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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

FLASH NO. 15
ARE STATES SWITCHING GEARS?

Over the last several years the trucking industry has had a fair amount of success in achieving positive legislation in the area of worker classification, particularly as to workers compensation and unemployment compensation matters. As you may know, state labor codes provide statutory definitions of "employer" and "employee", affecting workers compensation and unemployment compensation insurance requirements for companies across the country. Motor carriers and their independent contractors / owner-operators sometimes get lumped in and confused within this mix of various types of other industries. However, the transportation industry has recently seen at least seventeen states successfully enact some sort of specific exemptions to their labor code for motor carrier independent contractor / owner-operators.

Now it seems that there may be a move afoot to "put the big rig in reverse", so to speak. Several states are considering legislation which would presume that work arrangements with motor carriers are automatically employer-employee relationships.

For example, an Ohio employee misclassification bill which failed to pass last year is rearing its head again during this new legislative session, albeit with much less enthusiasm. Looking to reduce perceived lost revenue from workers "misclassified" as independent contractors, this session's bill proposes a definition of employee under the labor code that uses a broad 7-point standard test to determine employee status. The test doesn't match up with the IRS's independent contractor 20-point test and many current independent contractors would be considered employees under this new definition. Luckily, with the change in the statehouse administration last January, this bill is likely to go nowhere fast.

However, in New Jersey, another large trucking state, a new bill was introduced in late June focused specifically on the drayage and parcel delivery segments of the trucking industries. It would presume an employee-employer relationship for individuals in such industries unless the motor carrier can prove to the Department of Labor that it meets a three-point test and therefore can rebut the presumption. This three-point test requires the motor carrier to show that (1) the worker is free from control or direction; (2) the work is outside the motor carrier's normal course of business; and (3) the worker is normally engaged in an independently established business. The act goes even further, proposing that those employers who knowingly misclassify individuals are guilty of a crime of the third degree and can be subject to fines of up to $15,000, all for the first offense. The penalties only increase from there for repeat offenders. There is some talk from insurers and others active in the state's trucking association that if a motor carrier has any involvement with the sourcing of the equipment (ala a traditional lease purchase plan) or if the motor carrier is not paying on an EIN or not paying to an entity such as an LLC or a corporation, rather than an individual, there will be a presumption to the effect that the work is within the motor carrier's normal course of business.

If such legislation actually gets legs, the time may be ripe for consideration of implementing a "hybrid" approach to the typical independent contractor model. As we discussed in Flash #11 (April 2011) and Flash #12 (May 2011), the emerging Freight Forwarder Model or Transportation Agent Model may warrant a closer look.

And speaking of a closer look at the hybrid approaches, we will be presenting more information on the hybrid models at the Truck Load Carriers Association Independent Contractor Division Meeting in Dallas, Texas on August 25 and 26. We hope to see you all there.

Additional Information

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