



**OWNER-OPERATORS OR EMPLOYEES:
THE TRANSPORTATION INDUSTRY BEGINS A COUNTER ATTACK ON THE PLAINTIFF BAR AND
THE GOVERNMENT OVER INDEPENDENT CONTRACTOR MISCLASSIFICATION**

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The transportation industry is under siege from a serious challenge to the way it interacts with drivers. But this time, it is not only the plaintiff bar taking aim at the types of relationships trucking companies and other transportation providers have with their drivers. Now, the federal government and multiple state agencies are joining forces with plaintiff attorneys armed with a threatening new weapon: Independent Contractor Misclassification.

As we saw with wage and hour litigation, the plaintiff bar has included the transportation industry as one of its primary targets in alleging that employers are misclassifying employees as independent contractors and depriving them of various rights including overtime pay, unemployment compensation, workers compensation and health/retirement benefits. State and federal governments soon joined the fight in an attempt to increase tax revenues from companies who allegedly misclassified their drivers as independent owner-operators.

In response, the transportation industry and its owner-operators are fighting back to preserve the independent contractor status of drivers with carefully worded contracts and policies that give drivers the autonomy to run their own individual businesses.

Plaintiff Attorneys Fire the First Shots

The misclassification battles began with many prominent transportation companies defending claims in multiple jurisdictions over its classification of drivers as independent contractors. 3P Delivery, who had ordinarily classified its drivers as independent contractors and not employees, was sued by drivers in Oregon and Washington under the theory that it compelled its drivers to appear to be running independent businesses when they were actually employees. The plaintiffs sought damages including denial of overtime, paid holiday pay, penalty wages and reimbursement of driver's expenses for operating the vehicles. Included among the claims that apparently influenced 3P to settle class action litigation were the following:

- 3P chose the payment method for the drivers;
- Drivers were required to adhere to 3P's standards set forth in a guidebook;
- 3P advertised that it maintained its own fleet of vehicles;
- The company controlled the work load of the drivers and did not allow substitute drivers;
- The company instructed drivers how to load, transport and unload shipments;
- The company prohibited drivers from using the vehicles to offer delivery services to other companies;
- 3P evaluated the performance of its drivers;
- The Company committed fraud by directing drivers to set up Limited Liability Companies to hide the fact that the drivers were actually employees.

Similarly, Fed Ex Ground Package System, Inc. has also faced litigation over misclassification in multiple venues. The stakes quickly became large when a nationwide class of more than 20,000 drivers was certified by the Northern District of Indiana under the company's failure to provide Employee Retirement Income Security Act benefits that the drivers would have been eligible for had they been employees rather than independent contractors. Judge Robert Miller ruled that the company required drivers to:

- buy or use trucks with company specifications;
- pay for the company logo to be painted on their trucks;
- use assigned routes on pick-ups and deliveries;
- wear specific company uniforms;
- stop using the trucks to haul for other companies.

Soon Fed Ex was facing driver claims under 35 other state laws in multi-district litigation, and the California Supreme Court rejected Fed Ex's appeal of a California appellate court's affirmance of a trial court finding that drivers were employees rather than independent contractors for the purpose of their being entitled to reimbursement for work-related expenses.

Federal and State Governments Join the Attack

Recognizing the bounty being claimed by the plaintiff bar, multiple state agencies and the federal government began taking aim at the transportation industry in an apparent attempt to replenish their coffers. Since 2009, multiple states have passed laws giving labor enforcement agencies more teeth in auditing and penalizing companies that illegally classified employees as independent contractors. In fact, recent audits by the California Employment Development Department netted \$140 million in additional tax revenue from companies that misclassified 70,000 workers. In 2009, then California Attorney General Jerry Brown targeted the transportation industry by prosecuting trucking companies over misclassification of drivers. Next, Massachusetts Attorney General Martha Kochly began a campaign against restaurant meal delivery companies. Not to be outdone by his state counterparts, President Obama proposed a \$25 million initiative to beef up enforcement efforts by the Department of Labor Wage and Hour Division to monitor misclassification by employers.

According to statistics from the Department of Labor of the U. S. Government Accountability Office, up to 30% of U. S. employers illegally classified employees as independent contractors creating a \$15 billion tax gap. Not surprisingly, the U. S. Department of Labor has hired more investigators to pursue misclassification and the Internal Revenue Service is implementing a tax audit program aimed at improper misclassification. And now more than thirty states and municipalities are in the process of making claims for additional sources of revenue through overdue employment taxes and related fines and penalties due to independent contractor misclassification.

The Courts Provide a Map for a Trucking Counterattack

It had been previously a standard assumption in the trucking industry that owner-operator and related agreements would insulate motor carriers from the allegation of independent contractor misclassification. However, it is very clear now that the courts are looking beyond the agreement and scrutinizing the factual nature of the relationship between the companies and the drivers. One recent decision in the Second Appellate District in California is illustrative. The plaintiffs, members of the Teamsters Union, owned their trucks and brought a wage and hour class action against defendant Bridge Terminal Transport, Inc. The defendant hired

its drivers to transport cargo from ports to the facilities of its customers.¹ The plaintiffs were described in the applicable collective bargaining agreement as owner-operators who worked exclusively for the employer. Plaintiffs and defendants also signed lease agreements under which each plaintiff leased the truck he owned to the defendant. The lease agreement provided that the defendant would have exclusive possession, control and use of the truck, and would assume full responsibility for operation of the equipment for the duration of the lease. The plaintiff also signed a contract in which he or she was identified as a contractor and responsible for controlling the method and means by which the motor vehicle equipment was operated.

In obtaining a summary judgment from the trial court, the defendant employer emphasized that it did not control the manner and means by which the plaintiff hauled loads. Defendant noted that the plaintiffs drove their own trucks, paid the related expenses, could decline a dispatch, and decided when and where to take meal and rest breaks. However, the Court of Appeal overruled the trial court and found that triable issues of fact existed as to whether or not the plaintiffs were independent contractors. The decision was based on the following factors which indicated a possible employer-employee relationship:

- Defendant issued W-2 forms to the plaintiffs, withheld taxes and offered health plan benefits that included paying 70% of the cost;
- Defendant paid hourly rates for some of plaintiff's work day, such as waiting time and driver's meetings;
- Defendant could terminate the lease agreement on 24 hours' notice;
- The collective bargaining agreement noted that the owner-operators were employees of the company;
- The work performed by the plaintiff is a part of the regular business of the defendant. (*Arzate vs. Bridge Terminal Transport, Inc.* (2011) 192 Cal. App. 4th 419.)

Transportation Fires Back

Although litigation and Court decisions have provided motor carriers some guidance in crafting independent contractor relationships with drivers, an inherent tension exists with the requirement that employers give autonomy to drivers and the need to comply with federal regulations. Therefore, it is useful to look beyond the judicial rulings and into specific industry practices implemented with an eye to both avoiding litigation and aggressive federal and state agencies:

- Independent contractors are allowed the freedom to accept or turn down loads with the exception that drivers be shut down when they are close to exceeding federal hours of service limits;
- Companies using independent contractors are avoiding use of driver uniforms, universal driver policies and common painting or logos on vehicles, especially in fleets with a combination of employee and independent contractor drivers;
- Companies are not requiring mandatory training for independent contractors. Rather, if a driver does commit a violation that runs afoul of company policy, or federal regulations, corrective action such as remedial training, or even termination of the relationship, can occur;
- Educating owner-operator drivers as to the need for special permits or cards necessary for certain tasks like entering a port or military facility is advisable. But companies avoid making the obtaining of a card a requirement of becoming a contractor and let the drivers pay for the testing or application process;

¹ Port trucking or "drayage" motor carriers are particular targets for allegations of independent contractor misclassification due to the belief that the drayage industry is incredibly competitive which causes under capitalized firms to compete for business by exploiting misclassified drivers.

- While motor carriers will allow drivers to use company fuel cards to access discounts, the independent contractors are responsible for reimbursing the company for the fuel cost;
- Independent contractor drivers and motor carriers maintain separate insurance policies;
- Update owner-operator and lease agreements to make sure that the documents reflect the intent of both parties to enter into an independent contractor relationship. Review of these agreements may also be beneficial to assure compliance with 49 CFR 376.12(h) which has been interpreted, at least in California, to require carriers to:
 1. disclose charges in lease agreements so that owner-operators can calculate what costs will be deducted from their compensation; and
 2. produce documents verifying that the lessors (drivers) have been charged correctly. (Owner-Operator Independent Drivers Association v. Swift (2011) 11 CDOS 836).

Awareness of these practices has already proven fruitful to motor carriers seeking to preserve the independent contractor classification of drivers. In fact, a California court recently interpreted Georgia law in ruling that an independent truckman's agreement and an equipment agreement indicated that all parties were aware of the intended structure of the relationship. Therefore, it was correctly presumed that an independent contractor relationship existed and the burden was shifted to the drivers to show that the company exercised excessive control over the time, manner and method of work. With the burden shifted, the drivers were unsuccessful in demonstrating that they were employees.

In sum, plaintiff attorneys and governmental agencies have made the use of independent contractor drivers a decision that requires much deliberation and careful scrutiny by the motor carrier. But the relentless attacks of these vigilant foes can only be avoided by maintaining an arm's length relationship with the consenting drivers and giving them the autonomy to run their own businesses. Ironically, many (if not most) of the owner operators prefer the independent contractor relationship. The challenge is convincing the plaintiff bar and governmental regulators that big and small transportation companies can operate fairly and successfully as independent entities. The lawyers and politicians need to be reminded that some of the largest transportation companies today got their starts as one vehicle independent contractors.

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