The "Independent Contractor" Truck Driver, Wage & Hour Laws, the Affordable Care Act, and Safety Regulations

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On The challenges that trucking companies face regarding truck drivers continue to expand. One vexing issue facing many companies: Can they continue to treat many of their truck drivers as "independent contractors" as they have in the past? And if not, what costs will there be in connection with treating them now as employees?

Paying Hourly Wages

Many truck drivers have been treated as independent contractors to avoid the costs and complexities of tracking their hours and paying hourly wages, including, where applicable, overtime pay, and also federal and state employment taxes. The unions and federal regulators have made no secret of the fact that they are suspicious of such arrangements.[1] This issue came into sharp relief in 2014 when Federal Express lost its appeal in the Ninth Circuit in *Alexander v. FedEx Ground Package Sys*.[2] In that case, the court decided that many of the FedEx "independent contractors" should be treated as employees. It is expected that the costs to FedEx associated with this decision will exceed $250 million.[3] There have been other recent cases that also have been unfavorable to employers on this issue.[4]

Under federal tax regulations, truck drivers (as with other workers) generally should be treated as employees if the company has the right to control and direct the drivers not just as to the result to be accomplished by the drivers, but also as to the details and means by which that result is accomplished. Historically, to assist companies with classifying workers as employees or independent contractors, the Internal Revenue Service ("IRS") compiled a list of 20 factors to consider on to determine whether workers should be classified as common law employees or independent contractors.[5] While the IRS and some courts in recent years basically have acknowledged that cut-and-dry application of the 20 common law factors does not reflect the realities of modern industry, the focus on the right to control the details of work, as well as other key pertinent facts and circumstances derived from such factors--which may (but courts can sometimes be unpredictable) take into account the industry-- remain very relevant.

Focusing on drivers, different sectors of the trucking industry (parcel, drayage, etc.) have varying arrangements with the drivers, which create a lot of gray area for interpretation. Furthermore, trucking industry experts have suggested that bringing all the independent drivers into compliance with wage and hour laws for employees could put many trucking companies out of business, and exacerbate the shortages in trucking capacity that already exist in many markets.[6]

1 See "Trucking used to be a ticket to the middle class. Now it's just another low-wage job." Washington Post, April 28, 2014, available at http://www.washingtonpost.com/blogs/wonkblog/wp/2014/04/28/trucking-used-to-be-a-ticket-to-the-middle-class-now-its-just-another-low-wage-job/.

2 765 Fed.3rd 981 (2014).

3 See "FedEx Latest Company Slammed Over 'Independent' Employees," Forbes, September 3, 2014, available at http://www.forbes.com/sites/eriksherman/2014/09/03/fedex-latest-company-slammed-over-independent-employees/.

4 See *Hargrove v. Sleepy's, LLC*, 106 A.3d 449 (N.J. 2015); 863 To Go, Inc. v. Dep't of Labor, 99 A.3d 629 (Vt. 2014).

5 See IRS Rev Rul. 87-41.

6 See "Attacks on Independent Contractors Worsen the Driver Shortage," Material Handling & Logistics, May 18, 2015, available at http://mhlnews.com/transportation-distribution/attacks-independent-contractors-worsen-driver-shortage (subscription required).

The Affordable Care Act

The Affordable Care Act adds even more cost and complexity to this worker classification scenario. Beginning January 1, 2015, companies that employ an average of 50 or more full-time employees and/or full-time employee equivalents in the preceding calendar year are subject to the employer mandate, subject to a medium-sized employer (less than 100 full-time and/or full-time equivalent employees) transition exception for 2015. Referred to as the "applicable large employer" determination, controlled group and affiliated service group members are treated as a single employer for purposes of making the determination. Employees employed an average of 30 or more hours per week or 130 hours per month are considered full-time for this purpose.

Companies that qualify as applicable large employers generally must offer full-time employees and their dependents (excluding spouses) employer-sponsored health coverage that covers major medical benefits. In addition, the requisite coverage must provide "minimum value" and the employee's share of premiums for employee-only coverage must be "affordable," i.e., for employee-only coverage, no more than 9.5% of the employee's household income.[7]

Employers that fail to offer the requisite medical coverage run the risk of incurring one of two penalties.

The first penalty applies if a company fails to offer the minimum required medical coverage to at least 95% (70% for 2015 only) of its full-time employees, and as a result of that failure, at least one employee not offered coverage purchases health insurance through a state exchange and receives a premium tax credit or a cost sharing subsidy from the exchange. This first penalty is based on the company's total number of full-time employees, minus 30 (or potentially 80 for 2015 only), multiplied by $2,000 for the calendar year ($166.67 for each month coverage is not offered).[8]

The second penalty applies if a company offers coverage that does not include affordable employee-only coverage, or offers coverage that fails to provide minimum value, and the full-time employee purchases health insurance on the state exchange and receives a premium tax credit or cost sharing subsidy. If the second penalty applies, the employer pays the lesser of (1) the first penalty or (2) $3,000 for the calendar year ($250 for each month that the requisite coverage is not offered) multiplied by the number of full-time employees who so obtain a premium tax credit or a cost sharing subsidy through the state exchange.[9]

If employees or independent contractors purchase health insurance on a state exchange, their income will be confirmed from tax records. Also if a worker (whether correctly or not) claims that his or her employer did not offer affordable (and minimum value) health insurance coverage, the government will confirm this with the supposed employer. It is through this means that the government will focus on the worker's income information and employment (or not) status and may challenge a company's decision to classify a worker as an independent contractor. If this happens, and a company incorrectly relies on independent contractor classification either to avoid applicable large employer status under the Affordable Care Act or to avoid offering full-time employees and applicable dependents company-sponsored group health coverage, the company could find itself subject to significant employer mandate penalties.

In addition, due to employee protections provided under the Affordable Care Act, companies should carefully consider adverse decisions they make against their employees, including workers whom they may have misclassified as independent contractors. Employers also may be unaware that the Affordable Care Act includes protected rights for employees who engage in certain Affordable Care Act-related activities, enabling employees to file whistleblower complaints against the employer if they suspect retaliation.

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7 Minimum value means the plan's share of the total allowed costs of benefits under the plan must be at least 60% (basically, an actuarial value determination). Also, because it is unlikely that employers will know their employees' household incomes, most employers will have to rely on one of 3 safe harbors provided under IRS regulations to determine whether coverage is affordable for the employee's share of premiums for employee-only coverage. (The dependent coverage is not subject to an affordability requirement.)

8 The penalty is determined monthly, although assessed annually, and also is adjusted for inflation (such that it actually is $2,080 annually ($173 per month) for 2015. If the company is a member of a related group of companies, the company must prorate the 30 (or 80 generally for 2015) exception among the group's members.

9 Again, the penalty is determined monthly, although assessed annually, and also is adjusted for inflation (such that it actually is $3,120 annually ($260 per month) for 2015.

The Obama administration has made employee misclassification as independent contractors an enforcement priority, noting that misclassified workers often lose out on critical benefits, including overtime[10], to which they are entitled—and also cause substantial losses to the Treasury.[11] With the Affordable Care Act's focus on employers sharing a large part of the load for the government's goal of reducing the number of uninsured, the government now has all the more incentive to prevent companies from improperly avoiding the financial responsibilities associated with employment.

Safety Regulations

The Federal Motor Carrier Safety Administration (FMCSA) has been implementing increasingly stringent safety regulations governing truck drivers.[12] When drivers previously treated as independent contractors are reclassified as employees, the trucking company will have increased oversight responsibilities with respect to those drivers, and increased potential liability. Although the reclassification may have been driven by tax or employee benefit considerations, it may have the effect of increasing the trucking company's regulatory exposure for the drivers. Truck driver safety has come under increased scrutiny in the wake of recent serious accidents involving commercial trucks, including an accident in New Jersey which caused serious injury to actor Tracy Morgan and another in Georgia which caused multiple fatalities.[13]

Addressing the Issue Now

Trucking companies should analyze their current independent contractor drivers and make sure that their classification is defensible under IRS guidelines and the recent case law. If such classification is no longer sustainable, the company should immediately consult with counsel and develop a remediation plan, to minimize costly penalties and potential lawsuits.

10 Drivers employed by carriers may be exempt from overtime pursuant to the motor carrier exemption provided in Section 13(b)(1) of the Fair Labor Standards Act. See the U.S. Department of Labor's discussion of the exemption at http://www.dol.gov/whd/regs/compliance/whdfs19.pdf.

11 See the discussion of the U.S. Department of Labor's "Misclassification Initiative" at www.dol.gov/whd/workers/misclassification; see also Independent Contractor Enforcement: There's More Than the IRS to Fear, by John Thompson, at www.forbes.com/sites/janetnovack/2013/05/09/independent-contractor-enforcement-theres-more-than-the-irs-to-fear.

12 See the text of the most significant regulations at 49 C.F.R. §§ 391, 392 and 395.

13 See *In wake of Tracy Morgan crash, rising truck fatalities lead to new scrutiny,* NJ.com June 15, 2014, available at http://www.nj.com/news/index.ssf/2014/06/rising_truck_fatalities_nationwide_leading_to_new_scrutiny_in_wake_of_tracy_morgan_crash.html; *Trucking Company In Accident That Killed 5 Nursing Students Has Numerous Safety Violations, Trucker Wi*shes He Died Too, CDL Life April 24, 2015, available at http://cdllife.com/2015/featured/trucking-company-in-accident-that-killed-5-nursing-students-has-numerous-safety-violations-trucker-wishes-he-died-too/.

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