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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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FLASH NO. 49
DOL WAGE & HOUR DIVISION'S "ADMINISTRATOR'S INTERPRETATION" NO INDEPENDENT CONTRACTOR COUP DE GRÂCE FOR TRUCKING—JUST NEW MOTIVATION FOR CONTINUED FOCUS

On July 15, 2015, David Weil, Department of Labor Wage and Hour Division (the "Division") Administrator, issued the much anticipated and promised "administrator's interpretation" (the "Memo") on the issue of worker classification. The Memo was expected to provide the Division's view of what constitutes an independent contractor. Instead, not surprisingly, the Memo is a bureaucratic employee advocacy piece, straining to convince readers that independent contractors really do not exist, and reminding readers, more than once per page, just how broadly the Fair Labor Standards Act ("FLSA") defines employee. The sky is not falling though; the Memo does not mean motor carriers should convert all independent contractors to employees, or worse, shudder businesses or fleets altogether.

Granted, publication of the Memo is certainly not a positive event. But, the industry has been aware of the Obama administration's overt interest in undermining the classification of workers as independent contractors. Since President Obama took office, the Department of Labor has increased funding to states for misclassification investigations, and entered into memoranda of understanding with various states and the Internal Revenue Service as part of a Misclassification Initiative. Consequently, it is important to keep Mr. Weil's Memo in perspective. It merely provides guidance for worker classifications under the FLSA, which chiefly governs minimum wage, overtime, and child labor laws.

The Memo provides that the under the FLSA, the broad "economic realities" test, rather than the "control" test, should be applied to determine whether a worker is an employee or an independent contractor. Mr. Weil explains that the "economic realities" test focuses on whether a worker is "economically dependent" on an employer or is in business for himself or herself. "If the worker is economically dependent on the employer, then the worker is an employee. If the worker is in business for him or herself (i.e., economically independent from the employer), then the worker is an independent contractor."

The factors proffered to ascertain the economic realities merely "guide the determination." The Memo considers the following six factors:

- the extent to which the work performed is an integral part of the employer's business;
- the worker's opportunity for profit or loss depending on his or her managerial skill;
- the extent of the relative investments of the employer and the worker;
- whether the work performed requires special skills and initiative;
- the permanency of the relationship; and
- the degree of control exercised or retained by the employer.

(continued)

Predictably, the Division's analysis of these factors is heavily slanted in favor of concluding that most workers are employees. For example, Mr. Weil concludes that "[a] true independent contractor's work … is unlikely to be integral to the employer's business." An examination of the second factor "should not focus … on whether there is an opportunity for profit or loss, but rather on whether the worker has the ability to make decisions and use his or her managerial skill and initiative to affect opportunity for profit or loss." For the third factor, "the worker's investment should not be relatively minor compared with that of the employer." "Moreover, an analysis that compares the worker's investment to the employer's investment—but only to the employer's investment in the particular job performed by the worker—likewise disregards the ultimate determination by examining only a piece of the employer's business for the comparison." Next, "a worker who is truly in business for him or herself will eschew a permanent or indefinite relationship with an employer and the dependence that comes with such permanence or indefiniteness." However, the Division opines that even a lack of permanence or indefiniteness does not necessarily mean the worker is an independent contractor. Last, the "worker's control over meaningful aspects of the work must be more than theoretical—the worker must actually exercise it." Following an analysis of the "economic realities" test factors, the Division concludes that "[i]n sum, most workers are employees under the FLSA's broad definition."

For the majority of mainstream trucking businesses, the Memo poses no new challenge, though it may present heightened scrutiny for the courier/parcel segment. At the very least, the Memo calls for increased awareness of the "do's and don'ts" when operating with independent contractors/owner-operators. The Division's Memo is not the law, nor does it have the force of law; it is merely guidance offered by a governmental agency. Of course, the potential exists for the "economic realities" test to filter down to other federal and state agencies that currently use other analytical methodologies, *e.g.*, the IRS's "control" test, but that has yet to occur. In any event, the transportation industry already operates under its own guidance—the Leasing Regulations—and compliance with those regulations is not indicia of control over a worker. In short, the Memo is by no means a death blow to the independent contractor model, but it should serve as new motivation for intensified focus on motor carrier contracts and operational conduct. Despite the Division's "guidance," motor carriers can continue to be successful with the independent contractor/owner-operator model.

Of course, the Benesch Transportation & Logistics Practice Group has a very deep and experienced team that is well versed in this area of law. If you have any questions regarding this new development or how it may impact your independent contractor operations, we are happy to provide any assistance that may be needed or desired.

For more information

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Mr. Jones is a partner with Benesch's Transportation & Logistics Practice Group. Mr. Jones 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/owner-operator issues, lost, damaged or stolen freight, freight charge collection, and transportation related service agreements.

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