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NO. 635182

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

RANDY ANFINSON, JAMES GEIGER and STEVEN HARDIE,
individually and on behalf of others similarly situated,

Appellant/Plaintiff,

v.

FEDEX GROUND PACKAGE SYSTEM, INC.,

Respondent/Defendant.

Appeal from the Superior Court of Washington
for King County
(Cause No. 04-2-39981-5-SEA)

BRIEF OF APPELLANTS

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I. ASSIGNMENTS OF ERROR

The trial court erred in:

- A. Entering judgment for defendant (CP 2384);
- B. Giving Instruction No. 9 (CP 2195);
- C. Giving Instruction No. 8 (CP 2194)
- D. Giving the Special Verdict Form (CP 2220);
- E. Failing to give Plaintiffs' Proposed Instruction No. 13C (CP 2172-2173);
- F. Failing to give Plaintiffs' Proposed Instruction Nos. 4 or 4A (CP 2169);
- G. Failing to give Plaintiffs' Proposed Instruction No. 15A (CP 2174);
- H. Failing to give Plaintiffs' Proposed Instruction No. 11A (CP 2170);
- I. Failing to give Plaintiffs' Proposed Instruction No. 12A (CP 2171); and
- J. Failing to give Plaintiffs' Proposed Verdict Form [Second Alternative] (CP 2175-2176).

II. ISSUES PRESENTED

- A. Was it prejudicial error to instruct the jury that the class members' status as employee versus independent contractor turns on

whether FedEx¹ controlled or had the right to control the details of the class members' performance of the work? AOE A, B, E, F, G.

B. Should employee status for purposes of paying employees minimum wages and overtime be determined based on a test developed to carry out the purposes of the wage and hour laws or a test developed to determine liability in *respondeat superior* tort actions? AOE B, E, F, G.

C. When the definitions of "employ" and "employee" are substantively the same in the Fair Labor Standards Act ("FLSA") and the Washington Minimum Wage Act ("MWA"), should Washington use the FLSA approach in determining who is an employee under the MWA? AOE A, B, E, F, G.

D. In order to win relief for any class member in a wage and hour class action turning on employment status, must plaintiffs prove that every class member has the same status? (AOE A, C, H, I)

E. Does the concept of "representative evidence" which is widely used in FLSA cases, have applicability in MWA cases? (AOE A, H, I)

¹ Defendant "FedEx Ground Package System, Inc." provides small package pick-up and delivery services through two divisions, "FedEx Ground," which focuses on businesses, and "FedEx Home Delivery," which focuses on residential customers. For ease of reference, plaintiffs refer to defendant (and its two divisions) as "FedEx."

F. May the jury decide employment status based on class members stated beliefs or contractual labels if those beliefs do not mirror economic reality? AOE B, E, F.

G. Is a class member's investment or relative investment the appropriate factor in determining employment status? AOE, B, E.

H. Whether the finding of employment status is an issue of fact for a jury, or an issue of law for the court? AOE D, J.

I. Whether plaintiffs should be awarded their attorneys fees and expenses under RAP 18.1, RCW 49.46.090 and RCW 49.48.030.

III. STATEMENT OF THE CASE

A. Procedural Background.

Plaintiffs Randy Anfinson, James Geiger and Steven Hardie filed this action on December 17, 2004 alleging that defendant FedEx deprived them of overtime wages, in violation of the Washington Minimum Wage Act, RCW 49.46.130. Plaintiffs sought damages for the period commencing three years prior to the date this action was filed, December 21, 2001, through December 31, 2005 ("the class period"). CP 7-13.

King County Superior Court Judge Gregory P. Canova certified the class in an Order dated January 28, 2008 and defined the class as all persons, excluding opt-outs, who performed services as a pick-up and delivery driver, or "contractor," for defendant who signed (or did so through a personal corporate entity) a FedEx operating agreement and who

handled a single route at some point during the class period. CP 217.

There are approximately 320 members of the class.

In an order dated May 5, 2008, the Court bifurcated the proceedings into a liability and damages phases. CP 223-224. The issue for the liability phase was whether defendant misclassified class members as independent contractors during the class period instead of treating them as employees. CP 2188 (Instruction No. 2). The trial lasted four weeks from March 3, 2009 through March 31, 2009. This appeal arises from the proceedings in this trial on liability.

B. The Parties Agreed That The FLSA Is Persuasive Authority.

Beginning in October, 2008, both sides relied on the FLSA in establishing a test for differentiating between employee and independent contractor for purposes of the MWA.² For example, FedEx argued that “Washington Courts View Federal FLSA Case Law As Persuasive Authority In Construing Equivalent Provisions Of The MWA.” CP 768-772. This argument and authority took several forms.

First, quoting Inniss v. Tandy Corp., 141 Wn.2d 517, 524, 7 P.3d 807 (2000), FedEx pointed out “[i]n 1975, the Legislature enacted [the MWA] to conform state minimum wage laws to the federal [FLSA].” CP

² During the first part of the litigation, both sides focused on the right to control test. See, e.g., CP 211 (plaintiffs relying on Ebling v. Gove’s Cove, Inc., 34 Wn. App. 495, 663 P.2d 132 (1983) and defendant on the 10-part test set forth in Hollingbery v. Dunn, 68 Wn.2d 75, 411 P.2d 431 (1966).

768-769. FedEx argued at the same CP that Washington courts should look to federal courts' interpretation of the FLSA as:

[P]ersuasive authority in interpreting the MWA particularly where, as here, no reported Washington case has interpreted [the definition of "employee" under the MWA] or identified the correct legal standard for distinguishing between an employee and an independent contractor for purposes of an MWA claim. (Emphasis added).³

Secondly, defendant acknowledged that federal courts, including the Supreme Court in Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961), adopted an "economic realities" approach for purposes of deciding whether an employee relationship exists under the FLSA, and admitted that:

Under this approach, "employees are those who as a matter of economic reality are dependent upon the business to which they render service." *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748 (9th Cir. 1979) [The *Real*] test for determining employment status under the FLSA has been widely adopted by the federal courts.⁴

CP 771.⁵ Plaintiffs read those cases, determined that there was substantial authority supporting those arguments, and proposed jury instructions premised on those authorities.

³ Defendant's position that no reported Washington case had interpreted the definition of employee under the MWA is correct. Hollingbery was a common law tort case, so the MWA issue did not come up. Ebling also was not an MWA case, but instead was based on RCW 49.52.050, .070. Moreover, is no indication that the appeals court had cited to it or considered either the MWA statutory definitions of "employ" or "employee" or any cases suggesting that in interpreting definitions under the MWA, the court should look to the FLSA and cases interpreting it.

⁴ FedEx also cited appellate state court decisions in Pennsylvania, New Mexico, Maine and Illinois from which, like Washington, modeled their Minimum Wage Acts on the FLSA and found "the FLSA test for employment status to be persuasive authority in interpreting State statutes." CP 768-770.

⁵ Defendant reiterated those arguments and cases in its trial brief. CP 1020-21.

Plaintiffs' and defendant's proposed jury instructions were submitted on October 17, 2007. Both parties proposed jury instructions relying at least in part on the FLSA. Compare plaintiffs' Proposed Jury Instruction No. 13A at CP 1078 with Defendant's Proposed Jury Instruction No. 16 at CP 994-995. Both parties also continued to rely on FLSA case law in a series of supplemental memoranda during the next several months. For example, at CP 1273-1275, FedEx cited both MWA cases and federal cases interpreting the FLSA test for differentiating between employees and independent contractors, including Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748 (9th Cir. 1979); Baker v. Flint Eng'g & Constr. Co., 137 F.3d 1436 (10th Cir. 1998); and U.S. Dept. of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987). Plaintiffs responded with a Supplemental Trial Brief which at CP 1761-1768 argued that "the FLSA test is an appropriate alternative" jury instruction, and cited cases relied upon by defendant as well as more than a dozen other cases interpreting the FLSA.⁶ See also CP 995, 1020-21, 1761-62, and 1274.

⁶ Those cases included Walling v. Portland Terminal Co., 330 U.S. 148, 150-151 (1947); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947); Donovan v. Sureway Cleaners, 656 F.2d 1368 (9th Cir. 1981); and Dole v. Snell, 875 F.2d 802, 803 (10th Cir. 1989). Other memoranda on both sides discussing these matters are contained at CP 1789-1808 and CP 1824-1829 (defendant) and CP 1811-1816 (plaintiffs).

IV. SUMMARY OF ARGUMENT

Washington law interpreting the MWA should look to the FLSA for the test to determine whether a worker is an employee or an independent contractor. See Inniss, Hisle v. Todd Pac. Shipyards, 151 Wn.2d 853, 93 P.3d 108 (2004), and Anderson v. Department of Social and Health Svc, 115 Wn. App. 452, 63 P.3d 134 (2003). Since the mid-1940s, every appellate decision that plaintiffs have found dealing with the test for employee status under the FLSA has viewed the focal point of the test as whether the worker, as a matter of economic reality, is dependent on the alleged employer. In other words, the relevant question is whether the worker is in fact in business for himself or whether he is dependent on the employer.

The trial court's instructions never mentioned the words "economic reality", "dependence", or "economic dependence." The trial court instead instructed the jury that the decision whether class members were employees or independent contractors "requires you to determine whether FedEx controlled, or had the right to control, the details of the class members' performance of the work." CP 2195. That is essentially the common law test of employee status used primarily for tort cases based on *respondeat superior*. It is narrower than the correct economic dependence test. Walling; Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318 (1992); and Bartels v. Birmingham, 332 U.S. 126, 130 (1947).

By focusing on the narrower rather than the broader test of employee status, the instructions not only misstated the MWA, but materially prejudiced plaintiffs who would have benefitted from a broader definition of employee.

The trial court's second overarching error in its instructions was to impose on plaintiffs an essentially insurmountable burden of proof. Court's Instruction No. 8 imposed on plaintiffs "the burden of proving that 'employee' status was common to the class members during the class period." CP 2194. That instruction permitted defendant to argue that if plaintiffs proved that 319 of the class members were employees "and one wasn't, your verdict should be for FedEx because [plaintiffs] haven't met their burden. They have to show you all." RP 03/26/09 (1:33 pm session), p. 97. That burden of proof makes it all but impossible for plaintiffs in a class action ever to win since it allows the evidence for one out of 320 class members to override the evidence for 319 such class members.

Third, factor 3 of Instruction No. 9 directs the jury to evaluate only the class member's investment rather than the relative investment of the class member and FedEx. The actual factor in determining employment versus independent contractor status is the relative investment of the worker compared to the alleged employer, not simply the worker's investment. "Relative investment" is a crucial concept, as in this case the

worker has some investment, but that investment pales in comparison to the employer's investment. By omitting relative investment as a factor, but leaving only "investment", the trial court prevented plaintiffs from arguing based on the correct law.

Fourth, the trial court erroneously gave factor 8 of Instruction No. 9 which listed the subjective intent of the parties as to the type of employment relationship they agreed to create without providing the necessary limitation on that element, namely, that any such belief or intention must mirror "economic realities." Similarly, the trial court should have given Proposed Instruction Nos. 13C, 15A, 4 or 4A, which required, inter alia, that subjective intent, or contractual labels, reflect the economic realities.

Fifth, the trial court should have given proposed Instruction Nos. 11A and 12A which set forth the correct legal standard on "pattern or practice" and "representative evidence." These instructions explain the correct legal standard for how to assess evidence of the misclassification claim in the context of this class action.

Finally, the trial court should not have permitted the jury to make the ultimate decision of law on the employment status of class members based on a simple general verdict. The trial court should have asked the jury to make factual determinations, as set forth in the Plaintiffs' Proposed Second Alternative Jury Verdict Form. Under Washington law as well as

the FLSA, the ultimate determination of employment status is a legal question which must be decided by the trial court.

V. ARGUMENT

A. Standard Of Review Of Jury Instructions And The Requirements Of CR 51(f).

Jury instructions must “allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.” Cox v. Spangler, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000). Jury instructions are reviewed *de novo* when based on issues of law and an instruction containing an erroneous statement of applicable law is reversible error when it prejudices a party. Thompson v. King Feed & Nutrition, 153 Wn.2d 447, 453 105 P.3d 378 (2005). See also, Blaney v. Int’l Ass’n of Machinists, 151 Wn.2d 203, 210, 87 P.3d 757 (2004) (“[a]lleged errors of law in jury instructions are reviewed *de novo*”). Moreover, a clear misstatement of the law is “presumed to be prejudicial.” Thompson, 153 Wn.2d at 453; Keller v. City of Spokane, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002). A trial court’s refusal to give an instruction based on a ruling of law is also reviewed *de novo*. State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998).

CR 51(f) provides that counsel, in objecting to the giving of any instructions, must “state distinctively the matter to which [he or she]

objects and the grounds of [his or her] objection.” The purpose of that “requirement is to ‘sufficiently apprise the court of any alleged error in order to afford it the opportunity to correct the matter if necessary.’”

Queen City Farms v. Cent. Nat'l Ins. Co., 126 Wn.2d 50, 63, 882 P.2d 703 (1994).

In Stewart v. State, 92 Wn.2d 285, 298, 597 P.2d 101 (1979), the court held that CR 51(f) was not met because “neither theory nor authority was cited to the court as required by the rules.” (Emphasis added.)

However, CR 51(f) is met when counsel cites authority but not theory and

the trial judge understood the basis for counsel’s objection. Crossen v.

Skagit County, 100 Wn.2d 355, 359, 669 P.2d 1244 (1983). Similarly, in

Mavroudis v. Pittsburgh-Corning Corp., 86 Wn. App. 22, 35, 935 P.2d

684 (1997), this Court held that CR 51(f) was met when counsel cited

theory, but not authority. Moreover, when the purposes behind CR 51(f)

have been met, its specific terms need not be followed. Mut. of Enumclaw

Ins. Co. v. Cox, 110 Wn.2d 643, 651-652, 757 P.2d 499 (1988).⁷

⁷ See Queen City, 126 Wn.2d at 63; Falk v. Keene Corp., 113 Wn.2d 645, 658, 782 P.2d 974 (1989). Moreover, as held in Joyce v. The Department of Corrections, et al., 155 Wn.2d 306, 324-25, 119 P.3d 825 (2005), CR 51(f) does not require a party objecting to an instruction given by the court to propose an alternative instruction. See also Wickswat v. Safeco Ins. Co., 78 Wn. App. 958, 967, 904 P.2d 767 (1995), where this court explained that if a:

[P]roposed instruction is not legally correct in every respect, then the party cannot complain about the court’s failure to give it. . . .

These requirements, however, do not preclude an appellate court from reviewing a claimed instructional error when the party has properly excepted pursuant to CR 51(f).

B. Court's Instruction No. 9 Is Inconsistent With The MWA To Plaintiffs' Prejudice Because The Instruction's Focal Point Was "Right Of Control" Rather Than "Economic Dependence," Which Is A Different And Broader Concept.

1. Introduction

The Court's Instruction No. 9 and the preliminary instruction is inconsistent with overwhelming precedent construing the FLSA because it misstated the "focal point" for determining an employment relationship. The instructions are thus also inconsistent with the MWA, which follows the FLSA on this issue. See Inniss, Hisle, and Anderson. The ultimate issue in determining an employment relationship under the FLSA (and thus the MWA) should be whether, based on "economic realities," the worker is economically dependent upon the employer. Bartels, 332 U.S. at 130 (emphasis added); Whitaker; Walling; Rutherford; Sureway Cleaners; Dole v. Snell.

On March 3, 2009, the trial court, over objection by the plaintiffs concerning its content,⁸ gave a preliminary instruction. RP 03/03/09

See also Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 96 F.3d 386 (2004).

⁸ Given the extensive briefing and oral argument on the issue of right of control versus economic dependency as the focal point of the Court's preliminary instructions (RP 03/02/09 (morning session), 9:12-10:40, p. 28)), the Court already knew and thus filled in part of plaintiffs' exception:

MR. RUTZICK: The proposed instruction is preferable than just using 16A because at least it moors it to something. However, I want to be clear. What it's being moored to, while a concept under Hollingbery -- while the controlling concept under Hollingbery[,] is not the controlling concept under the wage and hour laws.

THE COURT: So you think it's economic reality or economic dependence.

(afternoon session), pp. 26-27. That instruction was identical to the Court's Instruction No. 9, also given over plaintiffs' objections⁹ as part of the final instructions on March 30, 2009. RP 03/30/09 (morning session), p. 20. Under both instructions, the jury's determination of employee versus independent contractor status turns not on "economic dependence" or "economic reality," but on "whether FedEx controlled or had the right to control the details of the class members' performance of the work."¹⁰ That "right of control" test was taken from the common law basis for distinguishing between employees and independent contractors. Restatement (Second) of Agency § 220. Washington tort law utilizes that test. See Hollingbery.¹¹ That test was adopted only for tort cases at WPI

MR. RUTZICK: Economic dependence as a matter of economic reality, and that, I submit, [is] what Whitaker and Bartels and Sureway and Real, among others, say.

RP 03/02/09 (morning session), pp. 27-28) (emphasis added).

⁹ In excepting to Instruction No. 9 at the end of the case, after extensive discussion at RP 03/27/09 (morning session), p. 14), plaintiffs' counsel stated that:

[T]he most specific objection comes to number 3 which fails to include that the -- that there should be a relative investment consideration. We specifically object to the giving of factors seven and eight for the reasons that we have discussed at great length. And also, of course, to the failure to include any language that these factors are premised on economic reality.

RP 03/27/09 (morning session), p. 14)(emphasis added). This meets the requirements of CR 51(f), both standing alone and in connection with the extensive discussions preceding it.

¹⁰ The preliminary instruction is attached as Appendix J at pp. 26-27, and Court's Instruction No. 9 is attached as Appendix B hereto.

¹¹ See also Larner v. Torgerson Corp., 93 Wn.2d 801, 613 P.2d 780 (1980) (tort claim by employee of repair shop against customer); Chapman v. Black, 49 Wn. App. 94, 741 P.2d 998 (1987) (injured construction worker suing premises owner).

50.11.01. See WPI Civil Fifth Edition 50.00 Introduction, p. 436 (all instructions in Chapter 50 are intended for use in tort actions based upon “respondeat superior.”). The “economic dependence” test of the FLSA is broader than the “right to control” test so, under the “economic dependency” test, workers would be classified as employees even though they would be classified as independent contractors under the right to control test. See Walling, Darden, and Hopkins v. Cornerstone, 545 F.3d 338, 347 (5th Cir. 2008).

2. “Employ” And “Employee” Under The MWA Are Defined Similarly To The FLSA And Should Be Interpreted Consistently With The Interpretation Of Those Terms Under The FLSA.

a. Washington Authority Finds FLSA Cases Persuasive In Interpreting Similar MWA Language.

The Washington Minimum Wage Act (“MWA”) was enacted in 1959. As pointed out in Drinkwitz v. Alliant Techsystems, Inc., 140 Wn.2d 291, 298, 996 P.2d 582 (2000), the MWA was “based upon the FLSA [Fair Labor Standards Act],” which was enacted in 1938. Since the MWA is based on the FLSA, Washington courts consider the Secretary Of Labor’s and federal courts’ interpretation of the FLSA to be “persuasive authority” in construing comparable provisions of the MWA. Hisle, 151 Wn.2d at 862, n. 6; Inniss, 141 Wn.2d at 523; Anderson, 115 Wn. App. at 455. In 1975, the legislature amended the MWA to add provisions relating to overtime pay to conform state law to the FLSA. Inniss, 141

Wn.2d 523-524. In Anderson, the issue was whether the term "employ" under the MWA included commute time. Anderson, 115 Wn. App. at 455. Consistent with Inniss, the court noted that the MWA was amended to conform to the FLSA, that the wording of the MWA and FLSA provisions were similar, and that federal authority was therefore persuasive. Id.

The definitions of "employ" and "employee" in the MWA and FLSA are very similar. As defendant acknowledged at CP 1274:

The two statutes are substantively identical, which is all that is required for this Court to apply FLSA case law. *E.g., Inniss v. Tandy Corp.*, 141 Wn.2d 517, 523, 7 P.3d 807 (2000).

The FLSA provides that the term "'employ' includes to suffer or permit to work." The MWA provides that "'employ' includes to permit to work."¹² "Suffer" means "to allow or permit." BLACK'S LAW DICTIONARY DELUXE (7th Ed.), p. 1446 (emphasis added). Thus, the two definitions are substantively identical. The MWA provides that an "employee" "includes any individual employed by an employer but shall not include. . . .". RCW 49.46.010(5). That language, too, was largely taken from 29 U.S.C. §203(e)(1) of the FLSA which provides:

Except as provided in paragraphs (2), (3), and (4) the term "employee"¹³ means any individual employed by an employer.

¹² Compare 29 U.S.C. §203(g) with RCW 49.46.010(3).

¹³ The MWA's definition of "employee" is, if anything, broader than that of the FLSA. It provides that "'employee' includes any individual employed by an employer . . ." (emphasis added), while the FLSA definition uses the verb "means". "Includes" is a term of enlargement, while "means" is a term of limitation. Brown v Scott Paper Worldwide Co., 143 Wn.2d 349, 359, 20 P.3d 921 (2001).

Given the similarity between these definitions, this Court should find persuasive the opinions of federal courts and of the Secretary of Labor as to the criteria for distinguishing between employees and independent contractors for purposes of the MWA. Inniss, Hisle, and Anderson. Thus “economic dependence” and “economic reality” are the focal point for distinguishing employees from independent contractors rather than the “right to control” focal point in Instruction No. 9.

b. The Terms “Employ” And “Employee” In The MWA Should Be Given The Same Interpretation As Pre-MWA U.S. Supreme Court Decisions Interpreting Those Terms Under The FLSA.

Further strong support for interpreting the MWA to follow the federal courts’ construction of the FLSA comes from the longstanding rule of statutory interpretation in Washington set forth, inter alia, in State v. Bobic, 140 Wn.2d 250, 996 P.2d 610 (2000). In Bobic, 140 Wn.2d at 264, the Supreme Court, citing State v. Carroll, 81 Wn.2d 95, 109, 500 P.2d 115 (1972), held that when a Washington law is taken “substantially verbatim” from a federal statute, “. . . it carries the same construction as the federal law and the same interpretation as federal case law.”¹⁴

That rule is applicable here because, as discussed above, the United States Supreme Court rejected the common law test and substituted

¹⁴ Carroll relied on cases since 1908, holding that in Washington “[i]t is the rule that a statute adopted from another jurisdiction will carry the construction placed upon such statute by the other jurisdiction.” 81 Wn.2d at 109 (emphasis added). This rule applies in both civil and criminal cases. See McClellan v. Sundholm, 89 Wn.2d 527, 531-532, 574 P.2d 371 (1978).

the economic dependence test under the FLSA in the 1940's well before the MWA was enacted in 1959. Thus, when the MWA's definitions of "employ" and "employee" were adopted, they carried with them the United States Supreme Court's interpretations of those terms that were in effect at the time.

3. The United States Supreme Court Rejected The Common Law "Right Of Control" Test For Purposes Of Defining "Employee" Under The FLSA And Substituted An "Economic Dependence" Test.

The common law test was developed to limit an employer's tort liability to third persons for acts of another to those situations in which the employer had the ability to control the actions of the actual tortfeasor. The United States Supreme Court, in a series of cases decided in the 1940s, rejected the use of that common law test to distinguish between employees and independent contractors for purposes of the National Labor Relations Act ("NLRA"), the Social Security Act ("SSA"), and the FLSA. The Supreme Court reasoned that social legislation called for broader definitions than the common law and served purposes which were inconsistent with using the narrower common law test. The U.S. Supreme Court, in construing the definition of "employee" under the FLSA, held that "[a] broader or more comprehensive coverage of employees ... would

be difficult to frame.” United States v. Rosenwasser, 323 U.S. 360, 362-363 (1945).¹⁵

In NLRB v. Hearst Publs., 322 U.S. 111 (1944), the Court rejected using the “power of control” test adopted by the Restatement of Agency for purposes of distinguishing between employees and independent contractors under the NLRA. The court instead adopted a broader definition in order to carry out the language and purposes of the legislation. As summarized in United States v. Silk, 331 U.S. 704, 713 (1947), in defining “employee”, Hearst

[R]ejected the test of the "technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants." This is often referred to as power of control, whether exercised or not, over the manner of performing service to the industry. Restatement of the Law, Agency, § 220.

(Emphasis added.) In Bartels, 332 U.S. at 130, the Supreme Court reiterated that holding and went on to explain that the crucial issue in the application of social legislation is the economic dependence or economic reality test, i.e., “employees are those who as a matter of economic reality are dependent on the business” to which they render service.

In Walling, 330 U.S. at 150-151, the Supreme Court relied on Hearst again in rejecting the use of the common law test for determining

¹⁵ Indeed, Rosenwasser quotes Senator [later, Justice] Black’s comment on FLSA coverage: “the broadest definition that has ever been included in any one act.” Id. at 363, n. 3.

who is an employee for purposes of the FLSA. The court explained that the FLSA:

[C]ontains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category.

(Emphasis added.) Rutherford, an FLSA case, decided the same day as Silk, held that boners in a slaughterhouse were employees rather than independent contractors. Rutherford quoted Walling, 330 U.S. at 726-727. It also quoted approvingly from the lower court decision that held that economic realities rather than the common law test of control should be used in correcting “economic evils through remedies which were unknown at common law.”

Congress reacted negatively to Silk and Bartels in 1948, and changed the definition of employee in several statutes. For example, it amended the term “employee” under the Federal Insurance Contributions Act (“FICA”) to incorporate “the usual common law rules applicable in determining the employer-employee relationship.” See 26 U.S.C. § 3121(d). See also United States v. W. M. Webb, Inc., 397 U.S. 179, 183-188 (1970) (re FICA); Nationwide Mutual Ins. Co. v. Darden (reviewing changes in various statutes).

Significantly, Congress did not amend the FLSA definition of employee. The Supreme Court analysis of Walling, Silk, Bartels and

Rutherford thus remain in effect for purposes of the FLSA. For example, in *Whitaker*, 366 U.S. at 33, the Supreme Court held that a cooperative was an employer and its members were employees under the FLSA. The court based its decision upon the “economic reality” test set forth in *Silk* and *Rutherford*, rather than technical common law concepts. *Id.*

4. Lower Federal Appellate Courts Repeatedly Hold Economic Dependence To Be The Focal Point In Determining Employee Status Under The FLSA.

Federal appellate cases from the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth and Tenth Circuits hold (often repeatedly) that economic dependence is the “focal point” or “final step” in determining whether a worker is an employee or independent contractor under the FLSA. For example, in the words of the Tenth Circuit:

[T]he Supreme Court has directed that the economic realities of the relationship govern, and the focal point is “whether the individual is economically dependent on the business to which he renders service . . . or is, as a matter of economic fact, in business for himself.” *See Bartels v. Birmingham*, 332 U.S. 126, 130 . . .

Dole, 875 F.2d at 804-805 (emphasis added).¹⁶ In *Donovan v. Sureway Cleaners*, 656 F.2d at 1370, the Ninth Circuit made the almost identical point:

Whether an employer-employee relationship exists

¹⁶ In *Baker*, 137 F.3d at 1443, the Tenth Circuit explained that this is the “final step” in determining employment status:

Our final step is to review the findings on each of the above factors and determine whether plaintiffs, as a matter of economic fact, depend upon Flint's business for the opportunity to render service, or are in business for themselves. (Emphasis added.)

depends . . . ultimately, whether, as a matter of economic reality, the individuals “are dependent upon the business to which they render service.” *Bartels v. Birmingham*, 332 U.S. 126, 130 . . .

(Emphasis added.) Numerous other cases make the same point.¹⁷ Schultz v. Capital Int’l Security, Inc., 466 F.3d 298, 304 (4th Cir. 2006); Brock v. Superior Care, Inc., 840 F.2d 1054, 1059 (2d Cir. 1988); Donovan v. DialAmerica Marketing, Inc., 757 F.2d 1376, 1381 (3d Cir. 1985); Lauritzen, 835 F.2d at 1534; McLaughlin v. Seafood, Inc., 861 F.2d 450, 452 (5th Cir. 1988); Donovan v. Brandel, 736 F.2d 1114, 1116 (6th Cir. 1984) (“economic dependence may be the ultimate controlling factor for finding an employment relationship”) and Usery, 527 F.2d at 1311, n.6. Plaintiffs have found no federal appellate cases interpreting the FLSA (absent waiver¹⁸), which hold that right of control rather than economic

¹⁷ In Hageman v. Park W. Gardens, 480 N.W.2d 223, 227 (N.D. 1992), the North Dakota Supreme Court construed the FLSA and reached the same conclusion citing Usery v. Pilgrim Equipment Co., 527 F.2d 1308 (5th Cir. 1976).

¹⁸ In Suskovich v. Anthem Health Plans of Va., Inc., 553 F.3d 559, 565 (7th Cir. 2009), involving both ERISA and FLSA issues, the Court recognized:

FLSA cases, meanwhile, are decided utilizing a broader definition of employee than the common law, and determine whether an arrangement is an employment or independent contractor relationship with a six-factor test to determine the "economic reality" of the situation.

The Court at footnote 1 went on to say, however:

¹. Additionally, the estate invokes the Restatement test in its arguments and briefs and thus has waived any argument that the broader FLSA standard ought to apply to this case.

dependence is the proper focal point of the analysis.¹⁹ If there are such cases, defendant will no doubt supply them.

The Federal Wage and Hour Administrator (“Administrator”)²⁰ agreed with the economic reality and “dependence” analysis in a 2000 opinion in which the facts being analyzed are almost identical to the facts in this case:

Courts look to the “economic reality” of the relationship between worker and employer to decide whether FLSA coverage exists; coverage does not depend upon the common law definitions of “employer” and “employee.” Rather, employees are those who as a matter of economic reality are dependent upon the business to which they render service.

(WAGE AND HOUR MANUAL (BNA), 99:8331 (Dec. 7, 2000)) (emphasis added), and relied upon at CP 2173 (see Appendix K).

5. Many States Also Utilize The FLSA Test For Determining Employment Status Under State Wage and Hour Laws Which Define “Employ” And/Or “Employee” Similarly To The FLSA.

Defendant’s prior briefing (CP 770-771) and its Trial Brief (CP 1021) identified Pennsylvania, New Mexico, Maine and Illinois as states that rely on the FLSA test for employment status for purposes of interpreting their state wage and hour statutes. There are other states, including Alaska, Oregon, and Minnesota, which also look to the FLSA for the same purpose. For example, in Jeffcoat v. Department of Labor,

¹⁹ “Right of control” is typically listed as a relevant, but not determining factor in determining whether there is economic dependence in FLSA cases.

²⁰ The Administrator oversees the enforcement of the FLSA within the U.S. Department of Labor.

732 P.2d 1073, 1075 (1987), the Alaska Supreme Court “turned to federal authorities for appropriate case law” concerning the very issue in this case, i.e., “employees” versus “independent contractors.” It held:

The court must determine whether the worker is dependent upon finding employment in the business of others. If the facts show such a dependency, the worker is an employee. *Castillo v. Givens*, 704 F.2d 181, 190 (5th Cir. 1983).

(Emphasis added.)²¹

6. The Economic Dependency Test Is Broader Than The Right To Control Test.

The FLSA test, which focuses on “economic dependency” and “economic reality” is different from, and more expansive than, the common law test which is focused on right or power to control. In Walling, as discussed above, the Supreme Court held that the FLSA applied to “many persons” who, under common law, would not have qualified as employees. In Nationwide v. Darden, 503 U.S. at 323, the

²¹ In Oregon, the Bureau of Labor and Industries (“BOLI”) administers the Oregon Wage and Hour laws and uses an economic reality test to determine, for purposes of that law whether a worker is an employee or an independent contractor. In Presley v. Bureau of Labor & Indus., 200 Ore. App. 113, 117, 112 P.3d 485, 487 (2005), the Court recited BOLI’s approach, which relies on economic dependence as a matter of economic reality. Similarly, in In re Kokesch, 411 N.W. 2d 559, 562 (Minn. Ct. of Appeals, 1987), the Minnesota Commissioner for Labor and Industries used the same FLSA test under the Minnesota Fair Labor Standard Act.

There are also other states that employ some variation of the common law test of employee status for wage and hour purposes, e.g., California and Maryland. Estrada v. FedEx Ground Package System, Inc., 154 Cal. App. 4th 1 (2007); and Balt. Harbor Charters v. Ayd, 365 Md. 366, 780 A.2d 303 (2001). Significantly, however, while those cases used the common law test for distinguishing between employees and independent contractors, they did so when there was no statutory definition of the term “employee” under the state statute, unlike both the FLSA and MWA. In Estrada, 154 Cal. App. 4th at 10, the Court of Appeals specifically stated “[b]ecause the Labor Code does not expressly define ‘employee’ for purposes of section 2802, the common law test of employment applies.” See Balt. Harbor Charters v. Ayd, 365 Md. at 386 (same).

Supreme Court applied the common law test for determining employee status under ERISA, 29 U.S.C. § 1001 *et seq.*, but explained that the FLSA's definition of "employee" was distinguishable (and broader) than under ERISA because it [the FLSA] was "derive[d] from the child labor statutes." *Id.* at 326.²²

Courts of Appeals construing the FLSA generally agree that economic dependence test is broader than the power of control test and includes as employees, workers who would not be considered employees under the power or right of control test. For example, in Schultz v. Capital Int'l Security, Inc., 466 F.3d at 304, the Fourth Circuit relied in part on Darden in holding that:

These [FLSA] definitions broaden "the meaning of 'employee' to cover some [workers] who might not qualify as such under a strict application of traditional agency [or contract] law principles." *Id.*

(Emphasis added). In Hopkins, 545 F.3d at 347, the Fifth Circuit recently held "it is legally possible to be an employee for purposes of the FLSA and an independent contractors under most other statutes." The Eleventh Circuit agrees with those holdings as do multiple cases from the Fifth Circuit, as well as the Seventh, Ninth, and Tenth Circuits.²³ Plaintiffs

²² This same distinction with the FLSA is found with several federal statutes which utilize the common law test of employee status. See e.g., NLRB v. United Ins. Co. of America, 390 U.S. 254 (1968) (common law test used for the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*); Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) (common law test used for Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*)

²³ Wolf v. Coca-Cola Co., 200 F.3d 1337, 1343 n. 4 (11th Cir. 2000) ("[t]he definition of 'employee under the FLSA is broader than that under ERISA'"); Dole v. Snell, 875 F.2d

have discovered no appellate cases disputing that the FLSA test should be interpreted more broadly than the right or power of control test.

In DOL v. Lauritzen, 835 F.2d at 1544, Judge Easterbrook's concurrence echoed Rutherford in explaining why the different purposes of tort law and social legislation such as the FLSA justify a broader interpretation of employment status for purposes of the FLSA than does the common law right of control:

The functions of the FLSA call for coverage. How about the functions of the independent contractor doctrine? This is a branch of tort law, designed to identify who is answerable for a wrong (and therefore, indirectly, to determine who must take care to prevent injuries). To say "X is an independent contractor" is to say that the chain of vicarious liability runs from X's employees to X but stops there....It is the right allocation when X is in the best position to determine what care is appropriate....This usually follows the right to control the work....The reasons for blocking vicarious liability at a particular point have nothing to do with the functions of the FLSA.

(Emphasis added).²⁴ In Jeffcoat v. Department of Labor, 732 P.2d at 1075, the Alaska Supreme Court made the same analysis:

at 804 ("[c]ourts are not limited by any contractual terminology used by the parties or by the traditional common law concepts of "employee" or "independent contractor""); Lauritzen 835 F.2d at 1534 ("[c]ourts, therefore, have not considered the common law concepts of "employee" and "independent contractor" to define the limits of the Act's coverage"); Real v. Driscoll Strawberry Associates, Inc., 603 F.2d at 754 (common law concepts are not conclusive determinants of the FLSA's coverage"); McLaughlin v. Seafood, Inc., 861 F.2d at 452 ("remedial purposes of the FLSA require the courts to define employer more broadly than the term would be interpreted in traditional common law applications"); Robicheaux v. Radcliff Material, Inc., 697 F.2d 662, 666 (5th Cir. 1983) ("[i]n this regard, common law concepts of "employee" and "independent contractor" have been specifically rejected by the courts") (emphasis added).

²⁴ This tort/MWA distinction also explains why Hollingbery and the pattern jury instruction, at WPI 50.11.01, which incorporates the Hollingbery test and is designed for tort cases, is inapplicable to this MWA case.

Tort concepts of the distinction between employees and independent contractors have proven somewhat inappropriate in labor cases, as those concepts arose in an effort to limit employer liability under the doctrine of respondeat superior. (Emphasis added.)

The failure of the trial court to instruct on economic dependence meant that important evidence could not be appropriately highlighted. For example, there was documentary and testimonial evidence that the drivers could not work for any company other than FedEx. The take-it-or-leave-it operating agreement signed by all class members explicitly provided that the trucks could only be used to carry FedEx packages when “in service for FedEx.” Ex. 505, §1.4. Moreover, all trucks had to be in service for FedEx 5 days a week (RP 03/09/09 (afternoon session), pp. 12-13), and all drivers had to work between 9.5 hours and 11 hours each work day. Ex. 331, p. 4. And, the trucks could not be used for any other purpose at any time unless the very large logos, which were specified by FedEx, were completely covered up. Ex. 505, §1.5.

Thus, had plaintiffs been permitted, they would have argued that the combination of these FedEx rules and federal hours-of-work limitations demonstrated the utterly economic dependent relationship between driver and FedEx. Under U.S. Department of Transportation safety rules, truck drivers are not permitted to work more than 60 hours in any 7-day period, or more than 10 hours of drive time after a rest of 8 hours off duty. *E.g.*, Ex. 1 (Policy SAF-055, p. 3). Thus, since the drivers had to work more than full time hours for FedEx, and could not by law

drive longer hours, the class members were economically dependent on FedEx.²⁵

Finally, plaintiffs' closing argument lasted for close to one hour and was necessarily confined to arguing "right of control." RP 03/31/09 (morning session), pp. 23-69. Because of the constraints placed by Instruction No. 9, plaintiffs' counsel was unable to discuss any of the evidence through the "focal point" of "economic dependence."

7. The Trial Court's Reasons For Providing No Instruction Referring To Economic Dependency Or Economic Reality Do Not Withstand Analysis.

The trial court, at RP 03/27/09 (morning session), pp. 16-17, responded to and overruled both parties'²⁶ exceptions to Court's Instruction No. 9. While concluding that "there is no established or set standard for the test in the State of Washington," the trial court "did take into consideration" (a) "WPI 50.11.01 which codifies the common law," (b) "the multi-factor test enumerated by the federal courts," and (c) "gave particular weight" to California law including Estrada. The trial court

²⁵ There was also class member testimony along these same lines. Class member Jeff Cesta testified that he had hoped to provide a pick up and delivery service for other customers but was told that he could not do so. RP 03/12/09 (morning session), pp. 39-40 (advised by manager that there was no way to cover up FedEx logos and therefore working for someone else would be "violating the contract"). Class representative James Geiger complained explicitly about this condition of dependence: "Why are we called independent contractors when in fact we are dependent on FedEx for our very livelihood?" Ex. 681, p.1.

²⁶ While defendant also excepted to the instruction, plaintiffs point out that the first 6 lines of the Court's Instruction No. 9 (CP 2195), including basing the instruction on control or right of control, were identical to FedEx's Proposed Instruction No. 16 (CP 2021).

incorrectly ruled that “control or right to control” (not the proper economic dependency test) was “the determinative factor” and, given that ruling, reasoned that Instruction No. 9 allowed:

[E]ach side to argue its theory of the case as to all evidence bearing on the question of control or the right to control, which is the determinative factor in establishing status as either employee or independent contractor.

(Emphasis added.) None of those reasons justify the trial court’s ruling.

(a) As discussed above, WPI 50.11.01 was adopted from the common law, and was designed to be used in tort cases. The rationale for defining employees based on right of control makes sense in *respondeat superior* tort cases, but is inconsistent with the broader intent of the FLSA and, thus, the MWA. See, e.g., Walling, Rutherford, Lauritzen, Jeffcoat. Moreover, every case that plaintiffs have located comparing the two tests finds that the common law right of control test is narrower (and thus leads to fewer workers being classified as employees) than the broader definitions and interpretations of the FLSA and MWA. See Walling, Darden, Schultz, as well as all of the cases cited at footnote 23. It is also inconsistent with the MWA’s reliance on the FLSA set forth in such cases as Inniss, Hisle, and Anderson, as well as Washington’s “long and proud history of being a pioneer in the protection of employee rights”²⁷ to utilize

²⁷ Bostain v. Food Express, Inc., 159 Wn.2d 700, 712, 153 P.3d 846 (2007).

the tort-based and narrower right of control test. It also is inconsistent with the rule set out in Bobic.

(b) The trial court's reference to a "multi-factor test enumerated by the federal courts" as a basis for justifying the use of the right to control test was erroneous. The federal multi-factor test was first enunciated in United States v. Silk, 331 U.S. at 716. Silk rejected the use of the "technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants.' This is often referred to as power of control. . . ." Id. at 713. See also Bartels, 332 U.S. at 130. Furthermore, FLSA Court of Appeals cases overwhelmingly hold that economic realities control and that the focal point of the analysis is economic dependence not right of control. See Dole v. Snell, Sureway Cleaners, Schulz, and the numerous other cases cited at page 21-22 of this brief. It, therefore, does not make sense to read the federal court multi-factor test to justify using right of control as the focal point of the definition of employee.²⁸

(c) Estrada does not support the trial court because Estrada pointed out that the reason it applied that common law test of employment

²⁸ The fact that the trial court in Instruction No. 9 adopted most of the individual factors set forth in the Sureway Cleaners multi-factor test, does not rectify the trial court's failure even to mention the words "economic reality" or "economic dependence" anywhere in its instructions. In other words, even if the trial court had given all of the right factors (which it did not), the critical fact remains that the factors listed were to be analyzed under the wrong standard of right of control rather than the correct standard of economic dependence.

was “[b]ecause the Labor Code did not expressly define employee for purposes of Section 2802.” 154 Cal. App. at 10. It would violate Washington law²⁹ and, for that matter, California law³⁰, to use a common law definition where, as here, the MWA definitions of both “employ” and “employee” are substantively the same as the FLSA definitions, and are broader than the common law definitions.

In addition to the trial court’s statements at RP 03/27/09 (morning session), pp. 16-17, the trial court also acknowledged that:

I do not intend on giving an instruction with regard to either economic dependence or economic reality.

I acknowledge that there's lots of case law out there under FLSA cases talking about that being the test, but I believe that that is dicta and not one of the actual factors considered by the courts. So I would not be inclined to give instruction 15-A.

03/26/07 (afternoon session), p. 98 (emphasis added). The trial court’s characterization of the “lots of case law” being “dicta” is flatly incorrect.³¹ That characterization is inconsistent even with FedEx’s view of the law referred to above at page 5 that the Supreme Court “adopted” an economic

²⁹ State v. Chester, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997).

³⁰ See Chen v. Franchise Tax Board, 75 Cal. App. 4th 1116, 1123 (1998).

³¹ In State ex rel. Lemon v. Langlie, 45 Wn.2d 82, 89, 273 P.2d 464 (1954), the court utilized BLACK’S LAW DICTIONARY’S definition of “dicta” which defines it in relevant parts as:

an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination; . .

(Emphasis added.)

realities approach. Adopting a test by which to decide a case can hardly be called dicta. Similarly, in Brock v. Superior Care, the court held that “the ultimate concern is whether as a matter of economic reality, the worker depended upon someone else’s business for the opportunity to render service or are in business for themselves,” and held that “in the present case, the District Court properly looked to the economic reality test ... in deciding the nurses were employees.” (emphasis added). See also Herman v. Express Sixty-Minutes Delivery Serv., 161 F.3d 299, 303 (5th Cir. 1998), where the court held that to determine employee status, “our task is to determine whether the individual is, as a matter of economic reality, in business for himself or herself.” (Emphasis added.)

Further proof that the repeated references in cases to “economic dependence” were not dicta can be found in the many cases in which the Supreme Court and the Courts of Appeals reversed lower courts findings on this issue. In Whitaker, 366 U.S. at 33, the Supreme Court reversed the lower courts stating if the “‘economic reality’ rather than the ‘technical concepts’ is to be the test of employment” the home workers should be considered employees. In Donovan v. DialAmerica Marketing, Inc., 757 F.2d at 1385, the Third Circuit reversed in part the District Court’s finding that workers were independent contractors rather than employee where the defendant had “very little control over the home researchers.” The Third Circuit held the district court misapplied the final consideration which was

“whether, as a matter of economic reality, the workers at issue ‘are dependent upon the business to which they render service.’” Id. at 1383. In Dole v. Snell, 875 F.2d at 812, the Tenth Circuit reversed the District Court, stating that “[t]he focal point is ‘whether the individual is economically dependent on the business to which he renders service ...’”³² In McLaughlin, 861 F.2d at 453, the Fifth Circuit reversed the lower court holding:

Therefore, focusing on "economic reality" as the Supreme Court decisions require, we conclude that the backers, pickers, and peelers are "dependent upon finding employment in the business of others," and therefore "employees" within the coverage of the FLSA.

(Emphasis added; footnote omitted.) See also Mednick v. Albert Enterprises, Inc., 508 F.2d 297, 300 (1975) (same); Usery, 527 F.2d at 1311 (same); and Castillo, 704 F.2d at 190 (same). In each these cases, the District Court was reversed. Under no fair reading of the term “dicta” can the opinions on the use of the economic dependence test in those and many other FLSA cases on this issue cited throughout this Brief be considered dicta.

Finally, the trial court’s failure to give proposed Instruction No. 15A was error for the same reasons as its failure to provide the jury with the correct “focal point” contained in Instruction No. 13C. Instruction No.

³² The Court held that the cake decorators, as a matter of "economic reality," are "economically dependent" on the business to which they supply their services and are therefore "employees," not "independent contractors," within the protection of the FLSA.

15A explained the necessity of finding whether class members were “so dependent upon defendant’s business such that plaintiffs were not, as a matter of economic reality, in business for themselves during the class period...” As shown in this section and based on the same case law, this statement is a correct statement of the law and should have given to the jury.

C. Court Instruction No. 9 Was Also Prejudicially Erroneous In Its Characterization Of Factors 3 and 8.

1. Factor 3 Misstated The Law By Instructing Only An “Investment” Rather Than “Relative Investment.”

Over plaintiffs’ written argument³³ and oral exception,³⁴ Factor 3 of Instruction No. 9 referred only to “class members’ investment in equipment or materials required . . .” rather than “the extent of relative investments of alleged employer and employee.” CP 1819 (emphasis added). Plaintiffs thus had no basis in the instructions for arguing that, while the class members leased or purchased trucks at significant cost, that investment does not support independent contractors status because the driver’s investment was insignificant “relative” to FedEx’s investment.

The Department of Labor believes that the relevant factor relating to investment is “the extent of the relative investment by the alleged employer and employee.” Dec. 7, 2000 opinion by Administrator reported

³³ CP 1812-13.

³⁴ RP 03/27/09 (morning session), p. 14.

at WHM (BNA) 99-8331.³⁵ That is just what plaintiffs proposed at CP 2172-73. Essentially the same language is used by the Fifth Circuit. See Hopkins, 545 F.3d at 343. While the language used by the trial court at first glance, seems to appear in a number of Court of Appeals cases including Lauritzen, Real, and Baker, the courts' analyses of the investment factor in all three of those cases agrees with plaintiffs' view of the law; the analysis in each opinion not only includes a discussion of relative investment but turns on the comparison of relative investment between alleged employee and employer. Real, 603 F.2d at 755, Lauritzen, 835 F.2d at 1537; and Baker, 137 F.2d at 1442. Without reference to relative investment, the jury had no way of knowing that, in considering Factor 3, it should have compared relative investments.

2. Factor 8 Misstates The Law Because It Omits A Significant Limitation On The Jury's Use Of Evidence Of The Parties' Beliefs.

The Court's Instruction No. 9 gave as Factor 8 "whether or not the class members and FedEx believed they were creating an employment relationship or an independent contractor relationship." CP 2195. No FLSA appellate case cited by either party lists that factor in any "multi-

³⁵ The significance of the "relative investment" can be seen by the Administrator's analysis of the factor on the fourth page of that opinion attached as Appendix K:

No information, however, is provided concerning the amount of capital that the company expends in its delivery business. Accordingly, a determination of employee status based upon a comparison of the relative investments cannot be made ...

(Emphasis added.)

factor test.” While a number of appellate FLSA cases conclude that the parties understanding can be relevant, the relevance is generally limited to situations in which the understanding correctly reflects or “mirrors” economic realities. For example, in Castillo v. Givens, 704 F.2d at 188, the Fifth Circuit held:

In determining an individual's status as "employee" within the meaning of the FLSA, however, defendant's intent or the label that he attaches to the relationship is meaningless unless it mirrors the "economic realities" of the relationship. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 67 S. Ct. 1473, 1476, 91 L. Ed. 1772 (1947);

That holding was adopted by the Fourth Circuit in Reich v. Shiloh True Light Church of Christ, 895 F.Supp. 799, 815 (W.D.N.C. 1995), *aff'd*. 85 F.3d 616 (4th Cir. 1996), Morrison v. International Programs Consortium, 253 F.3d 5, 11 (D.C. Cir. 2001), and made an almost identical holdings as did courts in the Ninth and Tenth Circuits.³⁶ Those holdings are supported by RCW § 49.46.090 which states:

Any agreement between such employee and the employer to work for less than such wage rate shall be no defense to such action.

Thus, if a worker is in fact an employee, he or she is not permitted to give up MWA rights by characterizing herself or himself as an independent

³⁶ See Real, 603 F.2d at 755 (“the subjective intent of the parties to a labor contract cannot override the economic realities reflected in the factors described above”); Dole, 875 F.2d at 804. Some cases emphasize the relevance subjective belief when it is the alleged employer who characterizes the worker as an employee. Brock v. Superior Care, Inc., 840 F.2d at 1059 (employer admission that his workers covered by the FLSA is highly probative”); Halferty v. Pulse Drug Co., 821 F.2d 261, 268, n. 5 (5th Cir. 1987) (same). See also Carrell v. Sunland Constr., Inc., 998 F.2d 330, 334 (5th Cir. 1993). That was not the evidence in this case.

contractor. To plaintiffs' prejudice, the jury had would have no way to understand and utilize that limitation given the Court's instruction.

D. Trial Court Committed Prejudicial Error In Not Giving Plaintiffs' Proposed No. 13C³⁷ or Nos. 4³⁸, or 4A.³⁹

1. 13C Should Have Been Given.

Proposed Instruction 13C correctly stated the law, did not mislead the jury, and allowed each party to argue its theory of the case within the law.⁴⁰ The six factors set out in the proposed instruction are almost identical to the factors listed by the Administrator in its 2000 opinion, and are substantively identical to the analysis used in numerous Court of Appeals cases. The portion of the proposed instruction beginning with "no one factor" and continuing to the end of the proposed instruction, is supported by Bartels, Rutherford, Sureway, and more than a dozen Court of Appeals cases previously cited. The sentence beginning "you may consider" follows directly from cases such as Rutherford, Castillo, Morrison, and from RCW 49.46.090.

2. Proposed Instruction Nos. 4 and 4A Correctly Stated The Law On Subjective Belief And Should Have Been Given Since Proposed Instruction No. 13C Was Not Given.

Proposed Instruction No. 4 (CP 2169) provided in part "[s]tated

³⁷ The proposed instruction is attached as Appendix G.

³⁸ The proposed instruction is attached as Appendix C.

³⁹ The proposed instruction is attached as Appendix D.

⁴⁰ The failure to give this instruction was excepted to at RP 03/27/09 (morning session), page 29, referring to many previous discussions. See, e.g., RP 03/26/09 (afternoon session), pp. 61-74.

otherwise, the subjective intent of plaintiffs and defendant cannot override the facts of this actual relationship.” Economic reality rather than labels or subjective beliefs, has been the touchstone of the FLSA test for many decades. In Rutherford, 331 U.S. at 729, the United States Supreme Court held that:

Where the work done, in its essence, follows the usual path of an employee, putting on an “independent contractor” label does not take the worker from the protection of the Act.

Courts (including the District of Columbia, Fourth, Fifth, Ninth, and Tenth Circuits) since then have consistently used evidence of the parties for the parties’ belief or subjective intent for purposes of the FLSA only to the extent that that evidence reflects or “mirrors” economic realities.

Morrison, Castillo, Real, Reich v. Shiloh True Light Church of Christ; Brennan v. Partida, 492 F.2d 707, 709 (5th Cir. 1974); Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1044 (5th Cir. 1987). Giving Plaintiffs’ Proposed Jury Instructions Nos. 4 or 4A would have allowed the jury to consider evidence of the parties’ subjective beliefs, while properly limiting its use to when those statements or beliefs mirror economic reality.⁴¹

⁴¹ RP 3/26/09 (afternoon session, pp. 61-74) contains an extended discussion of this issue in which plaintiffs explained their objections to this aspect of Court Instruction 9 and why Instruction 4 or 13C should be given instead on this issue. The trial court acknowledged in that discussion that “proposed instruction number four as presented by the plaintiffs is, in my opinion, a correct statement of the law. . . .” Id. at 61. However, the trial court refused the proposed instruction on the grounds that Court’s Instruction No. 9 allows both parties to argue their case because “[t]he jury’s required to look at actualities.” Id. at 65.

Plaintiffs’ counsel then argued:

Contrary to defendant's argument and the Court's position,⁴² Proposed Instruction No. 4 was not a comment on the evidence any more than ER 105 or WPI 6.01⁴³ is a comment on the evidence. A limiting instruction explains to the jury that certain evidence can only be used for limited purposes. That is just what the proposed Instruction did and, indeed, is similar to what the second sentence of Court's Instruction No. 8 did.⁴⁴

⁴² RP 03/27/09 (morning session), p. 25.

⁴³ WPI 6.07 provides:

Limited Purpose Evidence—Generally. Evidence on the subject of (fill in nature of evidence) will now be introduced. You may consider this evidence only to determine (fill in purpose) . This means that you are not to consider this evidence for any other purpose. You are not to discuss this evidence when you deliberate in the jury room except to determine (fill in purpose) .

State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990).

⁴⁴ There is reference in the record to alternative proposed Instruction No. 4A. RP 03/27/09 (morning session), pp. 24-25. While this alternative instruction does not appear to have been filed and is not in the clerk's papers, it was given to defendant's counsel and discussed with the trial court. Id. It is attached hereto as Appendix D. Moreover, it is identical to proposed Instruction No. 4, except that it omits the last sentence therein, which states "[s]tated otherwise, the subjective intent of plaintiffs and defendant cannot override the facts of this actual relationship." The trial court rejected both versions of this instruction for the same reasons. RP 03/26/09 (morning session), pp. 64-65 (re Instruction No. 4); 03/27/09 (morning session), p. 25 (re Instruction No. 4A).

E. The Trial Court Committed Prejudicial Error Both In Giving Court's Instruction Nos. 8,⁴⁵ And In Not Giving Plaintiffs' Proposed Instruction Nos. 11A⁴⁶ and/or 12A.⁴⁷

1. Introduction.

Proposed Instruction No. 12A defined “representative evidence” and tied such evidence to proving a “pattern or practice.” CP 2171. Proposed Instruction 11A defined “pattern” and “practice” and set forth the parties’ respective burdens of proof. CP 2170. FLSA cases supporting the use of pattern or practice and representative evidence were extensively briefed in the trial court. For example at CP 2622-23, plaintiffs quoted Donovan v. Bel-Loc Diner, Inc., 780 F.2d 1113 (4th Cir. 1985) as permitting representative evidence to be used to prove a pattern or practice in an FLSA case. Bel-Loc relied on Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946), and even referred to “a *Mt. Clemens*’ pattern or practice.” Bel-Loc, 780 F.2d at 1116.⁴⁸

Plaintiffs also argued orally to the trial court that Bel-Loc’s use of “pattern or practice” in an FLSA case was based upon Mt. Clemens and

⁴⁵ Instruction No. 8 (CP 2194) is attached as Appendix A.

⁴⁶ Proposed Instruction No. 11A (CP 2170) is attached as Appendix E.

⁴⁷ Proposed Instruction No. 12A (CP 2171) is attached as Appendix F.

⁴⁸ Plaintiffs’ Trial Brief argued that this case may be “Proven Using Representative Evidence” (CP 1050) and also argued, citing, inter alia, Donovan v. Tehco, Inc., 642 F.2d 141, 144 (5th Cir. 1981), that precedent called “for the use of representative evidence in the employee versus independent contractor cases.” CP 1051. Plaintiffs cited a number of cases in support of Proposed Instruction Nos. 11A and 12A, including Mt. Clemens and Int’l Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), a Title VII discrimination case. CP 2169-70.

the use of “representative evidence.” RP 03/0 2/09 (morning session), pp.

73-77. Counsel also explained:

[R]epresentative evidence is basically where a pattern or practice comes from. Because by representative evidence, you show a pattern or practice which is what the bell lock [sic] case said and other cases say.”⁴⁹

Id. at 76. Similarly counsel cited Donovan v. Tehco, an employment status case, in which the Fifth Circuit “using the *Mt. Clemens* analysis on the issue of employee versus independent contractors held that the Secretary “had provided enough evidence to move the burden from it to the employer ...” Id. at 71-80.

2. **Instruction No. 8 Prejudicially Misstated The Law.**

The trial court ultimately gave Court’s Instruction No. 8 which used neither the terms “pattern,” nor “representative evidence,” but used the undefined terms “common to the class members” and “practices.” The trial court acknowledged that the law did not require practices to apply to all class members. RP 03/26/09 (1:33 pm session), pp. 88-89; 93-94. However, the trial court rejected plaintiffs’ request that defendant not be permitted to argue that “common to the class members” meant all class members and ruled that defendant was free to argue that “common” means

⁴⁹ At RP 03/26/09 (1:33 pm session), pp. 83-84, plaintiffs’ counsel advised the Court that she was not aware of any FLSA case “that contains the language pattern or practice,” but argued that many such cases “talk about representative evidence, and analogized to Teamsters, a Title VII case. However, as discussed above, plaintiffs had repeatedly advised the trial court orally and in writing about the Bel-Loc case and the use in FLSA cases of “pattern or practice.”

that the evidence must apply to all class members.⁵⁰ RP 03/26/09 (1:33 pm session), p. 97. Defendant made just such an argument. RP 03/30/09 (10:46 am – 12:04 pm), p. 69.⁵¹ Plaintiffs excepted to Court’s Instruction No. 8 and also excepted to the trial court’s refusal to give Proposed Instruction Nos. 11A and 12A. RP 03/27/09 (morning session), pp. 12-14, 25-27, and 28-29).⁵²

The first sentence of Court’s Instruction No. 8 misstated the law which does not require plaintiffs in a wage and hour case involving the employment status of a large number of workers to show that every single worker has the same status. The phrase “common to the class members” in Instruction No. 8 was drafted by the trial court, appears to be taken from CR 23, and, in that context, is often referred to as “commonality.” Even in the Rule 23 context, however, “commonality” does not require that the evidence show that every class member is subject to the same facts. See

⁵⁰ The definition of “common” can either mean “widespread” or “of or relating to the community as a whole.” Compare definition 1(b) and 2 in the definition of “common” in the AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (Third Edition), p. 381.

⁵¹ By Defendant’s Counsel:

There’s 15 terminals here, statewide, for all four years to all 320 class members. That is their burden. They have to show you that all 320 of those people are employees.

And I will s how you in just a second that if they showed you that only 319 were and one wasn’t, your verdict should be for FedEx Ground because they haven’t met their burden. They have to show you all.

(Emphasis added.)

⁵² The Court’s Instruction No. 8 as well as Proposed Instruction Nos. 11A and 12A were also discussed on the record with the Court at RP 03/26/09, (1:33 pm session), pp. 81-97.

Brown v. Brown, 6 Wn. App. 249, 255, 492 P.2d 581 (1971); Miller v. Farmer Bros., 115 Wn. App. 815, 824, 64 P.3d 49 (2003) (it is not necessary, however, that the shared questions of law or fact be identical”);⁵³ Rosario v. Livaditis, 963 F.2d 1013, 1017-18 (7th Cir. 1992) (rejecting the argument that “the presence of these two satisfied students shows that not every member of the class suffered so commonality was not met.”)

FLSA cases determining employee versus independent contractor status relating to group of workers repeatedly held that a factor can be met even if only proven for some of the workers. In Sureway Cleaners, when defendant pointed out that 2 of 66 workers exercised “extensive powers and options,” the Ninth Circuit responded that:

[T]his argument, however, ignores the “circumstances of the whole activity” and the “economic reality” of sixty-four “agents” and focuses instead on specific factors relating to two.

656 F.2d at 1371. In Reich v. Circle C. Investments, Inc., 998 F.2d 324, 328 (5th Cir. 1993), the court held

The parties do agree, and the district court found, that most dancers have short-term relationships with Circle C.³ Although not determinative, the impermanent relationship between the dancers and Circle C indicates non-employee status.

⁵³ In Sitton v. State Farm, 116 Wn. App. 245, 256-57, 63 P.2d 198 (2003), this Court referred to litigating a pattern or practice of “bad faith”:

But forcing numerous plaintiffs to litigate the alleged pattern or practice of bad faith in repeated individual trials runs counter to the very purpose of a class action:

(Footnote omitted.)⁵⁴

The second sentence of Instruction No. 8 also misstates the law when it directed the jury not to consider “individualized actions, conduct, or work experience unless you find that they reflect policies, procedures, or practices common to the class members.” CP 2194. That instruction prevented the jury from considering much of plaintiffs’ evidence. For example, plaintiffs submitted into evidence more than a hundred “contract discussion notes” affecting scores of individual class members. See Exs. 187-189, 193-195, 198-200, 204-207, 209-225, 231-243, 378-381. Those contract discussion notes were written by FedEx managers and showed FedEx exercising control over details of class members’ work in a variety of settings. However, they do not show that these practices affected all class members. Under the jury instruction as argued by FedEx, the jury would not have considered that evidence. Yet, under, Sureway, Circle C, Herman, Mr. W Fireworks, and Donovan v. Burger King Corp., 672 F.2d 221 (1st Cir. 1982), such evidence should have been considered.

At RP 3/27/09 (morning session), p. 29, the trial court explained its

⁵⁴ In Herman, the court found lack of permanency, *inter alia*, because “the majority of drivers worked for Express for a short period of time.” 161 F.3d at 305. See Brock v. Mr. W Fireworks, Inc. 814 F.2d at 1048-1049 (a case involving 109 firework stand operators, court determined control by the employer despite testimony by a number of workers indicating lack of control); Donovan v. Burger King Corp. (decision affecting more than 40 stores based on testimony from 6 stores); U.S. Dept. of Labor v. Lauritzen, 835 F.2d at 1536 (evidence of control included that “workers sometimes referred to Michael Lauritzen as the ‘boss’”).

decision to give Instruction No. 8 and not give Proposed Instruction

No. 12A:

[T]he Court concludes that instruction number 8 regarding common evidence does allow the plaintiffs to argue their theory of the case with regard to policies, procedures, or practices, which are common to the class members during the class period, and they can argue their representative evidence argument based upon that instruction.

However, the trial court's explanation was incorrect. The law provides that plaintiffs may prove the status of the class without the testimony of all class members and could prove the employment status for the class even if the jury found that some or a few class members were not employees.

There is no other way to read such cases as Mt. Clemens, Bel-Loc, Sureway, and Teamsters. Nor would it comport remotely with the purposes of the MWA for the law to be what defendant argued the law was, i.e., plaintiffs lose for all 320 workers if plaintiffs show that 319 class members were employees and one was not an employee. Instructions have to both allow each side to argue its case (the point made by the trial judge) and to correctly state the law. Here the instruction used the words "common to class members" which can mean either frequent or common to all. Giving an instruction that reasonably conveys ambiguous and/or contradictory meanings does not properly state the law. The law does not adopt an "all or nothing" requirement. This obviously prejudiced plaintiffs who did not have an instruction that correctly stated the law.

3. Plaintiffs Were Entitled To A “Pattern Or Practice” Instruction.

Mt. Clemens held that plaintiffs in a class action under the FLSA “need only produce sufficient evidence to show the amount and extent of the work improperly compensated for ‘as a matter of just and reasonable inference.’” 328 U.S. at 687. The Fifth Circuit in Donovan v. Tehco, Inc. explicitly applied the Mt. Clemens’s analysis to employment status. In Donovan v. Bel-Loc Diner, Inc., 780 F.2d at 1116, the Fourth Circuit explicitly held that Mt. Clemens permitted proving a “pattern or practice” by the use of “representative evidence”:

There is no requirement that to establish a *Mt. Clemens* pattern or practice, testimony must refer to all non-testifying employees. Such a requirement would thwart the purposes of the sort of representational testimony clearly contemplated by *Mt. Clemens*.

(Emphasis added.) The Bel-Loc court also held that contrary testimony by some workers did not preclude a pattern or practice. Id.

The Third, Eighth and Eleventh Circuits also held that representative evidence in FLSA cases could prove a pattern or a practice. Martin v. Selker Bros., Inc., 949 F.2d 1286, 1298 (3d Cir. 1991) (“[i]t is not necessary for every single affected employee to testify in order to prove violations or to recoup back wages. The testimony and evidence of representative employees may establish prima facie proof of a pattern and practice of FLSA violations.”); accord. Martin v. Tony & Susan Alamo

Found., 952 F.2d 1050, 1051 (8th Cir. 1992); and Donovan v. New Floridian Hotel, Inc., 676 F.2d 468, 472 (11th Cir. 1982).⁵⁵ Proposed Instruction No. 11A was taken from those cases and correctly stated the law.

The trial court refused to give Proposed Instruction No. 11A because (a) the court found Title VII of the Civil Rights Act of 1964 [42 U.S.C. §§2000e, et seq.] cases distinguishable from the proposed use in this case, and (b) the absence of any case law that “even adopted a pattern and practice standard for determining class wide employment status.” RP 03/27/09 (morning session), p. 28. In fact, however, the Title VII pattern or practice approach is almost identical to the pattern or practice approach called for by Mt. Clemens. Both approaches call for a prima facie decision based on evidence that may not cover all class members, with a second phase allowing the defendant to demonstrate that the prima facie finding does not apply to some or many class members. Compare Mt. Clemens with Teamsters at 431 U.S. at 360-362. Moreover, as discussed above, there is substantial FLSA case law, including Martin v. Selker Bros. and Donovan v. New Floridian Hotel which refer to pattern or

⁵⁵ Federal courts also routinely approve the use of pattern or practice in FLSA collective actions. See Falcon v. Starbucks Corp., 580 F. Supp. 2d 528, 535 (S.D. Tex. 2008); Renfro v. Spartan Computer Servs., 243 F.R.D. 431, 433-434 (D. Kan. 2007); Huang v. Gateway Hotel Holdings, 248 F.R.D. 225, 227-228 (E.D. Mo. 2008); and Wren v. RGIS Inventory Specialists, 256 F.R.D. 180 (N.D. Cal. 2009).

practice and had been cited to the trial court orally and/or in writing. See CP 2170, 2171.

4. Plaintiffs Were Entitled To Proposed Instruction No. 12A In Order To Prove Their Case With Representative Evidence.

The trial court had previously ruled in its Findings And Order Granting Class Certification, that “representative evidence” was appropriate in this case:

In light of FedEx’s centralized method of doing business, the use of representative evidence from a manageable number of drivers will permit resolution of the merits of the dispute.

CP 1854. That ruling was supported by abundant authority. See, e.g., *Donovan v. Bel-Loc Diner, Inc.*; and *Reich v. Southern New England Telecomm.*, 121 F.3d 58, 66-68 (2d Cir. 1997). Representative evidence is also commonly used in determining employment status. For example, in *Snell v. Dole*, 875 F.2d at 803, DOL and defendant stipulated that:

[T]he testimony of Novak was representative of the method of payment and the type of work and circumstances of the other decorators.

(Emphasis added.) In *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d at 1381, 1384, the Court of Appeals determined employee status of “dozens” of employees based on testimony of 17 witnesses and found the “degree of permanence factor” was met because “the working relationship between the home researchers and *DialAmerica* was, for the most part, not

a transitory one.”).⁵⁶ In Donovan v. Tehco, Inc., 642 F.2d at 144, the Fifth Circuit explicitly used the Mt. Clemens test enunciated in Proposed Instruction No. 11A to the determination of whether several workers were employees rather than independent contractors. See also Brown, Circle C, and Lauritzen.⁵⁷

Plaintiffs have found no appellate case under the FLSA which comes close to accepting the argument defendant was permitted to make here, i.e., that unless every one of hundreds of workers proves that he or she are employees, all of the workers should be considered independent contractors rather than employees.

F. The Trial Court Erred In Giving Its Verdict Form and Refusing Plaintiffs’ Proposed Verdict Form.

Plaintiffs argued in their Trial Brief “The Ultimate Conclusion That An Individual Is An Employee Or Is An Independent Is A Legal Rather Than A Factual Determination.” CP 1050. They proposed a verdict form consistent with that argument and excepted from the trial court’s failure to give it. RP 3/27/09 (morning session), pp. 18-21, 31.

⁵⁶ Dole and DialAmerica both involved proving the issue of employee versus independent contractor in the wage and hour context for a large number of workers by submitting evidence from only a fraction of the workers.

⁵⁷ Herman v. Express Sixty-Minutes Delivery Service, 161 F.3d at 305 (finding no permanency of the relationship because “[t]he majority of drivers work for Express for a short period of time.”) (emphasis added); Reich v. Circle C. Investments, Inc., 998 F.2d at 327 (finding control exercised, inter alia, because “[s]everal dancers testified that they were expected to mingle with customers when not dancing.”) (emphasis added); and Lauritzen, 835 F.2d at 1536 (finding control, inter alia, because “[t]he workers sometimes referred to Michael Lauritzen as the ‘boss,’ and some of them expressed a belief that he had the right to fire them.”) (emphasis added).

The trial court later rejected the proposed verdict form (CP 2175-76), and only asked the jury an ultimate question. CP 2220.

That was error. In Tift v. Nursing Services, 76 Wn. App. 577, 582-83, 886 P.2d 1158 (1995), this Court held:

The ultimate finding as to employee status is not simply a factual inference drawn from historical facts, but more accurately, is a legal conclusion based on factual inferences drawn from historical facts. The federal court thus has held repeatedly that the ultimate determination of employee status is a conclusion of law subject to *de novo* considerations by that court. Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1045 (5th Cir., *cert. denied*, 484 U.S. 924 (1987).

* * *

We shall then review *de novo* the trial court's ultimate determination of whether Tift was salaried. In reviewing an issue *de novo*, the reviewing court determines the correct law and applies it to the facts as found below. (Emphasis added.)

In Brock v. Mr. W Fireworks, Inc., the controlling legal conclusion was whether the workers there were employees or independent contractors. See also Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1327 & n.24 (5th Cir. 1985); Castillo v. Givens, 704 F.2d at 185, Martin v. Selker, 949 F.2d at 1292. The jury should have been asked questions, the answers to which would have enabled the trial court (and this Court reviewing *de novo*), to make the legal determination of whether the class members were employees or independent contractors.

G. Plaintiffs Should Be Awarded Fees and Expenses.

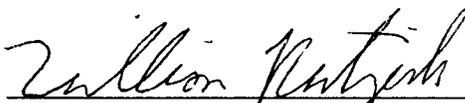
Pursuant to RAP 18.1, and based upon RCW 49.46.090 and 49.48.030, plaintiffs-appellants should be awarded their attorneys fees and expenses incurred in connection with this appeal.

VI. CONCLUSION

For the foregoing reasons, the judgment should be reversed and the matter remanded back to the Superior Court for re-trial.

RESPECTFULLY SUBMITTED this 24th day of **September, 2009**.

SCHROETER, GOLDMARK & BENDER



William Rutzick, WSBA #11533
Martin S. Garfinkel, WSBA #20787

SCHWERIN CAMPBELL BARNARD
IGLITZIN & LAVITT
Lawrence Schwerin, WSBA #4360
Dmitri Iglitzin, WSBA # 17673

NO. 635182

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

RANDY ANFINSON, JAMES GEIGER and STEVEN HARDIE,
individually and on behalf of others similarly situated,

Appellant/Plaintiff,

v.

FEDEX GROUND PACKAGE SYSTEM, INC.,

Respondent/Defendant.

Appeal from the Superior Court of Washington
for King County
(Cause No. 04-2-39981-5-SEA)

**APPENDIX TO
BRIEF OF APPELLANTS**

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COURT OF APPEALS
STATE OF WASHINGTON
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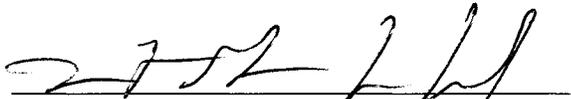
ORIGINAL

Appellants hereby submit the following Appendix in support of
Brief of Appellants.

- Appendix A: Court's Instruction No. 8 [CP 2194];
 - Appendix B: Court's Instruction No. 9 [CP 2195];
 - Appendix C: Plaintiffs' Proposed Instruction No. 4 [CP 2029];
 - Appendix D: Plaintiffs' Proposed Instruction No. 4A;
 - Appendix E: Plaintiffs' Proposed Instruction No. 11A [CP 2170];
 - Appendix F: Plaintiffs' Proposed Instruction No. 12A [CP 2171];
 - Appendix G: Plaintiffs' Proposed Instruction No. 13C [CP 2033-2034];
 - Appendix H: Plaintiffs' Proposed Instruction No. 15A [CP 2035];
 - Appendix I: Plaintiffs' Verdict Form [Second Alternative] [CP 2175-2176];
 - Appendix J: Court's Preliminary Instructions to Jury [RP 03/03/09 (afternoon session), pp. 1, 11-27];
 - Appendix K: The opinion of the Federal Wage and Hour Administrator of the U.S. Department of Labor in *Package Pickup And Delivery Drivers/FLSA And SCA Coverage*, WHM 99:8831(BNA, Dec. 7, 2000); and
 - Appendix L: Verdict, dated March 31, 2009 [CP 2220].
- //
- //
- //
- //

DATED this 24th day of September, 2009.

SCHROETER, GOLDMARK & BENDER



WILLIAM RUTZICK, WSBA #11533
MARTIN S. GARFINKEL, WSBA #20787

SCHWERIN CAMPBELL
BARNARD IGLITZIN &
LAVITT

Lawrence Schwerin, WSBA #4360
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APPENDIX A

INSTRUCTION NO. 8

1 Plaintiffs have the burden of proving that "employee" status was common to the class
2 members during the class period. You should not consider individualized actions, conduct, or
3 work experience unless you find that they reflect policies, procedures, or practices common to
4 the class members during the class period.
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APPENDIX B

INSTRUCTION NO. 9

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2 You must decide whether the class members were employees or independent contractors
3 when performing work for FedEx Ground. This decision requires you to determine whether
4 FedEx Ground controlled, or had the right to control, the details of the class members'
5 performance of the work.

6 In deciding control or right to control, you should consider all the evidence bearing on the
7 question, and you may consider the following factors, among others:

- 8 1. The degree of FedEx Ground's right to control the manner in which the work is to be
9 performed;
- 10 2. The class members' opportunity for profit or loss depending upon each one's managerial
11 skill;
- 12 3. The class members' investment in equipment or materials required for their tasks, or their
13 employment of others;
- 14 4. Whether the service rendered requires a special skill;
- 15 5. The degree of permanence of the working relationship;
- 16 6. Whether the service rendered is an integral part of FedEx Ground's business;
- 17 7. The method of payment, whether by the time or by the job; and
- 18 8. Whether or not the class members and FedEx Ground believed they were creating an
19 employment relationship or an independent contractor relationship.

20 Neither the presence nor the absence of any individual factor is determinative.
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APPENDIX C

INSTRUCTION NO. _____

Plaintiffs have signed operating agreements, or contracts, with defendant. These contracts state, among other things, that plaintiffs are “independent contractors.” The contractual label of “independent contractor” does not determine whether plaintiffs are independent contractors or employees. You must determine whether plaintiffs are employees or independent contractors based on the actual relationship between plaintiffs and defendant. Stated otherwise, the subjective intent of plaintiffs and defendant cannot override the facts of this actual relationship.

Donovan v. Sureway Cleaners, 656 F.2d 1368, 1370 (9th Cir. 1981); Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748, 754 (9th Cir. 1948), relying upon Bartels v. Birmingham, 332 U.S. 126, 130, 67 S.Ct. 1547, 91 L.Ed. 1947 & Rutherford Food Corp. v. McComb, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947).

Plaintiffs' Proposed Jury Instruction No. 4.

APPENDIX D

INSTRUCTION NO. _____

Plaintiffs have signed operating agreements, or contracts, with defendant. These contracts state, among other things, that plaintiffs are “independent contractors.” The contractual label of “independent contractor” does not determine whether plaintiffs are independent contractors or employees. You must determine whether plaintiffs are employees or independent contractors based on the actual relationship between plaintiffs and defendant.

Estrada v. FedEx Ground Package System, Inc., 154 Cal. App. 4th 1, 64 Cal. Rptr. 3d 327 (2007); S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations, 48 Cal. 3d 341, 769 P.2d 399 (1989); Donovan v. Sureway Cleaners, 656 F.2d 1368, 1370 (9th Cir. 1981); Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748, 754 (9th Cir. 1948), relying upon Bartels v. Birmingham, 332 U.S. 126, 130, 67 S. Ct. 1547, 91 L. Ed. 1947 & Rutherford Food Corp. v. McComb, 331 U.S. 722, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947).

Plaintiffs' Proposed Jury Instruction No. 4A

APPENDIX E

INSTRUCTION NO. _____

It is plaintiffs' burden to prove that they are employees, and not independent contractors, and that there is a pattern or practice of this employment status throughout the class of plaintiffs during the class period.

A pattern is a regular, mainly unvarying way of acting or doing. A practice is a frequent or usual action. Events which are isolated, sporadic or infrequent do not establish a pattern or practice.

You must find that plaintiffs' evidence supports an inference that defendant engaged in these patterns or practices on a class-wide basis. Once plaintiffs satisfy this burden of proof, the burden of proof shifts to defendant to come forward with evidence to disprove such evidence of such patterns or practices.

Adapted from Ryder v. Taco Bell, Case No. 95-2-03738-1 and Thiebes v. Wal-Mart Stores, Inc., Civ. No. 98-802-KI (D. Or.); Re pattern or practice: Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 (1977); Reich v. Southern New England Telecomm., 121 F.3d 58, 66-68 (2nd Cir., 1997); McLaughlin v. Seto, 850 F.2d 586, 589 (9th Cir. 1988); Herman v. Hector I. Nieves Transp., Inc., 91 F.Supp.2d 435, 446-47 (D.P.R. 2000). Re burdens of proof: Anderson v. Mt. Clemons Pottery Co., 328 U.S. 680, 66 S. Ct. 1187, 90 L.Ed. 1515 (1946); Donovan v. Tehco, Inc., 642 F.2d 141, 144 (5th Cir. 1981).

Plaintiffs' Proposed Jury Instruction No. 11A

APPENDIX F

INSTRUCTION NO. _____

Plaintiffs have produced testimony and other evidence alleged to be representative of class members in order to establish that they are employees and not independent contractors.

In determining whether the evidence is representative, you may consider policies or practices, the working conditions, the relationships with terminal managers, and the detail and credibility of the testimony. Plaintiffs must present a sufficient number of representative evidence, which, when considered together with all of the other evidence presented in this case, establishes a pattern or practice of the allegations presented.

Adapted from Ryder v. Taco Bell, Case No. 95-2-03738-1 and Thiebes v. Wal-Mart Stores, Inc., Civ. No. 98-802-KI (D. Or.); Secretary of Labor v. Desisto, 929 F.2d 789, 792-93 (1st Cir. 1991); Reich v. Southern New England Telecomm., 121 F.3d 58, 66-68 (2nd Cir., 1997); Dole v. Snell, 875 F.2d 802 (10th Cir. 1989); Donovan v. New Floridian Hotel, Inc., 676 F.2d 468, 471-73 (11th Cir. 1982); Donovan v. Bel-Loc Diner, Inc., 780 F.2d 1113, 1116 (4th Cir. 1985); McLaughlin v. Seto, 850 F.2d 586, 589 (9th Cir. 1988); Herman v. Hector I. Nieves Transp., Inc., 91 F.Supp.2d 435, 446-47 (D.P.R. 2000); and Donovan v. DialAmerica Marketing, Inc., 757 F.2d 1376 (3rd Cir. 1985), on remand, McLaughlin v. DialAmerica Marketing, Inc., 716 F. Supp. 812, 823-25 (D.N.J. 1989), aff'd, 935 F.2d 1281 (3rd Cir. 1991).

APPENDIX G

INSTRUCTION NO. _____

In order to determine whether class members are employees or independent contractors, you should consider the following six factors:

- (1) the degree of the alleged employer's right to control the manner in which the work is to be performed;
- (2) the extent of the relative investments of the alleged employer and employee and whether the alleged employee employs helpers;
- (3) the alleged employee's opportunity for profit or loss depending upon his or her managerial skills;
- (4) whether the service rendered requires a special skill;
- (5) degree of permanence of the working relationship; and
- (6) whether the service rendered is an integral part of the alleged employer's business.

You may also consider other evidence bearing on this matter (including whether the alleged employer and alleged employees' believed or stated that they were creating an employment relationship or an independent contractor relationship) only to the extent that such statements or beliefs mirror economic reality. No one factor is controlling but you should weigh them all to determine whether or not the class members are so dependent upon defendant's business such that class members are not, as a matter of economic reality, in business for themselves. If you find that class members were, as a matter of economic reality, dependent upon defendant during the class period, you should find that class members were employees of defendant. On the other

hand, if you find that class members, as a matter of economic reality, were not dependent upon defendant during the class period, you should find that class members were independent contractors.

-2-

[Plaintiffs propose this Instruction as an alternative to Plaintiffs' Proposed Instruction No. 13, 13A, and 13C. It differs from Proposed Instruction No. 13A because it adds a sixth factor, and differs only slightly from 13B in that it follows the wording contained in Ninth Circuit authority.]

Donovan v. Sureway Cleaners, 656 F.2d 1368 (9th Cir. 1981); Federal Wage and Hour Administrator's 2000 Opinion; Usery v. Pilgrim Equip. Co., Inc., 527 F.2d 1308, 1311 (5th Cir.), cert. denied sub nom., Pilgrim Equip. Co., Inc., 429 U.S. 826 (1976); Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748, 754 (9th Cir. 1948), Bartels v. Birmingham, 332 U.S. 126, 130, 67 S. Ct. 1547, 91 L. Ed. 1747; Rutherford Food Corp. v. McComb, 331 U.S. 722, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947); and Dole v. Snell, 875 F.2d 802 (10th Cir. 1989).

Plaintiffs Proposed Jury Instruction No. 13C

APPENDIX H

INSTRUCTION NO. _____

The fact that one or more of the plaintiffs, who provided services to defendant, did so through his or her personal business entity should not impact your decision in this case. If, applying the six factors set forth in Instruction No. ___, you find that the plaintiffs were so dependent upon defendant's business such that plaintiffs were not, as a matter of economic reality, in business for themselves during the class period, you must find that plaintiffs were employees of defendant.

[Plaintiffs proposed this Instruction only if the Court chooses not to follow Ebling as providing the test for employment status for plaintiffs and as companion to Proposed Instruction 13A]

Robicheaux v. Radcliff Material, Inc., 697 F.2d 662, 666 (5th Cir. 1983); Usery v. Pilgrim Equip. Co., Inc., 527 F.2d 1308, 1311 (5th Cir.), cert. denied sub nom., Pilgrim Equip. Co., Inc., 429 U.S. 826 (1976); see also Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748, 754 (9th Cir. 1948), relying upon Bartels v. Birmingham, 332 U.S. 126, 130, 67 S. Ct. 1547, 91 L. Ed. 1947 & Rutherford Food Corp. v. McComb, 331 U.S. 722, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947); Tumulty v. Fedex Ground Package Sys., Inc., No. C04-1425P, 2005 WL 1979104 (W.D.Wash. 2005); Arculeo v. On-Site Sales & Marketing, 425 F.3d 193, 198 (2nd Cir. 2005); 29 C.F.R. § 791.2.

Plaintiffs Proposed Jury Instruction No. 15A

APPENDIX I

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

RANDY ANFINSON, JAMES GEIGER,
AND STEVEN HARDIE, individually and
on behalf of others similarly situated,

Plaintiffs,

v.

FEDEX GROUND PACKAGE SYSTEM,
INC.,

Defendant.

No. 04-2-39981-5-SEA

VERDICT FORM
[SECOND ALTERNATIVE]

QUESTION 1: Was there a pattern or practice of defendant having the right to control the manner in which plaintiffs performed their work as single route contractors?

Answer "Yes" or "No" _____

QUESTION 2: Was there a pattern or practice of defendant having a larger financial investment in the business as compared to plaintiffs when they worked as single route contractors?

Answer "Yes" or "No" _____

QUESTION 3: Was there a pattern or practice that plaintiffs' opportunities for profit or loss were largely determined by defendant when plaintiffs worked as single route contractors?

Answer "Yes" or "No" _____

QUESTION 4: Was there a pattern or practice that a high level of skill was required by plaintiffs in performing the work as single route contractors?

Answer "Yes" or "No" _____

QUESTION 5: Was there a pattern or practice that the relationships between plaintiffs (when working as single route contractors) and defendant were more permanent than they were short term?

Answer "Yes" or "No" _____

QUESTION 6: Was there a pattern or practice that plaintiffs' work (when working as single route contractors) was integral to defendant's business?

If you answered all of the previous questions, sign and return this verdict form.

DATED: _____, 2009

FOREPERSON

APPENDIX J

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF KING

3
4 RANDY ANFINSON, JAMES GEIGER,)
5 and STEVEN HARDIE, individually,))
6 and on behalf of others))
7 similarly situated,))
8 Plaintiffs,) KING COUNTY CAUSE
9 vs.) No. 04-2-39981-5 SEA
10 FEDEX GROUND PACKAGE SYSTEM,) COA: 63518-2-I
11 INC.,)
12 Defendant.)

13
14 VERBATIM REPORT OF PROCEEDINGS

15 Heard before the Honorable John Erlick
16 King County Courthouse, 516 Third Avenue, Room W-1060
17 Seattle, Washington
18 Afternoon Session 1:36 p.m. - 3:12 p.m. (Pages 1 - 59)

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23
24 DATE REPORTED: MARCH 3, 2009
25 REPORTED BY: JOANN BOWEN, RPR, CRR, CCP, CCR# 2695

21 wants an opportunity to depose him, they will have leave
22 to depose him. I think that's the fairest way to
23 proceed. I think that's the least severe sanction that I
24 can impose at this time for non-production of documents.
25 The defense is entitled to that tax

11

1 information. I don't see that they are going to get the
2 tax information at this point. But I don't think that
3 they should be ambushed either with Mr. Herd's testimony.

4 So the ruling of the Court is references to
5 Mr. Herd are to be excluded from opening. Mr. Herd may
6 testify but only after defense has had an opportunity to
7 depose him.

8 All right. Anything else before we call in
9 the jury?

10 MS. ROE: Your Honor, are we going to take
11 a minute between your instruction and setting up or
12 should I move -- because I'm going to want to move the
13 podium over here. I think it's kind a minimal setup. If
14 you want me to do that now.

15 THE COURT: No. Why don't I instruct and
16 then I will let you set up, and I will come up with some
17 sort of story to tell the jury. Trials like this, I will
18 run out of material. Call in the jury, please.

19 (Jury enters.)

20 THE COURT: Good afternoon. Please be
21 seated. Members of the jury, the following is the
22 court's advanced oral instruction to the jury.
23 This is a civil case brought by plaintiffs
24 Randy Anfinson, James Geiger and Steven Hardie
25 individually and on behalf of other similarly situated

12

1 against defendant FedEx Ground. The plaintiffs' lawyers
2 are Martin Garfinkel, William Rutzick, Rebecca Roe, Larry
3 Schwerin and Dmitri Iglitzin. The defendant's lawyers
4 are Kelly Corr, Guy Michelson and Kevin Baumgardner.

5 This case arises out of services performed by
6 the plaintiffs for the defendant in Washington state
7 between December 21, 2001, and December 31, 2005.

8 When I refer in these instructions to FedEx,
9 you can assume that I mean both FedEx Ground and FedEx
10 Home Delivery. If another company or division of FedEx
11 is involved, that other company or division will be
12 specified.

13 I will now describe for you the basic elements
14 of the claims and defenses that the parties intend to
15 prove in this case. I am doing so for only one purpose;
16 to help you evaluate the evidence as it is being
17 presented. Please remember that the claims and defenses
18 might change during the course of a trial. For this

19 reason, this instruction is preliminary only. It may
20 differ from the final instructions you receive at the end
21 of the trial. Your deliberations will be guided entirely
22 by the final written instructions that I give to you at
23 the end of this case.

24 Plaintiffs claim that FedEx Ground improperly
25 classified the class members as, quote, independent

13

1 contractors for the period of time between December 21,
2 2001, and December 31, 2005. Plaintiffs claim that the
3 class members were actually employees of FedEx Ground.
4 Defendant FedEx Ground claims that the class members were
5 properly classified as independent contractors and
6 behaved in a manner consistent with that status.

7 The members of the class may be referred to by
8 the lawyers as drivers or contractors. You are not to
9 attach any significance to the lawyers' use of these
10 labels since it will be for you, the jury, who will
11 decide whether the class members are employees or whether
12 they are independent contractors.

13 Now, it is your duty as a jury to decide the
14 facts in this case based upon the evidence presented to
15 you during this trial. Evidence is a legal term.
16 Evidence includes such things as the testimony of
17 witnesses, documents, or other physical objects.

18 One of my duties as a judge is to decide
19 whether or not evidence should be admitted during the
20 course of the trial. What this means is that I must
21 decide whether or not you should consider evidence
22 offered by the parties.

23 For example, if a party offers a photograph as
24 an exhibit, I will decide whether or not that exhibit is
25 admissible. Do not be concerned about the reasons for my

14

1 rulings. You must not consider or discuss any evidence
2 that I do not admit or that I tell you to disregard.

3 The evidence in this case may include the
4 testimony of witnesses or actual physical objects such as
5 papers, photographs and other exhibits. Any exhibits
6 that are admitted into evidence will go with you to the
7 jury room when you begin your deliberations.

8 When witnesses testify, please listen very
9 carefully. You will need to remember testimony during
10 your deliberations because testimony will rarely, if
11 ever, be repeated. That said, you will be allowed to
12 take notes, and I will tell you about note-taking in just
13 a moment.

14 The lawyers' remarks, statements and arguments
15 are intended to help you to understand the evidence and
16 to apply the law. However, the lawyers' statements are

17 not evidence or the law. The evidence is the testimony
18 and exhibits. The law will be contained in my
19 instructions. You must disregard anything the lawyers
20 say that is at odds with the evidence or the law in my
21 instructions.

22 Our State's Constitution prohibits a trial
23 judge from making a comment on the evidence. For
24 example, it would be improper for me to express my
25 personal opinion about the value of a particular witness'

15

1 testimony. Although I will not intentionally do so, if
2 it appears to you that I have indicated my personal
3 opinion concerning any evidence, you must disregard that
4 opinion entirely.

5 Let me give you an example of how things can
6 go awry. There is an infamous case in a state adjoining
7 hours. I won't mention the state not to embarrass any
8 other judges, but they are famous for their potatoes.

9 Anyway, this particular high-profile case went
10 to the jury. It was the killing of another individual,
11 and the charge to the jury was first degree murder,
12 second degree murder or manslaughter. So the jury had to
13 decide which of those three or a defense verdict.

14 so after much deliberation the jury came back
15 a little quicker than the parties had expected because

16 the trial had gone on for a long time, and the jury had
17 entered a conviction of murder in the second degree.

18 So afterwards the jurors were then free to
19 talk to the attorneys. The attorneys said: How did you
20 come to your decision so quickly? They said: It was
21 obvious. The judge was telling us what to do. The judge
22 was telling you what to do? He sat there the whole time
23 with his fingers like this. We figured he was telling us
24 to convict him of murder in the second degree.

25 what I'm telling you is, you make your own

16

1 decisions. Don't base it on what you think I'm doing or
2 how I'm reacting to a witness. Sometimes you will see me
3 on the computer from time to time. I will explain that
4 as well. Marci may type me something quickly and say:
5 Sorry, Judge, emergency hearing tonight. You have to
6 stay late. I'm not happy about that. You will see me
7 unhappy about that. witness is on the stand. You're
8 thinking, boy, Judge Erlick does not like this witness.
9 You have to make your own judgments.

10 Now, you may hear objections from the lawyers
11 during the course of the trial. Each party has the right
12 to object to questions asked by another lawyer and may,
13 in fact, have a duty to do so. These objections should
14 not influence you. Do not make any assumptions or draw

15 any conclusions based on the lawyers' objections.

16 In deciding this case, you will be asked to
17 apply a concept called burden of proof. The phrase
18 burden of proof may be unfamiliar to you. Burden of
19 proof refers to the measure or amount of proof required
20 to prove a fact.

21 The burden of proof in this case is proof by a
22 preponderance of the evidence. Proof by preponderance of
23 the evidence means that you must be persuaded considering
24 all the evidence in the case that a proposition is more
25 probably true than not true. Now, that is an instruction

17

1 you will be given at the end of the case and that will be
2 explained by me then as well as the lawyers.

3 During your deliberations, you must apply the
4 law to the facts that you find to be true. It is your
5 duty to accept the law from my instructions regardless of
6 what you personally believe the law is or ought to be.
7 You are to apply the law you receive from my instructions
8 to the facts that you find, and in this way you will
9 decide this case.

10 Now, let me explain to you the procedure that
11 we're going to follow this afternoon. We are going to
12 hear opening statements from each of the sides. The
13 plaintiff has the burden of proof, so the plaintiff gets

14 to go first. After the plaintiff has made their opening
15 statement, then the defense will make its opening
16 statement.

17 Then the plaintiff will present the testimony
18 of witnesses and other evidence to you. After the
19 plaintiff has finished, then the defense may present the
20 testimony of witnesses or other evidence. Each witness
21 may be cross-examined by the other side.

22 When all the evidence has been presented to
23 you -- and that will be close to the end of this month --
24 I will instruct you on what the law is that applies to
25 this case. I will read these instructions to you out

18

1 loud. And unlike these instructions I'm giving to you
2 now, the final instructions will be in writing. Each of
3 will you have a copy. I will read the instructions to
4 you, and you will also have a copy of those written
5 instructions for you when you deliberate your decision.
6 Then the lawyers will make closing arguments.

7 Finally, you will be taken back to the jury
8 room by the bailiff where you will select a presiding
9 juror, the person we used to call the foreperson and
10 before that the foreman, now known as the presiding
11 juror. The presiding juror will preside over your
12 discussions of the case. Your discussions are called

13 deliberations.

14 You will then deliberate in order to reach a
15 decision. Your decision in the case is called the
16 verdict. Until you are in the jury room for those
17 deliberations, you must not discuss this case with the
18 other jurors or anyone else or remain within hearing
19 distance of anyone discussing the case.

20 You will be allowed to take notes during the
21 course of the trial. I am not instructing you to take
22 notes nor am I encouraging you to do so. Taking notes
23 may interfere with your ability to listen and to observe.
24 If you choose to take notes, I must remind you to listen
25 carefully to all the testimony and carefully observe all

19

1 witnesses.

2 At an appropriate time, Marci will provide you
3 with a notebook and a pen for each of you. The notebooks
4 will have your juror number on the front page. You must
5 take notes in the notebook only and not on any other
6 paper. You must not take your notepad from the courtroom
7 or jury room for any reason. When you recess during the
8 course of the day or at adjournment at the end of the
9 day, Marci or I will tell you what to do with your
10 notebook.

11 while you are away from the courtroom or the

12 jury room, no one else will be allowed to read your
13 notes. You must not discuss your notes with anyone or
14 show your notes to anyone until you begin deliberating on
15 the verdict. This includes the other jurors.

16 During deliberation you may discuss your notes
17 with the other jurors or show your notes to them. You
18 are not to assume that your notes are necessarily more
19 accurate than your memory. I'm allowing you to take
20 notes to assist you in remembering clearly, not to
21 substitute for your memory. You are also not to assume
22 that your notes are more accurate than the memories or
23 notes of your fellow jurors.

24 After you have reached a verdict, your notes
25 will be collected and destroyed by the bailiff. No

20

1 one -- and that includes the bailiff or myself -- will be
2 allowed to read your notes.

3 You will also be allowed to propose written
4 questions to witnesses after the lawyers have completed
5 their questioning. You may ask questions in order to
6 clarify the testimony, but you are not to express any
7 opinion about any testimony or to argue with a witness.
8 If you ask any questions, remember, your role is that of
9 a neutral fact finder, not that of an advocate. We've
10 got lots of advocates around the tables here. You are

11 supposed to find the facts impartially, fairly and
12 neutrally.

13 Before I excuse each witness, I will offer you
14 the opportunity to write out a question on a form
15 provided by the Court. Do not sign the question. I will
16 review the question to determine if it is legally proper.
17 There are some questions that I will not ask or that I
18 will ask but not ask in the wording submitted by a
19 particular juror. This might happen due to the rules of
20 evidence or other legal reasons or because the question
21 is expected to be answered later in the trial through
22 another witness. If I do not ask a juror's question or
23 if I rephrase it, do not attempt to speculate as to the
24 reasons, and do not discuss these circumstances with the
25 other jurors.

21

1 By giving you the opportunity to propose
2 questions, I am not requesting or suggesting that you do
3 so. It will often be the case that a lawyer has not
4 asked a question because it's legally objectionable or
5 because a later witness may be addressing that subject.

6 Throughout this trial, you must come and go
7 directly from the jury room. Do not remain in the hall
8 or the courtroom as witnesses and parties may not
9 recognize you as a juror and you may accidentally

10 overhear some discussions about this case. I have
11 instructed the lawyers, the parties and witnesses not to
12 talk to you during the trial.

13 It is essential to a fair trial that
14 everything you learn about this case comes to you in this
15 courtroom and only in this courtroom. Do not allow
16 yourself to be exposed to any outside information about
17 this case and do not permit anyone to discuss this case
18 in your presence. You must keep your mind free of
19 outside influences so that your decision is based
20 entirely on the evidence presented during the trial and
21 on the instructions to you about the law.

22 As I stated yesterday, until you are dismissed
23 from the case, you must avoid outside sources such as
24 newspapers, magazines, the Internet, radio, television
25 broadcasts which may discuss the issues involved in this

22

1 trial. By giving this instruction, I do not mean to
2 suggest that this particular case is newsworthy. I give
3 this instruction in every case.

4 During the trial do not try to determine on
5 your own what the law is. Do not seek out any evidence
6 on your own. Don't do any research on the web, in
7 dictionaries, encyclopedias, PDAs, Google, what have you.
8 Do not inspect the scene of any event involved in this

9 case.

10 You must keep your mind clear of anything that
11 is not presented to you in this courtroom. Throughout
12 the trial you must maintain an open mind. You must not
13 form any firm and fixed opinion about any issue in the
14 case until the entire case has been submitted to you for
15 deliberations.

16 If anyone asks you about this case, you could
17 tell them the following, our mantra: Judge Erlick's
18 courtroom, 10th floor, civil case, about a month long,
19 we've got windows.

20 As jurors, you're officers of the court. As
21 such, you must not let your emotions overcome your
22 rational thought process. You must reach your decision
23 based on the facts proved to you and on the law given to
24 you, not on sympathy, bias or personal preference.

25 To assure that all parties receive a fair

23

1 trial, you must act impartially with an earnest desire to
2 reach a just and proper verdict. To accomplish a fair
3 trial takes work, commitment, and cooperation. A fair
4 trial is possible only with a serious and continuous
5 effort by each one of us working together.

6 On behalf of the bench, the lower bench,
7 counsel and the parties, we want to thank each and every

8 one of you willing to sit on this jury to serve our
9 system of justice.

10 Now, I have a few more instructions that I'm
11 going to read with respect to this case in particular.
12 Before I do so, I want to go over some logistics. I'm
13 going to ask that all jurors when they are in the box
14 please turn off your electronic devices; cell phones,
15 PDAs, whatever pagers, whatever beeps, please turn it off.
16 It can be distracting. Attorneys have been instructed to
17 do the same as well as witnesses and spectators in the
18 courtroom.

19 My general rule -- which every rule sometimes
20 can be breached -- so my general rule is that in the
21 courtroom itself, you can only have water, which we will
22 serve, or you can bring your own sparkling, tap, spring,
23 whatever you'd like. However, given the length of this
24 case, you can have coffee in the jury box.

25 I want to be careful about the coffee. The

24

1 reason I have this rule about nothing but water is
2 because I had an allow coffee rule. Coffee became
3 lattes. The lattes became mochaccinos. The mochaccinos
4 became double brownie frappuccinos. We had a spill and
5 it was a mess. Let's start with coffee or lattes and we
6 will take it from there.

7 Back in the jury room, you can have whatever
8 you want so long as it's not alcoholic or offensive to
9 your fellow jurors. If you're in the box, please don't
10 chew gum. It can be distracting to the person next to
11 you. Marci will give you notepads and pens.

12 Any problems at any time hearing or seeing the
13 attorneys, the witnesses, myself, please raise your hand.
14 If you can't see a document or something that's being
15 projected, just let us know. We are here to make sure
16 that you understand and you can see the evidence in this
17 case. So any problems at all, please let us know.

18 From time to time, you will see me on the
19 computer. I want to assure you I'm not looking at my
20 stock portfolio, which is not worth looking at, or
21 checking for cheap flights to Palm Springs. Actually,
22 it's my way of communicating with Marci and other judges
23 when they send information to me. I also have a
24 transcript of the record that is shown live. So
25 sometimes you will see me dealing with the transcript. I

25

1 want to assure you that I am paying attention.

2 If I can give you one word to sum up what you
3 will need in the next four weeks, the word is patience.
4 There will be a lot of downtime. It's worked into our
5 schedule. We know there's going to be downtime just

6 because things happen. We don't know when things are
7 going to happen or how long things are going to take when
8 they happen. We just know that they will happen.

9 So please understand in advance there's
10 sometimes that I will say you are excused for 15 minutes
11 and 30 minutes later you wonder what's going on out here.
12 There's just stuff that has to be addressed.

13 I think that's it. Are there any questions
14 from the jurors regarding logistics issues? Okay. If
15 you have any questions at any time, ask Marci. She
16 pretty much can handle it all.

17 I have one more instruction and it is specific
18 to this case. It reads as follows: You must decide
19 whether the class members were employees or independent
20 contractors when performing work for FedEx Ground. This
21 decision requires you to determine whether FedEx Ground
22 controlled or had the right to control the details of the
23 class members' performance of the work.

24 In deciding control or right to control, you
25 should consider all the evidence bearing on the question

26

1 and may consider the following factors among others; one,
2 the degree of FedEx Ground's right to control the manner
3 in which the work is to be performed; two, the class
4 members' opportunity for profit or loss depending upon

5 each one's managerial skill; three, the class members'
6 investment in equipment or materials required for their
7 tasks or their employment of others; four, whether the
8 service rendered requires a special skill; five, the
9 degree of permanence of the working relationship; six,
10 whether the services rendered is an integral part of
11 FedEx Ground's business; seven, the method of payment
12 whether by the time or by the job; and, eight, whether or
13 not class members and FedEx Ground believed they were
14 creating an employment relationship or an independent
15 contractor relationship. Neither the presence nor the
16 absence of any individual factor is determinative.

17 As I stated earlier, this is the preliminary
18 instruction. It may change before the end of the case.
19 But I wanted to give you some guidance as to what some of
20 the factors may be that you should consider.

21 Those are the Court's advance instructions to
22 the jury. As I indicated, at this time we will have
23 opening statement by each of the parties. The plaintiffs
24 have the burden of proof, and Ms. Roe will be presenting
25 opening statement on behalf of plaintiffs. If you would

27

1 kindly give your attention to Ms. Roe at this time.

2 MS. ROE: We will take one moment to set
3 up. I do wonder if the judge's exception on the coffee

APPENDIX K

[Nov. 21, 2000—Contd.]

than that required for a bachelors' degree would not be work of a bona fide professional level within the meaning of the regulations.

It is clear that the work of an ultrasound technologist involves the use of skills and procedures which do not require four years of college or university training to obtain a degree in a professional discipline. The information provided suggests that an ultrasound technologist is best characterized as a skilled nonexempt technician. The fact that the ultrasound technologist has specialized training, uses considerable independent judgment, and is compensated higher than any other staff technologist in the

field of radiology does not change our conclusion.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

We trust that the above information is responsive to your inquiry.

[Opinion signed by Office of Enforcement Policy, Fair Labor Standards Team member Barbara R. Relferford, Nov. 21, 2000]

Package Pickup And Delivery Drivers/FLSA And SCA Coverage

[Dec. 7, 2000]

This is in response to your February 23 letter requesting an opinion on the application of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201 *et seq.*, and the McNamara-O'Hara Service Contract Act ("SCA"), 41 U.S.C. 351 *et seq.*, to pickup and delivery drivers working for a private carrier that operate small-package pickup and delivery service throughout the United States. Specifically, you ask: (1) Whether pickup and delivery drivers working for a company engaged in a nationwide system of pickup and delivery of small packages are independent contractors or are employees covered under the FLSA; (2) if the drivers are employees and exempt from the overtime compensation provisions of the FLSA under section 13(b)(1) of the Act, whether the company must maintain records on the drivers; and (3) whether the SCA obligates the company to pay minimum monetary wages to the drivers for work performed on SCA-covered contracts.

Facts

You state that the private company at issue has numerous terminals and uses several thousand pickup and delivery drivers to transport, pick up and deliver packages between the drivers' respective

terminals and the company's customers. Each driver provides daily service in a principal service area, which is comprised of several postal zip codes or other comparable geographic boundaries, and which is assigned to the driver by the company. In most cases, the drivers do not cross state lines to make their pickups or deliveries; the packages the drivers pick up and deliver, however, usually originate from a state different from the state for which the packages are destined.

All drivers working for the company must sign an agreement stating that they are independent contractors. The agreement requires the driver to make his vehicle available each weekday, and prohibits drivers from conducting outside business for other companies while trucks are in the company's service. When not in service, drivers may use the trucks for other commercial purposes; only a few of the company's drivers have availed themselves of this opportunity.

The agreement permits drivers to sell off portions of their service area. If the density of the service area increases, the potential value of the customers that the driver services also may increase, and the driver may sell part or all of his primary

[Dec. 7, 2000—Contd.]

service area to the highest bidder. The scope of the driver's proprietary interest and right to sell, however, is limited because the company can reconfigure a driver's service area with several days notice to take account of customer service requirements. During this notice period, the driver has the opportunity, using means satisfactory to the company, to restore service to the level called for in the agreement. If the driver cannot sufficiently service the area, the company may reconfigure the area at its sole discretion.

Drivers may hire helpers and may operate additional vehicles with the company's consent. Less than ten percent of the drivers have a second vehicle. In general, the drivers do not advertise independently or have separate business sites; a small percentage of the drivers operate as incorporated businesses.

The drivers must purchase or lease trucks ranging in price, depending on size, from \$20,000 to \$40,000. The company purchases the necessary trucks from a particular manufacturer, which builds them to the company's specifications. The drivers' trucks must clearly display the company logo and colors. The company provides the drivers with warranty recovery assistance and assistance in arranging the financing for the leasing or purchasing of the trucks. The company also arranges for the rental of trucks when a driver's own vehicle is unavailable because of needed maintenance or repair. Virtually all drivers purchase a "support package" offered by the company which includes a clean uniform each day (which must be worn by the drivers), lease of a scanner, communications equipment necessary for customer service, an annual Department of Transportation inspection, and a vehicle washing service.

Drivers do not need any prior training or experience to work for the company. The drivers learn from attending new driver orientation meetings conducted by company personnel. The company determines the drivers' rate of compensation as well as the rates that customers are charged. Income from each pick up and

delivery constitutes a substantial part of the drivers' earnings. The company has a policy of subsidizing the income of its beginner drivers until they reach a normal range of pickups and deliveries for their service areas. This policy shields these drivers from loss by guaranteeing an income level.

Drivers may devise their own routes for making those deliveries that are not pre-scheduled for a specific time; several of the pickups have specific time periods that have been arranged by the company at the customer's request. While on their routes, the drivers must use a scanner that they lease from the company to feed tracking data about their work into a computer that electronically transmits the information to the company's central computer. On their return to the terminal at the end of the day, the drivers must also transfer additional data from their equipment into the company's computer.

The daily pickups and deliveries of the drivers must interface with a "line haul" operation by which the company transports overnight packages to and from its terminals. This line-haul operation requires the drivers to return to the terminals to have their trucks unloaded by the company's package handlers during the late afternoon or evening hours, prior to the scheduled line haul departures. The drivers have no particular starting time for work, but their trucks must be present for loading in the early morning hours after the terminal's line-haul process is done, if the drivers wish to have the company's package handlers load their trucks with that particular day's deliveries. However, the drivers also have the option of loading their own trucks. Drivers may not refuse to accept merchandise for pickup and delivery in their primary service area. They work an average of nine to nine and one-half hours each day, Monday through Friday.

The drivers' agreement with the company provides for a number of increased benefits available the longer a driver works for the company and also provides for automatic yearly renewals, unless either party provides written notice of termination within a specified time. The

[Dec. 7, 2000—Contd.]

company has on occasion terminated its drivers' contracts for various reasons, including the failure to pass a drug test, thefts, repeated accidents, safety violations, or customer complaints. The agreement provides that a driver may pursue arbitration of any wrongful termination of his contract.

Employer-employee relationship

The FLSA defines an employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee;" it defines "employ" as "to suffer or permit to work," and an employee as "any individual employed by an employer." 29 U.S.C. 203(e), 203(d), and 203(g). Courts look to the "economic reality" of the relationship between worker and employer to decide whether FLSA coverage exists; coverage does not depend upon the common law definitions of "employer" and "employee." Rather, employees are those who as a matter of economic reality are dependent upon the business to which they render service.

To determine whether an individual is an employee or independent contractor for FLSA purposes, courts generally apply an "economic reality" test consisting of the following six factors: 1) The degree of control exercised by the alleged employer; 2) the extent of the relative investments of the alleged employer and employees; 3) the degree to which the alleged employee's opportunity for profit and loss is determined by the employer; 4) the skill and initiative necessary for performing the work; 5) the permanency of the relationship; and 6) the extent to which the work performed is an integral part of the employer's business. Neither the presence nor the absence of any individual factor is determinative. Nor is it dispositive that workers sign an agreement acknowledging that they are independent contractors. As the Supreme Court stated in *Rutherford Food Corp. v. McComb*, 331 U.S. at 729, "Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of

the Act." Furthermore, in determining the "economic realities" of the relationship between alleged employers and employees, it is important to look at what the workers actually do, rather than at what they conceivably can do.

As the discussion below illustrates, an examination of the "economic reality" test to the facts contained in your letter indicates that the drivers are employees of the delivery company. In reaching this determination, we are cognizant of the recent Fifth Circuit decision in *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F3d 299, 5 WH Cases2d 7 (5th Cir. 1998), finding certain courier delivery drivers to be independent contractors, rather than employees within the meaning of the FLSA. A determination of whether an employment relationship exists between alleged employers and employees is necessarily a very "fact-intensive" inquiry. Significant factual differences exist between the *Express Sixty-Minutes* case and that of the working relationship described in your letter, particularly with respect to the control factor. Thus, while we disagree with the outcome in *Express Sixty-Minutes*, we believe that even under the analysis therein, the drivers that you describe in your letter are likely to be employees, rather than independent contractors.

1) Control

With respect to the control factor of the "economic reality" test, it appears that the company you have described exercises significant control over the drivers. The company controls the rate at which the drivers are compensated and controls the number of packages that the drivers are given to deliver. In addition, the company assigns the drivers to their principal service areas, which may be reconfigured at the sole discretion of the company. Any ability of the drivers to determine their own routes for making deliveries is significantly circumscribed by specific arrangements that the company makes with its customers. Furthermore, because the company does not permit its drivers to refuse merchandise for pickup and delivery in their primary service area, any ability of the drivers to determine at what

[Dec. 7, 2000—Contd.]

time they begin work for the day is of limited significance. Courts have frequently found an employment relationship to exist even where the employer has no right to set hours, particularly where workers are paid on a piece-rate basis. In any event, the company exercises significant control over the drivers' specific work hours by requiring them to return to the terminals at the end of their day to have their trucks unloaded by the company's package handlers prior to the company's scheduled line haul departures. The company further exercises control by requiring the drivers to record into a scanner tracking data about their work that is transmitted to the company's central computer and by requiring them to transfer additional data into the company's computer at the end of their day.

The company also exercises control by requiring the drivers to lease or purchase trucks from a particular manufacturer, to display the company's logo and colors on the truck, and to wear a company uniform. In addition, drivers are not permitted to work for other businesses while their trucks are in the company's service. We also note, with regard to control, that the company appears to have the authority, which it exercises, to terminate its drivers' contracts for a variety of reasons. The significant degree of control exercised by the company over the manner in which the drivers perform their work suggests that an employment relationship between the company and drivers exists.

2) Investment

Your letter indicates that the drivers are required to lease or purchase trucks costing between \$20,000 and \$40,000. No information, however, is provided concerning the amount of capital that the company expends in its delivery business. Accordingly, a determination of employee status based upon a comparison of the relative investments cannot be made. We nevertheless suspect, however, that the investment of the drivers in their trucks is disproportionately small when compared to the company's investment in its overall business. In this regard, we note

that in *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 4 WH Cases2d 673, (10th Cir. 1998), the Tenth Circuit found not significant the investment of rig welders working in the natural gas pipeline construction industry who invested in equipped trucks, or "welding rigs," costing between \$35,000 and \$40,000, compared to the overall business investment of the company.

3) Profit and loss

In considering the profit and loss factor of the "economic reality" test, courts focus upon who, the alleged employer or employee, controls the major determinants of profit or loss and who exercises the managerial skills on which profit or loss depend. Courts also focus upon whether the alleged employee has significant capital expenditure at risk. Under the facts that you describe, the drivers do not appear to control the major determinants of their profits, nor do they appear to risk significant capital losses. The company determines the number of packages that the drivers are to deliver, the rate at which the drivers will be compensated, and the amount that the customers will be charged for the pickup and delivery of their packages, all factors that determine how much the drivers can earn. While the agreement permits the drivers to sell off portions of their service areas, the right to sell is limited and the company may reconfigure a driver's service area to meet its customer's need with just a few days notice. In this regard, we note that your letter does not indicate whether, in fact, drivers avail themselves of this opportunity to sell portions of their service areas, information which might bear upon the "economic reality" of the relationship between the drivers and the company. Nor does your letter indicate how many drivers actually hire helpers. Based upon the information provided, however, the company appears to control all the major determinants of a driver's profits suggesting that an employment relationship exists.

With regard to potential losses, the company apparently shields beginning drivers from loss by guaranteeing them a certain income level. The company also

[Dec. 7, 2000—Contd.]

provides its drivers with warranty recovery assistance and assistance in arranging the financing for the leasing or purchasing of their trucks. The company arranges for a truck rental when a driver's own truck is unavailable because of needed maintenance or repair. Based upon this information, it appears that drivers do not risk, and are not subject to, major loss of capital expenditures.

4) Skill

The drivers do not appear to exercise the type of skills and initiative that are generally associated with independent businessmen or women, i.e., they do not perform work requiring the organizational, management, and financial skills of an independent contractor. Rather, the drivers appear to perform routine work that requires no prior experience.

5) Permanency of relationship

Although the facts in your letter relative to the permanency factor are limited, i.e., there is no information on how long drivers generally work for the company or on how freely the company or its drivers void their contracts, the circumstances suggest that the drivers have a permanent relationship with the delivery company. They operate under one-year contracts, and their benefits increase as their tenure with the company increases. The drivers work full-time, i.e., between nine and nine and one-half hours per day, five days a week. Moreover, drivers are prohibited from conducting outside business for others while their trucks are in this service for the company. This suggests that the drivers are economically dependent upon the delivery company's business for their livelihood.

6) Integral nature of work performed

The drivers perform work that is integral to the company's business. Where workers play a crucial role in a company's operation, they are more likely to be employees than independent contractors.

In sum, an analysis of the facts provided in your letter under the "economic reality" test suggests that the delivery drivers are employees covered by the FLSA, rather than independent contractors.

Applicability of 13(b)(1) and record-keeping requirements

You do not ask, nor do we express an opinion on, whether the pickup and delivery drivers described in your letter are exempt from the FLSA's overtime provisions under section 13(b)(1) of the Act. You do ask, however, whether the company must keep records on the pickup and delivery drivers, if those drivers are exempt. The Secretary's regulations provide that with respect to each employee exempt from the FLSA's overtime compensation provisions pursuant to section 13(b)(1), employers "shall maintain and preserve payroll or other records, containing all the information and data required by § 516.2(a) except paragraphs (a)(6) and (9) and, in addition, information and data regarding the basis on which wages are paid (such as the monetary amount paid, expressed as earnings per hour, per day, per week, etc.)." 29 C.F.R. 516.12.

Service Contract Act coverage

Your letter states that the company contracts with the federal and District of Columbia governments to furnish services. You ask whether the pickup and delivery drivers working on these contracts, which are in excess of \$2,500, are covered by the SCA. As you know, the SCA applies to government contracts in excess of \$2,500, the principal purpose of which is the furnishing of services through the use of service employees. The regulations establish that any government contract requiring the type of pickup and delivery services that you describe in your letter would be subject to the requirements of the SCA. See 29 C.F.R. 4.130 (a)(31) and (50).

Section 8(b) of the SCA defines a service employee as any person engaged in the performance of a covered contract other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 C.F.R. Part 541. 41 U.S.C. 357(b). In this regard, exempt status under the SCA depends upon whether each individual employee meets all of the duties and salary requirements specified at 29 C.F.R.

[Dec. 7, 2000—Contd.]

Part 541, and does not depend upon an employee's position title or his or her occupational group. Thus, any individual, regardless of title (e.g., owner, independent contractor, partner, etc.), performing the work required by a government service contract must be paid in accordance with the requirements of the SCA unless exempt under 29 C.F.R. Part 541. The drivers described in your letter who are performing pick up and delivery services would be considered service employees for the purposes of SCA coverage, unless exempt under 29 C.F.R. Part 541, regardless of their possible status as independent contractors under the FLSA. Those drivers would thus have to be paid in accordance with the requirements of any applicable SCA wage determination included in the government contract.

This opinion is based exclusively on the facts and circumstances described in your

opinion request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the questions presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

If I may be of further assistance, please do not hesitate to contact me.

[Opinion signed by Wage Hour Administrator T Michael Kerr, Dec. 7, 2000]

Human-Resources Generalists/Administrative Exemption

[Dec. 8, 2000]

This is in response to your letter requesting an opinion concerning the application of the Fair Labor Standards Act (FLSA) to HR generalists/analysts and university technical recruiters employed in the _____.

The position descriptions indicate that both the HR generalist/analyst and the university technical recruiter recruit, screen, test and interview applicants for employment; participate in college career/job fairs; research, develop, implement, and coordinate procedures for personnel processes and policies; make personnel recommendations to hiring managers; monitor and maintain files, computer reports, and manuals; conduct and analyze salary survey data for applicable managers; create and place media advertisements; process new hire paperwork and assist in new hire orientation; process personnel status reports (regarding new hires, promotions, transfers, salary adjustments, separations, and other employee actions). Additionally, the uni-

versity technical recruiter administers the Intern, Co-op, and Leadership Development Programs; and the HR generalist/analyst assists in grievance resolution; conducts research on personnel issues (including EEO and affirmative action goals) and makes appropriate recommendations; and acts as a liaison with consulting firms.

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, professional, or outside sales capacity, as those terms are defined in Regulations, 29 CFR Part 541, copy enclosed. An employee may qualify for exemption if all pertinent tests relating to duties, responsibilities and salary, as discussed in the appropriate sections of the regulations, are met. Although your letter does not contain sufficient information for us to make a definite determination concerning the application of section 541.2 to the employment in question, the

APPENDIX L

FILED
KING COUNTY, WASHINGTON

MAR 31 2009

SUPERIOR COURT CLERK
THERESA GRAHAM
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

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RANDY ANFINSON, JAMES GEIGER and
STEVEN HARDIE, individually and on behalf
of others similarly situated,

No. 04-2-39981-5SEA

Plaintiffs,

v.

JURY VERDICT

FEDEX GROUND PACKAGE SYSTEM,
INC., et al.,

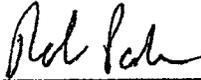
Defendants.

We, the jury, find that during the class period, December 21, 2001 to December 31, 2005,
the class members were (check one):

Independent Contractors

Employees

DATE: MAR 31, 2009



Presiding Juror

NO. 635182

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

RANDY ANFINSON, JAMES GEIGER and STEVEN HARDIE,
individually and on behalf of others similarly situated,

Appellant/Plaintiff,

v.

FEDEX GROUND PACKAGE SYSTEM, INC.,

Respondent/Defendant.

Appeal from the Superior Court of Washington
for King County
(Cause No. 04-2-39981-5-SEA)

**DECLARATION OF SERVICE OF
BRIEF OF APPELLANTS; AND
APPENDIX TO BRIEF OF APPELLANTS**

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DECLARATION OF SERVICE

I, Sheila Cronan, a resident of the County of Kitsap, declare under penalty of perjury under the laws of the State of Washington that on September 24, 2009, I caused to be delivered in the manner set forth below a true and correct copy of BRIEF OF APPELLANTS, APPENDIX TO BRIEF OF APPELLANTS, and this DECLARATION OF SERVICE on the following counsel of record:

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DATED at Seattle, Washington this 24th day of September, 2009.


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