NEWSLETTERS

InterConnect FLASH! No. 39 – Recent Court Decisions Reflect the Rule of Reason: Totality of the Circumstances Regains Traction

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Two recent court decisions from two different jurisdictions, issued several weeks apart, reflect a more balanced and reasonable approach for determining worker classification issues based on the totality of the facts and circumstances of the relationship between an owner-operator and a motor carrier.

In the first decision, the Colorado Supreme Court, in a dispute regarding unemployment tax liability under Colorado law, determined the following:

Whether an individual is customarily engaged in an independent trade or business related to the service performed is a question of fact that can only be resolved by applying a totality of circumstances that evaluates the dynamics of the relationship between the punitive employee and employer; there is no dispositive single factor or set of factors. W. Logistics, Inc. v. Indus. Claim Appeals Office, 2014 CO 31, 2014 Colo. LEXIS 352 (Colo. 2014)

Coming from a different direction regarding alleged violations of the Fair Labor Standards Act (FLSA) and the Washington Law Against Discrimination Act (WLAD) by a motor carrier, the second decision, from the United States District Court for the Western District of Washington, stated the same conclusion somewhat differently:

Whether one is an employee for the purposes of the FLSA depends on the totality of the circumstances and whether, as a matter of economic reality, the individual is dependent on the business he or she is serving. Neither the presence nor the absence of any individual factor is determinative. Moba v. Total Transp. Servs., 2014 U.S. Dist. LEXIS 58854 (W.D. Wash. Apr. 25, 2014)

In the Washington lawsuit, certain owner-operators alleged violations of the FLSA and the WLAD by Seattle Freight Services Inc. (Seattle Freight) and certain managerial individuals. The threshold question was, of course, whether the Plaintiffs were employees or independent contractors, since the FLSA and the WLAD do not apply to independent contractors. The Ninth Circuit Federal District Court had previously identified several factors that should be considered when determining if an individual is an employee for the purposes of the FLSA. The factors were all those that we typically see and deal with in worker classification matters: (1) the right of control; (2) opportunity to realize a profit or loss; (3) investment in equipment; (4) whether the services require a special skill; (5) the degree of permanence of the relationships; and (6) whether the service rendered was an integral part of the alleged employer's business.

The Court in the Seattle Freight case dealt with all six factors, finding quite quickly an absence of the right to control. The Court further found that the owner-operators had a significant investment in equipment and that an opportunity for profit or loss was present. In addressing the factor regarding special skills, one that has been dealt with differently in various other Court decisions, this particular Court took note that the owner-operators had attended truck driving school, and determined that the tasks performed by a driver of a commercial motor vehicle requires a significant degree of skill, including professional driving skills, business management skills, knowledge of the U.S. DOT Regulations and freight-handling skills, thus suggesting independent contractor status.

The degree of permanence issue was also dealt with quite quickly in a straightforward manner, but perhaps the most interesting assessment was how the Court dealt with the issue regarding the integral part of the motor carrier's business. This issue has always been troublesome to persuasively address in determining proper worker classification. In answering the question of whether the driver is in business for himself or dependent on someone else's business, the Court relied on a decision from the Eastern District of New York (Velu v. Velocity Exp., Inc., 666 F. Supp. 2d 300, 307) and considered factors such as the driver's freedom to make his own schedule, the ability to work for other companies, the discretion to decline offers of dispatch, and whether the driver owns, insures, maintains and services his vehicle without reimbursement or contribution from the motor carrier. Using those factors, the Court determined that the Plaintiffs are ultimately in business for themselves, suggesting independent contractor status.

That being said, after having gone through the step-by-step analysis, the Court nevertheless determined that the totality of the circumstances and whether, as a matter of economic reality, the individual is dependent on the motor carrier with which he or she is under contract, is an overriding consideration that must be incorporated into an analysis. Neither the presence nor the absence of any individual factor is determinative. Therefore, notwithstanding the "finesse" with which the Court dealt with the requirement for special skills and being an integral part of the motor carrier's business, the Court's instruction was to look at the relationship in its entirety and the operative facts and circumstances. The Court did indeed do this, and determined that there was independent contractor status, which is good news.

In the Colorado case, the determination whether an individual is an employee or an independent contractor for unemployment tax liability under the Colorado Employment Security Act (CESA) was based on whether the putative employer could prove that the individual was (1) free from control and direction in the performance of services, and (2) customarily engaged in an independent trade or business related to the services performed. Much like in the Washington decision, the Court dealt with the issue of control quite quickly. This left only the independent trade or business issue for the Court to determine, which had traditionally been decided on a single factor-whether the individual was providing similar services for anyone else during the period in question.

Interestingly, in an unrelated case, the Court of Appeals found that the use of the single factor was incorrectly relied on and that the determination should be made in considering the nine factors set forth in the Colorado Statute (Section 8-70-115(1)(c)). In a case decided the same day as the Western Logistics case, the Supreme Court agreed with the Court of Appeals that the single factor test was inappropriate and that the nine factors set forth in the statute should be considered, but declined to adopt the Court of Appeals' decision that the nine factor test was outcome determinative.

The Court noted that the nine factors contained in the CESA were provided to determine whether a document established a presumption that a putative employee is an independent contractor, but it does not provide a general test for determining whether an individual is an independent contractor. The nine factors were somewhat different than those that we typically see. They included the element of exclusivity; prohibition against quality standards; pay based on performance; termination for breach; minimal training; source of equipment; setting work times; payment to individuals personally rather than to trade or business names; and maintaining operations separate and distinct from the putative employer. The Court observed that the nine factors did not reflect a statutory test for determining if a worker is customarily engaged in an independent business, noting that the factors may be indicative of what the General Assembly thought would be important distinctions between employees and independent contractors and may be considered in questions concerning proper worker classification. The Court did not stop there, however, relying on prior case law that had previously used the factors in different ways. The Court concluded that, given the wide array of factors that could be relevant, requiring a rigid "check-the-box" type inspection was not appropriate. Rather, a more accurate test to determine if an individual is customarily engaged in an independent business involves an inquiry into the nature of the working relationship.

Therefore, a finder of fact may indeed consider the nine factors found in the statute as well as other information relevant to the nature of the work. Ultimately, the totality of the circumstances, which evaluates the dynamics of the relationship between the putative employee and the employer, controls the decision, and there is no dispositive single factor or set of factors that control the decision.

These two decisions demonstrate that there is indeed a basis upon which to argue a broader-based test when faced with various "check-the-box," ABC-type criteria in a statute under which a worker classification dispute may arise, and that the "big picture" is more important than each criteria in a punch list. Both decisions contain definitive material to cite when dealing with any of the factors that have been more difficult for a motor carrier to adequately support or defend in an owner-operator relationship, such as the requirement of special skills and of course the integral part of the motor carrier's business.

As always, the concluding guidance is vigilance, vigilance, vigilance with respect to a motor carrier's contract documentation and actual practices with its owner-operators to ensure that it presents the best possible scenario to ward off attacks under either state or federal laws. The Benesch Transportation Logistics Practice Group is very experienced in this area of the law and can certainly provide counsel and assistance to the extent required.