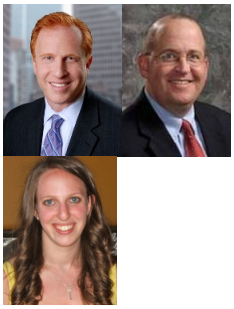

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The Independent Contractor Driver – An Endangered Species?

Courts and administrative agencies are increasingly scrutinizing whether workers are employees or independent contractors, holding on occasion that an employment relationship exists, even when both parties intend to create and maintain an independent contractor relationship. In the trucking industry, drivers fall into one of two categories: (1) employee of an authorized motor carrier; or (2) independent contractor ("IC"), under contract with an authorized motor carrier. The distinction between employees and IC drivers is becoming increasingly blurred by courts, administrative agencies and federal and state tribunals, despite the clear intent of both the trucking company and the IC driver to define the relationship as an independent contractor, and not an employment, relationship.

How a driver is classified has significant implications under federal, state, and local laws. For example, trucking companies are not required to pay unemployment insurance taxes or workers' compensation premiums, and do not make Social Security or Medicare contributions on behalf of IC drivers. Additionally, applicability of federal labor and employment laws, and imposition of vicarious liability for a driver's tortious acts will hinge on the question of whether the driver is an independent contractor or an employee.

There is no single test for determining drivers' IC or employee status. Different state and federal laws often focus on different aspects of the independent contractor relationship. Consequently, courts and administrative agencies have long been divided on the issue of driver classification.

The Control Test

Although the U.S. Supreme Court has counseled that "there is no shorthand formula or magic phrase" that can be applied in determining the classification of workers,[1] the degree of control that a company exerts over the worker is an important factor in the adjudication of employee-IC classification disputes.[2] Among the factors that courts have looked at when applying a "control test" are the amount of supervision exercised by the company, the company's right to direct the work, the company's right to control the details and means by which the end result of the work is accomplished[3] and the entrepreneurial interests of the worker.

[1] N.L.R.B. v. United Insurance Co., 390 U.S. 254, 258 (1968).
[2] N.L.R.B. v. Deaton, Inc., 502 F.2d 1221, 1223 (1974).
[3] ***Id.***

Consequences of Worker Misclassification

It has become increasingly important for companies to properly classify workers as independent contractors or employees. In the last several years, there has been a wave of agency investigations and court rulings, as well as potential class action litigation, arising out of the misclassification of workers as independent contractors, resulting in assessments of unpaid taxes, penalties and interest for workers found to be improperly classified as independent contractors. In New York, an inter-agency Joint Enforcement Task Force on Employee Misclassification was created in 2007 and has been active in investigating and prosecuting companies that misclassify workers. In 2010, the Task Force identified over 18,500 instances of worker misclassification, discovered over $314 million in unreported wages, assessed over $10.5 million in unemployment taxes, over $2 million in unpaid wages and over $800,000 in workers' compensation fines and penalties.[4] Other states, including Maine, Michigan, Massachusetts and Iowa, have created task forces to investigate employee misclassification. In Connecticut, a state law was amended to increase the civil penalty imposed on companies who improperly classify their workers as independent contractors to an amount up to $1000 *per day.* In light of such initiatives, it is not surprising that courts and agencies may view facts less objectively than they would in the absence of such initiatives and programs.

Similar efforts to prevent and penalize worker misclassification have been made on the federal level. In 2010, both the Employee Misclassification Prevention Act and the Fair Playing Field Act were introduced before Congress. The former aimed to amend the Fair Labor Standards Act to impose a penalty on companies who misclassify workers as non-employees. The latter bill would prevent businesses from being able to classify workers as independent contractors as long as there is a "legal basis" for the classification, and the business has consistently treated such workers as independent contractors. The current trend toward penalizing employee misclassification would suggest that one or both of these bills could be reintroduced in future Congressional sessions. Because different jurisdictions often apply different independent contractor tests, federal legislation in certain industries, such as the trucking industry, may be a sensible approach.

The Interplay of Trucking Regulations

The trucking industry is one of the most heavily regulated industries in the country. In order to maintain its permit to operate, a motor carrier must comply with numerous statutes and regulations meant to ensure the safety of the public. If one wishes to haul freight in the United States, he or she cannot simply purchase or lease a truck, obtain customers and proceed to carry goods over the nation's highways. Cargo can only be transported in interstate commerce by an authorized motor carrier under permit from the Department of Transportation.

[4] http://www.labor.ny.gov/ui/PDFs/2011%202011%20Misclassification%20Report%20to%20the%20Governor%20(4)%20(2).pdf

Pursuant to statute and regulation, a carrier is required to maintain a measure of direction and control over its vehicles and drivers for the purpose of protecting public safety. The Federal Motor Carrier Safety Regulations ("FMCSR") adopted by the Department of Transportation include comprehensive and detailed requirements for operational issues, such as: driver qualifications; driver training; hours of service; inspection, repair and maintenance of vehicles; parts and accessory specifications; drug and alcohol testing; transportation of hazardous materials; record keeping; minimum financial responsibility requirements; safety and fitness procedures; and inspection, enforcement and audit procedures; among other things. Interestingly, the motor carrier is required to ensure driver compliance with the regulations, for both employee drivers and independent contractors. At the same time, the regulations direct that the motor carrier's control over independent contractors that is required by regulation is not to be taken into consideration in challenging the driver's independent contractor status.

Generally, a CDL-licensed driver can choose to either be an employee-driver of an authorized motor carrier, or an independent contractor driver. If he or she chooses to operate as a contractor, the driver enters into a contract with an authorized motor carrier. The items that must be included in such an independent contractor agreement are also highly regulated, with the regulations specifying numerous points that must be addressed in the IC agreement. An IC driver accepts both the upside potential of being an owner, including increased earnings, control over how he performs his job (other than with respect to the regulated elements), and when he chooses to work, as well as the downside risks inherent in business ownership. An employee driver, on the other hand, is usually subject to control by his employer over how and when he performs his work, among other things.

Because federal regulations require such a high degree of control on the part of the motor carrier, the question that arises is whether a driver can ever properly be classified as an independent contractor by application of the control test. This issue has come up in several labor and employment law decisions. Where the company did not require more of drivers than the regulations required, courts have generally held that the controls exercised by the motor carrier over IC drivers did not justify classification of the driver as an employee. In *National Labor Relations Board v. Associate Diamond Cabs, Inc.,* the court held that a cab company's requirement that cab drivers keep trip sheets was not "indicative of control" by the employer because it was a requirement imposed not by the employer, but by city code.[5] More specific to the trucking industry, in *Penn v. Virginia Int'l Terminals, Inc.*, the court held that an agreement that designated a truck driver as an independent contractor met all of the standards of the "highly regulated" trucking industry but none of the indicia of control exercised by the trucking company justified a conclusion that the driver was an employee.[6]

[5] National Labor Relations Board v. Associate Diamond Cabs, Inc., 702 F.2d 912 (1983).
[6] Penn v. Virginia Int'l Terminals, Inc., 819 F.Supp. 514 (1993).

A trucking company can run into classification problems when it imposes significant additional controls over its drivers in excess of federal, state and local regulations. In *National Labor Relations Board v. Deaton*, the Fifth Circuit recognized that in interstate truck line cases, the regulations imposed by the Interstate Commerce Commission and the Department of Transportation added an "additional wrinkle" to the control test.[1] However, the court found it unnecessary to decide whether ICC-mandated controls alone would be sufficient to establish employee status due to the existence of "additional controls" voluntarily reserved by the defendant trucking company. For example, Deaton made more thorough inquiries of its drivers than required by federal regulations and exercised significant control over the manner and means by which the drivers performed their work. Based on the company's exercise of these additional controls, the court found the drivers to be employees rather than independent contractors.

Maintaining a Satisfactory Safety Rating

Trucking companies are faced with the risk of misclassification and the accusation of exercising control over the manner and means of the work when they undertake efforts to implement safety controls that help drivers operate safer. Trucking companies must maintain a satisfactory safety rating to stay in business. To do so, they must follow the Safety Fitness Procedures mandated by 49 CFR § 385, which provides that a "satisfactory safety rating means that a motor carrier has in place and functioning adequate safety management controls to meet the safety fitness standard prescribed in Section 385.5." The federal regulations do not mandate the specific details of a motor carrier's safety policies, but instead lay out a list of factors that the Department of Transportation considers in determining a safety rating, including the adequacy of safety management controls, the frequency and severity of regulatory violations, the frequency of accidents, hazardous material incidents, accident rate per million miles, and the number and severity of violations of state safety rules, regulations, standards and orders.

A trucking company has an overall federally-mandated responsibility for the safe operation of vehicles in its fleet, whether these vehicles are leased under independent contractor agreements, or are company-owned and driven by an employee-driver. Given the broad language of the mandated Safety Fitness Procedures and the grave importance of safety management controls in the trucking industry, fact-finders should not view a company's safety requirements as indicia of supervision, direction or control over drivers.

[7] N.L.R.B. v. Deaton, Inc., 502 F.2d 1221, 1223 (1974).

Recommendations for the trucking industry

Existing case law indicates that compliance with governmental regulations does not evidence control by a motor carrier. Compliance with the regulations and federally-mandated control over an IC driver is not sufficient to lead a court or administrative tribunal to misclassify a driver as a company employee. Notwithstanding, trucking companies should be aware that the employee-independent contractor distinction often involves a multi-factor analysis and is ultimately fact-intensive. Trucking companies must remain vigilant to changes in applicable federal, state and local regulations in order to ensure that they are not subjecting workers to any significant controls beyond those required by law. Where a certain control is exercised over workers in the interest of safety and is necessitated by compliance with the regulations and Safety Fitness Procedures, the broad language of the federal regulations and society's interest in promoting safety in the transportation industry should not be used to abrogate the clear intent of the company and driver to define an independent contractor relationship.

Both trucking companies and drivers can benefit from independent contractor status. Indeed, independent contractor status provides opportunities for many individuals to develop their own career and business – opportunities that do not exist for employees. However, the heightened scrutiny that is being applied to driver misclassification on both the state and federal levels highlights the fact that an adverse classification ruling can be costly to a trucking company. Courts and administrative agencies should, especially because of recent trends to implement initiatives regarding this issue, make concerted efforts to view facts objectively understand the impact of the federal motor carrier regulations on the independent contractor analysis.

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