BENESCH
Attorneys at Law

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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

FLASH NO. 20

THE ABC TEST IS SET FOR A TEST!

At year-end 2011, we issued a reminder to you that Massachusetts law has a unique and decidedly unfriendly definition of the "ABC" Test, used to rebut the presumption that all workers are employees. This Massachusetts statute has rocked motor carriers with operations in the Bay State, especially the courier/delivery, package/parcel and light LTL segments. But, a ruling issued on January 20, 2012 offers some hope.

Massachusetts law currently presumes that all of a company's workers are employees, which can only be rebutted by meeting the "ABC" Test. This "ABC" Test has three prongs: (1) the company must establish that the worker is free from control and direction in performing the work (under the contract and in fact); (2) services provided by the worker are outside of the company's normal course of business; and (3) the worker is normally engaged in an independent business performing such services. Prong 2 was revised in 2004, eliminating a clause which also exempted workers who performed their work outside of the company's places of business. The 2004 amendment was a "game changer" for motor carriers that regularly utilize independent contractors, forcing them to consider radical, costly changes in their business models to comply or run the risk of penalties.

The Massachusetts Delivery Association (MDA) brought suit in 2010 against the Massachusetts Attorney General in Federal Court, claiming that this state law is preempted for motor carriers under the Federal Aviation and Administration Authorization Act of 1994 (FAAAA), which expressly preempts the states' attempts at regulating "a price, route or service of any motor carrier." The MDA also claimed that the state law is unconstitutional under the Supremacy Clause and violates the Commerce Clause. The Attorney General filed a motion to dismiss based on the argument that three MDA-member businesses were defendants in ongoing litigation in State Court and the MDA was simply an alter ego of these defendants. In effect, the AG alleged that the MDA tried to establish a second beachhead in the preemption battle, which would interfere with the ongoing State Court proceedings. The lower Court granted the motion to dismiss and the MDA appealed.

The legal arguments surrounding the appeal, although very interesting, are beyond the scope of this *FLASH*, but the Appeals Court reversed the lower Court's ruling. The case is now back on track to be decided on the federal preemption issue, which is good news for not only motor carriers with operations in Massachusetts who have struggled with the state's version of the "ABC" Test but also the more far reaching effect a Federal Court's decision may have on other states that also use a similar version of the "ABC" Test in making worker classification determinations.

We will keep a close eye on the progress of this case and report back to you in a future *FLASH*. In the meantime, please give us a call if you would like more information on the case or would like to discuss your IC business model.

Additional Information

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