BENESCH
Attorneys at Law

December 2010

The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

FLASH NO. 6
OOIDA/LANDSTAR: UPON FURTHER REVIEW

The *OOIDA v. Landstar System* case, pending since 2002, does not seem to have any end in sight. The Eleventh District Court of Appeals recently withdrew its previously issued opinion and substituted a new opinion. This most recent decision does provide some helpful news, however.

The Court was called upon to review seven topics, but the three with the greatest applicability to the owner-operator/independent contractor model are: (1) compensation under the leasing regulations; (2) chargebacks; and (3) measure of damages.

Compensation: Under 49 CFR 376.12(d), the amount to be paid by the motor carrier for equipment and driver services must be *clearly stated* on the face of the lease or in an attached addendum. Landstar's lease used broad terms referring to "third party fees." The court found that such language does not "clearly state" that compensation may be reduced by processing fees and determined that fair notice is needed as to how compensation may be reduced. Catch-all phrases do not work because they do not give adequate notice of any specific charges.

Chargebacks: The Court's opinion held new twists. Under 49 CFR 376.12(h), the carrier must *clearly specify* in the agreement (a) all items that may be initially paid by the carrier, but ultimately deducted from the owner-operator's compensation, and (b) how each item is computed. Copies of documents necessary to determine the validity of the charges must be made available. The Court concluded that the carrier is not required to disclose actual costs, but rather a flat-fee with follow-up settlement statements is sufficient to determine how each amount is computed. The expected cost of the chargeback is what is really important to the owner-operator, not the actual cost to the motor carrier. This position is consistent with a 2009 decision in the OOIDA/Swift litigation where that Court rejected a similar argument requiring disclosure of the "actual insurance cost the Carrier paid to third party insurance providers" and instead concluded that the carrier only needed to explain that the computation is a flat rate assessed to all owner-operators. Exceptions exist where a carrier must disclose third party costs when necessary to determine the validity of a variable-rate charge-back. For example, road service, consisting of the cost of repair and parts plus a percentage mark-up, requires disclosure of actual costs to determine the percentage upcharge. Contrast this with a flat-fee chargeback, such as the cost of fuel disclosed at purchase at the gas pump, where the owner-operator only needs to review the settlement statement to see if the charges are correct.

Measure of Damages: The regulations state that a motor carrier is liable for damages sustained by owner-operators due to carrier's violations of the leasing regulations. The Court indicated that the complaining owner-operator must prove actual damages. Proof of profits or other overcharges by the motor carrier is not, standing alone, proof of actual damages, but requires an examination of set-offs, advances and other items. This finding played into the Court's determination about class decertification. Calculating actual damages gives rise to individualized questions of liability that need individual assessments as to amounts.

Benesch can assist your business in reviewing owner-operator agreements in light of this new opinion. 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.

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.