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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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FLASH NO. 59
MASSACHUSETTS "ABC" TEST COURT DECISION: FRESH APPLICATION ON OLD SPIN

Over the last two years, the Benesch Transportation & Logistics Team has written in various installments of the *FLASH* about the Massachusetts Independent Contractor Law, Mass. Gen. Laws ch. 149, §148B (the "Massachusetts 'ABC' Test"). The Massachusetts "ABC" Test provides that a worker is properly classified as an independent contractor if the employer can show that: (A) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and (B) the service is performed outside the usual course of the business of the employer, and (C) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed. As we reported in *FLASH Nos. 53* and *54*,[1] the First Circuit Court of Appeals held that Prong B of the Massachusetts "ABC" Test was preempted for motor carriers under the Federal Aviation and Administration Authorization Act of 1994 ("FAAAA").[2] Nevertheless, Prongs A and C of the Massachusetts "ABC" Test remain in play. The preemption of Prong B does not equal a free pass.

Late last month, the Massachusetts Supreme Court considered the relationship between drivers and a provider of "last mile" delivery services for retail furniture companies in *Chambers v. RDI Logistics, Inc.* In its opinion, the court reversed the trial court's judgment in favor of RDI on the grounds that Prongs A and C of the Massachusetts "ABC" Test were not preempted under FAAAA, and that issues of material fact existed as to whether plaintiffs had standing as individuals to assert their misclassification claims. While there is certainly nothing overwhelmingly earth-shattering about the court's decision, the facts of the case (which were construed in a light most favorable to the plaintiffs) reemphasize the importance of treating your independent contractors like any other vendor with which you do business. In addition, the opinion highlights the potential minefield when you are too clever by half.

According to the court's decision, RDI only did business with corporate entities (*i.e.*, not individuals), and that policy extended to RDI's independent contractor drivers. The service agreements entered into between RDI and its ICs contained a nonsolicitation provision (which is not unusual) and also an onerous noncompete agreement with a three-year tail. RDI, through its managers, allegedly told drivers they would be terminated if they performed services for any company other than RDI. Moreover, the court noted that RDI regulated how its drivers loaded furniture onto their trucks, required drivers to follow prescribed routes, and mandated the use of GPS devices to make certain drivers followed the prescribed routes.

As we begin a new year, audit the relationships between your businesses and your independent contractor fleets and/or drivers, particularly your service agreements. Recognize the importance of treating independent contractors like customers or

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vendors. They are not employees. If you have a noncompete provision in a service agreement with an independent contractor, like RDI, ask your attorney to help you revise that agreement. Employers can restrict the ability of an employee to perform work for another employer, but independent contractors are free to perform services for others while performing services for you.

If you control the manner and means of your independent contractors' performance of services to your business, through the service agreement or through your managers or operations, like RDI did, ask your attorney to help you revise that agreement and audit your operations to make certain your operational conduct mirrors the terms and provisions of your service agreement. Employers dictate employees' routines and hours worked. Employers direct the means and methods by which tasks and assignments are performed by their employees. Employers generally control the way an employee's tasks are performed. Independent contractors, on the other hand, determine their own routines and when to work, they determine the way accepted tasks and assignments will be performed, and they are responsible only for the results or final product.

The other important takeaway from the *RDI Logistics* decision is to avoid the temptation in your business to act overconfidently or cutely based upon a misguided understanding or interpretation of the legal landscape. The court does not say, but the opinion suggests, that RDI was so insistent that its independent contractors be business entities as opposed to individuals because RDI, or perhaps its attorneys, mistakenly believed that corporate entities were barred from asserting misclassification claims under the Massachusetts Independent Contractor Law, which refers only to individuals. Applicable case law cited by the court demonstrates that the statute's reference to individuals does not preclude individuals providing services through a corporate entity from asserting a misclassification claim if the worker was forced to incorporate so the "employer" could misclassify the worker as an independent contractor. The court precluded summary judgment on this point because "the allegations raise the question whether the plaintiffs incorporated for their own benefit, as the defendants suggest, or whether RDI required them to incorporate in order to misclassify them as independent contractors."

The treatment of independent contractors/owner-operators in your business is important to profitability, sustainability, and the mitigation of potentially costly misclassification litigation. It is mission-critical that your service agreements and business operations are consistent. The Benesch Transportation & Logistics Team is happy to help your business review its independent contractor program at the operational level, through an audit of your service agreements, or both. Happy New Year!

[1] Previous issues of the *FLASH* can be found here.

[2] *See Massachusetts Delivery Association v. Healy*, 821 F.3d 187 (1st Cir. 2016) and *Schwann, et al. v. FedEx Ground Package System, Inc.*, 813 F.3d 429 (1st Cir. 2016).

For more information, contact:

J. Allen Jones at ajones@beneschlaw.com or (614) 223-9323
Allen is a partner with Benesch's Transportation & Logistics Practice Group. He focuses his practice on the representation of companies located throughout the country in virtually all segments of the transportation industry, including, among others, truckload carriers, overweight/over-dimensional carriers, bulk and tank carriers, dray carriers, and third-party logistics providers in matters involving, among other things, independent contractor/owneroperator issues, lost, damaged or stolen freight, freight charge collection, and transportation related service agreements.

Richard A. Plewacki at rplewacki@beneschlaw.com or (216) 363-4159
Richard is a partner with the firm's Litigation and Transportation & Logistics Practice Groups. He has been in the transportation and logistics industry, both as a businessman and an attorney, for over 40 years during which he has been heavily involved with the IC model within the trucking industry. His practice also includes advising and representing motor carriers, leasing companies, third party logistics providers, national shippers, large private fleets and water carriers in the domestic, non-contiguous trade lanes.

Additional Information

For additional information, please contact:

Transportation & Logistics Practice Group

Michael J. Barrie at (302) 442-7068 or mbarrie@beneschlaw.com
Marc S. Blubaugh at (614) 223-9382 or mblubaugh@beneschlaw.com
Matthew D. Gurbach at (216) 363-4413 or mgurbach@beneschlaw.com
Jennifer R. Hoover at (302) 442-7006 or jhoover@beneschlaw.com
J. Allen Jones III at (614) 223-9323 or ajones@beneschlaw.com
Thomas B. Kern at (614) 223-9369 or tkern@beneschlaw.com
Peter N. Kirsanow at (216) 363-4481 or pkirsanow@beneschlaw.com
David M. Krueger at (216) 363-4683 or dkrueger@beneschlaw.com
Christopher J. Lalak at (216) 363-4557 or clalak@beneschlaw.com
Stephanie V. McGowan at (317) 685-6161 or smcgowan@beneschlaw.com
Andi M. Metzel at (317) 685-6159 or ametzel@beneschlaw.com
Michael J. Mozes at (614) 223-9376 or mmozes@beneschlaw.com
Kelly E. Mulrane at (614) 223-9318 or kmulrane@beneschlaw.com
Lianzhong Pan at (86 21) 3222-0388 or lpan@beneschlaw.com
Martha J. Payne at (541) 764-2859 or mpayne@beneschlaw.com
Stephanie S. Penninger at (317) 685-6188 or spenninger@beneschlaw.com
Joel R. Pentz at (216) 363-4618 or jpentz@beneschlaw.com
Richard A. Plewacki at (216) 363-4159 or rplewacki@beneschlaw.com
Matthew J. Selby at (216) 363-4458 or mselby@beneschlaw.com
Brittany L. Shaw at (317) 685-6118 or bshaw@beneschlaw.com
Peter K. Shelton at (216) 363-4169 or pshelton@beneschlaw.com
Clare R. Taft at (216) 363-4435 or ctaft@beneschlaw.com
Jonathan Todd at (216) 363-4658 or jtodd@beneschlaw.com
Eric L. Zalud at (216) 363-4178 or ezalud@beneschlaw.com

Labor & Employment Practice Group

Maynard Buck at (216) 363-4694 or mbuck@beneschlaw.com
Joseph Gross at (216) 363-4163 or jgross@beneschlaw.com
Rick Hepp at (216) 363-4657 or rhepp@beneschlaw.com
Christopher J. Lalak at (216) 363-4557 or clalak@beneschlaw.com
Peter Kirsanow at (216) 363-4481 or pkirsanow@beneschlaw.com

www.beneschlaw.com