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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

FLASH NO. 42 FEDEX GROUND DRIVERS FOUND TO BE EMPLOYEES: A SEQUEL TO *RUIZ*

In a decision issued on August 27, the Ninth Circuit Federal Court of Appeals, in a case captioned *Alexander v. FedEx Ground Package System*, determined that FedEx Ground drivers were employees as a matter of law under California’s right-to-control test. In reaching its conclusion, the Court found that when viewing the evidence in a light most favorable to FedEx, the Operating Agreement between FedEx and its drivers grants FedEx a broad right to control the manner in which the drivers perform their work, and the most important factor of the right-to-control test strongly favors employee status.

In reaching the same conclusion in June, 2014 in the *Ruiz v. Affinity Logistics* case, the same Court, albeit through different judges, concluded that the undisputed facts indicated that Affinity had the right to control the details of the drivers’ work, and the application of the secondary factors weighed toward finding that drivers were employees.

The *Alexander* decision follows the same outline and analysis as the Ninth Circuit performed in *Ruiz* but applying the FedEx facts to the analysis. As such, the Court relied heavily on the 1989 California Supreme Court Decision in *Borello v. Department of Industrial Relations*, which set forth California’s right-to-control test through an analysis of whether the person to whom service was rendered has the right to control the manner and means of accomplishing the result desired. Also, as in *Ruiz*, the judges in *Alexander* referenced the *Tieberg v. Unemployment Insurance* decision in citing the application of several “secondary” factors which reflect the indicia of the nature of a work relationship. However, the Court did not rely heavily on those factors.

FedEx argued that its Operating Agreement with its drivers created an independent contractor relationship to which the Ninth Circuit responded that the label placement of the parties on the document is not dispositive; what matters is what the contract, in actual effect, allows or requires. The Court determined that the Operating Agreement and FedEx’s policies and procedures unambiguously allow FedEx to exercise a great deal of control over the manner in which the drivers do their jobs. The Court referenced FedEx’s control over the appearance of the driver, which encompassed every exquisite detail including the color of their socks and the style of their hair. The Court also addressed the vehicles, which FedEx required the drivers to paint a specific shade of white, mark with a distinctive FedEx logo, and keep “clean and presentable and free from body damage and extraneous markings.” The specification for the dimensions for package shelves within the vehicles was of particular note to the Court.

The Court addressed that FedEx can and does control the time the drivers can work as well as how and when the drivers deliver their packages. FedEx argued, however, that it controls the drivers only with respect to results to be accomplished and not the manner and means in which

the drivers achieve those results. The Court agreed with FedEx that “results,” reasonably understood, refers in this context to timely and professional delivery of packages, but that the inclusion of detailed specifications as to the drivers’ fashion choices and grooming and the specification of equipment go beyond such reasonable meaning of “results”.

FedEx also argued that the Operating Agreement gives its drivers flexibility and entrepreneurial opportunities that no employee has. The Court, again relying on *Borello*, replied to this argument by saying a business entity may not avoid its statutory obligations by carving up its production process into minute steps, and then asserting that it “lacks” control over the exact means by which one such step is performed.

FedEx attempted to use the favorable decision received from the D.C. Circuit Court in 2009 in an action against the National Labor Relations Board indicating that its drivers had entrepreneurial opportunities through the ability to take on multiple routes and vehicles and to hire third party helpers, which is inconsistent with employee status. The Ninth Circuit indicated that the D.C. Circuit, even if correct, had no bearing on this case and that there is no indication that California has replaced its longstanding right-to-control test with the new entrepreneurial-opportunities test.

The secondary factors came into play in a much more detailed manner in the *Ruiz* case, which included such things as performing services in (i) a distinct occupation or business; (ii) the kind of occupation; (iii) the skill required; (iv) whether the principal or the worker supplies the tools through which the work is performed; (v) length of time for which services are performed; (vi) method of payment; (vii) integral part of the principal’s regular business; and (viii) whether or not the parties believed they were creating the relationship of an employer-employee. However, in this case, the Court determined that in light of the powerful evidence of FedEx’s right to control the manner in which drivers perform their work, none of the remaining right-to-control factors sufficiently favor FedEx to allow holding that Plaintiffs are independent contractors.

The decision in *Alexander* is not good news – period!!! By closely tracking the *Ruiz* decision in June, the Ninth Circuit has clearly sent an

unfavorable signal to both the home delivery segment and the business-to-business parcel delivery segment and further fuels the continuing and escalating attacks on the independent contractor concept within the trucking industry.

If there is any good news to garner from these decisions, it is that the Court of Appeals in both decisions was very specific in outlining the indicia of control. Therefore, the decisions can be used as a lessons-learned recipe book from which to engineer, or if necessary to re-engineer, a motor carrier’s approach to its business relationships with individuals or entities that it treats as independent contractors/owner-operators.

Alternatively, there are other models that are available through which to preserve an independent contractor service relationship and merit consideration, such as the Transportation Agent Model, the Freight Forwarder Model, the Settlement Model, and/or the Taxi Medallion Model, which may have applicability in different contexts.

The Transportation Logistics Group at Benesch has a significant depth of experience in dealing with independent contractors going back to 1987 when RPS (now FedEx Ground) was launched and has working experience with all the alternative models referenced and is available to discuss any or all of them in the event that any stakeholder may have an interest.

Additional Information

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