

InterConnect FLASH! No. 10 – Maybe the Best Answer is “It Depends”

The InterConnect FLASH! Practical Bursts of Information Regarding Critical Independent Contractor Relationships

MARCH 1, 2011

Today, the dynamics of the application of state-related benefits such as workers compensation and unemployment insurance are ever changing. During a down economy the spirit of “entitlement” increases from disgruntled workers, and state agency resources decrease. As a result, the independent contractor worker classification comes under greater scrutiny and often the best way to predict the outcome is to say “It Depends”.

In *SZL, Inc. v. Industrial Claims Appeals Office*, an unemployment tax liability claim shows that independent contractor status may not be as cut-and-dried as carriers would hope. A driver contracted with SZL in Colorado for three months as an independent contractor, under a truck leasing arrangement. The driver filed for unemployment benefits and both a hearing officer and subsequent review panel determined that he was an employee under Colorado tax statutes because he was “not free from control and direction” while performing the services and was not customarily engaged in an independent business. SZL appealed the decision.

Under Colorado law, workers are considered employees for unemployment tax liability purposes unless the employer can prove two points: (1) the worker “is free from control and direction in the performance of the service” and (2) the worker is actually engaged in a separate business venture while providing the same services for the employer. The first point is a traditional “control” test. The second point looks for evidence of business activity like non-exclusivity, payment methods, equipment ownership, actual business listings, length of time of business, and if the business would survive after the relationship ends. Interestingly, Colorado may consider someone as an “employee” for unemployment tax liability purposes even though they consider them to be an independent contractor for other purposes. In SZL’s case, the Court determined that the driver did not work for others, had only the SZL- leased tractor which was used only for SZL, did not have his own business, and was paid by SZL as an individual. Because the business activity test was dispositive of the claim, SZL’s control test challenge was not addressed.

A second case, involving Workers’ Compensation benefits, ends with the opposite result. In *Alonso v. Express Service Messenger & Trucking, Inc.*, the driver, Antonio Alonso, began delivering packages in Florida as a courier for Express until he fell during a routine delivery. He brought an action seeking worker’s compensation benefits. The Court’s critical factor to determine independent contractor status was the degree of control exercised by the alleged employer. Here the driver owned his own

delivery vehicle, provided his own insurance, paid for his own gas and cell phone, was paid per job, controlled his own means of performing his work, and was responsible for the satisfactory completion of the delivery. He did not receive mileage reimbursements or benefits, no taxes were deducted from his pay, and he was not instructed on delivery routes. Because his expenses were his own responsibility, he risked suffering economic loss if his expenses exceeded his delivery monies. Finally, he had signed an agreement acknowledging that he had no right to claim anything against Express. The Court found that all factors pointed to an independent contractor status.

The right to control, and the actual degree of control exerted by the carrier, are the basic starting points in an independent contractor analysis. There are, however, a variety of steps that a motor carrier can take to improve its chances of successfully defending its independent contractor program. However “the devil is in the detail.” Benesch can assist your team to conduct an independent contractor program review.

Please call if you have questions or if we can be of further assistance.

For additional information on this topic, please contact:

Marc S. Blubaugh at (614) 223-9382 or mblubaugh@beneschlaw.com

Martha Payne at (541) 764-2859 or mpayne@beneschlaw.com

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

Eric L. Zalud at (216) 363-4178 or ezalud@beneschlaw.com

Maynard Buck at (216) 363-4694 or mbuck@beneschlaw.com

Joseph N. Gross at (216) 363-4163 or jgross@beneschlaw.com

Peter N. Kirsanow at (216) 363-4481 or pkirsanow@beneschlaw.com