

InterConnect FLASH! No. 2 – Factors Leading to an Employer/Employee Relationship: What the Trucker Needs to Know

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

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A review of two recent United States Tax Court cases demonstrates how differences in management policies and contractual requirements can result in the IRS finding an employer/employee relationship in one case and an independent contractor relationship in the other. In *Peno Trucking Inc. v. Commissioner*, the Tax Court found that the drivers were employees of Peno Trucking. (The Tax Court decision was later overruled by a U. S. Court of Appeals on other grounds.) In *Byers v. Commissioner*, however, the carrier was successful in defending an independent contractor relationship.

RIGHT TO CONTROL IS KEY

In *Peno Trucking*, Peno was under contract to provide trucking services as an agent for a motor carrier. Although an independent contractor model was contemplated by Peno, Peno was required to supervise, discipline and discharge the drivers; determine days and hours per day the drivers worked, routes traveled by the drivers, and the order of pick up and delivery for the drivers. Peno was also required to withhold and pay employment taxes, pay workers compensation and employer's liability premiums. As can be seen, the agreements included specific obligations to be performed by Peno and by the drivers that are indicia of control.

In *Byers*, the carrier and the drivers were under no similar restriction. Drivers were permitted to choose what days they wanted to work. Refusing a load would not have a negative impact on the driver's status with the carrier.

INVESTMENT IN FACILITIES

Ownership of the trucks is another factor to consider. In *Peno*, Peno Trucking Company actually owned the trucks and made them available to the drivers to make deliveries on behalf of Peno's customer. The fact that the drivers owned their own tools and assumed responsibility for maintaining their commercial drivers licenses was not enough to influence the Tax Court to decide that the drivers were, in fact, independent contractors.

In *Byers*, the truck drivers all either owned their own trucks or leased trucks from a third party. The carrier did not assume responsibility for any costs relating to maintenance, fuel, or insurance. Drivers were able to use their equipment to make deliveries for other companies. Therefore, a driver under contract to Byers had opportunities but also had significant risks.

Benesch can assist your business in developing and reviewing management policies and operating agreements in this area. Please call if you have questions or if we can be of further assistance.

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