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## The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

### FLASH NO. 70 RECENT IC DEVELOPMENTS IN A STATE NOT CALIFORNIA

The significance and meaning of the midterm election results is obviously the subject of pervasive interest and intense debate, and the uncertainty of what comes next may be thrilling or terrifying, depending on one's perspective. At times, however, it seems more productive to us to analyze what is already happening rather than speculate about what may occur, and in that vein we turn our focus in this article to New Jersey, a state where the new Democratic governor elected last fall has initiated a number of actions that are noteworthy for those concerned with employee classification issues and the independent contractor model in the transportation industry. (We also thought an article about a state other than California would be a welcome reprieve).

2018 has been a busy year for New Jersey Governor Phil Murphy. Since being inaugurated on January 16, he has reversed his predecessor Chris Christie's position on gun control, taxes, climate change, and a host of other issues. During his campaign he stated he “rejects the myth that boosting our working class and giving them a pathway to the middle class through higher wages and stronger workplace protections kills jobs,” and since becoming Governor his Administration has been alacritous in addressing issues related to worker classification and wages, including taking the following actions:

- In **May**, Gov. Murphy signed an Executive Order establishing a task force on “employee misclassification.”

The Governor's Task Force on Employee Misclassification consists of 12 initial members representing state agencies, including 3 each from the Departments of Labor and Workforce Development and Treasury, and is responsible for providing advice and recommendations on strategies and actions to combat employee misclassification, including evaluating existing misclassification enforcement and developing best practices to improve enforcement and compliance. The Executive Order suggests that misclassification may deprive New Jersey of over \$500 million in tax revenue every year. Just prior to signing the Executive Order, Gov. Murphy explained that his team had looked to other states with similar task forces like New York and Massachusetts. The Task Force has conducted at least one meeting in early August but has not yet issued any recommendations or findings.

- In **August**, the NJDOL announced it had entered into a memorandum of cooperation with the USDOL to share information and coordinate enforcement efforts related to independent contractor misclassification.

Over 40 other states had previously agreed to similar information sharing arrangements. The NJDOL's press release announcing the agreement stated that "misclassification violations can happen anywhere, but those who work in construction, transportation, information technology, and other in-demand businesses appear to be most vulnerable," and that this partnership "sends a strong message to unscrupulous business owners that misclassification laws are being strictly enforced."

- In **August**, the NJDOL filed an amicus brief in *Bedoya v. American Eagle Express*, arguing vigorously against FAAAA preemption of New Jersey's ABC test.

In *Bedoya*, a Third Circuit wage and hour delivery driver misclassification class action, American Eagle Express contended that New Jersey's ABC test for employee classification, codified at N.J. Stat. Ann. 43:21-19(i)(6)(A)-(C), is preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"). NJDOL maintains in its brief that its Unemployment Compensation Laws ("UCLs") are not preempted because they are federally empowered and laws of general application, and the brief also expresses support for the test's wage and hour applicability, as articulated by the New Jersey Supreme Court in its 2015 *Hargrove v. Sleepy's, LLC* decision. Under *Hargrove*, a worker may not be characterized as an independent contractor unless: (1) the worker has been and will continue to be free from control over the performance of his or her work; (2) such work is either outside the usual course of the business or is performed outside of all of the places of business of the enterprise; and (3) the worker is customarily engaged in an independently established trade, profession or occupation.

- In **September**, the NJDOL amended its rules to eliminate the traditional IRS 20-factor test as relevant evidence of a FUTA exemption for purposes of New Jersey's UCLs.

Encouraged by the Teamsters, the NJDOL made this change to N.J.A.C. 12:16-23.2(a), effective September 17, 2018, which removed a reference to "documentation of responses to the 20 tests required by the IRS to meet its criteria for independence" as acceptable support for a FUTA exemption for UCL purposes. After this change, IRS letter determinations and clean IRS employment tax audits are the only remaining bases (other than satisfying the ABC test) under the rule for exclusion from coverage by the UCL. Carriers are generally reluctant to request IRS letter determinations because they don't want to invite an audit, and some carriers have also reported anecdotally that the IRS is not particularly prompt in responding to such requests.

- Also in **September**, the NJDOL proposed making the New Jersey ABC test the only classification tool for determining worker eligibility for paid sick leave under the New Jersey's new Paid Sick Leave Law.

Gov. Murphy fulfilled a campaign promise in May by signing the Paid Sick Leave Law, which provides sick leave benefits to all employees, regardless of the size of the employer. The law became effective on October 29, and NJDOL proposed the utilization of the ABC test to determine which entities are subject to its requirements on September 13. Public comment on NJDOL's proposal is being accepted through December 14, and a hearing will be conducted in Trenton on November 13.

- In **October**, the NJDOL announced a \$.25 increase in the minimum wage to \$8.85.

During his campaign, Gov. Murphy promised to raise the minimum wage to \$15 an hour "so that those who want to work can support their family and ensure that no one who works full time in 2017 lives in poverty." New Jersey is one of eight states that adjusts the minimum wage administratively to account for cost of living increases, and the NJDOL announced on October 12 that the state's minimum wage will increase to \$8.85 effective January 1. Former Gov. Christie previously vetoed legislation to phase in a \$15 minimum wage, under which the wage would have reached \$15 after five years, and Gov. Murphy has recently indicated he hopes similar legislation will reach his desk by the end of the year, as he has his "signing pen ready to go."

- Also in **October**, the NJDOL filed a motion urging the District Court in *PDX North Inc. v. Asaro-Angelo* to either reject PDX North's FAAAA preemption argument or defer a decision pending the Third Circuit's decision in *Bedoya*.

PDX North's complaint was originally filed in 2015 against then-current NJDOL commissioner Wirths after state audits found that PDX incorrectly classified its drivers as independent contractors between 2006 and 2012 and owed nearly \$1 million in unpaid unemployment contributions and other fees as a result. PDX contends the relevant state statutes violates FAAAA, which prohibits enforcing state laws "related to a price, route or service of any motor carrier." NJDOL's motion for judgment on the pleadings echoes the arguments made in the *Bedoya* case mentioned above related to FAAAA preemption and the character of its UCLs, and in fact NJDOL alternatively requests in its motion that the court stay the proceedings until the Third Circuit rules in *Bedoya*.

The obvious upshot of all of this activity: New Jersey trucking companies using an independent contractor business model are going to be closely scrutinized for at least the next three years and are well-advised to manage their contractor relationships carefully and steer clear of questionable classification practices.

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