



FlexBulletin #100: Kindergarten Sharing Lesson Delivered to Fed Ex

June 17, 2015

Happy Anniversary to FlexBulletin #100

We launched the **FlexBulletin** in the depths of the Great Recession with "FlexBulletin #1 - September 23, 2008 - [Compressed Workweeks Can Work For You.](#)" Our goal for this letter was, and continues to be, nuanced advocacy of mutually beneficial forms of flexible scheduling and staffing. Above all we champion equitable flexibility, different ways of working that are animated by fairness and effectiveness. As the economy continues its very slow recovery, and flexibility re-emerges in new forms and with renewed vigor, we look forward to bringing you the next hundred issues with this unique focus.

For this landmark hundredth issue, we turn our lens on recent developments in the realm of independent contracting. Last week FedEx announced a [\\$228 million settlement](#) following a San Francisco Court of Appeals ruling that it had wrongly classified thousands of employees as independent contractors and denied them vital benefits and protections provided to regular employees. Such periodic judgments have occurred as long as employers have used contractors. What made this one stand out is: 1) its sheer size and 2) its potential impact on the so-called sharing economy.

On size: The amount of the settlement with 2300 current and former drivers equals the total dollars collected by the US Labor Department in back pay and other wage enforcement nationally for the last seven years. **On impact:** The explosive start-ups of the sharing economy rely upon hundreds of thousands of contractors for their workforces. Their leaders and lawyers have been watching this case very closely for precedent. At issue for industry legends like Uber and its legions of drivers is the question of flexibility for whom and at what cost.

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The upsurge in contracting and the question of equity

"Contractors in professional or technical areas...can command higher compensation than they would as employees. Contracting out, however, can also be exploitative... In effect, [contractors] perform as employees, but receive less compensation because they have no benefits protection."

--Kathleen Christensen, *Flexible Staffing and Scheduling in U.S. Corporations* (1989)

While independent contracting is a longstanding business practice, its use became more systematic in the 1980s and was dubbed "core-ring" or "contingent" work. A popular model envisioned a more secure, fully compensated employee core surrounded by a ring of less expensive contractors who could be disposed of in a downturn. Like the best of battle plans, this theory did not survive so well in its first encounter with the recession/enemy: terminating the inhabitants of the less costly ring did not produce the same savings as cutting the pricier folks in the core. So in many cases the core ended up protecting the ring.

Nonetheless, significant use of contractors continued. Issues of equity and fairness were raised and continue to challenge the practice. Ironically, Kathy Christensen and I worked together on this issue with New Ways to Work's EquiFlex Project in the late 1980s and now find ourselves - twenty-five years later - working on the Bay Area Collaboration@Work project in a national hotbed of contractor workforces. Of course, this national issue affects others such as FedEx in Memphis and Microsoft in Seattle.

What we learned in kindergarten - and from the IRS

As Kathy captured so well in her study and the quote above, "contracting" can be designed as a legal, flexible and fair way of working - mutually beneficial to employer and contractor. Or it can be driven by a strategy of staffing an enterprise at the lowest possible cost - with real or perceived unfairness at its core.

While the famous "[IRS 20-question test](#)" to determine independent contractor status has its share of wiggle room, there is an even greater range of design space within contracting itself. There is a slowly growing army emerging between the two poles of voluntary, well-paid specialists enjoying great flexibility and low-paid, regimented laborers without benefits.

The IRS gives guidance on status, but not on fair treatment and compensation. For that we might have to fall back on a widely shared ethical text - say, "[All I Really Need To Know I Learned In Kindergarten](#)". In this age of growing concern about income inequality and great places to work, Robert Fulghum's iconic guide suggests some simple design principles.

Most of what I really need
To know about how to live
And what to do and how to be
I learned in kindergarten.
Wisdom was not at the top
Of the graduate school mountain,
But there in the sand pile at Sunday school.

These are the things I learned:

Share everything.
Play fair.
Don't hit people.
Put things back where you found them.
Clean up your own mess.
Don't take things that aren't yours.
Say you're sorry when you hurt somebody

What lessons did business leaders and Appeals Court justices take away from kindergarten?

It is likely that FedEx's leaders and the judges, like you and I, learned similar lessons and tried to apply them as needed to questions of contracting, of flexible scheduling and staffing. Interestingly, FedEx's settlement covered its practices with its ground shipment drivers in the years 2000-07. The company says it stopped its questionable practices in 2007 and since then has treated its drivers as employees - just as its major competitor UPS did all along.

Just as there are no bright lines for deciding who is an employee and who is a contractor, the kindergarten principles of "share everything," "play fair" and "don't take things that aren't yours" are open to interpretation. They factor into the ethics of business decision-making. The years ahead will be marked by noticeable growth in contracting that is near or over the line. Business leaders, judges and contractors will all have their say. And this FedEx case is one of several worth paying attention to and learning from.

There's more than one way to close a gap

In just the first half of 2015, contractor events have occurred around the country. They include:

- **Memphis** - Powerful, well-resourced FedEx is successfully sued and settles.
- **Silicon Valley** - Google avoids a contract bus driver walkout by offering a 20% raise hike
- **Seattle** - Thousands of Microsoft contractors organize and secure paid leave as step 1
- **San Francisco** - Uber and Lyft go to trial on a misclassification lawsuit in August

As these and similar conflicts unfold in the period ahead, they will shed light on a simple proposition: flexible staffing and flexible scheduling can deliver positive results for employers and employees. It all comes down to a matter of mutual respect and the design of the arrangements.

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***We welcome your comments on this Bulletin. When you write, please email me at:
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