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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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INDEPENDENT CONTRACTORS AND DISTRIBUTORS AND MANUFACTURERS, OH MY!

Often in this monthly forum we discuss owner-operator issues with for-hire motor carriers. However, these issues are more far-reaching in the transportation and logistics supply chain, touching everyone from warehousing to couriers to distributors. For example, this month we consider the case of a snack food company and its authorized distributor. If you are "hungry" to learn more, read on...

In *McKee Foods Corp. v. Lawrence* (June 3, 2011), a delivery truck operated by a McKee Foods authorized distributor collided with another vehicle whose driver sued the distributor, its owner, and McKee for damages, alleging McKee had vicarious liability for the delivery driver's negligence because the driver was selling McKee's products. McKee's motion for summary judgment was denied and they appealed.

McKee and its distributor had signed a distributorship agreement, where McKee sold snack items to the distributor, who in turn sold them to retailers. The agreement defined the products, territory, payments, facilities, sanitation guidelines, and insurance requirements and designated the distributor as an independent contractor. McKee gave up any right to control the manner and means by which the distributor achieved results. However, just because an agreement <u>says</u> that someone is an independent contractor does not magically <u>make it so</u>. As we have seen, the real key is control. The right to control the time, manner and method for completing the work creates a employer-employee relationship for which a company may be held vicariously liable.

McKee's relationship with its distributor was akin to a franchisor/franchisee situation. Like a franchisor, McKee wanted to have just enough control over the distributor to protect its products' reputation while not having <u>too</u> much control making it vicariously liable for acts of the distributor. The goal was to set standards for how to maintain, present and deliver its product while not controlling the distributor's actual daily business operations.

In this case, the courts again focused on the right to control. Although McKee dictated food storage, freshness, trademarks insurance, territory, and sales, it did not have the right to control daily operations. The distributorship agreement's terms were broad guidelines, allowing the distributor its own latitude with sales calls, customers, and promotional displays. It did not receive McKee's benefits, compensation or commissions and hired and directed its own employees. It was free to choose its own delivery vehicles, schedules, routes and methods and did not display the McKee trademarks on its trucks. The distributor could sell a mix of products from both McKee and other companies, but it purchased McKee's products for resale and could not return unsold merchandise. While McKee suggested retail pricing, the distributor was free to charge whatever was best for its business. Optimal pricing, along with the distributor's careful inventory ordering made the difference between realizing a profit or loss.

Guidelines imposed to protect quality and reputation, coupled with interest in the distributor's general results, is fine within an independent contractor arrangement. As we have seen, lack of control over daily activities, along with no right to control such activities, is the key element in determining when there is an independent contractor relationship.

Whether in the context of a traditional motor carrier or similar to a franchisor situation, we at Benesch can assist your business in reviewing your independent contractor programs,. Please call if you have questions or if we can be of further assistance.

Additional Information

For additional information, please contact any of the following attorneys:

Transportation & Logistics Practice Group

Marc S. Blubaugh at 614.223.9382 or mblubaugh@beneschlaw.com

Martha Payne at 541.764.2859 or mpayne@beneschlaw.com

Richard A. Plewacki at .216.363.4159 or rplewacki@beneschlaw.com

Teresa E. Purtiman at 614.223.9380 or tpurtiman@beneschlaw.com

Eric L. Zalud at 216.363.4178 or ezalud@beneschlaw.com

Labor & Employment Practice Group

Maynard Buck at 216.363.4694 or mbuck@beneschlaw.com

Joseph N. Gross at 216.363.4163 or jgross@beneschlaw.com

Peter N. Kirsanow at 216.363.4481 or pkirsanow@beneschlaw.com

www.beneschlaw.com