NEWSLETTERS

InterConnect FLASH! No. 37 – New York: From Recently Reasonably Relaxed to Somewhat Concerned

FEBRUARY 24, 2014

Authors: Richard A. Plewacki

A few weeks ago we reported in a *FLASH* publication about New York's Governor signing into law the New York State Commercial Goods Transportation Industry Fair Play Act. Our assessment of the substantive content contained in the Act was that, notwithstanding many comments to the contrary, the New York law may be more even handed than it appeared. The primary reasons for our prior assessment was that the substantive content of the Act clearly indicates that it applied to motor carriers that (1) are "permitted by law to do business within the state" and (2) compensated the CMV drivers who possessed a state-issued commercial driver's license.

The other basis for our prior assessment was even though a traditional "ABC Test" is included in the Act as a way to establish an independent contractor work relationship, the Act also provided an alternative test, called the "Separate Business Entity" which, when closely analyzed, is substantively an abbreviated version of the traditional 20 Test point test used by the IRS to determine employee or independent contractor status.

All that being said however, it appears that the Governor, when signing the Bill, never really intended to have the substantive content of the Bill, as signed on January 10, 2014, become operative law in the State of New York. Thus, the *Transport Topics* report that Governor Cuomo "made some changes in scope and timeline." Indeed, such changes are in process through the legislation. On January 15, a Bill was introduced into the New York State Senate to make "technical corrections" to the Act. Identical language was introduced in the New York State Assembly and was adopted on February 11. It is anticipated that the Senate will pass its Bill soon, presumably as early as this week. The changes being made are reportedly to close "loop holes" which appeared in the legislation as previously passed by both houses of the New York Legislature.

The bottom line is that the substantive tests (the "ABC Test" and the "Separate Business Entity" Test) remain the same but the scope of application of the law is in the process of being expanded. Thus, the following are the changes, a couple of which cause a degree of concern.

1. One of the changes seems to make sense. The scope of the Act has been expanded to include vehicles 10,001 pounds or greater. This change is accomplished through adding the following words to the text of the "amending" legislation: "operates a commercial motor vehicle as defined in subdivision four-a section two of the transportation law." This expansion in the scope will include segments of the industry such as the small package delivery and the last mile retail delivery services, among others. One would suspect that FedEx Ground may have affirmatively supported and/or encouraged this change in scope since the "Separate Business Entity" test falls right in line with its revised business model. Thus, it may be fair to say that the first meaningful change was indeed

intended to capture a “loop hole” as to a group of motor carriers that were otherwise excluded from the substantive content of the original Bill.

2. With the scope of the law expanded to include lighter weight vehicles, the accompanying changes may produce unintended consequences. The words “permitted by law to do business within the state” have been deleted. Thus, the amended language essentially defines a Commercial Goods Transportation Contractor (i.e. a motor carrier) as “any sole proprietor, partnership, corporation, limited liability company or other legal entity.” Accordingly, without the “permitted by law” language (which would essentially apply to business entities formed under New York law or motor carriers with a physical presence in New York) the deletion of the key words would suggest that the scope of the Act as amended may reach motor carriers that merely travel through the state of New York and have no physical presence within the state.

3. Another change is the deletion of the words regarding a “commercial vehicle driver” and a “commercial vehicle driver’s license.” This was really driven by the first change regarding the inclusion of lighter weight vehicles since the drivers of the lighter weight vehicles do not necessarily require a CDL. However, when combined with the deletion of the “permitted by law” language and its precedent reference to the state (i.e. New York) the definition in its simplest sense now reads as follows:

A motor carrier that compensates a driver who possesses a state-issued license, transports goods in the state of New York, and operates a commercial vehicle weighing in excess of 10,001 lbs.

We have been told that arguably the change is not substantively different since it appears in a New York law. However, the mere reference to “a state-issued” driver’s license might suggest differently. In other words, if there was no intention to change the substantive meaning of the content of the Act through this amendment, then that would beg the question as to why the original language of the Act was altered to eliminate the limitation as to issuance by the state of New York.

Thus, as indicated by the title above, our thought process has been moved from once being reasonably relaxed about the New York statute to being somewhat more concerned, particularly with respect to motor carriers that have no physical presence in the state of New York but that merely have drivers transport freight through New York under a driver’s license issued by a state other than New York.

Unless we are way off base on reading tea leaves, we suspect that there will be an announcement relatively soon that the Senate has adopted the amendments as proposed and the Governor will presumably sign the amended Bill reasonably promptly thereafter with an effective date of April 10 rather than on March 11. The takeaway to motor carriers transporting through New York, but not domiciled in New York, is that they ought to be a bit more concerned and triple check their independent contractor programs and contracts to make sure that both the conduct and the contracts related to such programs can pass muster under the “Separate Business Entity" Test. It really may not be that difficult of a goal to attain, once attention is focused on the issue. To the extent that you may be interested more information about the amendment or forward looking corrective action with respect to your IC program, the Benesch Logistics and Transportation Law Group is available to assist.

Transportation & Logistics Practice Group

Michael Barrie at (302) 44-7068 or mbarrie@beneschlaw.com
Marc Blubaugh at (614) 223-9382 or mblubaugh@beneschlaw.com
Tamar Gontovnik at (216) 363-4658 or tgontovnik@beneschlaw.com
Matthew Gurbach at (216) 363-4413 or mgurbach@beneschlaw.com
James Hill at (216) 363-4444 or jhill@beneschlaw.com
J. Allen Jones III at (614) 223-9323 or ajones@beneschlaw.com
Thomas Kern at (614) 223-9369 or tkern@beneschlaw.com
David Krueger at (216) 363-4683 or dkrueger@beneschlaw.com
Andi Metzel at (317) 685-6159 or ametzel@beneschlaw.com
Lianzhong Pan at (86 21) 3222-0388 or lpan@beneschlaw.com
Martha Payne at (541) 764-2859 or mpayne@beneschlaw.com
Stephanie Penninger at (317) 685-6188 or spenninger@beneschlaw.com
Eric Zalud at (216) 363-4178 or ezalud@beneschlaw.com