

INDEPENDENT CONTRACTOR ISSUES IN THE TRUCKING INDUSTRY

By Mike Jonson
Jonson & Jonson, P.S.
September, 2010

1. WA Unemployment Compensation

The news on this subject continues to develop. Washington State Employment Security has issued assessments that reclassify Owner- Operators (OO's) to employee status without a traditional audit. This may be a reflection of a beginning trend towards "Virtual Audits" discussed below, or an agency change in its interpretation of law on what constitutes an independent contractor.

Either way, truckers using OO's should be prepared for an audit notice or other communication from Employment Security questioning the status of OO's.

2. Virtual Audits

There appears to be at least the beginnings of a national trend at the state level to do what are called "Virtual Audits" (VA's) which have been loosely defined as paperless, electronic audits that are conducted without face to face interaction between government and industry. These are essentially audits of electronic documents (ED's). The ED's could be returns or reports filed in the normal course or those in response to an audit notice and request for documents.

VA's could have some advantages for businesses. They avoid the time and expense of an on-site audit. They also could mean less digging by auditor's to create new issues. However, in our experience the tendency of auditors when they discover issues where they are not sure what the result should be is to issue an assessment and let the business defend itself. In a VA the auditor will not have at hand access to the businesses files and records, such as agreements or other documents that establish such things as independent contract status. Auditors may thus be more inclined to just issue the assessment and see what happens.

We think this trend will mean a greater agency focus on electronically filed documents, like monthly returns and reports, to develop audit targets. It may also mean a trend towards centralizing agency treatment of audit issues and applying new audit theories across the board to like groups of businesses. In addition, it may result in an increase in the number of firms audited and requests for ED's.

3. Proposed Federal Laws re Independent Contractors

Several proposed laws have been introduced in Congress to restrict the use of OO's. These laws are characterized as efforts eliminate the "misclassification" of independent contracts, but the actual affect if passed would be to make independent contractor status more difficult to attain.

Here are two examples:

Employee Misclassification Prevention Act, or S. 3254

4. Port of Los Angeles

In 2008 the Port of Los Angeles (POLA) passed a requirement that all drayage trucks entering the Port be registered under a "Concession Agreement" ("CA") with the Port. The CA's had various requirements, including a requirement that drivers be employed by the carrier signing the CA, thus eliminating the use of OO's at POLA.

The ATA sued POLA asserting primarily that some provisions of the CA's, including the employed driver provision, were preempted by federal law. There have been several court decisions in this case. In the latest one (ATA v. City of Los Angeles, US Dist Ct., Central Dist of CA; Case No. CV-08-4920 CAS (RZx) the Federal District Court in the Central District of California upheld the requirement for drivers to be employees because the Port was acting in a "proprietary" capacity. One of the exceptions to the preemption doctrine is where the government entity is procuring goods and services for itself (i.e. acting in a proprietary capacity) rather than regulating. Please contact me if you would like a copy of this decision.

The Port of Seattle does not have a requirement for drivers to be employed by carriers accessing port property. However, it could adopt such a requirement if the Port of Los Angeles is ultimately successful on this issue.

Here is a link to a recent update on this decision:

<http://www.labusinessjournal.com/news/2010/sep/06/port-drivers-will-keep-truckin/>

As the above article notes, the Port of Long Beach has not adopted the requirement that drivers be employed to enter port property. It will be interesting to watch the competition between the two ports as this litigation plays out.

Here is another link to a website with news on this subject:

http://www.cunninghamreport.com/news_item.php?id=1349

5. Fedex Litigation

There has been much litigation against FedEx by FedEx contract drivers attempting to establish an employment relationship with FedEx. This website chronicles some of the litigation: <http://fedexdriverslawsuit.com/>. An employment relationship brings many benefits—collective bargaining, Social Security contribution, Workman's Compensation and Unemployment coverage, claims for wrongful discharge, discrimination claims, overtime, et.—so there is much to be gained by establishing an employment relationship, particularly for a large group of drivers.

According to this website the most recent court decision favoring FedEx decided the case based on the issue of control, holding that "suggestions and best practices" but does not dictate delivery requirements." The driver's attorney commented that

"The drivers know that what FedEx may call a "suggestion" is, in reality a mandate, because not following it leads to termination.

This raises a crucial point for future planning. The appearance of independence is not enough. Even though FedEx won at this stage, if actual practices included controlling drivers, there is risk that the drivers could be found to be employees.

6. Joint Employment

A developing concept in employment law is "joint employment" or the assertion that more than one employer has employment responsibility for an employee. This concept has been the basis for overtime and wrongful termination claims. In a Washington federal court case in 2005, *Tumulty v. FedEx Ground Package System, Inc.* (2005 U.S. Dist. LEXIS 26215 (W.D. Wash. March 7, 2005)), FedEx was determined to have the right to hire and fire the drivers of an independent contractor delivering packages. FedEx also tracked their performance held weekly meetings, check uniforms, assigned extra work, kept records on the drivers and required them to contact FedEx managers if they could not deliver packages. The drivers also relied heavily on FedEx terminals to perform their work.

This potential issue needs to be considered in any effort by a carrier to increase protections against claims that independent contractors are in fact employees.

7. What Can Be Done To Prepare

The above are just a few of the efforts by some to restrict the use of independent contractors. Some of these efforts may find success and some may fail. Nonetheless, it makes sense to be prepared for challenges to the independent contractor status of your OO's and to take steps to strengthen this status.

Characteristics of Operators

1. Contract only with ***incorporated*** OO's (Driver LLC's). Without question this is easier said than done, and it does not provide a perfect defense, particularly if the carrier continues to control the driver. However, it is an important first step in establishing a separate business entity. It also means the new incorporated business must address the formalities of accounts with the DOR, L&I, and Employment Security (ESD) and an Employer number with the IRS.

2. Require OO's to show compliance with state tax, unemployment and workman's compensation requirements. This helps in two ways. First, it helps to prove the OO is an independent business. Second, if ESD premiums, for example, are paid, there is little incentive for an audit by ESD.

Compliance with these requirements does not, however, create a perfect defense for the carrier, and there are questions. Corporations for example can elect non-reporting status with the DOR and elect out of L&I and ESD coverage for owners and officers. Carriers, on the other hand, might require proof of active reporting status with the DOR and proof the L&I and ESD premiums are paid.

3. Require OO's to work for other carriers. This may not be practical in some cases because insurance some carriers provide to OO's prevent OO's from working for other carriers. However, working for multiple customers is a key factor in determining independent contractor status. Perhaps insurance carriers will recognize this and respond to the need for OO's to work for others.

4. Contract with OO's who have multiple employed drivers. We have seen cases where an OO has one or several employed drivers. In these cases, the OO should be filing tax returns and reports with the DOR, L&I and ESD. Perhaps some progress in this area can be made using incentive pricing, i.e. the OO that hauls more freight gets a better rate.

Control Issues

From what we have seen and read in court decisions, controlling OO's the same way employed drivers are controlled may be the most significant and difficult issue facing carriers in this area of the law. We have seen ESD assert that OO's are employees because they are dispatched like employed drivers.

Some ideas to reduce control are:

- a. Use some means other than traditional dispatching to assign loads. If there is any kind of electronic bulletin board in use, it would be worth looking at. Anything that reduces the carrier's control over the driver's time is probably worth looking at. Presently, some intermodal carriers give OO's minimal information about their next assignment and a level of control over the OO is exercised by the terminal operator when the OO enters the yard. Things like this could help.
- b. Allow an incorporated OO with several drivers to dispatch its own drivers.
- c. Work to develop insurance programs for OO's that are not provided by the carrier.
- d. Reduce the level of transactions between the OO and carrier. Selling fuel, repairs, advances, etc. are all incidences of integration between the OO and carrier, and make it more difficult to assert the OO is independent.

If you are interested in learning more about this subject, please contact Mike Jonson at mike@jonson-jonson.com

This is intended to be a source of information for educational purposes. It is not intended for use as legal advice or to address any specific situation and does not create an attorney-client relationship with any of our readers. It should not be used without consulting your legal advisor. Please note that case law, statutes and rules may have changed since the date this article was written. If you would like more information regarding this subject or to inquire whether we may assist you in any particular matter, please contact one of our lawyers using care not to provide us any confidential information until we have agreed in writing to represent you.