

InterConnect FLASH! No. 23 – The Empire State Gears Up for a Fight

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

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In last month's *FLASH*, we told you about a proposed New York bill which would create the presumption of an employer-employee relationship for transportation industry workers, much like the Massachusetts statute which is currently being challenged. New York is the latest battleground for this type of proposed legislation which would meaningfully threaten the use of the independent contractor model for motor carriers were it to become the law. So far, the industry has been able to stall any movement by the New York legislature on the proposed regulation. In fact, the New York State Motor Truck Association spearheaded a meeting with New York lawmakers during "Business Day at the Capital" on April 18 to put a voice and face with the trucking industry and independent operators' concerns. Not only did trucking company owners and executives attend but many owner-operators also attended and expressed their views as to why they choose to be an independent contractor driver.

But, with interesting timing, those that are pushing for passage of the bill got some ammunition of their own. Released at the same time as the "Business Day" event, the Drum Major Institute for Public Policy published a report on how the misclassification of truck drivers in New York is hurting the drivers and their job quality. The entire purpose of the DMI report is to encourage adoption of the "ABC" test rather than retaining the common law test of the right to control as the standard by which to measure proper worker classification. As indicated in prior *FLASH* updates, the ABC test is extremely difficult when applied to trucking.

The DMI report claims a very high misclassification rate in trucking and therefore encourages that the proposed bill should be passed to protect these drivers as employees. Their investigation claims that since 2008, audits have found 5,876 cases of misclassification amounting to \$126M unreported wages and \$1.2M unpaid unemployment taxes. With over 4,000 trucking firms in New York, these investigations have touched on less than 10% of them. Using this data, DMI estimates that 18%, or 29,500, New York truck drivers are misclassified. The DMI report also looked at the traditional independent contractor / employee factors, such as whether the IC works for others. DMI claims that 45% of New York owner-operators worked exclusively for only one carrier.

As an argument against passage of the bill, the Business Council of New York State said in early April that the proposed bill's sponsor offers no specific data on misclassification in trucking which

would justify its passage. Well, unfortunately, they may now have that data to work with in this DMI report.

Of course the transportation industry continues to fight these types of legislative initiatives but motor carriers need to be involved in the process as well either directly or through their state associations. This initiative is a reminder to consider choices with respect to the IC model that may be appropriate for your business. If the traditional IC model, which has long been a part of the trucking industry, is going to be continually attacked by state legislation then perhaps alternative hybrid models make sense, such as the Transportation Agent Model or the Freight Forwarder Model that have been discussed from time to time. Certainly the federal preemption arguments will be made, as they are in Massachusetts, California, Washington and elsewhere, but those are long and expensive battles and maybe a hybrid is worth consideration. We at Benesch would be happy to assist you with any review of your IC program or questions you may have about how pending legislation could affect your business.

For additional information, please contact:

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

J. Allen Jones III at (614) 223-9323 or ajones@beneschlaw.com

Thomas Kern at (614) 223-9369 or tkern@beneschlaw.com

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

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

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

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

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

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