NEWSLETTERS

InterConnect FLASH! No. 73 – Ohio Legislature Enacts Statutory Protections for Motor Carriers Using Bona Fide Independent Contractor Drivers

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The State of Ohio has enacted legislation, effective July 1, 2019, establishing clear rules governing when a motor carrier driver qualifies as an independent contractor.

The Ohio Trucking Association successfully led and won the fight to enact House Bill 62 (the "Bill") in an effort to assist its members in standardizing the administrative processes that burden motor carriers using independent contractor drivers in Ohio. Prior to July 1, 2019, Ohio utilized three different tests, none of which were transportation-specific, to evaluate the nature of the relationship.

Those three tests are as follows:

(i) Workers' Compensation - the test is whether the employer reserves the right to control the manner or means of doing the work.[1]

(ii) Unemployment Compensation - the test involves a 20-factor analysis similar to the "common law test" used by the Internal Revenue Service to determine whether a person is an independent contractor under the federal income tax and federal unemployment tax laws.[2]

(iii) Minimum Wage/Overtime - the test requires application of the "economic realities" test that is used to determine an individual's employment status under the federal minimum wage and overtime laws.[3]

The Bill replaces these three tests with a comprehensive and industry-specific seven factor test (the "Test") to evaluate the nature of the relationship between the motor carrier and the putative independent contractor driver. The Bill requires that all seven factors of the Test be met in order to establish that a driver is an independent contractor and not an employee.

The Test is as follows:

(i) The individual owns the vehicle or vessel that is used in performing the services for or on behalf of the carrier, or the individual leases the vehicle or vessel under a bona fide lease agreement that is not a temporary replacement lease agreement. For purposes of this division, a bona fide lease agreement does not include an agreement between the individual and the motor carrier transporting property for which, or on whose behalf, the individual provides services;

(ii) The individual is responsible for supplying the necessary personal services to operate the vehicle or vessel used to provide the service;

(iii) The compensation paid to the individual is based on factors related to work performed, including on a mileage-based rate or a percentage of any schedule of rates, and not solely on the basis of the hours or time expended;

(iv) The individual substantially controls the means and manner of performing the services, in conformance with regulatory requirements and specifications of the shipper;

(v) The individual enters into a written contract with the carrier for whom the individual is performing the services that describes the relationship between the individual and the carrier to be that of an independent contractor and not that of an employee;

(vi) The individual is responsible for substantially all of the principal operating costs of the vehicle or vessel and equipment used to provide the services, including maintenance, fuel, repairs, supplies, vehicle or vessel insurance, and personal expenses, except that the individual may be paid by the carrier's fuel surcharge and incidental costs, including tolls, permits, and lumper fees; and

(vii) The individual is responsible for any economic loss or economic gain from the arrangement with the carrier.[4]

As has always been the case in Ohio, but is even more evident from the individual factors outlined in the Test, the relationship between the motor carrier and the independent contractor must be bona fide. The Test further requires that vehicle lease agreement must be between the independent contractor and a party other than the motor carrier to which it provides services. The payment structure cannot be based upon the hours worked, but must be related to the more typical means of driver payment such as mileage or percentage based pay, and the independent contractor should be responsible for most of the operating costs.

The relationship must be in writing, specify that it's an independent contractor relationship, and the motor carrier cannot control the manner and means to which the independent contractor performs such services. However, the Test has clarified that compliance with regulations or shipper-specific instructions is not the equivalent of controlling the manner and means of such services. Practically, if the relationship follows these typical parameters, the relationship should satisfy the requirement that the independent contractor is responsible for economic loss or gain that results.

The Test was negotiated by The Ohio Trucking Association and its President & CEO, Thomas Balzar, and was ultimately agreed upon by typical adversarial parties associated with various unions and plaintiff attorneys' organizations. Previous attempts in Ohio to establish a transportation industry specific test had been unsuccessful in implementing the reasonable observation that typical motor carrier obligations, such as complying with FMCSA regulations or shipper requirements, should not be factors in determining whether or not a motor carrier is exercising control over a driver.

Fortunately, the Test now provides a clear path for motor carriers and independent contractor drivers to structure their relationships without the uncertainty of inconsistent administrative rulings. The Bill is effective July 1st, 2019 but still awaits promulgation of the rules by the applicable state agencies which will outline the practical use of the Test during administrative hearings.

For further guidance concerning this new legislation, please feel free to contact Benesch's experienced transportation team.

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[1]Gillum v. Industrial Comm., 141 Ohio St. 373, 374 (1943). See also Bostic v. Connor, 37 Ohio St.3d 144 (1988).
[2]R.C. 4141.01(B)(2)(k) and Ohio Administrative Code 4141-3-05.
[3]See Donovan v. Brandal, 736 F.2d 1114 (6th Cir. 1984) and Solis v. Cascom, Inc., 2011 U.S. Dist. LEXIS 122573, case No. 3:09-cv-257 (S.D. Ohio 2011).
[4]Am. Sub. H.B. No. 62, 133rd G.A. (Oh. 2019).