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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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FLASH NO. 64
NLRB RULES AGAINST EMPLOYEE STATUS FOR MENARD'S DRIVERS

A National Labor Relations Judge dismissed an action brought by the National Labor Relations Board ("NLRB") regional director against Menard, Inc. ("Menards") for misclassifying its independent contractor ("ICs") drivers in violation of the National Labor Relations Act ("Act").[1]

The underlying action was originally submitted to the NLRB in August 2016 by Local 153, Office & Professional Employees International Union, AFL-CIO, alleging that Menards was in violation of Section 8(a)(i) of the Act. The basis of the alleged violation was that Menards' delivery drivers were misclassified as ICs rather than employees and that the hauling contracts contained mandatory arbitration clauses limiting the putative employees from filing class actions and/or claims for unfair labor practices with the NLRB.

Menards is the business of selling home improvement merchandise from its 300/ plus stores located throughout the United States. In addition, Menards offers delivery services for its customers purchasing its store merchandise by contracting with hauling contractors, ICs, to ultimately deliver the merchandise while Menards arranges the delivery and handles the payment from the customer.

The Administrative Law Judge ("ALJ") reviewed the Complaint by evaluating whether the delivery drivers were indeed ICs for purposes of applicability under the Act per Section 2(3). The "ALJ" used the ten (10) factor test established by the United States Supreme Court in determining employee versus IC classification.[2]

Through testimony and briefs filed by both parties, it was revealed that Menards utilized three (3) types of hauling contracts with its ICs: 1) one where the ICs provide their own truck with a forklift/crane; 2) one where ICs provide their own forklift truck and Menards provides the trailer; and 3) IC makes deliveries using a box truck/van. It was also disclosed that some ICs operate their own truck while others have multiple trucks and their own employees operating the trucks and some made deliveries for other companies besides Menards.

Ultimately, the ALJ went through the various facts relating to Menards' operation and its interaction with the ICs, and determined by an *overwhelming majority* that the drivers were independent contractors and **not** employees. In making such a determination, the ALJ reasoned that: 1) that the ICs had the balance of control over the work; 2) that the ICs were involved in a distinct business; 3) that the ICs supplied the instrumentalities of work; 4) that the ICs had the right to terminate the contracts on short notice; 5) that the ICS were paid by the 'job'; 6) the parties believed the nature of the relationship to be that

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of an independent contractor; and 7) that the ICs had meaningful entrepreneurial opportunity as they could provide services for multiple companies and sell their own business.

The only factor that weighed in favor of employee status was the 'level of skill required to perform the services'. The ALJ opined that there was not enough evidence on the record, such as training or CDL requirements, to make a determination of the level of skill required to perform such services.

Since the ALJ determined the drivers to be independent contractors and **not** employees, the drivers did not qualify for protections under the Act and the complaint was dismissed. The ALJ did not even address the issue surrounding the enforcement of the arbitration clause in the hauling contracts.

The ruling in this decision is a win for the IC model which has been continuously under fire by unions, and state and federal agencies attempting to undermine the longestablished business model. The decision took into account several facts/ factors common to motor carriers operating with ICs.

The analysis by the ALJ provides a roadmap for others to compare against their IC agreements and more importantly, their operational actions.

[1] *Menard, Inc. & Local 153, Office & Prof'l Employees Int'l Union, Afl-Cio,* Case 18-CA-18121 (2017) (not reported in Board volumes).

[2] *Nationwide Mutual Insurance Co. vs. Darden,* 503 U.S. 318 (1992).

If you need assistance or have questions about your agreements/operations, please feel free to contact Benesch's Transportation Team.

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Richard is a partner with the firm's Litigation and Transportation & Logistics Practice Groups. He has been in the transportation and logistics industry, both as a businessman and an attorney, for over 40 years during which he has been heavily involved with the IC model within the trucking industry. His practice also includes advising and representing motor carriers, leasing companies, third party logistics providers, national shippers, large private fleets and water carriers in the domestic, non-contiguous trade lanes.

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