

# A New Division of Labor

## ***Independent Contractor or Employee? The Legal Battle has been Joined.***

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When John Kirkwood delivered packages for FedEx Ground, he wore a purple FedEx shirt, drove a white FedEx truck and, he says, followed orders from FedEx managers.

But the Orangevale resident wasn't a FedEx employee. Instead, he was what company officials call an independent contractor, meaning that he and other drivers own their own trucks, buy rights to their routes and — at least in theory — operate as self-employed businesspeople.

"It was ridiculous. I wasn't called an employee, (but) they controlled everything I did," Kirkwood said.

The arrangement and others like it are coming under increased scrutiny. Kirkwood is a plaintiff in a class-action lawsuit in which a Los Angeles Superior Court judge ruled in July that several hundred California drivers should have been classified as employees, which would have required FedEx to pay such costs as buying gas, maintaining trucks and paying into Social Security. An award for damages is pending.

Meanwhile, amid complaints to state agencies, a task force is looking into charges that too many California companies are avoiding paying payroll, workers' comp and other business taxes by shifting workers from employee to independent contractor status.

"It's very difficult for those businesses that use actual employees to compete (with companies using independent contractors). We're leveling the playing field," said Bob Affleck, deputy director of tax research at the state Employment Development Department.

The task force, which includes officials from the Employment Development Department, the Franchise Tax Board, the Division of Labor Standard Enforcement, the Department of Consumer Affairs, the Department of Insurance and Cal-OSHA, is seeking additional funding in next year's budget to address the issue.

The use of independent contractors is particularly prevalent in the courier industry, where growth in such arrangements has been rapid. The construction and technology industries also are big users, according to state and national researchers.

"This is an extremely pervasive practice we see in many parts of the economy. For the most part, it has a negative impact for workers who don't receive adequate benefits," said Bruce Herman, executive director of the liberal-leaning National Employment Law Project. "Companies are setting the terms and conditions of work but denying they are the employer of record."

But FedEx and other businesses vigorously defend the practice, saying the arrangement provides outlets for ambitious workers to become their own bosses. They say using independent contractors allows them to save money on benefits and payroll taxes, while operating more efficiently. And, they say, it's part of a growing push to introduce flexibility into how companies manage their work force.

“The model works for our contractors, it works for our customers and it works for us,” said David Westrick, a spokesman for FedEx Ground, a division of Federal Express since 1998, when Federal Express bought RPS Inc. to compete in the ground delivery business. Drivers in FedEx’s other divisions are classified as employees.

A survey by the U.S. Bureau of Labor Statistics indicates that most independent contractors like their autonomous status: 84 percent of those surveyed reported they prefer their alternative work arrangement to a more traditional one.

One such budding entrepreneur is FedEx Ground driver Josh Andes in Chico.

“The harder you work, the more you deliver, the more money you make. If you’re willing to put in the time, you can grow your business,” said Andes, who spent \$40,000 to buy a FedEx Ground route in Chico three years ago, plus \$50,000 for his truck. A year ago, Andes bought a Yuba City route as well.

He says he grosses \$178,000 a year between the two routes, and takes home about \$100,000. To do that, he said he works 10 hours a day, five days a week — the same hours as his office job at a previous company, but for twice the pay.

Sacramento’s SuperShuttle, which ferries passengers to Sacramento International Airport, recently converted its 50 employee drivers to independent contractor status. The drivers now lease or buy their vans and aren’t required to attend company meetings, although managers hope drivers show up.

“The main reason (for switching) was workers’ compensation was costing so much for us,” said Dave Boldt, director of sales and services in the Sacramento office. “If we’d kept them as employees, we would’ve had to close our doors.”

Researchers say the extent of wrongly classified independent contractors is difficult to pinpoint, since reporting is so haphazard. A U.S. Department of Labor study compiled in 2000, based on data from individual states, reported that 29 percent of randomly audited companies in California had some misclassified independent contractors. And of the 418,400 new jobs created in California in 1998. The last year that numbers were available, 9,478 of them were misclassified as independent contractors, the study states.

Among high-profile companies accused of misclassifying employees as independent contractors is Microsoft Corp. — a federal court ruled in 1997 that the software behemoth was responsible for paying benefits to the high-tech workers who were paid as independent contractors — and a San Francisco strip club. The strip club agreed in 1998 to a \$3 million settlement with exotic dancers who were subsequently reclassified as employees.

“Today, with the economy apparently on the upswing, the use of independent contractors could become more prevalent,” said Terrie Weinand, chief operating officer of PrO Unlimited, a work force management firm. She said “businesses are looking to expand services without committing to a permanent work force.”

“There’s much more flexibility,” said Weinand, who advises companies on how to manage independent contractors.

Under the FedEx Ground system, drivers are paid on a per stop and per package rate. On top of that, they are paid \$45 a day for simply being available and can receive a \$500 monthly bonus. The company doesn’t pay for Medicare, Social Security, worker’ comp, unemployment insurance, health insurance, retirement or paid time off.

But just how much control managers can exert over independent contractors is matter of dispute. That's because, legally, whether workers are properly classified as independent contractors or employees hinges on the extent to which the employer controls day-to-day work. Under federal and California standards, independent contractor must operate with significantly more autonomy than regular employees.

FedEx Ground says its drivers are independent and are only required to follow the terms of their contract with FedEx. But Los Angeles Superior Court Judge Howard Schwab said "those contracts give FedEx managers "almost absolute control" over their independent contractors."

As spelled out in the lawsuit, the contract required drivers to wear the FedEx uniform, keep their trucks up to certain standards, and even wear black shoes.

Kirkwood, of Orangevale, said his local manager were so controlling that drivers were locked inside the loading terminal until they got the go-ahead to start their routes. He said when he showed up one day wearing white sneakers he was told to find a black pair. And, Kirkwood said, managers told him when to get an oil change and rotate his tires.

In an e-mail, a FedEx spokesman responded that managers regularly inspect vans because image is important to the company and its customers. And he said there's no policy on when drivers can enter and leave the company's loading facility.

The dispute, however, is far from over. FedEx's Westrick said the transport company will appeal the Los Angeles Superior Court ruling. "We stand behind our model," Westrick said.

### **It's All In A Name**

An independent contractor isn't your standard employee. Employees receives wages or salaries from companies. Independent contractors, however, have self-employed tax status and are usually paid on commission. The companies they work for don't provide Social Security, workers' compensation or other benefits, such as health insurance. Depending on the industry, the term "independent contractor" is sometimes used interchangeably with self-employed "consultants" or "Freelancers."