



The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

FLASH NO. 5 CONDUCT & CONTRACT MUST MATCH

A recent U.S. Federal Appeals Court case is a perfect example of why independent contractor agreements must reflect the actual day-to-day actions between the contracting company and its independent contractor. In *Narayan v. EGL, Inc.*, the Court analyzed multiple factors to determine if drivers were independent contractors, finding that on a summary judgment motion EGL could not overcome the presumption that the drivers are employees. The gloom-and-doom predictions that this case represents the demise of the independent contractor concept are overblown; however, the case is filled with valuable lessons for those utilizing independent contractors.

In *Narayan*, EGL entered into independent contractor agreements with drivers. Three California drivers alleged they were really employees and had been deprived of benefits under the California Labor Code. Despite the parties' designation of Texas law as the agreements' governing law, the Appeals Court applied California law because the drivers' claims for benefits really arose under regulations and NOT under the contract itself.

Under California law, like many state laws, if someone shows that they are performing work for another, then they are assumed to be an employee unless the employer can prove an independent contractor relationship. The test for independent contractors looks at a combination of several elements. EGL's actual business practices told the ultimate tale. An instructional video shown to drivers was particularly troubling, containing phrases like "for our company

to continue to grow, every driver must understand the critical importance of the job they do." The video pounds home the point that drivers were considered an essential part of EGL's regular business, one of many factors considered indicative of an employee/employer relationship.

Similarly, the EGL handbook provided detailed instructions to drivers on how and when to communicate with dispatch. While training is important, handbooks should only address objectives or goals to be accomplished, not specific detailed instructions. Basic elements such as setting daily start times; discipline; truck markings; driver appearance; equipment; the right to employ assistants; length of contract; termination rights; and skills required, all were examined in daily practice. In the end, the *actual conduct* could not overcome the presumption of an employer/employee relationship.

The bottom line lesson here is nothing new: independent contractor agreements must reflect the actual conduct between the motor carrier and driver, and their conduct must reflect what is written in the agreement.

In our next issue, we will examine how the recent *In re FedEx* ruling focused on only the right of FedEx to control its independent contractors.

There are plenty of ways to accomplish your desired objective, but you need to be careful. Benesch can assist your business in developing and reviewing business practices and contractual agreements in this regard. Please call if you have questions or if we can be of further assistance.

As a reminder, this Advisory is being sent to draw your attention to issues and is not to replace legal counseling.

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Additional Information

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

Marc S. Blubaugh at 614.223.9382 or mblubaugh@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

Ann E. Knuth at 216.363.4168 or aknuth@beneschlaw.com

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

Biographical information is available at www.beneschlaw.com.