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"I KNOW IT WHEN I SEE IT": THE NLRB’S GLARING INCONSISTENCIES WHEN CLASSIFYING WORKERS

Hunter Igoe

INTRODUCTION

You are behind the wheel, the eighth passenger of the evening in the backseat of your Toyota Camry, as you approach your passenger’s destination. As you arrive, your phone lights up and sings: another request for a ride. The screen only displays the address where you pick the passenger up and the option to accept or decline. You think quickly before the offer ends, thinking whether or not you have driven enough today. Ultimately, you accept the request, deciding to accept one more pick-up. You drop your current passenger off and check the next passenger’s destination: it is worse than you could have thought. The destination is an hour and a half away. You consider cancelling the pick-up, but remember the “ridesharing” app you use can suspend your account if you cancel too many trips. The fare will probably be high because of how far the drop off is, but the app does not tell you the amount. You are not sure if it will be worth the trip.

1. This is in reference to Justice Potter Stewart’s decision in Jacobellis v. Ohio, a Supreme Court case regarding obscenity. In the case, Justice Stewart famously remarked, “I shall not today attempt to define the kinds of material I understand to be embraced within the shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it.” Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).


5. Rosenblat, supra note 3.

6. Id.
Nevertheless, you feel compelled to follow through. Any plan of ending the night early has vanished. You pick up your new passenger, drive the hour and a half to his destination, drive the hour and a half back home, and finally end your workday. You check your ride sharing app account, and despite all the driving you did, the amount you earned for the hours you worked does not even equal the state minimum wage.\footnote{Sam Levin, \textit{Uber drivers often make below minimum wage, report finds}, \textit{The Guardian} (Mar. 5, 2018, 7:28 PM), https://www.theguardian.com/technology/2018/mar/01/uber-lyft-driver-wages-median-report.}

Some days pass and a friend, who also drives with the same ridesharing app, approaches you. She tells you that she and a group of other drivers are trying to form a union to demand better fares, paid sick time, and possibly more. You are immediately interested. You, your friend, and the prospective union continue organizing when you all hit a road bump: a labor attorney tells you the National Labor Relations Board (hereinafter “NLRB” or “the Board”), the federal agency that recognizes unions, is unlikely to recognize the prospective union.\footnote{What We Do, Nat’l Lab. Rel. Bd., https://www.nlrb.gov/about-nlrb/what-we-do (last visited Mar. 25, 2021).} The attorney explains that the Board will only recognize a union of employees, and according to the agreement with the ridesharing app, you are all independent contractors.\footnote{See generally Greg Bensinger, \textit{Uber: The ride-hailing app that says it has ‘zero’ drivers}, Wash. Post (Oct. 14, 2019, 1:16 PM), https://www.washingtonpost.com/technology/2019/10/14/uber-ride-hailing-app-that-says-it-has-zero-drivers/ (quoting Uber executive Nicholas Valentino who stated that “They’re independent, third-party transportation providers.”).}

Classifying a worker is inherently challenging and entirely fact specific.\footnote{Charles J. Muhl, \textit{What is an Employee? The Answer Depends on the Federal Law}, Monthly Lab. Rev. 3, 5 (Jan. 2002), https://www.bls.gov/opub/mlr/2002/01/art1full.pdf. (There is a totality of the circumstances approach that governs the characterization of an employee).} It is a determination that can hinge on the smallest fact or slightest alteration to them.\footnote{See \textit{id.} (explaining that several factors are weighed when determining a worker classification).} What if your ridesharing company let you decide how much you charged for a ride? Or if you kept the entirety of the fare, but paid a weekly fee to the ridesharing company? What if you were required to wear a uniform or drive a car provided by the ridesharing company? Or what if you could decline a ride at any time without any discipline from your ridesharing company? Any one of these changes could alter the outcome of a worker classification.\footnote{See infra Part II.} Therefore, while the labor attorney that spoke to the prospective union was surely well
intentioned, it is nearly impossible to predict whether or not the Board will classify a worker as an employee or an independent contractor.\textsuperscript{13}

This Note focuses on the Board’s approach to classifying workers, arguing the Board’s fact driven, case-by-case, unpredictable approach is fundamentally flawed.\textsuperscript{14} The approach is nothing more than an ‘I-know-it-when-I-see-it’ determination with no room for a meaningful review of the decision.\textsuperscript{15} No attorney—nor worker—can rely on such inconsistent decisions that change so rapidly.\textsuperscript{16} Part I.A of this Note attempts to define employee and independent contractor, highlighting the difficulties,\textsuperscript{17} while Part I.B explains why the distinction between employee and independent contractor matters.\textsuperscript{18} Part I.B.1 lists some of the rights employees are afforded but independent contractors are not,\textsuperscript{19} and Part I.B.2 demonstrates how the growing gig economy is causing workers facing economic challenges to be classified as independent contractors, and therefore not receiving the protections employee status brings.\textsuperscript{20} Part II illustrates how the Board classifies workers, both currently and historically.\textsuperscript{21} Part II.A highlights where the Board receives its authority to “define” employee and independent contractor, namely through two Supreme Court decisions: \textit{NLRB v. United Insurance Co.} and \textit{Chevron USA, Inc. v. Natural Resources Defense Council, Inc.}\textsuperscript{22} Part II.B dissects the Board’s classification of workers.\textsuperscript{23} It focuses on drivers—delivery drivers, taxicab drivers, and “ridesharing” drivers—from the Clinton era through the Trump era.\textsuperscript{24} This section shows the Board’s ever-changing approach to classification, its inconsistency in the application of established tests, and its failure to follow its own precedent.\textsuperscript{25}

\begin{itemize}
\item \textsuperscript{13} See infra Part II.
\item \textsuperscript{14} See infra Part I.A.
\item \textsuperscript{15} See infra Part I.B.
\item \textsuperscript{16} See infra Part I.B.
\item \textsuperscript{17} See infra Part I.A.
\item \textsuperscript{18} See infra Part I.B.
\item \textsuperscript{19} See infra Part I.B.1.
\item \textsuperscript{20} See infra Part I.B.2.
\item \textsuperscript{21} See infra Part II.
\item \textsuperscript{22} See infra Part II.A.
\item \textsuperscript{23} See infra Part II.B; see also NLRB v. United Ins. Co., 390 U.S. 254, 256 (1968) (stating that the Board is tasked with distinguishing between employees and independent contractors).
\item \textsuperscript{24} Id.; see generally Velox Express, Inc., 368 N.L.R.B. No. 61, 2-3 (2019) (displaying an example of a Trump era Board decision); see also Roadway Package Sys., Inc., 326 N.L.R.B. No. 72, 850 (1998) (displaying an example of a Clinton era Board decision).
\item \textsuperscript{25} See generally SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, 7-8 (2019) (showing an example of the Board overruling its previous precedent).
\end{itemize}
I. BACKGROUND

A. Defining Independent Contractor & Employee

Defining "independent contractor" and "employee" is extraordinarily difficult for a multitude of reasons. First, an independent contractor is primarily defined by what it is not—an employee. A similar problem emerges with employee being commonly defined as an individual who is "employed." Black's Law Dictionary attempts to more adequately define the terms, but still comes up short. There, an independent contractor is defined as a "person who is asked to perform an action or job who maintains the control over the job." Employee is not given a strict definition, but instead Black's states the term is "ordinarily . . . used to signify a person in some official employment, and . . . [i]s understood to mean some permanent employment or position." Second, as laid out below, various government agencies define independent contractors differently, and typically reach their definition through assessing a variety of varying factors.

The National Labor Relations Act (hereinafter "NLRA"), the act that governs and protects unionization, is also not helpful when determining who is and who is not an employee as the NLRA defines "employee" to "include any employee." While the NLRA listed individuals who are not employees—"agricultural laborer[s]" and "domestic" workers—it was not until the passage of the Taft-Hartley Amendment in 1947 that

26. See Muhl, supra note 10, at 3, 5.
30. Id.
32. See Muhl, supra note 10, at 5 (stating that different tests are applied in different jurisdictions which can lead to varying classifications).
“supervisors,” individuals working for their parents or spouse, and “independent contractors” were added to the exclusions. Yet still, other than defining “supervisor,” the Act and subsequent Amendment did not shine light on the meaning of these exclusions. This has left the Board to “define” these terms through the agency’s statutory interpretation authority. The Board has done this by classifying workers through agency adjudications. The common-law agency test—the Board’s current classification test—has changed drastically over the years. This change is outlined in Part II.B.

The Board is not the only agency tasked with parsing out whether a worker is an employee or independent contractor. Other federal agencies—including the Department of Labor (hereinafter “DOL”), the Equal Employment Opportunity Commission (hereinafter “EEOC”), and the Internal Revenue Service (hereinafter “IRS”)—are tasked with classifying workers regarding the statutes they administer. These agencies all face the same problem as the Board, in that they must classify workers as employees and independent contractors, and the statutes they administer fail to adequately define these terms. Each agency uses a different test, resulting in more confusion for workers and the legal

35. See 29 U.S.C. § 152(11); see also Rivlin-Nadler, supra note 34.
36. See infra Part II.B.
37. See generally Roadway Package Sys., Inc., 326 N.L.R.B. No. 72, 842, 843, 849 (1998) (discussing several proceedings where the Board had to resolve employee-definition issues).
38. See discussion infra Part II.B.
39. See discussion infra Part II.B.
40. See infra note 41.
42. See infra notes 44-46 and accompanying text.
community. The DOL applies the economic realities test, the EEOC applies the sixteen-factor independent contractor checklist, and the IRS focuses on three broad categories: behavioral control, financial control, and the relationship between the parties. Therefore, it is possible to be classified as an employee by one agency and an independent contractor by another.

Several scholars have pointed out the challenges agencies and courts face in defining employee and independent contractor, and have attempted to more adequately define these terms. For instance, John Pearce II and Jonathan Silva propose a universal adoption of the "ABC Test" for all statutes that call for classifying workers as employees or independent contractors. Alternatively, Pearce and Silva, as well as several other scholars, advocate for a third classification, most commonly referred to as a "dependent contractor." These scholars, however, root the need for change in the confusion caused by the number of varying tests applied by

43. See infra notes 44-46 and accompanying text.
48. See id.
49. See id. at 27 ("The ABC Test is a simplified version of the common law ‘right to control’ test . . . This succinct test requires employers to show: (A) that ‘the individual is free from control and direction in connection with the performance of service and in fact,’ (B) that ‘the service is performed outside the usual course of the business of the employer,’ and (C) that ‘the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.’").
50. Id. at 26-30.
51. Id. at 30-31, 34; see also Carl Shaffer, Square Pegs Do Not Fit in Round Holes: The Case for a Third Worker Classification for the Sharing Economy and Transportation Network Company Drivers, 119 W. VA. L. REV. 1031, 1057-59 (2017); Carol Louise Williamson, Poached Eggs: The Misclassification of Egg Donors as Independent Contractors and How Egg Donors Can Contribute to the Argument for a New Category of Worker—The Dependent Contractor, 51 GA. L. REV. 327, 352-53 (2016); but see Michael L. Nadler, Independent Employees: A New Category of Workers for the Gig Economy, 19 N.C. J. L. & TECH 443, 480-81 (2018) (instead referring to a third classification as “independent employees”).
different agencies,\textsuperscript{52} circuit court splits,\textsuperscript{53} and the changing economic circumstances workers face in the modern economy.\textsuperscript{54} The scope of this Note is focused exclusively on the NLRB’s approach to classifying workers, highlighting the inconsistencies within the agency’s understanding and application of its preferred legal test.\textsuperscript{55}

### B. Why the Distinction Matters

#### 1. Employees Possess More Rights than Independent Contractors

The distinction between employees and independent contractors determines the rights workers are afforded.\textsuperscript{56} Under the NLRA, employees are guaranteed “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”\textsuperscript{57} These rights are commonly referred to as Section 7 rights, as they are enshrined in Section 7 of the NLRA.\textsuperscript{58} Simply put, the NLRA recognizes workers’ rights to unionize.\textsuperscript{59} Unions have far greater bargaining power than workers would individually.\textsuperscript{60} This greater bargaining power allows unions—on behalf of their members—to negotiate with employees over workplace safety, higher wages, and benefits, such as health coverage, pensions, and leave.\textsuperscript{61}

\begin{itemize}
  \item \textsuperscript{52} See John Bruntz, The Employee/Independent Contractor Dichotomy: A Rose is Not Always a Rose, 8 HOFSTRA LAB. L. J. 337, 342-43, 348-49, 357 (1991).
  \item \textsuperscript{53} Pearce & Silva, supra note 47, at 15, 16-18.
  \item \textsuperscript{55} See discussion infra Part II.
  \item \textsuperscript{56} See generally Rivlin-Nadler, supra note 34 (discussing how the Board had held that independent contractors are not, by definition, employees and therefore are not entitled to the protection and benefits of employees).
  \item \textsuperscript{57} National Labor Relations Act, 29 U.S.C. § 157 (2018).
  \item \textsuperscript{58} Id.; Mammoth Team, What are Section 7 Rights?, MAMMOTH (Aug. 18, 2016), https://blog.mammothhr.com/what-are-section-7-rights.
  \item \textsuperscript{60} What are the Benefits of Being a Union Worker?, UWUA: AFL-CIO, https://uwua.net/what-are-the-benefits-of-being-a-union-worker/ (last visited Apr. 4, 2021).
  \item \textsuperscript{61} Id.
\end{itemize}
Unions are frequently met with great success in their negotiations. For example, on average, union members make thirty percent more than their non-union counterparts. Union members are twenty-four percent more likely to have health coverage through their employer, with ninety-two percent of all union members receiving such a benefit. Union health coverage is often better for workers as well, with union members paying eighteen percent less in deductibles. Additionally, union members are between fifty-four percent and sixty-five percent more likely to have pensions, with sixty-seven percent of private sector union members and seventy-eight percent of public sector union members receiving pensions through their employer. Employers contribute twenty-eight percent more towards pensions of union members than employers of non-union members. Further, union members receive twenty-six percent more vacation time and fourteen percent more total paid leave.

Another major protection most unions provide their members is “just-cause” termination. The default presumption in the United States

63. Robert P. Hunter, Why Beck Rights Are Important to Workers, MACKINAC CTR. FOR PUB. POL’Y (May 1, 1997), https://www.mackinac.org/1021 (noting that even non-union members receive several of the benefits of union membership).
65. Id.; Mishel & Walters, supra note 62, at 2.
67. “The [p]rivate [s]ector is usually comprised of organizations run by individuals and groups who seek to generate and return a profit back to its owners. Organizations in the private section are usually free from government control or ownership.” Private Sector, PRIVACYSENSE.NET (2016), http://www.privacysense.net/terms/private-sector/.
68. “The [p]ublic [s]ector is usually comprised of organizations that are owned and operated by the government and exist to provide services for its citizens.” Public Sector, PRIVACYSENSE.NET (2016), http://www.privacysense.net/terms/public-sector/. Examples include education, emergency services, healthcare, law enforcement, and public transit. Id. While public sector employees are statutorily excluded from protection under the NLRA, they are protected through state laws in many states—like the Taylor Law in New York, which function similarly to the NLRA. National Labor Relations Act, 29 U.S.C. § 152(2) (“employer’ . . . shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof’); see generally N.Y. CIV. SERV. L.AW §§ 200-215 (1969); Collective Bargaining Rights for Public Employees, UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF A.M., https://www.ueunion.org/ue-policy/collective-bargaining-rights-for-public-employees (last visited Apr. 29, 2020).
69. Benefits of Union Membership, supra note 64.
70. Mishel & Walters, supra note 62, at 2.
71. Id.
is that all workers are "at-will" employees. 73 This means an employee may be fired for a ""good reason, bad reason, or no reason at all."" 74 The only reason an employer cannot fire an employee is an unlawful one, such as because of the employee's protected characteristics, like race or gender. 75 This presumption of at-will employment, however, can be contracted away, and it commonly is in union contracts with employers. 76 These contracts, or collective bargaining agreements, typically contain just-cause provisions, such as, ""[n]o employee will be disciplined or discharged except for just cause"" or ""good cause,"" ""reasonable cause,"" or ""simply 'cause."" 77 Just cause requirements protect employees from perceived unfair termination, such as terminating an employee to hire a relative of a supervisor. 78

Union membership not only grants benefits listed under the NLRA, but also makes workers more likely to exercise their rights to other benefits and protections. 79 For example, union members are twenty-three percent more likely to receive unemployment insurance, sixty percent more likely to file a worker's compensation claim, ten percent more likely to have understood their rights under the Family Medical Leave Act, and are forty-five percent more likely to seek an Occupational Safety and Health Act inspection in the workspace. 80 This occurs because ""unions provide information to workers about benefit exceptions, rules, and procedures."" 81

But workers may only act on and enjoy these rights if they are classified as employees by the relevant agencies. 82 Ancillary employee rights and benefits outside the NLRA include, but are not limited to, the

75. At-Will Employment – Overview, supra note 73; see e.g. 42 U.S.C. 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire . . . any individuals . . . because of such individual’s race, color, religion, sex, or national origin.").
76. At-Will Employment – Overview, supra note 73.
77. Schwartz, supra note 72.
78. Id.
79. Mishel & Walters, supra note 62, at 11-12.
80. Id. at 12-14.
81. Id. at 12.
82. See generally Françoise Carré, (In)dependent Contractor Misclassification, ECON. POL’Y INST. (June 8, 2015), https://www.epi.org/publication/independent-contractor-misclassification/.
federal minimum wage, state minimum wage, overtime pay, federal employment discrimination protections, state employment discrimination protections, unemployment insurance, workers’ compensation insurance, family medical leave, proof of employment, and a differing tax structure.

2. The Gig Economy is Only Growing, Causing More Workers to Be Classified as Independent Contractors

The gig economy is, unsurprisingly, also difficult to define. The National Association of Counties recognizes three components that make up gig work; (1) workers who are paid by the task or project as opposed to hourly or on a salary; (2) consumers who require a temporary service; and (3) companies that directly connect the workers and consumers. These companies are typically app-based, such as Uber or Lyft.

83. See generally Fair Labor Standards Act, 29 U.S.C. § 206 (2020); see also Carré, supra note 82, at 4.
84. See generally New York State Minimum Wage Act, N.Y. LAB. LAW §§ 650-694 (McKinney 2020); see also Carré, supra note 82, at 4.
85. See generally 29 U.S.C. § 207; see also Carré, supra note 82, at 4.
86. 42 U.S.C. § 2000e-2(a)(1) (2020) (“It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”); Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1) (2020) (“[i]t shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age”); Americans with Disabilities Act, 42 U.S.C. § 12112(a) (2020) (“[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment”).
87. See e.g., New York State Human Rights Law, N.Y. EXEC. LAW § 296(1)(a) (McKinney 2020).
88. See e.g., N.Y. LAB. LAW 18 §§ 500-643 (McKinney 2020).
89. See Andrew G. Malik, Worker Classification and the Gig-Economy, 69 RUTGERS UNIV. L. REV. 1729, 1734 (2017); N.Y. WORKERS’ COMP. LAW § 2(4) (McKinney 2020).
91. Malik, supra note 89, at 1734. Lacking proof of employment may be a draw back for individuals attempting to rent or securing a loan. Id.
92. Id.
94. Id.
While most gig work is now app-based, the gig\(^5\) economy is not new, nor is classifying gig workers as independent contractors.\(^6\) This classification of worker was first recognized in 1917 with the creation of the 1099 tax form.\(^7\) Then, in 1938, the term was listed as an exclusion to the Fair Labor Standards Act (hereinafter "FLSA") protections, and again in 1947 as an exclusion to the NLRA.\(^8\)

Independent contract work and the gig economy have only grown since the early 20\(^{th}\) century.\(^9\) Businesses comprised primarily of independent contractors and temporary workers have grown by 2.6 percent annually while traditional payroll businesses have grown only by 0.8 percent annually since 1997.\(^{10}\) In 2005, 10.7 percent of individuals in the workforce worked in "alternative work arrangements," which include temporary help, on-call workers, contract company workers, and independent contractors.\(^{101}\) This number rose to 15.8 percent in 2015.\(^{102}\)

When looking solely at independent contractors, it is estimated that independent contracting rose by roughly thirty percent from 2005 to 2015.\(^{103}\) In May 2017, the Bureau of Labor Statistics stated that 10.6 million individuals worked primarily as independent contractors, comprising a total of 6.9 percent of the workforce.\(^{104}\) And in 2018, a Gallup Poll reported that thirty-six percent of workers are part of the gig

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95. \textit{Id.} See also Brandie P., \textit{The History of the Modern Gig Economy}, \textsc{Writer’s Access} (Oct. 23, 2019), https://www.writeraccess.com/blog/the-history-of-the-modern-gig-economy/ (explaining that the term "gig" is over a century old, with jazz musicians in the early 1900s describing their performances as "gigs").

96. Istrate & Harris, \textit{ supra} note 93, at 3.


98. \textit{Id.}; Rivlin-Nadler, \textit{ supra} note 34.

99. Istrate & Harris, \textit{ supra} note 93, at 3.


102. \textit{Id.}


economy in some capacity.\textsuperscript{105} In fact, in 2015, twenty-four percent of people made some money through an online platform, most of them as independent contractors.\textsuperscript{106}

For the majority of individuals, however, this money is not supplemental income.\textsuperscript{107} Rather, fifty-six percent of individuals say the income they make through these platforms is ""essential' or 'important."\textsuperscript{108} However, a worker's income—and several other rights—may not be protected if the worker is an independent contractor and not an employee.\textsuperscript{109}

Properly classifying workers as either employees or independent contractors is essential to ensuring they are adequately protected. Despite this, workers are frequently misclassified, both by their employer and themselves.\textsuperscript{110} According to the Economic Policy Institute, between ten and twenty percent of employers misclassify at least one worker as an independent contractor.\textsuperscript{111} Further, twenty-six percent of gig workers believe themselves to be employees of the company where they solicit work, despite being classified as independent contractors.\textsuperscript{112} This confusion in classification can be catastrophic for an individual who was wrongfully classified as an employee, only to later find out he or she is in actuality an independent contractor, thereby losing the above listed rights and protections.\textsuperscript{113}

II. HOW THE BOARD CLASSIFIES WORKERS

A. The Board's Authority to Classify Workers

The NLRA was passed to protect the rights of workers to bargain collectively and act in concert for mutual aid and protection regarding the


\textsuperscript{107} \textit{Id.}

\textsuperscript{108} \textit{Id.}


\textsuperscript{110} Carré, \textit{supra} note 82, at 1.

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} Smith, \textit{supra} note 106.

\textsuperscript{113} Carré, \textit{supra} note 82, at 4-5.
terms and conditions of their employment. In the Act’s “findings and declaration of policy” section, Congress declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

To achieve this goal, Section 3(a) of the NLRA created the Board to administer the Act. The Board is comprised of five members, all of whom are appointed by the President and confirmed by the Senate. Board members serve for a five-year term. Each Board member’s term expires in different years depending on their “seat.” For example, the term for the member who sits in the Madden Seat expires in years ending in zero and five, while the term for a Smith Seat expires in years ending in one and six. While there is no explicit rule governing the composition of the Board, it is tradition for the Board to have no more than three members of one political party. This tradition has resulted in, on most occasions, the Board majority reflecting the political party of the President.

The Supreme Court has explicitly recognized the Board’s authority to classify workers, thereby defining employee and independent contractor for the purposes of the NLRA. This authority stems from

115. Id. § 151. One such “substantial obstructions” is “diminution of employment wages.” Id.
116. Id. § 153(a).
117. Id.
118. Id.
120. See id. The Madden Seat is named after J. Warren Madden, the first Chairman of the Board.
121. Id. All seats are named after the first individual to serve in that capacity. Id.
122. See id. The Smith Seat is named after Edwin S. Smith. Id.
124. See Members of the NLRB since 1935, supra note 119.
125. See generally NLRB v. United Ins. Co., 390 U.S. 254 (1968) (explaining the difference between employees and independent contractors). Section 9(b) of the NLRA vests the Board with the authority to decide “appropriate” bargaining units. National Labor Relations Act, 29 U.S.C. § 159 (2018). As independent contractors are statutorily barred from bargaining unit membership, this
NLRB v. United Insurance Co. and Chevron USA, Inc. v. Natural Resources Defense Council, Inc.\textsuperscript{126} In United Insurance, the Supreme Court was asked whether "debit agents" were employees or independent contractors.\textsuperscript{127} Previously, the Board classified the agents as employees, but the Court of Appeals reversed, finding the agents to be independent contractors.\textsuperscript{128} In a show of deference to the Board, the Court held the Board's decision regarding whether a worker is an employee or independent contractor should not be overturned if it was a "choice between two fairly conflicting views."\textsuperscript{129} While the Court believed the Board is in no way more suited or expert in such questions of worker classification, merely because the Court could have reached a different conclusion was not enough for reversal.\textsuperscript{130}

Sixteen years after United Insurance, the Supreme Court articulated a general doctrine regarding deference to federal agencies interpreting statutes they administer.\textsuperscript{131} In Chevron, the Court was asked whether the Environmental Protection Agency's interpretation of the Clean Air Act was permissible.\textsuperscript{132} Writing for the Court, Justice Stevens held that a court will uphold an agency's reasonable interpretation of an ambiguous statute.\textsuperscript{133} The reviewing court does not impose its own interpretation of the statute.\textsuperscript{134} For this reason, the Court, on an appeal, upheld the Board's interpretation of employee and independent contractor in Town & Country Electric, citing Chevron in its reasoning.\textsuperscript{135}

\textsuperscript{127} United Ins. Co., 390 U.S. at 255. This decision was pre-Chevron. See Chevron, 467 U.S. at 837 (decided in June 1984).
\textsuperscript{128} United Ins. Co., 390 U.S. at 255.
\textsuperscript{129} Id. at 260.
\textsuperscript{130} Id. ("It should also be pointed out that such a determination of pure agency law involved no administrative expertise that a court does not possess.").
\textsuperscript{131} See generally Chevron, 467 U.S. at 843-44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency.").
\textsuperscript{132} Id. at 840.
\textsuperscript{133} Id. at 842 ("First, always, is the question whether Congress has directly spoke to the precise question at issue.").
\textsuperscript{134} Id. at 843.
B. The Board's Analysis Overtime\textsuperscript{136}


President Bill Clinton was sworn in to office in 1993.\textsuperscript{137} However, due to a controversial Senate hearing, he was unable to appoint anyone to the Board until March 1994.\textsuperscript{138} This left the Board Republican-dominated for over one year of his Presidency.\textsuperscript{139} Prior to the confirmation of his first appointment, the Board issued two classifications decisions regarding drivers: \textit{Diamond L} and \textit{Yellow Cab}.\textsuperscript{140} In \textit{Diamond L}, the Board stated the test to determine whether a taxi driver is an employee or independent contractor is the "right of control" test."\textsuperscript{141} This test asks "whether the party for whom the service is performed has the right to control the 'manner and means' of performance or whether that party is concerned only with the final result."\textsuperscript{142} Additionally, the test looks to "entrepreneurial risk" undertaken by the party performing the service."\textsuperscript{143} This test differed greatly from the previously established common-law agency test as recognized in \textit{United Insurance}.\textsuperscript{144}

In \textit{Yellow Cab}, about seven months after \textit{Diamond L}, the Board expressed the test for taxi drivers differently.\textsuperscript{145} The Board stated that

\textsuperscript{136} NLRB CiteNet, NAT’L LAB. RELS. BD., https://citenet.nlrb.gov/citenet/home/ (last visited Mar. 6, 2021). The Board decisions addressed below are accessed through CiteNet, the Board’s topical index. This index contains all Board decisions dating back to 1992. The specific decisions were accessed through filtering using the classification number for “independent contractors” (177-2484-5000-0000) under the heading “statutory exclusions of employee status,” and limiting the search to just Board decisions and cases after January 20, 1993. From the 171 results produced, the repeat results were grouped together, and further narrowed into those about drivers and those of other professions, analyzing the most recent Board decision for each that addressed the classification question. \textit{Id.}


\textsuperscript{139} Members of the NLRB Since 1935, supra note 119.

\textsuperscript{140} \textit{See generally} \textit{Yellow Cab} of Quincy, Inc., 312 N.L.R.B. No. 34 (1993) (changing the “right of control” test for taxi drivers); \textit{see generally} \textit{Diamond L Transp.}, Inc., 310 N.L.R.B. No. 97 (1993) (explaining the “right of control” test).

\textsuperscript{141} \textit{Diamond L Transp.}, Inc., 310 N.L.R.B. at 630.

\textsuperscript{142} \textit{Id.} at 630-31.

\textsuperscript{143} \textit{Id.} at 631 (quoting NLRB v. United Ins. Co., 390 U.S. 254 (1968)).

\textsuperscript{144} \textit{See generally} \textit{United Ins. Co.}, 390 U.S. at 255. (explaining a test contrary to the common-law test).

\textsuperscript{145} \textit{See generally} \textit{Yellow Cab of Quincy, Inc.}, 312 N.L.R.B. at 144 (changing the test when applied to taxi drivers).
they still considered control of manner and means, but they will also consider "whether there is any correlation between the employer's income and the amount of fares collected by its drivers," adding another factor to the analysis.146 Any mention of entrepreneurial risk in Yellow Cab is absent.147 Within a year the Republican-majority Board altered its approach to classifying the same type of worker.148

When the Board switched to a Democratic-majority after the confirmation of Clinton's nominee, the test was altered again, this time, even more drastically.149 In Prime Time Shuttle, issued a year and a half after Yellow Cab, the Board articulated an eight factor test—five more factors than in the prior decision—in applying the "right to control" test:

(1) whether individuals perform functions that are an essential part of the Company's normal operations or operate an independent business;
(2) whether they have a permanent working arrangement with the Company which will ordinarily continue as long as performance is satisfactory; (3) whether they do business in the Company's name with assistance from the Company's personnel and ordinarily sell only the Company's products; (4) whether the agreement which contains the terms and conditions under which they operate was promulgated and changed unilaterally by the Company; (5) whether they account to the Company for the funds they collect under a regular reporting system prescribed by the Company; (6) whether particular skills are required for the operations subject to the contract; (7) whether they have a proprietary interest in the work in which they are engaged; and (8) whether they have the opportunity to make decisions which involve risks taken by the independent businessman which may result in profit or loss.150

All of these factors were used to determine whether the alleged employer controlled the manner and means by which the alleged employees worked.151

Then, only four months later, in Schoolman, the Board again expressed the test differently by adopting the decision of an

146. Id.
147. See generally id. (focusing on "entrepreneurial opportunity" in the analysis); Cf. Diamond L Transp., Inc., 310 N.L.R.B. at 630 ("the analysis also includes examination of the 'entrepreneurial risk' undertaken by the party performing the service.").
148. Members of the NLRB since 1933, supra note 119.
149. See generally Prime Time Shuttle Int'l, Inc., 314 N.L.R.B. No. 139, 840 (1994) (expanding the "right to control" test in its analysis).
150. Id.
151. Id.
Administrative Law Judge (hereinafter “ALJ”). While the eight factors found in *Prime Time Shuttle* were echoed verbatim, "entrepreneurial risk" reappeared, though it was listed separate from the eight factors. While it can be argued that the eighth factor from *Prime Time Shuttle*, "whether they have the opportunity to make decisions which involve risks taken by the independent businessman which may result in profit or loss," is the same as entrepreneurial risk, the ALJ specifically severed it from the *Prime Time Shuttle* factors, analyzing it separately. Additionally, the Board stated the "method of compensation and tax withholding" should also be considered, though did not enumerate it like the factors in prior decisions. It is also important to note the ALJ referred to the test featured as the common-law agency test and the right-of-control test interchangeably. At no point does the Board attempt to correct the ALJ, distinguishing the tests and explaining their proper applications.

*Roadway* and *Dial-A-Mattress*, both issued on the same day, almost three years after *Schoolman*, again fundamentally changed the way the Board classified workers. These decisions were so monumental, they were featured under the "Big Decisions, Big Controversy" section of the Board’s eightieth anniversary publication. The changes presented in *Roadway* and *Dial-A-Mattress* were arguably the most drastic change in the Board’s approach to classification. The approach in both of these cases was the same, though in *Roadway*, the Board found the drivers to be employees, while in *Dial-A-Mattress*, they were found to be independent contractors.

In *Roadway*, the Board abandoned the right-of-control test—the test previously revered as the proper approach in all Clinton-era decisions, regardless of the actual contents of the test. Instead, the Board relied on the common-law agency test, as expressed by in *United Insurance*, as the proper approach. In *United Insurance*, Justice Black, writing for the

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152. See generally Schoolman Transportation System, Inc., 319 N.L.R.B. No. 96, 716 (1995) (the Board rephrased the “right-of-control” test, applying the common law of agency, but arranging the test into a list of non-determinative factors).

153. Id.

154. Id.

155. Id.

156. Id.

157. See id.


161. See id. at 849 (quoting NLRB v. United Ins. Co., 390 U.S. 254, 256 (1968)).
Court, declared that Congress’ intention in passing the Taft-Hartley Amendment to the NLRA was for “the Board and the courts [to] apply general agency principles in distinguishing between employees and independent contractors.” Despite the factors listed in United Insurance, both parties in Roadway pointed towards a modified version of these factors found in the Restatement of Agency. These factors are:

1. the extent of control which, by the agreement, the master may exercise over the details of the work;
2. whether or not the one employed is engaged in a distinct occupation or business;
3. the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
4. the skill required in the particular occupation;
5. whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
6. the length of time for which the person is employed;
7. the method of payment, whether by the time or by the job;
8. whether or not the work is part of the regular business of the employer;

163. Id. at 259 (“These factors are the agents do not operate their own independent businesses, but perform functions that are an essential part of the company’s normal operations; they need not have any prior training or experience, but are trained by company supervisory personnel; they do business in the company’s name with considerable assistance and guidance from the company and its managerial personnel and ordinarily sell only the company’s policies; the “Agent’s Commission Plan” that contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; the agents account to the company for the funds they collect under an elaborate and regular reporting procedure; the agents receive the benefits of the company’s vacation plan and group insurance and pension fund; and the agents have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.”).
[9] whether or not the parties believe they are creating the relation of master and servant; and

[10] whether the principal is or is not in business.165

The Board accepted the Restatement factors as the proper factors to rely on, never again mentioning the factors listed in United Insurance.166 Although the Restatement "ultimately assesses the amount or degree of control exercised by an employing entity over an individual," the Board rejected the notion that factors not including control were "insignificant when compared to those that do."167 In reaching this decision, the Board relied on language from the Supreme Court—"all of the incidents of the relationship must be assessed and weighed with no one factor being decisive"—and the Comments of the Restatement—"[t]he factors . . . are all considered in determining the question [of employee status]."168 This means when classifying workers, the Board should look to the factors listed in the Restatements, but use a totality of the circumstances approach when reaching its determination.

The Board continued applying the common-law agency test from Roadway and Dial-A-Mattress in their next two decisions, issued two years later.169 In fact, in one of these subsequent decisions, even though the ALJ below applied the common-law agency factors, the Board made note that the ALJ improperly referred to the test as the right-of-control test, making it clear the old control-centric test was scrapped.170


When President George W. Bush came to office in 2001, he appointed three Republicans to the Board, creating a Republican-majority on the Board for the first time since 1993.171 Despite this, the Board did not depart drastically from the framework established by the Clinton Board. Nearly two years after the last classification decision in the Clinton era, the Bush Board heard its first driver classification case, and

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167. Id. at 850.
168. Id.
again pointed to the common-law agency test as the proper analysis.\footnote{172} Again, two years after that, the Board continued this trend in their decision \textit{Community Bus Lines}.\footnote{173} However, the analysis there was not parallel to the analysis found in previous cases.\footnote{174} Instead, the Board classified workers based on whether the facts aligned more with those in \textit{Roadway}, where workers were found to be employees, or \textit{Dial-A-Mattress}, where workers were classified as independent contractors.\footnote{175}

In \textit{Friendly Cab}, decided merely one month after \textit{Community Line}, the Board again asserted the common-law agency test as the proper test when classifying workers.\footnote{176} There, the Board affirmed the decision of the Regional Director, which found drivers to be employees.\footnote{177} However, when analyzing the relevant facts, the Regional Director did not apply to the distinctive facts to each of the ten Restatement factors.\footnote{178} Instead, the Regional Director spoke broadly about facts weighing in favor of employee status and those in favor of independent contractor status.\footnote{179} This makes it difficult to distinguish which facts the Regional Director, and subsequently the Board, determined held weight regarding each common-law agency factor.\footnote{180}

Less than half a year after \textit{Friendly Cab}, the Bush Board issued its last driver classification decision.\footnote{181} The ALJ, in his decision below, seemingly reverted back to their comparator style approach used in \textit{Community Bus Line}, at no point applying the common-law agency test.\footnote{182} The Board adopts the ALJ’s decision, again, without applying the common-law agency test.\footnote{183} What is most troublesome is the Board’s disregard toward changing facts between the ALJ’s decision and their own. Between the two decisions, the parties stipulated some drivers were

\footnotesize{\begin{itemize}
  \item \textit{Time Auto Transp.}, 338 N.L.R.B. No. 75, 626 (2002).
  \item \textit{See generally id.} (reaching the same conclusion with a different analysis).
  \item \textit{Id.} at 480.
  \item \textit{See id.} at 722.
  \item \textit{See id.} at 724.
  \item \textit{See id.}
  \item \textit{See generally id.} (the Board looked at the overall evidence presented by the taxicab drivers as a whole when determining whether they are independent contractors or not, rather than applying the restatement factors).
  \item \textit{See generally Metro. Taxicab Bd. of Trade, Inc.}, 342 N.L.R.B. No. 130 (2004).
  \item \textit{See Metro. Taxicab Bd. of Trade, Inc}, 342 N.L.R.B. at 1301.
\end{itemize}
employees. Nevertheless, the Board claims the union was unable to show the drivers were employees on procedural grounds.

3. Obama Era (2009-2016)

When President Barack Obama assumed office in 2009, at first, his Democratic appointees to the Board continued the precedent set by previous Boards. Such can be seen in *N.Y. Party Shuttle*, decided nine years after the Bush Board’s last driver classification case. There, the Board affirmed an ALJ’s ruling that a driver was an employee. While the ALJ mischaracterized the common-law agency test, at times referring to it as the right-to-control test, and placing considerable weight on control, the Board took note of this error in a footnote.

Then, just over one year later, the Obama Board decided *FedEx*. Despite the predominantly consistent application of the common-law agency test from the end of the Clinton era through the Bush era, *FedEx* “restate[d] and refine[d]” the test. Like past boards, the Obama Board reaffirmed the importance of the Supreme Court’s *United Insurance* decision, again stressing all common-law agency factors must be considered without one factor being decisive.

When *FedEx* was initially decided by the Board, FedEx delivery drivers were held to be employees. However, this decision was appealed to the D.C. Circuit. Judge Brown, writing for the court, restated that the Board and courts apply the common-law agency test when determining whether a worker is an employee or independent

184. *Id.*
185. *See id.* at 1300-01.
187. *See generally id.* (continuing to apply the common-law agency test as the proper test for employee classification).
188. *Id.* at 1048.
189. *Id.* at 1046 n.2 (“We note that the judge characterized the longstanding common law agency test of independent contractor status as a ‘right-to-control’ test. However, the Board has repeatedly stated that an employer’s right to control the manner and means of performing a job is but one of a number of factors to be considered under the common law test, ‘with no one factor being decisive.’”).
191. *Id.*
192. *Id.*
contractor. The majority recognized this test previously used the ten Restatement factors, but considered it a “non-exhaustive” list. The majority asserted the test formerly focused on control, but shifted to “entrepreneurial opportunity for gain or loss,” declaring it the “animating principle” of the test. This means that all common-law agency factors were considered in relation to the amount of entrepreneurial opportunity they presented. However, if the opportunity could not realistically be taken by the worker, then such opportunity would not weigh in favor of independent contractor status. Using the newly developed animating principle approach, Judge Brown reversed the Board, finding the drivers were not employees, rather independent contractors.

The Board, after re-hearing the case that was initially vacated by the court, rejected the D.C. Circuit’s notion that entrepreneurial opportunity is the “animating principle” of the analysis. Instead, the Board doubled down on the traditional common-law agency test first found in Roadway and Dial-A-Mattress. It explicitly laid out how all factors should be considered: “(1) all factors must be assessed and weighed; (2) no one factor is decisive; (3) other relevant factors may be considered, depending on the circumstances; and (4) the weight to be given a particular factor or group of factors depend on the factual circumstances of each case.”

While the Board asserted the four considerations have been present since Roadway and Dial-A-Mattress, other relevant factors have predominantly been absent from the Board’s analysis until FedEx. Instead, the Board traditionally focused exclusively on the enumerated ten common-law agency factors. Therefore, despite the Board trying to walk away from the D.C. Circuit’s inflation of entrepreneurial opportunity, the Obama Board entertained entrepreneurial opportunity

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195. *Id.* at 495-96.
196. *Id.* at 496.
197. *Id.* at 497.
198. *See id.* at 504.
199. *See id.* at 502.
200. *Id.* at 504. The majority did not acknowledge the required deference the court owes to the Board’s interpretation, though Judge Garland, dissenting, did reference Chevron and this required deference: “although the NLRB may have authority to alter the test, or at least to alter its focus, see Chevron . . . , this court does not.” *Id.* at 510.
202. *See id.* at 621.
203. *Id.* at 611.
204. *See id.* at 612.
205. *See id.* at 610.
Unlike other previous Boards,\textsuperscript{206} the Board went so far as to lay out subfactors to consider when looking at entrepreneurial opportunity, such as whether workers “have the ability to work for other companies, can hire their own employees, and have a proprietary interest in their work.”\textsuperscript{207} Additionally, the Board supported the D.C. Circuit’s proposition that weight should be given to “actual, but not merely theoretical, entrepreneurial opportunity.”\textsuperscript{208} Ultimately, the Board tiptoes around rolling entrepreneurial opportunity into the fold while still respecting the common-law agency factors.\textsuperscript{209}

Also of note is the Board’s peculiar application of facts to the test here. The Board held the factor concerning what relationship the parties believed they were creating to weigh evenly for both sides.\textsuperscript{210} They reasoned this way because drivers signed agreements stating they were independent contractors, but a majority of drivers, by vote, wished to be employees—hence the litigation.\textsuperscript{211} However, the Board’s reasoning is flawed. In a classification decision, there is always going to be a disagreement between the parties as to what relationship they were creating.\textsuperscript{212} This disagreement is at the heart of classification litigation.\textsuperscript{213} If the Board considers the litigation as a fact weighing in favor employee status, this factor could never weigh in favor of independent contractor status.\textsuperscript{214} At best, it is always going to be weighed evenly for both sides.\textsuperscript{215} Therefore, the parties’ litigation cannot be probative in the analysis.\textsuperscript{216}

4. Trump Era (2017-2020)

Over four years after \textit{FedEx}, the Trump Board—at that point a Republican-majority of all Trump appointees—decided \textit{SuperShuttle} which dismantled past classification framework and dissected \textit{FedEx},

\begin{itemize}
\item 206. \textit{Id.} at 610.
\item 207. \textit{Id.} at 612.
\item 208. \textit{Id.} at 610.
\item 209. \textit{See id.} at 611-12.
\item 210. \textit{Id.} at 623, 627.
\item 211. \textit{Id.} at 623.
\item 212. \textit{See generally id.} at 610-11 (explaining how the law works in employee versus independent contractor status cases).
\item 213. \textit{See generally id.} at 611 (expressing the difficulty of determining if an individual should be classified as an employee or independent contractor).
\item 214. \textit{See generally id.} at 622-25 (demonstrating how the Board weighs each factor in favor of one side or the other).
\item 215. \textit{See generally id.} at 623 (showing two factors being weighed as neutral).
\item 216. \textit{FedEx} Home Delivery v. N.L.R.B., 563 F.3d 492, 495-96 (D.C. Cir. 2009).
\end{itemize}
using it as a basis to attack prior precedent.\footnote{217} The Board wrote, "the Board \ldots ha[\ldots s] shifted the emphasis from control to whether putative independent contractors have significant entrepreneurial opportunity for gain or loss."\footnote{218} The Board further emphasized how entrepreneurial opportunity is not treated merely as a factor, but instead is incorrectly used as the animating "principle to help evaluate the overall significance of the agency factors."\footnote{219}

What the Trump Board points to in \textit{SuperShuttle}, however, was cast off in the Board's decision in \textit{FedEx}—be it just in words or in practice.\footnote{220} Member McFerran, the lone dissenter in \textit{SuperShuttle}, points this out to the Board, yet the Board merely writes, in a footnote, "our review of the Board's case law shows, entrepreneurial opportunity, however it is characterized, has always been at the core of the common-law test."\footnote{221}

While the Trump Board attacks the Obama Board for altering the test, the Trump Board, too, alters the test.\footnote{222} Both Boards agree the common-law agency test requires the Board to look to the Restatement factors as "all the incidents of the relationship must be assessed and weighed with no one factor being decisive."\footnote{223} But on the same page the Trump Board stresses the importance of all factors being equal and that no factors be weighed more heavily, it claims the Board has historically given more weight to two factors in the driver context.\footnote{224} These factors are "the lack of any relationship between the company's compensation and the amount of fares collected," and "the company's lack of control over the manner and means by which the drivers conduct business after leaving the [company's] garage."\footnote{225}

The improper weight given to these factors, namely the one focused on control, is even more problematic when looking at other portions of the Board's decision.\footnote{226} The Board explicitly rejected Member McFerran's proposition that the common-law agency test centers

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\begin{itemize}
  \item \footnote{217} SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, 1 (2019).
  \item \footnote{218} Id. at 2.
  \item \footnote{219} Id.
  \item \footnote{220} Id.
  \item \footnote{221} Id. at 2 n.4 (McFerran, L., dissenting).
  \item \footnote{222} Id. at 2-3.
  \item \footnote{223} Id. at 1-2; FedEx Home Delivery, an Operating Division of FedEx Ground Package Sys., Inc., 361 N.L.R.B. No. 55, 623 (Sept. 30, 2014) ("[A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive.").
  \item \footnote{224} See SuperShuttle DFW, Inc., 367 N.L.R.B. at 2-3. This idea of significant weight being given to these two factors stems from two cases predating the refining of the common-law agency test in \textit{Roadway}, and therefore incorrectly draws on outdated precedent. \textit{Id}.
  \item \footnote{225} \textit{Id}.
  \item \footnote{226} \textit{Id}.
\end{itemize}
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around control. Moreover, the Board reiterated that factors that do not center around control are still significant in an analysis. Further, the Board conceded the Restatement "expressly recognizes that a master-servant relationship can exist in the absence of the master's control over the servant's performance of work." Thus, the Board is simultaneously embracing control and inflating its weight in the analysis, while at the same time stating control should not be the "'core concept'" of the analysis and that all factors much be considered.

Ultimately, SuperShuttle rejected FedEx, claiming it was unnecessary and refusing to even characterize it as a "'refinement'" of the common-law agency test. The Trump Board refused to even consider entrepreneurial opportunity as a factor, despite the original common-law agency test allowing for factors other than those listed to be considered. For future cases, the Board limited the use of entrepreneurial opportunity to instances "when the specific factual circumstances of the case make such an evaluation appropriate."

But this, like Board's statements about control, are inconsistent with the rest of the Board's decision. The Board wrote, "control and entrepreneurial opportunity are two sides of the same coin: the more of one, the less of the other." Further, the Board stated, "[g]enerally, common-law factors that support a worker's entrepreneurial opportunity indicate independent-contractor status; factors that support employer control indicate employee status." Therefore, this apprehension to entrepreneurial opportunity is needless. If the Board's assertion that the two are equal counterbalances, from what side the Board measures from is meaningless. Whether the Board states they are considering control, entrepreneurial opportunity, or both, it does not matter. Regardless of the measure, the Board should reach the same conclusion. Additionally, as the factual circumstances of any case would make considering control

227. Id. at 11.
228. Id.
229. Id.
230. Id.
231. Id. at 8.
232. Id. at 9.
233. Id. The Board offers no guidance as to when factual circumstances would make such an evaluation appropriate. Id.
234. See infra notes 235-36.
236. Id. at 2.
237. See id. at 9.
238. Id.
appropriate, it would be just as appropriate to consider entrepreneurial opportunity.\textsuperscript{239}

Seven months after \textit{SuperShuttle}, the same Board issued a new decision that again dealt with classifying drivers.\textsuperscript{240} Despite the Board railing against entrepreneurial opportunity in \textit{SuperShuttle}, they resurrected entrepreneurial opportunity in \textit{Velox Express}.\textsuperscript{241} In fact, the Board did not merely apply entrepreneurial opportunity as a factor, but instead used it as a "prism" to view all the other factors through.\textsuperscript{242} Using entrepreneurial opportunity in this way has no practical difference than using it as an "animating" principle, of which the Board took grave insult to in its decision seven months prior.\textsuperscript{243}

CONCLUSION

Nearly every time the Board is asked to classify drivers, the Board articulates a test that is inconsistent with its previous one.\textsuperscript{244} While the Board has consistently used the common-law agency test since \textit{Roadway} and \textit{Dial-A-Mattress}, its application varies from case to case, with the most recent cases differing most dramatically.\textsuperscript{245} Disputes have arisen regarding how the test is applied, what it really measures, and the weight each factor holds.\textsuperscript{246} With each Board answering these questions differently, each Board alters the test to suit its preference of the day.\textsuperscript{247} This inconsistency goes beyond mere different political agendas of Presidents and their respective political parties. Boards with the same political majority, and even Boards comprised of the exact same members, have been inconsistent in their approach.\textsuperscript{248}

\textsuperscript{239} \textit{Id.}
\textsuperscript{240} See generally \textit{Velox Express, Inc.} 368 N.L.R.B. No. 61 (2019).
\textsuperscript{241} \textit{Id.} at 3.
\textsuperscript{242} \textit{Id.}
\textsuperscript{243} \textit{SuperShuttle DFW, Inc.}, 367 N.L.R.B. at 2.
\textsuperscript{245} Compare \textit{SuperShuttle DFW, Inc.}, 367 N.L.R.B. at 1 (finding independent contractor status based on entrepreneurial opportunity and other factors), with Friendly Cab Co., 341 N.L.R.B. No. 103, 722 (2004) (finding employee status based on control and support of employer including a voucher-based compensation system).
\textsuperscript{246} See supra Part II.
\textsuperscript{247} See supra Part II.
\textsuperscript{248} See supra Part II.
Ultimately, the common-law agency test gives the Board too much leeway when classifying workers, letting the Board make decisions that are nothing more than "I-know-it-when-I-see-it" gut feelings guised with the illusion of law. First, the current test allows the Board to weigh the facts and common-law agency factors as they please. The common-law agency test is not a checklist where if a majority of the ten factors weigh in favor of employee status, the worker is classified as an employee. Instead, it is up to the Board to assess and give weight to the factors when making a determination. This means even where only one factor may weigh in favor of employee status, the worker can still be classified as an employee.

Second, even when cases share the same facts, Boards will treat them differently due to the lack of guidance on how facts should be analyzed. For example, one Board may find a fact weighs in favor of employee status when looking at a particular factor, while another may find it is neutral, and yet another may find it weighs in favor of independent contractor status. Additionally, this lack of guidance can cause a Board to inconsistently apply similar facts to different factors in the test.

Third, it allows the Board to consider factors outside of those listed in the Restatement. This allows one Board to give significant weight to an outside factor when making a decision and another Board to ignore it outright. Also, it means workers and advocates alike cannot predict whether facts that fall outside the ten common-law agency factors will carry weight with the Board.

These problems are compounded by the near lack of judicial review of these decisions. United Insurance and Chevron grant the Board the authority to define employee and independent contractor—and thereby alter the test to reach these definitions. So long as the Board’s classification is reasonable, such a classification will be upheld. This means a grievant appealing a classification decision based solely on prior

249. See supra Part II.
250. See supra Part II.B.4.
251. See supra notes 165-68, 192, 223-24 and accompanying text.
252. See supra notes 165-68, 192, 223-24 and accompanying text.
253. See supra notes 165-68, 192, 223-24 and accompanying text.
254. See supra notes 10-12 and accompanying text.
255. See supra Part II.
256. See supra Section II.B.1.
257. See supra Section II.B.1.
258. See supra Section II.B.1.
259. See supra Section II.A.
260. See supra Section II.B.1.
261. See supra notes 131-135 and accompanying text.
Board precedent would be futile.\textsuperscript{262} Such is true even if the facts of the grievant's case and the prior decision are near identical.\textsuperscript{263}

The Board's approach to classification leaves both the legal community and workers in the dark as to a worker's status prior to a decision.\textsuperscript{264} Now more than ever, with the growth of the gig economy, it is vital for workers to know whether they are employees or independent contractors as the distinction carries with it various benefits and rights.\textsuperscript{265} While defining employee and independent contractor in a way that fairly categorizes workers into one column or the other is near impossible, and any test is bound to have problems, the Board's current approach is too flawed, too inconsistent, and therefore must be revisited.\textsuperscript{266}

\textsuperscript{262} See supra Sections II.B.3., II.B.4.
\textsuperscript{263} See supra Sections II.B.3., II.B.4.
\textsuperscript{264} See supra Sections II.B.2., II.B.3.
\textsuperscript{265} See supra Section I.B.1.
\textsuperscript{266} See supra pp. 285-87.