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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

FLASH NO. 65 SHIPPER’S CONTROL OVER COURIER’S IC DRIVERS RESULTS IN ADVERSE JOINT EMPLOYER RULING

Recently the U.S. District Court for the Southern District of West Virginia determined that Co-Defendants, Omnicare, Inc. (“Omnicare”) and Act Fast Delivery of West Virginia, Inc. (“Act Fast”) were acting as joint employers in deciding that Act Fast’s independent contractor (“IC(s)”) drivers were misclassified in order to avoid payment of overtime wages.¹

The class representative, Plaintiff Eric Young (“Young”), alleged that Omnicare and Act Fast intentionally misclassified him and other similarly situated drivers as ICs when they were actually employees to avoid paying them overtime in violation of the Fair Labor Standards Act and state and federal wage payment laws.

Omnicare is a pharmaceutical company that “sells and delivers medications, mostly to nursing homes and long-term facilities.” A subsidiary of CVS, Omnicare has locations nationwide and works with care facilities to serve as their pharmacy which includes full delivery services. Act Fast is a separate and distinct business entity that provides pharmaceutical delivery services to its customers such as Omnicare.

In order to deliver prescriptions, Omnicare “utilizes different independent delivery service companies to deliver pharmaceuticals to its long-term care clients.” Omnicare contracted with Act Fast to serve as its delivery courier from Omnicare’s West Virginia pharmacies, which accounted for 90% of Act Fast’s business.

The service agreements (“Agreements”) between Omnicare and Act Fast stipulated that Act Fast was an independent contractor and “will operate its business and perform the Courier Service for Pharmacy (Omnicare) independent of the Pharmacy and Omnicare.” However, in spite of such language, Omnicare had numerous service terms that Act Fast was required to follow in order to provide services to Omnicare and its customers.

Through the terms of the Agreements, Omnicare established the routes, order of stops, delivery times and the types of vehicles that could be utilized by Act Fast’s drivers. Furthermore, Omnicare went as far as requiring Act Fast’s drivers to “look, smell and act professionally” while mandating that Act Fast “deal with poor driver conduct swiftly. . . . monitor drivers to makes sure they follow the routes as planned.” Omnicare regularly ‘suggested’ employment decisions to Act Fast including the termination of Young in this case.

In determining the Plaintiffs' Motion for Summary Judgment, the court applied the six factor test for joint employers outlined in *Salinas v. Commercial Interiors, Inc.*² which asks: (1) whether the putative joint employers jointly control or supervise the worker; (2) whether, putative joint employers can control the terms of a worker's employment; (3) the degree of permanency and duration of the relationship between the putative joint employers; (4) whether one putative joint employer is controlled by the other; (5) whether the work is performed on a premise owned or controlled by one or more of the putative joint employers; and (6) whether the joint employers share responsibility in functions carried out by an employer (payroll, taxes, worker's compensation etc.).

Regarding the first factor, the court found that Act Fast and Omnicare jointly directed, supervised, and controlled the Plaintiffs. Secondly, Omnicare shared in the ability to fire drivers and otherwise modify the terms of their contracts. With respect to factors three and four, no evidence demonstrated that Omnicare owned Act Fast but since Omnicare represented 90% of Act Fast's business, Act Fast was completely dependent on Omnicare. As for the fifth factor, Plaintiffs conducted business from their own automobiles while making deliveries. Finally, with respect to the sixth factor, Omnicare did not issue paychecks or otherwise control functions normally carried out by an employer. Based on the entirety of the facts, the court found that Omnicare and Act Fast were joint employers.

After reviewing Omnicare's elements of control over Act Fast and its drivers, the Court summarily reviewed the relationship between Act Fast and its drivers (Young). Despite Young providing his own vehicle and admitting that he filed his taxes as though he was an independent contractor, the court overwhelmingly determined that Omnicare's

control over the relationship equated to that of an employer/employee between Act Fast and Young. Notably, the court did not reference any written agreement between Young and Act Fast as might be expected in such an independent contractor arrangement.

In granting Plaintiffs' Motion, the court opined that "the Plaintiffs' service was so integral that Omnicare's business could not have functioned without it. Omnicare's specific business was delivering pharmaceuticals directly to its clients. Without these drivers, no pharmaceutical products would have been delivered. No reasonable jury considering the undisputed facts could find that the Plaintiffs were independent contractors."

This case further demonstrates the need to have proper distance between the shipper/customer, the motor carrier and its drivers while providing services generally, but particularly in the pharmaceutical space; retail last mile; small package, and courier segments. If shipper/customer desires to have so much control over the operations of the courier then the parties should expect to accept future determinations of joint employment/misclassification. Fortunately, this case provides shippers/customers and courier businesses a roadmap to avoid adverse decisions pertaining to joint employers and ultimately independent contractor misclassifications.

As always, Benesch's experienced and skilled transportation team would be glad to assist you with properly structuring such a relationship whether a shipper/customer or courier business utilizing independent contractor drivers.

If you need assistance or have questions about your agreements/operations, please feel free to contact Benesch's Transportation Team.

Richard A. Plewacki at rplewacki@beneschlaw.com or (216) 363-4159

Richard is a partner with the firm's Litigation and Transportation & Logistics Practice Groups. He has been in the transportation and logistics industry, both as a businessman and an attorney, for over 40 years during which he has been heavily involved with the IC model within the trucking industry. His practice also includes advising and representing motor carriers, leasing companies, third party logistics providers, national shippers, large private fleets and water carriers in the domestic, non-contiguous trade lanes.

Matthew J. Selby at mselby@beneschlaw.com or (216) 363-4458

Matt is Of Counsel in the firm's Transportation & Logistics Practice Group. He currently advises and represents a variety of transportation based organizations including motor carriers, leasing companies, third party logistics providers, regional and national shippers, large private fleets, both domestically and internationally. He has experience with independent contractor issues/owner-operator issues, shipper/carrier matters, industry specific litigation, transportation related service agreements, freight claims, mergers and acquisitions, insurance, licensing and permitting.

¹ *Young v. Act Fast Delivery of W. Virginia, Inc.*, No. 5:16-CV-09788, 2018 WL 279996 (S.D.W. Va. Jan. 3, 2018).

² *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017).

Additional Information

For additional information, please contact:

Transportation & Logistics Practice Group

Michael J. Barrie at (302) 442-7068 or mbarrie@beneschlaw.com
Marc S. Blubaugh at (614) 223-9382 or mblubaugh@beneschlaw.com
Kevin M. Capuzzi at (302) 442-7063 or kcapuzzi@beneschlaw.com
Matthew D. Gurbach at (216) 363-4413 or mgurbach@beneschlaw.com
Jennifer R. Hoover at (302) 442-7006 or jhoover@beneschlaw.com
Thomas B. Kern at (614) 223-9369 or tkern@beneschlaw.com
Peter N. Kirsanow at (216) 363-4481 or pkirsanow@beneschlaw.com
David M. Krueger at (216) 363-4683 or dkrueger@beneschlaw.com
Andi M. Metzler at (317) 685-6159 or ametzel@beneschlaw.com
Michael J. Mozes at (614) 223-9376 or mmoz@beneschlaw.com
Kelly E. Mulrane at (614) 223-9318 or kmulrane@beneschlaw.com
Lianzhong Pan at (86 21) 3222-0388 or lpan@beneschlaw.com
Martha J. Payne at (541) 764-2859 or mpayne@beneschlaw.com
Stephanie S. Penninger at (312) 212-4981 or spenninger@beneschlaw.com
Joel R. Pentz at (216) 363-4618 or jpentz@beneschlaw.com
Richard A. Plewacki at (216) 363-4159 or rplewacki@beneschlaw.com
Matthew J. Selby at (216) 363-4458 or mjelby@beneschlaw.com
Peter K. Shelton at (216) 363-4169 or pshelton@beneschlaw.com
Verlyn Suderman at (312) 212-4962 or vsuderman@beneschlaw.com
Clare R. Taft at (216) 363-4435 or ctaft@beneschlaw.com
Jonathan Todd at (216) 363-4658 or jtodd@beneschlaw.com
Joseph P. Yonadi, Jr. at (216) 363-4493 or jyonadi@beneschlaw.com
Eric L. Zalud at (216) 363-4178 or ezalud@beneschlaw.com

Labor & Employment Practice Group

W. Eric Baisden at (216) 363-4676 or ebaisden@beneschlaw.com
Maynard Buck at (216) 363-4694 or mbuck@beneschlaw.com
Joseph Gross at (216) 363-4163 or jgross@beneschlaw.com
Rick Hepp at (216) 363-4657 or rhepp@beneschlaw.com
Peter Kirsanow at (216) 363-4481 or pkirsanow@beneschlaw.com

www.beneschlaw.com

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