Labor and Employment Corner

by Thomas R. Revnew

The Push to Correct the Misclassification of Commercial Truck Drivers

Misclassification of workers as independent contractors has been a hot-button issue for the past few years. In September 2014, the U.S. Department of Labor awarded $10,225,183 to 19 states to implement or improve worker misclassification detection and enforcement initiatives.[1] The misclassification inquiry has not ignored the trucking industry, where there has been a nationwide debate regarding the propriety of the independent contractor status of truck drivers. Increasingly, lawsuits and state legislation have pushed to classify these drivers as employees.

For employers, the classification of drivers as independent contractors carries the implications of not being required to pay unemployment insurance taxes, workers' compensation premiums, and Social Security and Medicare contributions on behalf of those drivers. According to the U.S. Department of the Treasury, an employer can save approximately $3,710 per worker per year in employment taxes on an annual average of $43,007 in income paid per employee by classifying workers as independent contractors.[2] However, because different state laws focus on different determinative factors of an independent contractor relationship, there is no single test or rule regarding how drivers should be classified.

In an effort to curb any misclassification of truck drivers as independent contractors, several states have recently entertained legislation specifically addressing the independent contractor status in the trucking industry. Last year, New York enacted a law applicable to all employers in the commercial-goods transportation industry that established certain criteria that must be met to be considered a separate business entity from the contractor to which services are provided.[3] Under the New York State Commercial Goods Transportation Industry Fair Play Act (the "Act"), all workers in the commercial-goods transportation industry are presumed to be employees unless the employer can establish otherwise through the tests set forth in the Act. For drivers to legally qualify as independent contractors under the Act, their compensation from a transportation contractor must be reported on a Federal Income Tax Form 1099, and they must either qualify as a "separate business entity" or pass what is called the "ABC test." To qualify as a separate business entity, a driver must satisfy all elements of an 11-part test:

1. The business entity (driver) is free to determine on its own the means and manner of providing services, limited only by requirements to meet the desired result or federal rule or regulation.
2. The business entity can exist even if its relationship with the contractor terminates.
3. The business entity has substantial capital investment in its own equipment and tools.
4. The business entity owns or leases the capital goods and bears the risk of loss and profit.
5. The business entity is free to perform services to others and the general public on a continuing basis.
6. The business entity receives a 1099 for services provided to the contractor.
7. There is a written contract between the business entity and contractor specifying their relationship as independent contractors or separate business entities.
8. If the services require a license or permit, the business entity pays for the license or permit under its own name, or, where permitted by law, pays for reasonable use of the contractor's license or permit.
9. The business entity may hire its own employees without the contractor's approval, subject to applicable statutory or regulatory requirements, and the business entity is not reimbursed by the contractor for payments it makes to its employees.
10. The business entity is not required to present itself as an employee of the contractor.
11. The business entity is free to perform similar services for others on whatever basis and whenever it chooses.

Any employer willfully violating the law is subject to monetary penalties as well as criminal prosecution. The Act also requires that all commercial goods transportation contractors conspicuously post

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a Notice of Rights, which describes the responsibility of independent contractors to pay federal and state taxes and also explains the rights of employees to receive workers' compensation, unemployment benefits, minimum wage, overtime, and other federal and state workplace protections.

The alternative ABC test requires first that the driver be free from the control and direction of the contractor in performing services, both in the contract and in its actual, real-life application. Second, the service provided by the driver must be different from the services provided by the contractor or otherwise not part of the usual business of the contractor. Finally, the driver must be customarily engaged in carrying out the same services as an independent established trade or profession, rather than simply working for the contractor.

The New York legislation certainly represents the most thorough address of classification of truck drivers. Other states have made similar attempts. In 2013, both houses of the New Jersey legislature passed the Truck Operator Independent Contractor Act, which would have created a presumption that parcel delivery and drayage truck drivers in New Jersey were employees and not independent contractors unless they could satisfy a three-pronged statutory test for independent contractor status. However, Gov. Chris Christie vetoed the legislation. Similar bills defining independent contractor status within the trucking industry have been introduced but not passed in Georgia, Ohio, and Washington. In 2013, the Minnesota legislature entertained a bill that would amend the current Minnesota statute setting forth factors for finding that an operator is an independent contractor to include a presumption that a driver is an employee unless otherwise established, but the bill stalled.

Regardless of the existence of independent contractor legislation tailored to the trucking industry, and despite the differences in the independent contractor tests used by different states and agencies, recent court decisions have shown that the trend, no matter the set of factors used, is to find that truck drivers are employees rather than independent contractors. One set of decisions that fully illustrates this point are three cases that arose from 2010 litigation regarding whether FedEx drivers are employees.

In August 2014, the Ninth Circuit found in both *Alexander v. FedEx Ground Package System Inc.*[4] (applying the California test for independent contractors) and in *Slayman v. FedEx Ground Package System Inc.*[5] (applying the different set of Oregon factors) that FedEx had wrongfully classified approximately 2,300 drivers as independent contractors. California's independent contractor test primarily utilizes a set of right-to-control factors, while Oregon utilizes a right-to-control test for illegal wage-deduction claims and an economic-realities test for unpaid overtime claims. The Ninth Circuit found that under both states' tests, the FedEx drivers were employees, emphasizing the fact that FedEx had the right to control the physical appearance of drivers and their vehicles, the drivers' workloads, and the use of the drivers' vehicles when they were not delivering packages.

Subsequently, in October 2014, the Kansas Supreme Court in *Craig v. FedEx Ground Package System Inc.*[6] reached the same conclusion while utilizing Kansas' independent contractor tests. Kansas wage-payment law, a 20-factor test that is similar but not identical to the IRS' independent contractor test, must be applied to determine whether drivers are employees or independent contractors. The Kansas test incorporates both right-to-control tests and economic-realities tests but focuses on an employer's right of control. Although the Kansas test is different than the California and Oregon tests applied in the Ninth Circuit decisions, the result was the same, and the Kansas Supreme Court determined that "FedEx has established an employment relationship with its delivery drivers but dressed that relationship in independent contractor clothing."

Based upon the increased level of funding and enforcement initiatives by the U.S. Department of Labor aimed at preventing misclassification, the attempts by state legislatures to enact independent contractor legislation specific to the trucking industry, and recent court decisions, there is an obvious trend toward finding that truck drivers are employees rather than independent contractors. ⊙

Endnotes

[1]www.dol.gov/opa/media/press/eta/ETA20141708.htm.
[2]www.treasury.gov/tigta/auditreports/2013reports/201330058fr.pdf.
[3]N.Y. Labor Law § 862-b(2).
[4]765 F.3d 981 (9th Cir. 2014).
[5]765 F.3d 1033 (9th Cir. 2014).
[6]300 Kan. 788 (Kan. 2014).