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Attorneys at Law

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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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FLASH NO. 36
NEW YORK LAW MAY BE MORE EVENHANDED THAN IT APPEARS

Many folks have commented on the New York State Commercial Goods Transportation Industry Fair Play Act, which was recently signed by the Governor and will not be effective until March 11, 2014, and several sources are predicting gloom and doom for motor carriers once the Act is implemented. On its face, the Act is not particularly good news; however, after careful scrutiny it may not be as troublesome for the motor carriers as many are fearing.

Certainly, the Act has the overriding purpose of creating a presumption of employment in the commercial goods transportation industry. Its language provides that any person performing commercial goods transportation services for a commercial goods transportation contractor shall be classified as an employee unless the person is a "separate business entity" or all of the criteria of a traditional "ABC Test" are met. However, once the details of the Act are studied, it is not as bad as the introductory language might suggest.

The scope of the law applies only to motor carriers "permitted by law" to do business within the State of New York and who compensate CMV drivers who possess a commercial drivers license issued by the State of New York and drives CMV over 10,000 lbs. The phrase "permitted by law" may be a bit vague, and it will remain to be seen as to whether this encompasses only those companies registered with the New York Secretary of State's Office or if something as simple as the payment of a prorated share of highway use tax is sufficient to be considered "permitted by law." Once that first hurdle is reached, then the law applies only to the drivers who possess a New York CDL. So, at any rate, this limits the new law's reach for many motor carriers.

Even if the motor carrier falls under the Act, there are two tests which it can use to overcome the Act's statutory presumption that a driver is an employee rather than an independent contractor.

The first is a straight forward "ABC Test," which has three prongs, of which all must be satisfied: (1) the driver is free from control and direction in performing services, in practice and under the contract; (2) the service is performed outside the usual course of business for the company; and (3) the driver is normally engaged in an independently established business that is similar to the service at issue involving the transportation or delivery of commercial goods. This type of ABC Test has been prevalent in other states and, admittedly, can be a challenge for motor carriers to overcome, depending on the individual circumstances, but it is certainly not a "death knell."

Luckily, the Act provides an alternative solution in case the motor carrier fails with the ABC Test, which is not available in other states using the ABC Test. Known as the "separate business entity" standard, this alternative was the result of negotiations by a coalition of

business service stakeholders including The New York State Motor Truck Association and the American Trucking Association. It essentially requires that the independent contractor meet the test to be considered a "separate business entity."

This "separate business entity" standard has several key components. First, the business entity (or IC) must perform its services free from direction or control over the manner and means of providing the service, subject only to the motor carrier's right to specify the desired result or federal rule regulation. Essentially, this element is simply an improvement over the "ABC Test's" first prong which we discussed above. A related element is the requirement for a written contract with the motor carrier, under the business entity's name, specifying their relationship to be as independent contractors in separate business entities. Also, the motor carrier cannot require that the business entity be represented as an employee of the motor carrier to its customers.

The business entity must not dissolve or be cancelled once the relationship with the motor carrier is terminated. Hand in hand with this prong is another element, which requires that the business entity actually includes its services rendered on a Federal Income Tax Schedule as an independent business or profession. Additionally, the business entity must either pay for its own licenses or permits or for the reasonable use of the motor carrier's licenses or permits. And if the business entity needs employees, it must hire, pay for, and report any employee incomes to the IRS, all on its own without involvement or reimbursement from the motor carrier.

Other elements include the business entity's substantial investment of capital in the business, ownership or leasing of capital goods, ability to gain profit or bear the loss, and ability to offer services to the general public, on whatever basis and whenever it chooses.

After studying the new law, we cannot help but notice that this "separate business entity" test seems to be an abbreviated version of the traditional twenty-one point test used by the IRS to determine employee or independent contractor status. These elements should all be too familiar to those in the motor carrier industry.

Should a motor carrier use an independent contractor that unfortunately does not meet either of these two tests, then it will face some hefty civil and criminal penalties. An initial violation will net the motor carrier a civil penalty of $1,500 but any violation after that during the next five-year period may bump the penalty to $5,000. And, any willful misclassification increases the penalty for the initial violation to $2,500. Additionally, willful misclassification may subject the motor carrier to criminal liability as well.

A review of your company records to determine those IC drivers who possess a New York CDL would be in order. Thereafter, for those who think that they may be affected by the law, close scrutiny of your IC agreements and your day-to-day operations with owner-operators may be in order before the new law is effective. The corrective measures may be quite simple. We at Benesch are happy to assist you in your evaluation as you prepare for the new law. Please let us know if we can help.

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