



Photo courtesy of Port of Los Angeles

Independent Contractor Status Could Be Strengthened by Recent Developments

Recent changes in the political, judicial and legislative arenas could strengthen the stance of independent contractor status for companies and workers who have been battling persistent efforts to disrupt that productive relationship, industry experts believe.

Developments such as the election of President Trump, a Circuit Court of Appeals case and renewed congressional attention to worker status legislation were cited as reasons for impending changes during interviews with *Intermodal Insights* by three attorneys who specialize in transport worker status cases.

The issue of whether to classify workers as independent contractors or employees has been in sharp focus for a number of years. High-profile court battles have raged involving both Uber and FedEx Corp.'s Ground unit. FedEx has changed its independent contractor relationship model and settled cases. At the same time, intermodal trucking has been a target at the state level, particularly in California, where state agencies have ruled against motor carriers and the Teamsters have won a handful of elections to sign up workers as union employees.

"In the last year or two, the trend in many areas of the country has been to find that workers are employees," said attorney Greg Feary from Scopelitis, Garvin, Light, Hanson & Feary. "Over the last two months, not all tied to the election of President Trump,

things seem to be trending a little in the other direction."

Favorable Ninth Circuit Ruling

Feary specifically cited a late March Ninth U.S. Circuit Court of Appeals decision as a favorable indicator for trucking and intermodal. That Circuit, which often has ruled against companies in worker status cases, found that Ivan Iontchev and other taxicab workers in Arizona were independent contractors under the Fair Labor Standards Act and state wage and hour laws.

Feary indicated that the decision citing those drivers were "in business for themselves when they leased their taxicabs" should be helpful for trucking and intermodal because the relationships between companies and workers is analogous, and because the



Feary

ruling was based in part on factors relating to economics.

No decisions relating to labor law had been issued by mid-May, when *Intermodal Insights* went to press. No immediate agency rulings are expected, said Feary, who believes it will be late in 2017 before any Department of Labor regulatory actions are taken.

"I'm hoping for a better environment," said Mark Hunt, a trucking attorney at King & Ballow, while cautioning that "it may take a while because a ship as big as the federal government takes time to turn around".

Hunt said he believes the Trump administration will change policies, so that there are fewer attacks on the independent contractor relationships. He also said the president's directive to get rid of two regulations for every new one that is put in place will help.

"I don't know that the Trump administration is going to be the first wave of any meaningful relief," said Rich Plewacki, a transportation attorney at Benesch, Friedlander, Coplan & Aronoff. "Proposed legislation that industry organizations are pressing hard for passage in Congress very soon will be the impetus that starts tipping the



Hunt



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scale toward a more favorable industry environment as it relates to worker classification."

Rep. Jeff Denham (R-Calif.) has championed that legislation, which would block states from imposing labor laws or regulations on motor carriers whose workers are subject to federal Department of Transportation hours of service rules.

'Quagmire'

Hunt said he believes proposed legislative efforts on this issue, such as Denham's, "don't have a lot of legs. These cases already are a confusing environment, and I'm not sure Congress would actually like to step into that quagmire."

Trump's election also should lead to a new stance on worker classification at the Department of Labor, all three attorneys said.

Pro-labor rulings during President Obama's administration will be targeted, Feary noted. Those rulings were designed to find that workers were employees, rather than contractors, he added, making it possible to conduct collective bargaining.

Also on the legislative and regulatory front, American Trucking Associations is stepping up its attention to preserving the contractor model, said Jeff Lang, CEO of drayage operator Eagle Group and chairman of a newly formed ATA policy committee to address that issue.

"The committee's goal will be to protect the independent contractor model that has come under attack, especially at the state level," Lang said. "That model works very well in the intermodal space. It allows motor carriers such as ourselves to gear up and down for capacity changes."

While there is uncertainty when and how congressional and

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new Department of Labor leadership will act, there still are some other prominent cases that are being watched closely.

One case challenges an Obama administration Labor Department determination that people who work for multiple employers can be organized for the purpose of collective bargaining.

Another involves classification decisions in California and other states that also are wending their way through federal courts, and could eventually land at the Supreme Court, Feary noted.

Feary cautioned against reading too much into recent developments in a Swift Transportation case on the federal level. It was brought by workers claiming misclassification as independent contractors. While initial developments have been unfavorable to the company, he said, it's too soon to predict an outcome because it's "extremely early" in the case.

Intense State Activity

Plewacki and others noted that the current landscape in trucking worker status cases includes intense efforts to neutralize the independent contractor model on the state level, including labor organizing actions by the Teamsters.

"As vigorously as the Teamsters are trying to assert themselves, I don't see them gaining much traction on the organizing side," he said. He also believes there aren't any major cases in the offing on the scale of FedEx's Ground unit, where one case was settled for \$228 million.

Worker status cases will continue to be very active on the state level, particularly in California, though other states such as New Jersey, Illinois and Massachusetts also are hotspots, experts said.

State rulings in classification cases will continue to favor employee status in these states because legislators and regulators there lean toward Democrats, and states have the power to make and enforce their own laws and regulations, experts said, unless current congressional Republicans' efforts to change the law succeed.

Notable worker status cases typically are structured by plaintiffs' attorneys to seek and become class action cases since that status can create bigger payoffs for lawyers, the attorneys said.

One important fact is that workers must be certified as a class for a case to proceed, Hunt said. The case effectively goes away unless the class is certified because there isn't adequate financial reward for the plaintiffs' attorneys.

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— **Rich Plewacki, attorney at Benesch, Friedlander, Coplan & Aronoff**

Hunt also said some cases are so flimsy that a single individual has attempted to bring a class action case.

Actual Parties Left Out

"Too often, both parties get left out of the equation," Feary said. "Workers and employers want that contractor relationship, but plaintiffs' lawyers and the government seize on what they need to collect the money and further their agendas."

Plewacki urged transport businesses to "remain vigilant" in worker classification and leasing relationships by managing their businesses on an arms-length basis with all contractors.

"In actual practice, the contract has to reflect the conduct of the business, and the conduct has to reflect the contract," he emphasized. "Both have to reflect and live by that vendor-vendee relationship."

Hunt agreed that it's very important for companies to be very careful in structuring agreements, including lease-purchase contracts with drivers.

Broader dangers in the states, Hunt said, are very aggressive actions in unemployment and workers compensation cases, as well as wage and hour disputes.

Feary also believes that Teamster organizing efforts affect state legislatures, encouraging representatives to advance pro-labor policies.

Efforts to preserve independent contractor status on the state level include a California Trucking Association suit against the state's labor regulatory agency. IANA has provided financial support for that litigation.



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