

# Partisanship vs. Precedent in U.S. Labor Law

Analyzing the National Labor Relations Board (NLRB)'s Recent Dissension over the "Entrepreneurial Opportunity" Standard in Employee vs. Independent Contractor Classification Cases



Andy Feng  
Faculty Advisor: Dr. Joseph McCartin, Ph.D., Professor of History  
Georgetown University

GEORGETOWN UNIVERSITY  
Center for Research & Fellowships

## 1. Introduction

American labor law is adapting to the explosion of the online "platform economy" and the economic dominance of associated companies such as Uber, Lyft, Instacart, DoorDash. Given this context, worker classification, a historically contentious issue, is highly salient both legally and politically. The National Labor Relations Board, the United States' main arbiter on labor-management disputes and a fundamentally political body composed of presidential appointees, is now irrevocably polarized on the issue.

To determine the strength of precedent for recent landmark NLRB decisions, I traced the arc from *United Insurance* (1968) and the initial application of the Restatement (Second) of Agency (1958) in the Democratic worker classification regime, to the rise of the "entrepreneurial opportunity" (EO) concept in *FedEx Home Delivery v. NLRB*

This project treats the employee vs. independent contractor (IC) debate within the NLRB as a microcosm of politics and labor law at-large. Ultimately, my study reveals the work of pro-business interests within American courts and agencies while also highlighting countervailing strategies of resistance employed by organized labor groups.

## 2. Methodology

In accordance with the legal nature of this research project, I analyzed the following types of primary source documents: (1) NLRB rulings, found on nlr.gov and CiteNet, their proprietary legal research and case classification database; (2) the Restatements of the Law (Second); (3) Federal, U.S. and state Supreme Court decisions, incl. *FedEx I* (D.C. Cir), *United Insurance* (U.S.), for NLRB and various court decisions, e.g. AFL-CIO, U.S. Chamber of Commerce; (5) The National Labor Relations Act (1935) and Fair Labor Standards Act (1938).

To analyze the partisan and ideological context behind the NLRB members' rulings, I reviewed C-SPAN coverage of each member's Senate confirmation hearings as well as their pre- and post-NLRB writings and opinions, in both private practice and legal journals.

## The Misclassification Problem

**10% to 30%**  
of employers (or more)  
misclassify their employees as  
independent contractors.

National Employment Law Project, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries, (Oct. 2020), <https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020>.

## Recent NLRB Worker Classification Decisions and Corresponding Judges' Political Affiliations

The Atlanta Opera, Inc., 372 NLRB No. 95 (2023)  
Biden-era NLRB — 3-1 for IATSE Local 798



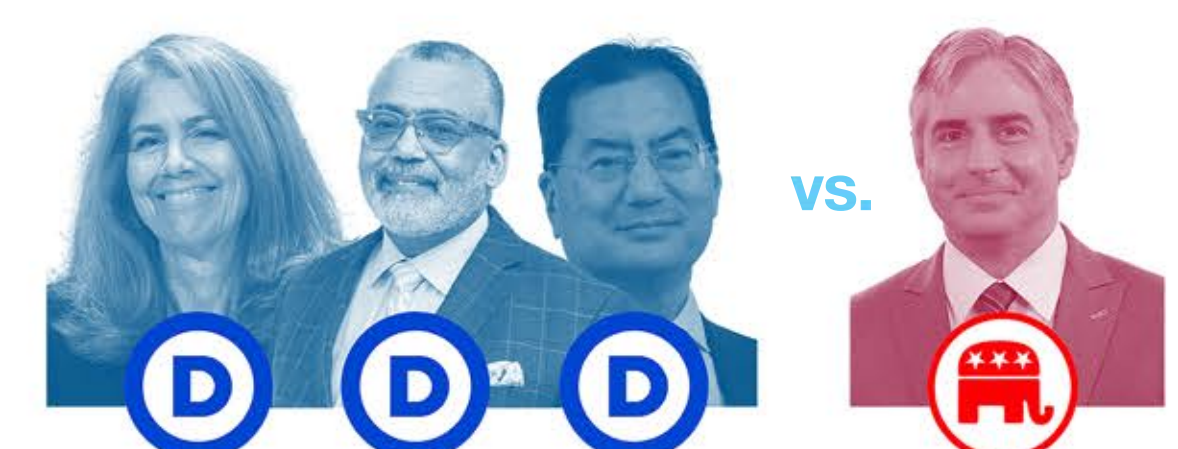
Overruled SuperShuttle (2019), strengthened FedEx II precedent, favored employees, harder to prove independent contractor status.

SuperShuttle DFW, Inc, 367 NLRB No. 75 (2019)  
Trump-era NLRB — 1-3 against ATU Local 1338



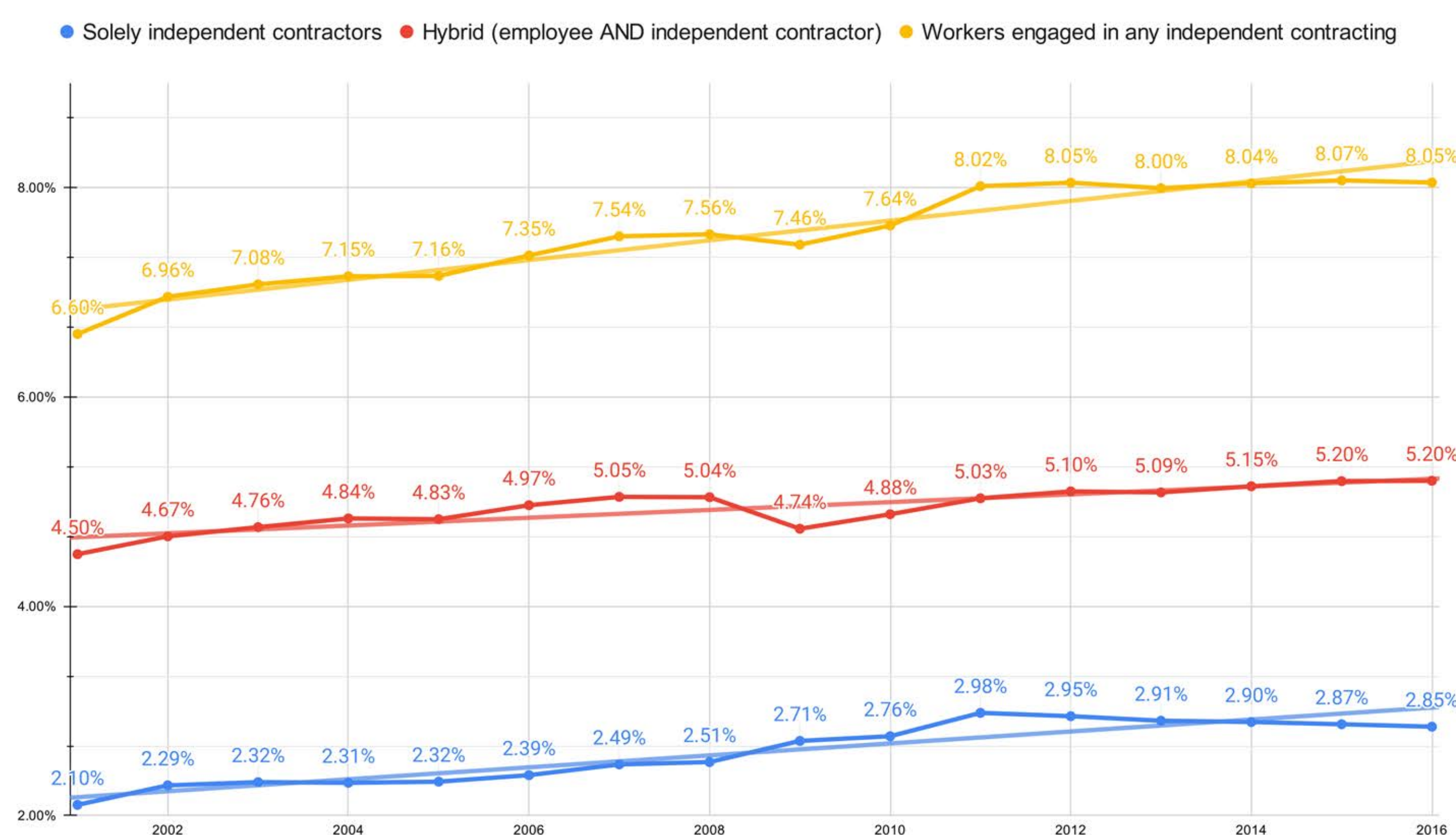
Overruled FedEx II (2014), emphasized 'entrepreneurial opportunity' principle, favored employers, easier to prove independent contractor status.

FedEx Home Delivery, 361 NLRB 610 ["FedEx II"] (2014)  
Obama-era NLRB — 3-1 for Teamsters Local 671



Overruled FedEx I (2008) (D.C. Cir), reaffirmed NLRB vs. United Insurance (1968) (SCOTUS), de-emphasized 'entrepreneurial opportunity' factor.

## The Rise of Contracted Labor (2005 - 2016)



Katherine Lim et al., "Independent Contractors in the US: New Trends from 15 Years of Administrative Tax Data," Internal Revenue Service Statistics of Income Working Papers, 2019, <https://www.irs.gov/pub/irs-soi/19rindcontractorinus.pdf>.

## 4. Conclusion

The question now is whether *Atlanta Opera*, the third iteration of landmark NLRB worker classification litigation, can withstand judicial review within the D.C. Circuit. Corporate interests are expected to launch litigation in the Court once a pro-business bench is installed by a future Republican president.

On the Republican side, NLRB Member David M. Prouty, the lone dissenter in *Atlanta Opera*, centered his dissent on the weakness of the current Democrat-implemented regime in the face of scrutiny by a future composition of the D.C. Circuit or a future Republican NLRB.

My legal judgment on the future of worker classification is informed by not only the research outlined here. California and New York are implementing legislature and advancing state Supreme Court cases (e.g. AB5, *Dynamex*, and their reliance on the ABC Test in California) that may create a base of precedent favoring a multifactor analysis over the pro-employer, weakly-supported EO principle.

Further research must be done to predict whether the D.C. Circuit will enshrine *Atlanta Opera's* holding into its own base of precedent and refuse to overturn the case entirely, relitigating the worker classification issue for the fourth time in two decades. In doing so, the Court will prioritize the stable establishment of long-term boundaries for the gig economy. However, it will have to buck the destabilizing trend—seen in the highlighted NLRB cases—of prioritizing partisan interests over binding precedent. Given the legal soundness of the *Atlanta Opera* case, which incorporates entrepreneurial opportunity but neutralizes it by developing a strong 'employer constraint' argument, the D.C. Circuit may soon provide clear and undisputed resolution on the legal worker classification debate.

## 3. Discussion

Modern worker classification cases revolve around the common-law standard in Restatement (Second) of Agency (1958), which dictates that businesses must engage in holistic IC classification determinations using ten nonexclusive factors such as (a) "extent of control," (b) the distinctness of the worker's business, and (h) similarity in the worker's and the employer's business function. The recent arc of the NLRB's worker classification jurisprudence turns on the shifting partisan implementation of the phrase "entrepreneurial opportunity" (EO) in three landmark Board cases: *FedEx Home Delivery* or "*FedEx II*" (2014), *SuperShuttle* (2019) and "*FedEx I*" (2008), was intended to be a prism through which the NLRB should analyze the Restatement factors and in turn favor rulings benefitting IC classification.

A Democrat-controlled NLRB overruled *FedEx I* in *FedEx II* (2014), instead returning to a classification regime laid out by binding precedent of the 1978 SCOTUS case *NLRB vs. United Insurance*. The Board's 2014 holding demoted EO into a subfactor of analysis in their favored common-law Restatement test. A Trump-era Republican NLRB reversed *FedEx II* in *SuperShuttle* (2019), reverting to *FedEx I* and awarding the EO principle primacy over the multifactor common-law test. Two clashing currents of jurisprudence appear in *SuperShuttle*, between the Democratic "pervasive employer control" analysis and the Republican EO regime.

In *Atlanta Opera* (2023), a Democratic NLRB again reversed course and overruled *SuperShuttle* (2019), strongly refuting the existence of the entrepreneurial opportunity concept in binding precedents such as the Restatement test and *United Insurance* (1978). The Biden-era NLRB additionally weakened the EO standard by emphasizing employer constraints on 'actual' entrepreneurial opportunity (compared to 'theoretical' EO). The Board ruled in turn that "*SuperShuttle* cannot be reconciled with the mainstream of Board law, the common law, or Supreme Court precedent."

## 5. Acknowledgments

I would like to thank both Dr. Joseph McCartin, for enabling me to conduct this research, and Joel Berger, for your continued guidance throughout this project. Additionally, thank you to the Georgetown Center for Research and Fellowships and Colleen Dougherty for your unyielding support for myself and Georgetown's entire Laidlaw cohort.

## 6. References

- Cc Eastern, Inc. v. NLRB, 60 F. 3d 855 (Court of Appeals, Dist. of Columbia Circuit 1995).
- Corporate Exp. Delivery Systems v. Nlr, 292 F. 3d 777 (Court of Appeals, Dist. of Columbia Circuit 2002).
- FedEx Home Delivery, 361 NLRB No. 055 (2014).
- FedEx Home Delivery v. NLRB, 563 F. 3d 492 (Court of Appeals, Dist. of Columbia Circuit 2008).
- North American Van Lines, Inc. v. NLRB, 869 F. 2d 596 (Court of Appeals, Dist. of Columbia Circuit 1989).
- Nlr v. United Ins. Co. of America, 390 US 254 (Supreme Court 1968).
- Roadway Package System, Inc. 326 NLRB 842 (1998).
- SuperShuttle DFW, Inc., 367 NLRB No. 75 (2019).
- The Atlanta Opera, Inc., 372 NLRB No. 95 (2023).
- SG Borello & Sons v. Department of Industrial Rel., 769 P. 2d 399 (Supreme Court 1989).