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Attorneys at Law

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The *InterConnect* FLASH!
Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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FLASH NO. 41
HOW THE NLRB AND 2 ALL-BEEF PATTIES RESONATE WITH TRUCKING

The National Labor Relations Board ("NLRB") General Counsel's July 31 announcement that he will name McDonald's U.S.A. LLC as a joint employer in dozens of unfair labor practice cases filed on behalf of employees of McDonald's franchisees has certainly caused a stir within the hospitality industry. It also has significant implications for the trucking industry. In a sweeping departure from existing law, the NLRB General Counsel is seeking to fundamentally alter the contours of joint employer liability that has existed for decades by going after McDonald's U.S.A. Certainly, if this position is sustained by the NLRB, motor carriers will be forced to examine their operations from top to bottom.

Motor carriers that operate with independent contractor owner-operators typically complement their operations through a network of agents. These agents have varying responsibilities depending on the particular arrangement, including business development, independent contractor recruiting, on-boarding, dispatching, etc. These contractual relationships are often exclusive in nature between the agent and the underlying motor carrier.

Also, motor carriers will very often contract with small fleet owners for a specified number of pieces of equipment and drivers for that equipment, operating under the motor carrier's U.S. DOT operating authority. This arrangement is generally encouraged from an independent contractor worker classification standpoint since it is helpful in establishing a separate business enterprise on behalf of the fleet owner. Thus, both the network of agents and the encouragement of fleet owners make good business sense for a whole host of reasons. Until now, labor law considerations have not been a huge concern for such arrangements since a joint employer relationship traditionally was found only when two separate entities jointly exercised control over, or "codetermined," the terms and conditions of an individual's "employment." Active participation in the exercise of control is generally required and such active participation is generally non-existent in a motor carrier's relationship with agents or fleet owners. However, the NLRB General Counsel is taking the position that McDonald's U.S.A. is a joint employer along with its franchisees because it "indirectly" controls terms and conditions of the franchisees' employees. This "indirect" control claim is based on the assertion that McDonald's U.S.A. dictates certain methods of operations to its franchisees.

Further, it seems no accident that the General Counsel's action came while the NLRB is considering the parameters of the joint employer doctrine in a separate case titled *Browning-Ferris*. Rather than wait for the Board's decision in that case, the General Counsel decided to

move forward against McDonald's U.S.A. now as though the Board's upcoming decision in *Browning-Ferris* is a foregone conclusion. This latest announcement from the NLRB General Counsel and the other, similar administrative agency actions that seem to encourage the finding of employee status for a variety of purposes should give motor carriers pause. Motor carriers should review and evaluate their contractual relationships with agents and/or fleet owners to address specific potential weaknesses that can be vulnerable to attack not only from a downstream motor carrier-to-agent and/or fleet owner-relationship but also upstream from agent and/or fleet owner conduct-related episodes that could implicate the motor carrier.

Benesch is representing the National Association of Manufacturers, the National Restaurant Association, and National Waste & Recycling Association as a *amici curiae* in the *Browning-Ferris* case and its lawyers in the Transportation & Logistics Group are well positioned to assist motor carriers in assessing and evaluating their present agent and/or fleet owner arrangements.

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