

InterConnect FLASH! No. 14 – And Then The Judge Asks - Who Is The “De Facto Employer”?...

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

JULY 1, 2011

The motor carrier answers, "the fleet owner". The fleet owner owned the power unit and trailer, leased it to the motor carrier, employed the driver, received all the tractor trailer unit's load monies from the motor carrier, and paid the driver on a per load basis while withholding required taxes. The contract between the motor carrier and fleet owner was compliant with the Federal Leasing Regs.

The Plaintiff responds, "no way"! The money went from motor carrier to fleet owner to driver, but the motor carrier's name, address and U.S. DOT # were on the tractor, and the driver took directions from the motor carrier's dispatchers and received safety recognitions from the motor carrier. Plaintiff argues that the motor carrier is the "defacto employer". Here *de facto* means "in reality" as opposed to "according to law".

This is the scenario in a lawsuit pending in Alabama. The motor carrier has a contract with a fleet owner who leases the motor carrier tractors and trailers and provides drivers. The Alabama workers compensation statute exempts companies with less than five employees from mandatory coverage, which the fleet owner does. The fleet owner provided worker occupational accident insurance coverage for work place accidents, along with medical coverage under a separate policy. One of their drivers was involved in a work related accident. The driver, assisted by the fleet owner, filed a claim with the occ/acc insurer which was declined because the driver turned 65 just before the accident (although the insurer accepted the premium during the accident month). The medical insurer also denied a claim. Now the severely-injured driver has a stack of medical bills and plaintiff's counsel wants those bills paid and more.

The testimony cited above is real, the fleet owner admits its relationship with the drivers, and the motor carrier - fleet owner contract is typical of a Federal Leasing Regulations-based independent contractor operating agreement. However, it does not contain an indemnification provision flowing from the fleet owner to the motor carrier for its relationships with its employees. The matter is now pending on a Motion for Summary Judgment. Scarily, this is not an isolated incident, and judges across the country are considering these questions. It raises the prospect of whether we are heading toward "placard liability" in driver workers compensation coverage, which is now well established in the area of public liability.

The two take-aways are: (1) the contract between motor carrier and fleet owner or owner-operator must specifically address the parties' relationship with the workers, including indemnity (for which the fleet owner can obtain insurance), as well as the delegation of authority from the fleet owner to

its employee drivers to accept or reject the tender of a load by the motor carrier; and (2) communications between drivers and motor carrier dispatchers is limited to customer requirements like pick-up and delivery time. The fleet owner should display tractor ownership through decals or air brush script, such as "Owned by Joe Trucking". Additionally, "leased to" script, affixed by decal or painting before the name of the motor carrier and its DOT #, must be affixed to the tractor in compliance with law. Finally any awards given to drivers for safety accomplishments must include a reference to the driver's employer, the fleet owner.

All this may be common sense but in today's environment, "belt and suspenders" is the call of the day. To the extent that we at Benesch can assist your business in reviewing your independent contractor programs, please call if you have any questions or if we can be of further assistance.

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