

December 2011



The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

FLASH NO. 19 A FAREWELL TO 2011

As we wind down another year which has been particularly active relative to independent contractor issues within the trucking industry, the notable activity in this very important area of concern has wound down as well, albeit temporarily to be sure.

One follow-up to an item that was addressed in the November *Flash* is that Colorado, the home of the Rocky Mountain Bighorn Sheep, has now also signed on to the Memorandum of Understanding with the U.S. Department of Labor to share information and coordinate law enforcement efforts aimed at stopping "improper" worker classification. There are now eleven states on board, along with the IRS, freely sharing employee misclassification information. The new year will no doubt find other states joining the ranks, particularly in what will be a pretty divisive political atmosphere in a contentious election year.

One final note for the year comes in the form of a reminder from the Bay State, Massachusetts, which uses a unique version of the "ABC" test that has reeked havoc on the transportation industry, particularly the courier/delivery, package/parcel, and light LTL segments. Massachusetts law creates a presumption that all workers are employees but this can be overcome by meeting the "ABC" test. The "ABC" test, of course, requires an employer to establish that the worker is free from control and direction in performing the work (under the contract and in fact), such services are outside of the

company's normal course of business, and the worker is normally engaged in an independent business performing such services.

Regardless of how you may approach incorporating independent contractors into your business, your focus must, of course, be on the ball at all times so that the contractual relationship between the company and the independent contractor is at arms length, is solid, and the conduct of the parties matches the contract terms. More importantly, if you approach the IC Model with a partner, such as a transportation agent as we mentioned several months ago in our May *Flash*, due care needs to be taken in scrutinizing that contractual relationship as well. On a Motion for Summary Judgment in a recent case in Massachusetts, a transportation agent was arguing vigorously that it had no reason to be in the midst of the misclassification allegations for a whole host of reasons, none of which really gained any traction or compassion from the Court. Seemingly the most ironic piece of the Court's decision was that the transportation agent was essentially trying to throw its customer, the motor carrier, under the bus. Therefore pause should be taken and those partner relationships should be scrutinized, particularly with respect to indemnification obligations to defend certain allegations based on specific representations that a transportation agent may make to its customers.

There is nothing particularly earth shattering in this message, but as is

often the case, reality is very often stranger than fiction. With that thought, we will close out the old year and will be here in 2012 to help as your needs arise in this very important area of independent contractor relations.

HAPPY HOLIDAYS!

Additional Information

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