ProfitCents, a financial research company, estimates that if FedEx Ground had to reclassify all of its independent contractor drivers as employees, it could owe \$1.4 billion in payroll taxes, health insurance, and overtime—excluding the costs of retirement benefits and paid vacations.⁵⁵ Hamilton told Forbes that FedEx faces “a significant financial risk,” but discloses little of it to its investors.⁵⁶ In its December 2006 quarterly report to the Securities and Exchange Commission, FedEx Ground dismissed any major liability: “We strongly believe that FedEx Ground is not an employer of these drivers and that we will prevail in these proceedings. Given the nature and preliminary status of these claims, we cannot yet determine the amount or a reasonable range of potential loss in these matters, if any.”⁵⁷

An Anti-Civil Rights Atmosphere at FedEx Ground



Based on court interpretations,

independent contractors are not protected under several federal laws prohibiting discrimination, including Title VII of the Civil Rights Act of 1964, which protects against employment discrimination based on race, sex, religion, and national origin; the Age Discrimination in Employment Act; and the Americans with Disabilities Act.⁵⁸ According to a 2000 Department of Labor report, avoiding the costs of complying with these statutes, such as paying damages awards for violations, is a primary reason employers misclassify their employees as independent contractors.⁵⁹

While FedEx Ground and FedEx Express drivers perform virtually the same work—picking up and delivering packages, often to the same customers—there are major differences in how they are able to address alleged discrimination based on their employment status. Because FedEx Express classifies its drivers as employees, they are automatically afforded protections from discrimination under state and federal laws.

Recently, African-American and Latino drivers and other employees at FedEx Express exercised their rights under the law, alleging that the company discriminated against them in job assignment, compensation, promotion, and discipline.⁶⁰ The company tentatively agreed to settle the charges for \$55 million, and more significantly, agreed to name a third party to oversee widespread changes to its personnel policies to avoid bias.⁶¹

Drivers at FedEx Ground, who are classified by the company as independent contractors, encounter a vastly different situation. FedEx Corporation does not even have a policy against harassment and discrimination of independent contractors, despite having a zero tolerance policy for employees. It also

does not train its managers to prevent and address such behavior at FedEx Ground.⁶² Paul Callahan, a division vice-president of FedEx Ground, testified that “we don't train contractors, we train employees in the company. And we talked to our employees about discrimination, about harassment, and—well, I have human resource managers in every regiment in this company and that's what their job is.”⁶³ This lack of company policy surely leaves drivers more vulnerable to discrimination.

Assertion that drivers are independent contractors creates hurdles to their pursuit of discrimination claims

Unlike their counterparts at FedEx Express, FedEx Ground drivers who file discrimination claims must first challenge the company's assertion that they are independent contractors and ineligible for civil rights protections—an enormous barrier that could leave them in bureaucratic limbo for months, even years. Adalberto Garcia claimed FedEx Ground refused to hire him because of his disability, but the company argued that he “cannot bring a disability discrimination claim because he was not an employee of FedEx Ground, nor was he seeking employment with FedEx Ground. The ADA does not protect independent contractors.”⁶⁴ Garcia failed to dispute the company's assertion, and the judge dismissed the case on that basis.⁶⁵ Fortunately for four Arab-American drivers who recently filed claims of racial, ethnic, and religious discrimination, the Massachusetts Commission Against Discrimination was unconvinced by FedEx Ground's faulty contractor defense and determined that the drivers were employees, allowing their case to proceed.⁶⁶



Loay El-Dagany, Yasir Sati, Montaser Harara, and Oukhayi Ibrahim are drivers for FedEx Ground in Wilmington, MA.

“It was surprising to see something like that at such a big company”

Four Arab-American drivers from the FedEx Ground terminal in Wilmington, MA, allege that they were the victims of racial, ethnic, and religious discrimination, and that senior company management failed to respond to their multiple complaints.⁶⁷ Loay El-Dagany maintains a savings account through FedEx, and when he requests a withdrawal to send money back to his family, his manager, David Goyette, “always comments that I’m sending the money to the Al Qaeda organization or Bin Laden.”⁶⁸ Montaser Harara recalls Goyette telling him, “I believe you are a terrorist.”⁶⁹ Harara also alleges that when he was exiting a bathroom in the terminal, Goyette asked him if he “was reading the Koran inside,” a particularly offensive statement for a Muslim.

All four drivers complained that managers assigned them a huge workload—larger than the white drivers.⁷⁰ Harara recalled being given 500 stops in one day—an impossible amount of work, especially given that his truck only fit packages for about 300 stops.⁷¹ The drivers complained that when they returned with packages they couldn’t deliver, Goyette threw the packages at them, yelled at them, and even pushed Oukhayi Ibrahim in front of the

other managers.⁷² Though Ibrahim complained to Contractor Relations, he asserts: “Everybody knows but nobody does anything about it.”⁷³

In 2005, all seven of the Arab-American drivers who worked at the Wilmington terminal were moved from the southern location to the northern one, forcing them to drive much farther for deliveries. At the new location, the drivers allege the manager, John Rose, intimidated them.⁷⁴ According to Ibrahim, before the union representation election was held for Wilmington terminal drivers, Rose “wanted to make sure we voted “no” for the union. And after [the vote] he said ‘I can’t trust Muslim people because they are liars.’”⁷⁵

Having proven their status as employees before the Massachusetts Commission Against Discrimination, the four drivers are now hoping to prevail in their discrimination claims in a case filed with a Massachusetts Superior Court. In reflecting on their experiences at FedEx Ground, El-Dagany noted, “It was surprising to see something like that at such a big company... a big international company.”⁷⁶

FedEx Ground drivers' contractor status also leaves them more vulnerable to retaliation when filing discrimination claims. Days after Annette Craig filed a claim against FedEx Ground alleging that as an African-American woman, she was the target of racial and gender discrimination by her managers, the company fired her.⁷⁷ Craig took a risk by filing the

claim, because the Pennsylvania Human Relations Commission (PHRC) could still determine that she is an independent contractor and without protection from discrimination, and from what could have been retaliatory termination by FedEx. When employees file a discrimination claim, the law protects them from retaliation by their employer,

"I want to be treated by Federal Express the way every other driver is treated."

When Annette Craig started as a driver for FedEx Ground at the Philadelphia terminal in 2005, her manager, Pete Adams, routinely diverted her from her primary route to deliver through dangerous parts of Philadelphia that required more customer signatures and took longer to complete. For six months, Craig, a single mom, didn't return home until between 11:00 p.m. and midnight and hardly saw her children. She claims that despite repeatedly complaining to Adams, he continued to assign her the difficult route, while giving more desirable routes and stops from her easier primary route to white male drivers—some of whom were newer than she.⁷⁹

In her complaint to the Pennsylvania Human Rights Commission (PHRC), Craig also alleges that Adams called her a "baboon," and when she reported his comment to a regional manager, he told her to resolve it with Adams herself. She also recounted how when she called Adams to tell him that she had to care for her sick daughter and couldn't deliver one day, he allegedly replied: "This is why I will not hire women with children."

Despite eventually speaking to a representative from Contractor Relations about the alleged discrimination and harassment, Craig said the mistreatment continued. In

October 2006, Craig was injured after being hit by a car while delivering packages. While she was forced to hire her own replacement to cover her route, she claimed that FedEx hired and paid for a temporary replacement for a white male driver who fell ill during the same time. On November 27, 2006, she filed a discrimination claim with the PHRC. In the claim she wrote, "I want to be treated by Federal Express the way every other driver is treated. I want to pay off my truck and make money without interference, and, as a single mom, to see my children more often."⁸⁰ Days later, FedEx Ground terminated her contract.



regardless of whether or not they win their discrimination suit. Now Craig is stuck in legal limbo, hoping the PHRC will determine that she is an employee in order to win civil rights protections. In April 2007, the PHRC rejected FedEx Ground's motion to dismiss the case on the basis that she was an independent contractor, and has decided that an investigation is necessary to determine her employee status.⁷⁸ There is no word on how long this investigation will take.

Catherine Ruckelshaus of the National Employment Law Project notes that misclassified independent contractors "have a lot of barriers to overcome before you even get to the merits of their cases."⁸¹ First, an employer may tell the worker she is an independent contractor without protection, and so she won't even bother to file a claim; second, if she does file a claim, the agency may simply take the employer's word that she is a contractor without pursuing an investigation; third, because an investigation into employee status is fact-intensive, agencies may not have the resources or legal guidance to reach fair determinations.⁸²

Illustrating Ruckelshaus' point are several recent discrimination cases filed against FedEx Ground that were dismissed because of the alleged independent contractor status of the claimant.⁸³ The agencies likely followed normal administrative procedures in reviewing submissions by FedEx to make their determinations. But the "evidence" cited was often the company's job posting or Operating Agreement which, on their face, refer to drivers as independent contractors; one agency called the Agreement "undisputed documentation" of the claimant's independent contractor status.⁸⁴ Without the benefit of full investigation and testimony concerning actual conditions and practices, an agency may fail to understand the true nature of the drivers' relationship to FedEx Ground.

Though claimants may have the right to appeal such rulings, those who claim discrimination during the hiring process would not have personal experience on the job to counter the company's claims that they are contractors. Other claimants may not be able to obtain legal representation to navigate a viable appeal. At least in Annette Craig's case, the PHRC determined that an investigation into her employment status was warranted, and that the Operating Agreement presented by FedEx was "not dispositive in establishing that [Craig] was an independent contractor."⁸⁵

Few protections from discrimination for independent contractors

FedEx Ground drivers lucky enough to live in California or Massachusetts have limited protections from discrimination that don't require them to prove they are employees. The Massachusetts Equal Rights Act protects independent contractors from discrimination. And in 1999, the California legislature expanded the Fair Employment and Housing Act to protect independent contractors from employment-based harassment in order to "provide needed protections for the ever-growing numbers of workers who are hired as independent contractors rather than employees, and who currently work unprotected against harassment simply by virtue of the contractual nature of their work and their lesser cost to the businesses who hire them."⁸⁶ This legislation helped two FedEx Ground drivers win a major harassment suit against the company in June 2006 without having to prove employee status.

Independent contractors can file discrimination suits under Section 1981, part of the post-Civil War era Civil Rights Act of 1886. Because Section 1981 prohibits racial discrimination in "making and enforcing contracts," drivers do not have to prove they are employees to be covered.⁹⁵ In *Carey v. FedEx Ground*, an African-American driver sued the company alleging discrimination when he was denied a delivery route during the time that white applicants were awarded several routes.⁹⁶ A court allowed his claim to proceed under Section 1981, and the case was settled shortly before it reached trial.⁹⁷

Section 1981 at best provides limited recourse for FedEx Ground drivers. The law requires the plaintiff to prove discriminatory intent, not just disparate impact. It also requires the plaintiff to hire a private lawyer to pursue the claim, which many can not afford, and only protects against racial discrimination.⁹⁸ Neither Section 1981 nor the California statute offer independent contractors the kinds of broad protections offered to employees under the various federal and state laws.

As case after case demonstrates, the independent contractor classification at FedEx Ground poses major problems for drivers who feel they are the victims of discrimination. Drivers must surmount bureaucratic hurdles before federal and state agencies will even consider the merits of their claims—challenges that may dissuade many from even filing claims.

Federal law also excludes independent contractors from the right to form unions and collectively bargain, depriving them of the protection unions provide against workplace discrimination. A union contract offers fair and transparent guide-

“We thank God that the jury stood up to the giant Federal Express”

In *Issa v. Roadway Package Systems*, two Lebanese drivers, Edgar Rizkallah and Kamil Issa, brought a case against FedEx Ground alleging harassment based on their race and national origin. According to the testimony of several drivers, managers physically assaulted Rizkallah and Issa; called them “camel jockeys,” “sand niggers,” and “terrorists;” regularly commented about Lebanese bombs; and threatened to fire them.⁸⁷ Drivers also testified that the managers created a hostile environment for minorities.⁸⁸ Issa testified: “...over the last three or four years...I was harassed, I was discriminated against, I was called names, and things that I don't think anybody will tolerate in a work environment.”⁸⁹

When the men complained to senior managers, including the Western Regional Manager for FedEx Ground, drivers testified that the company did nothing.⁹⁰ The primary perpetrator of the harassment, terminal manager Stacy Shoun, was promoted by the company four times, and was still employed there after the trial.⁹¹ In June 2006, an Alameda Superior Court jury found that the company acted “with oppression and malice” and awarded Issa and Rizkallah \$61 million,⁹² which was later reduced by a judge to \$12.4 million.⁹³ After the jury reached its verdict, the drivers commented, “We thank God that the jury stood up to the giant Federal Express and made a statement that we count, that we have rights, and that we should not be forced to work under conditions where we are treated as less than human.”⁹⁴

lines for promotions, wage increases, and discipline, eliminating much of the bias and discrimination in these processes. If a union-represented worker encounters discrimination, her contract provides her with a grievance process to remedy the issue. FedEx Ground drivers who want to organize unions must first prove they are employees. And as the following

section demonstrates, the drivers who manage to surmount this first legal obstacle find an even bigger hurdle in the anti-union campaign orchestrated by FedEx Ground.



After Serving His Country, Driver Denied Right to Return

Rich Farrell was a FedEx Ground driver for the Camden, NJ, terminal. He also serves as a medic in the Army National Guard. He was activated on September 11, 2001, and in December 2003 Farrell informed his terminal manager that he would soon be deployed overseas for six months.⁹⁹ His manager informed him that they would hire someone to deliver

to his route while he was away. In January 2004, FedEx Ground gave Farrell thirty days notice that they would not be renewing his contract, which expired the next month. Dave McMahon, a fellow driver, approached their manager and asked why Farrell was terminated. According to McMahon, the manager replied, "What do you think we were going to hold his contract until he gets done playing Army?"¹⁰⁰

After serving overseas, Farrell met with a military lawyer who informed him that since FedEx Ground classified him as an independent contractor, he was not protected under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The Act prohibits employers from discriminating against those who serve in the National Guard or other uniformed services. If Farrell was classified as an employee, USERRA would have protected him from termination when he was deployed and given him the right to reclaim his route when he returned.

Farrell returned home in January 2005 and was not able to find a full-time job until April 2006. He tried calling his old terminal to inquire about getting a route, but no one returned his messages. He sold his \$40,000 truck on eBay for a mere \$13,000. Farrell summarized his experience at FedEx Ground: "I kind of took a beating."

The Anti-Union Campaign at FedEx Ground



One may wonder why, if

FedEx Ground drivers are unhappy with the company's independent contractor model, they wouldn't simply quit. Bob Williams, a former driver, explains: "The truck is the hook. The reason why these guys can't quit is because they're into a lease situation with the truck and they can't get out of the lease."¹⁰¹ To address their working conditions without potentially losing their financial investment, drivers may decide to try to form unions—but this proves a daunting task.

Independent contractors are among the estimated 34 million Americans—nearly one quarter of the workforce—without the right to form a union and collectively bargain.¹⁰² The National Labor Relations Act (NLRA) expressly excludes independent contractors, along with agricultural, domestic, supervisory, and other categories of workers.¹⁰³ Because FedEx Ground classifies drivers as independent contractors, the company likely convinces many that they are without the right to form a union and should not bother pursuing union representation. When Rudy Trbovich attended a meeting held by managers soon after his Fairfield, NJ, terminal began organizing, he recounted how "They said that FedEx's policy, as well as their personal opinion, is that there is no benefit to unionizing and organizing and technically...we do not have the right."¹⁰⁴

Organizing a union is challenging enough for America's workers without having to prove they are employees under the NLRA. When faced with organizing efforts, 30 percent of employers fire pro-union workers, 49 percent threaten to close the worksite, and 51 percent of employers coerce workers into opposing unions with bribery or favoritism.¹⁰⁵

Unfortunately for the FedEx Ground drivers seeking union representation, they faced similar retaliation by the company.¹⁰⁶ This is not surprising, given the company's long history fighting its workers' union efforts.¹⁰⁷

FedEx has managed to keep its entire company union free, including 60,000 of its drivers, with the exception of its pilots.¹⁰⁸ In 1989, shortly before FedEx acquired Tiger International airline, whose pilots were union members,



FedEx CEO Fred Smith told *The Wall Street Journal*, "I don't intend to recognize any unions at Federal Express."

CEO Fred Smith told *The Wall Street Journal*, "I don't intend to recognize any unions at Federal Express."¹⁰⁹ In 1991, the federal government found that FedEx illegally interfered with the representation election for the merged group of pilots, and ordered another election, where they then voted for union representation.¹¹⁰ In 1996, FedEx successfully lobbied Congress to keep its Express employees covered by the Railway Labor Act, which poses huge barriers to organizing compared to the NLRA.¹¹¹ And FedEx Ground's decision to classify its drivers as independent contractors appears to be one more anti-union tactic. Philip Harvey, a professor at Rutgers University, spoke to *The Philadelphia Inquirer* about classifying workers as contractors: "As a tactic of avoiding unionization this is very effective. Organizing is much more difficult if it is not clear who the employee is."¹¹²

When employees are misclassified as independent contractors, they must first convince the NLRB that they are employees. All FedEx Ground drivers who have tried to form a union since 2004 have successfully cleared this hurdle and been declared employees by the Board. These organizing attempts occurred at five terminals: Fairfield, NJ, Barrington, NJ, Hartford, CT, Northboro, MA, and Wilmington, MA.¹¹³ The NLRB rulings were based on several elements, including the fact that drivers performed functions essential to the company's operations, the company exercised substantial control over drivers' performance, and drivers had no proprietary interest in the routes and little opportunity for profit gain or loss.¹¹⁴ The Regional Director wrote in the Fairfield decision that FedEx Ground "confers little entrepreneurial opportunities... [given] the Employer's unlimited ability to reconfigure routes without drivers receiving payments and by the Employer itself regularly obtaining and providing routes at no cost."¹¹⁵

Though the NLRB eventually determined that the drivers were employees, it took an average of 91 days from the day drivers filed a petition seeking an election to certify the union, to the day the NLRB Regional Director ruled on their employee status, and an additional 29 days until the election was held (excluding Northboro, where the election is pending). This significant delay exposes a problem with the system: the more time that passed before workers could proceed to a vote, the longer they were exposed to the vicious anti-union campaign that FedEx Ground unleashed.

Mike Kain, a former driver from the Fairfield terminal, explained how "the whole [NLRB] system is geared toward the company, not the worker."¹¹⁶ Kain contacted the International Brotherhood of Teamsters, wanting the same

benefits they had won for UPS drivers. Almost immediately, 20 of about 38 drivers at Fairfield signed cards supporting the union, and they petitioned for an NLRB election.¹¹⁷ Yet Kain recounts the effect of FedEx's anti-union campaign as time passed: "Guys started off gung-ho. You go to the first meeting, the second meeting and you get 30 people. Then the company finds out and by the third meeting, you get only 10 people." Over four months after they petitioned with majority support, drivers voted against union representation. This experience is typical of NLRB election campaigns; a recent survey of campaigns by the University of Chicago at Illinois found that 91 percent of union recognition petitions filed with the NLRB with majority support for the union, yet by the time the election was held, only 31 percent of campaigns voted for union representation.¹¹⁸

In response to recent organizing efforts around the company, FedEx Ground sent a company-wide letter to all drivers, warning: "a union would not be helpful to our mutual business relationship," and suggested drivers visit the anti-union Center for Union Facts website.¹¹⁹ But this anti-union pronouncement was tame compared to the company's targeted anti-union campaigns when drivers at the Fairfield, Northboro, and Wilmington terminals attempted to organize with the Teamsters, and when drivers at the Barrington terminal formed their own union, the FXG-HD Drivers Association. It appears from interviews with drivers involved that FedEx Ground orchestrated the same clearly-laid out plan to quash the union efforts each of these four terminals.

Elements of the campaign

The following are some of the ways FedEx Ground launches its campaign to search out and destroy union organizing activity.

1. Saturate terminals with anti-union propaganda

Once management got word of workers' organizing efforts, the first stage of the anti-union campaign was to saturate the terminal with anti-union propaganda. Dennis Lynch, a former driver at the Barrington terminal, recalls that once he and his fellow drivers petitioned for an election with the NLRB anti-union posters appeared all over the terminal, including in the bathroom stalls.¹²⁰ Rudy Trbovich attended an early union meeting for Fairfield drivers on a Friday, and by the following Monday, managers had saturated the terminal with posters.¹²¹

FedEx Ground also distributed anti-union videos to the drivers, and according to complaints filed by the NLRB, it "coercively solicited employees to appear in an anti-union video" in Northboro.¹²² Lynch recalls that the company warned in the video "that FedEx could send boxes elsewhere, or even close the terminal at anytime, leaving drivers with their trucks and no work."¹²³ The NLRB complaint charged the company with illegally threatening to close the Barrington and Northboro terminals.¹²⁴

2. Send in the managers

According to drivers, high-level management from all over the country descended upon the terminals where union organizing was rumored or underway so that they could spread an anti-union message. Donna Eickhorst actively supported the union effort at the Northboro terminal. She estimates that managers from across the country rode in her truck with her six times over the course of three weeks, whereas before the union effort, these "service rides" typically occurred once a year.¹²⁵ On one ride, she was accompanied by a manager from Kansas. Shortly before the ride, one of her terminal managers had called her the "ring leader" of the union effort, which caused her to wonder how they knew of her involvement. She asked



Dave McMahon, a former driver in Barrington, NJ, was fired after showing his support for a union

the Kansas manager where he was staying in town. According to Eickhorst, "when he told me the Holiday Inn in Marlboro, which is where we had our union meetings, I almost choked. Then I knew how they knew."

Lynch similarly recalled seeing managers "all over the terminal" once the union effort began, and they would ride with drivers and inquire about the union effort. According to Trbovich, shortly after a union meeting, high-level management from Pittsburgh showed up and held a series of meetings with food for drivers at the end of the day.¹²⁶ In a meeting he attended, five different managers spoke: "They announced to us that they 'know a group of drivers met with the Teamsters twice, they know which drivers.'" And in Northboro, Ken Flynn told *The New York Times* that FedEx Ground added six managers who were primarily engaged in the anti-union campaign to the terminal.¹²⁷

3. Woo the drivers

Another element of FedEx Ground's anti-union campaign attempted to address grievances to dissuade drivers from voting for the union. Cathy Curran, of the Wilmington terminal, said: "Every little thing that you told [the company] was wrong, nobody cared about it for five years, and then all of a sudden they are fixing everything that they could possibly

fix.”¹²⁸ She witnessed the company finally repay drivers for payments long overdue, remove an aggressive manager that drivers complained about, and reconfigure routes to help drivers with the excessive workload. Curran’s reaction to the company’s effort: “This is the best year I’ve ever worked for this company.”

Dave McMahon recalled similar efforts at the Barrington terminal, as managers helped drivers load their trucks and took people out to steak dinners to sway them against the union.¹²⁹ An NLRB complaint charged FedEx Ground with unlawfully soliciting drivers’ grievances and bribing drivers with the promise of benefits to discourage them from supporting this union effort.¹³⁰

4. Isolate, intimidate, and even terminate union supporters

The fourth element of FedEx’s anti-union campaign was to isolate, harass, and even fire union supporters. Trbovich was among several union supporters terminated during the campaign at the Fairfield terminal. Trbovich attended a union meeting held on a Friday. FedEx got word of the effort, held meetings the following Wednesday, and fired him the next day. He believes “they let me go first because I was the big mouth of the terminal...and I think they thought I organized [the union effort].” He later settled with the company through a private arbitration. Mike Kain, a fellow driver, felt he was forced to quit because of his union activities, and after filing a charge with the NLRB, the company settled.¹³¹

Dennis Lynch, an officer of the union at the Barrington terminal, was fired in March 2005. An NLRB complaint charged that FedEx Ground fired him in retaliation for his

testimony at the NLRB hearing to determine drivers’ status as employees.¹³² He had volunteered to stick his neck out and testify because he “knew there would be bloodshed,” and unlike the other drivers, he didn’t have a family to support.¹³³ But Dave McMahon, a fellow officer of the Drivers Association who has three young children, had already been terminated shortly after a brief attempt to form a union at the Camden terminal in December 2004. McMahon recounted that after he was fired, managers told his fellow drivers that they “got rid of the cancer.”¹³⁴ That organizing attempt ended after McMahon was fired, but he continued to help his fellow drivers in the union effort at the Barrington terminal.

Rick Lacina and Donna Eickhorst spoke about isolation at the Northboro terminal. Lacina recalled how a fellow driver told him that after they spoke at the terminal a manager immediately called and asked the other driver what they were discussing, later telling him: “It’s in your best interest to stay away from [Lacina].”¹³⁵ And Eickhorst recounted how a manager accosted her when



“In the old days of FedEx, it was ‘people, service, profits,’ now it’s ‘profits, service, people.’”

Bob Williams, fired from his Northboro, MA, route, had previously worked as a senior manager for FedEx

she spoke to people on the other side of the terminal.¹³⁶ An NLRB complaint charged that FedEx Ground illegally separated known union supporters from other drivers where they loaded their vehicles to discourage union activity at Northboro and Barrington.¹³⁷ It also charged FedEx Ground with retaliating against Lacina by taking away his pri-

mary route, and retaliating against Eickhorst by canceling her direct deposit.¹³⁸ Shortly after the NLRB issued this complaint, FedEx Ground fired Eickhorst.

Bob Williams, another union supporter at the Northboro terminal,

worked as a senior manager for FedEx in the late 1970s, and had enjoyed working for the company. After retirement didn't suit him, he went back to work as a driver. He quickly became frustrated: "In the old days of FedEx, it was 'people, service, profits,' now it's 'profits, service, people.'"¹³⁹ He contacted the union, testified at the NLRB hearing to determine their status as employees, and was fired soon after. An NLRB complaint charged FedEx Ground with illegally firing him in retaliation for his testimony.¹⁴⁰

5. Challenge election results and stymie contract negotiations

FedEx Ground also uses legal obstacles to stall union efforts of its drivers. At the Wilmington terminal, despite the company's anti-union campaign, drivers voted to form a union with the Teamsters in October 2006. The company filed an objection to the election, asserting that the immigrant workers could not comprehend English and were misled by a sample ballot distributed by the union before the election.¹⁴¹ An Administrative Law Judge overruled the objection, writing: "While the Employer here focused its attention on the foreign born, reading difficulties, of course, are not limited to those with a non-English native tongue. Indeed, I do not accept, as the Employer here seems to contend, that one can



"It's good to know that every day, regardless of what's handed to you, you know that the other guys are all going to have your back."

Cathy Curran, right, voted to form a union with her fellow drivers in Wilmington, MA.

generalize that there is something qualitatively different between the non-English speaking native's English language deficiencies and reading deficiencies of a native English speaker."¹⁴²

Consistent with its strategy of delay, FedEx Ground appealed the judge's ruling to the Board, which in June 2007 overruled the company's objections and certified the union. In order to throw the case back into the legal system, the company refused to bargain,¹⁴³ forcing the union to file an unfair labor practice with the NLRB. According to driver Bill Gardner, FedEx Ground has told drivers that they intend to take the case all the way to the Supreme Court if they have to.¹⁴⁴ Gardner described the frustrations drivers are facing: "It's been shocking. You have a group of people who want to form a union. They go by the book to form the union, and you're not going to let them form the union? It doesn't make any sense. Meanwhile, morale goes down the tubes." Driver Cathy Curran is still hopeful that they will eventually prevail, and in the meantime, "Everyone made a promise to each other that we're going to see this through together. And we are. It's good to know that every day, regardless of what's handed to you, you know that the other guys are all going to have your back."¹⁴⁵

Rick Lacina has seen 15 people leave FedEx Ground in Northboro, MA, in the last year and a half, but says he “wouldn’t give them the satisfaction” of quitting



In response to the anti-union tactics employed by FedEx Ground, the NLRB issued complaints charging the company with unlawful threats, interrogation, bribery, soliciting grievances, creating the impression that it was spying on workers’ union activities, and harassing, isolating, and firing union supporters.¹⁴⁶ The complaints in Fairfield and Barrington are settled, while the charges in Northboro remain pending.

Those who were fired face few solutions, even if the complaints are resolved in their favor. The legal remedy for a terminated employee consists solely of lost wages and cannot compensate for the frustration and humiliation of the job loss, nor can it restore the energy of an organizing effort chilled by the effect of the termination.

Drivers at the Barrington terminal voted for representation by their Drivers Association in December 2005 despite FedEx’s anti-union effort there. As Dave McMahon noted of the vote, “It was unbelievable how we prevailed after all this.”¹⁴⁷ However, they were never able to negotiate a contract with FedEx Ground. According to McMahon, “We were told that no one was going to tell them how to run

their business, and they would never sit and negotiate with us...[and] by the time we were done with the election, FedEx terminated every union supporter except for a few.” He is now happily working as an employee, and union member, at DHL.

In Northboro, drivers are continuing to push for union representation, despite fierce opposition by FedEx Ground. The election has been put on hold as the NLRB pursues charges against the company, including that the company is diluting support for the union by hiring new drivers.¹⁴⁸ Rick Lacina has seen 15 people leave in the last year and a half, whereas before the union effort, he estimates that roughly five drivers left the terminal in five years.¹⁴⁹ Yet Lacina says he “wouldn’t give them the satisfaction” of quitting.

By treating its drivers as independent contractors, FedEx Ground forces those who want to form unions to first prove their status as employees. The time it took for them to prevail at the NLRB further exposed the drivers to FedEx’s anti-union campaign. But the impact of this misclassification spreads beyond these terminals. Because FedEx Ground still claims its drivers are independent contractors, and because it’s improbable that the NLRB decisions are widely known, drivers across the country are likely dissuaded from even attempting to organize. And so 15,000 FedEx Ground drivers toil without the freedom of independent businesspeople, and without the collective bargaining power of union members.

Conclusion and Recommendations:

Changing FedEx's Course



The FedEx Ground case underscores the impact of crafty legal strategies by employers to defeat employee rights and suppress wages and benefits. Misclassification of workers as independent contractors is an especially pernicious method, which denies civil rights protections and benefits to employees, withholds federal and state tax revenue, and undercuts competition with employers who follow the law. Employees who miss out on the law's benefits and protections carry serious financial burdens and risks. In short, misclassification costs everyone in the system.

The extent of these practices is a growing problem at both FedEx Ground and in the economy as a whole. FedEx Corporation's brand and reputation suffer little despite FedEx Ground's rampant misclassification of so many workers for so many years. Dramatic steps are needed to address these problems at FedEx and other companies. Therefore, the Leadership Conference on Civil Rights and American Rights at Work make the following recommendations:

1. Urge FedEx Corporation to comply in good faith with labor laws

FedEx Ground should cease thwarting its workers' rights by manipulating the legal system. FedEx Ground drivers have repeatedly been deemed employees, and not independent contractors, by legal tribunals. FedEx Corporation should voluntarily classify FedEx Ground drivers as employees and bestow them with all the legal rights and protections to which employees are entitled. This would prevent drivers from being misled or discouraged from asserting their rights as employees because they have been misclassified as independent contractors. It would also eliminate costly litigation hurdles for drivers who wish to assert employment claims against FedEx Ground, and time-consuming delays in union elections that drain momentum from organizing drives.

2. Increase public awareness

The conduct of FedEx Ground and other major companies has not made headlines or attracted much public attention. Alerting socially-conscious consumers can generate customer-based pressure on FedEx, which will force it to change its ways or risk losing some of its loyal customers. Public pressure can also be brought to bear on responsible shareholders who can use their influence within the company to force it to treat workers justly.

3. Pass the Employee Free Choice Act

To better protect the freedom to form unions for drivers at FedEx Ground and elsewhere around the country who encounter fierce resistance from their employer, Congress should pass the Employee Free Choice Act. The bill would grant workers union representation after a majority present signed authorization cards to demonstrate their choice to belong to a union. This right to a "majority sign-up" would have given FedEx Ground drivers union recognition at the Hartford, Wilmington, Northboro, Fairfield, and Barrington terminals when they first petitioned for an election at the NLRB, preventing exposure to FedEx's anti-union campaign while they awaited an election.

The Employee Free Choice Act also includes a provision for first contract arbitration to prevent employers from engaging in bad faith bargaining and otherwise refusing to sign an agreement. This provision could have provided the drivers at the Barrington terminal with the power to reach a contract with FedEx, despite the company's apparent unwillingness to bargain. Finally, the legislation would increase penalties against employers who engage in illegal activity during organizing and first contract campaigns, potentially preventing the slash-and-burn tactics used by FedEx Ground against its drivers in the form of interrogation, threats, bribes, and firings.

4. Improve enforcement of existing laws, encourage closing loopholes, and enact strong new protections for workers

At both the federal and state levels, legislators must devote more resources to strengthening enforcement of the existing law. A greater investment may even pay for itself when offending employers are forced to pay taxes owed, as mentioned by the IRS in a recent announcement to focus on employer misclassification.¹⁵⁰ Agencies must use the resources they do have to perform more targeted audits of employers based on industries where misclassification is widespread, such as construction and trucking. The various agencies involved should also be encouraged, to the extent possible, to pool resources, share information and investigatory results, and jointly remedy instances of worker misclassification.

Officials appointed to enforce our labor laws must be willing to protect the rights of workers with diligence and resolve. Recent lax enforcement among executive agencies and departments has threatened to moot existing laws that protect workers from misclassification and anti-union conduct.

In addition to greater enforcement of current law, federal and state legislators must act to protect workers regardless of labels as employees or contractors. One way to accomplish this is to enact a presumption of employee status for all individuals who perform labor or services for a fee. Massachusetts and Illinois enacted such laws that place the burden of proving independent contractor status on employers, giving misclassified workers access to key benefits and protections. In addition, Congress must close the loopholes in the Internal Revenue Code that allows pervasive misclassification and increase the penalties for companies that misuse independent contractor status as a primary means of employment.

5. Improve procedures and increase congressional oversight at the National Labor Relations Board

The NLRB must do a better job of guaranteeing collective bargaining rights at FedEx Ground and other employers where supposed independent contractors are organizing. In case after case at each individual FedEx Ground facility the Board has ruled that the drivers are in fact employees. Despite these rulings, drivers that sought to organize still had to endure additional proceedings at which FedEx Ground re-litigated the same issue, further delaying an election and exposing drivers to the company’s anti-union campaign. According to former NLRB General Counsel Fred Feinstein, “The agency should be able to find ways to inhibit an employer’s ability to delay an election by asserting an already settled issue.”¹⁵¹ Congress must look closely at the agency to be certain it is doing its utmost to safeguard the rights of workers it is charged with protecting, such as using accelerated election and complaint-processing schedules, as well as discretionary injunctions to promptly stop unlawful employer conduct during union campaigns.


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FedEx Ground epitomizes corporate America’s use of clever maneuvering and exploitation of legal loopholes to deny workers their rights and dignity. That such a well-known brand can get away with what appears to be widespread misclassification of its workers indicates a serious lack of public awareness and government responsiveness toward this problem. American Rights at Work and the Leadership Conference on Civil Rights call for significant labor reforms to ensure that the drivers who are battling workplace intimidation and harassment and lengthy, expensive court cases will have their rights recognized and vindicated.

Epilogue

By Ray Marshall

U.S. Secretary of Labor, 1977-1981



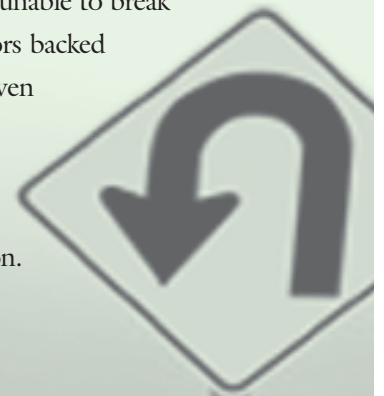
Fed Up with FedEx documents serious threats to legal protections for American workers, especially the right to organize and bargain collectively. All who are interested in strengthening workers' rights, democratic institutions, and promoting broadly shared prosperity should support the recommendations outlined in this report.

The 1935 National Labor Relations Act (NLRA) extended this basic right to private sector employees and, like every other advanced industrial democracy, the United States subscribed to the principle that independent labor organizations that represent employees at work and in the larger society are essential to free and democratic societies. Indeed, this principle has long been a basic tenet of U.S. foreign policy, especially during the Cold War. There can be little doubt that free trade unions played important roles in the transition to democracy in Eastern Europe, South Africa, Asia, and the Americas. The United States also has joined most other countries in declaring the ability to organize and bargain collectively a fundamental human right.

Despite these acknowledgements, American workers have less representation at work and in the society and polity than their counterparts in other advanced democratic countries. Indeed, despite polls showing that a clear and growing majority of nonunion workers would like to be represented by unions,¹⁵² a declining percentage of private

sector workers actually have collective bargaining coverage. There are many reasons for this mismatch between reality and what workers would like, including the NLRA's weak penalties and basic unfairness to workers, the National Labor Relations Board's reluctance to use its power to protect workers' rights, and the fact that union avoidance by legal and illegal means has become both more acceptable and institutionalized by anti-union employers and consultants. A major objective of these campaigns is to strike fear in the hearts of workers by showing them that not even the federal government can protect their bargaining rights from assaults by determined employers and their anti-union allies.

The Carter administration's labor law reforms were designed to improve workers' organizing rights by strengthening the NLRA's penalties and creating more fairness in representation elections by preventing tactical delays designed to erode union support. These reforms had broad public and bipartisan political support as demonstrated by the fact that our bill passed the House of Representatives with almost a 100-vote majority. Although we had 58 solid votes for passage in the Senate, we were unable to break a filibuster by anti-union senators backed by solid business opposition. Even those employers who privately acknowledged the need to modernize the NLRA refused to openly support this legislation.



It is ironic that the same forces that blocked our attempt to ensure fair representation elections now oppose the Employee Free Choice Act on the grounds that card checks designed to preempt unfair campaigns and delaying tactics violate workers' rights to fair elections. To paraphrase Alfred North Whitehead, to believe that NLRB elections are fair would require a temporary suspension of disbelief. The Employee Free Choice Act would not take away employees' ability to have elections, but it would moderate employers' ability to use delaying tactics and other actions documented in this report to intimidate enough employees to erode majority support for collective bargaining. What anti-union employers and consultants fear most is that the Employee Free Choice Act would demonstrate that the federal government could, in fact, protect workers' free choice.

The damage FedEx Ground does to workers' rights by misclassifying employees as independent contractors goes far beyond employers' fairly common anti-union tactics. These misclassifications would nullify the protections that the U.S. and other advanced democracies have extended to all workers. Wage and hour, anti-discrimination, occupational safety and health, pension protection, and unemployment compensation policies are all designed to protect employees from discriminatory actions by employers, as well as from damage that could be done to workers, their families, and the public by unemployment or substandard wages and working conditions. Some measures, like safety and health protections, prevent employers from shifting the costs of injuries and occupational health hazards to workers and the public. By maintaining workers' purchasing power, labor standards strengthen the national economy.

Misclassifying employees as independent contractors comes at a time when workers' ability to protect themselves has already been seriously weakened by globalization and court interpretations which have eroded worker protections. It is predictable that the competitive advantage FedEx Ground would gain from this subterfuge would cause this practice to spread rapidly to other employers, thus multiplying the damage to the national economy.

It is ironic that one of the factors causing FedEx Ground to argue that its drivers are independent contractors—the technical ownership of their trucks—binds these employees to the company, just as indebtedness to the company store bound workers to plantations, mines, and mill factories. It has become fashionable in some circles to argue that worker protections cause our economy to be less competitive in global markets. This argument is based on the belief that authoritarian management systems and low wages are the best way to compete. However, a low-wage strategy is a loser—it implies lower and more unequal wages and economic instability, since there are always places with lower wages. It would be much better, and more compatible with democratic institutions, to compete by improving value added (i.e., productivity and quality).

A value-added strategy promotes broadly shared prosperity and stresses the development of human resources, high performance organizations, worker participation, and continuous innovation and improvement through research and development. This sustainable high-road strategy clearly requires worker protections and social safety nets both to facilitate effective employee involvement in work place and national decisions and moderate management's natural preference for low-wage strategies.

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American Rights at Work is a nonprofit advocacy organization whose mission is to fight for a nation where the freedom of workers to organize unions and bargain collectively with employers is guaranteed and promoted.

Executive Director: Mary Beth Maxwell

The Leadership Conference on Civil Rights (LCCR), the nation's foremost civil rights coalition, consists of nearly 200 national organizations, representing people of color, women, children, workers, individuals with disabilities, older Americans, people of faith, gays and lesbians, and civil liberties and human rights groups. Its mission: to promote the enactment and enforcement of effective civil rights laws and to advance public policies that further the cause of equal opportunity for all.

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