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Employee Misclassification Issues in Pennsylvania

Consistent with the actions and efforts of several other states, the Commonwealth of Pennsylvania has taken square aim at motor carriers in the context of employee misclassification claims. The Commonwealth, along with the U.S. Department of Labor (DOL), has devoted resources and personnel to identify and, where they believe necessary, address misclassification issues.

The allegedly problematic issue of misclassification of employees as independent contractors in the context of trucking has proven to be an expensive sinkhole for targeted motor carriers. The purported basis for this concern stems from the lack of protection independent contractors are afforded under state and federal law, including the Fair Labor Standards Act (FLSA). The misclassification of an employee as an independent contractor, when it actually occurs, potentially denies that employee access to multiple benefits and protections under the law, such as minimum wage, workers' compensation, overtime, family medical leave and unemployment compensation. Pennsylvania is not alone in its efforts to curb employee misclassification. Currently, the Department of Labor has partnered with approximately 37 states to intensify efforts to prevent and/or correct employee misclassification.

This emerging partnership between the U.S. DOL and the Commonwealth of Pennsylvania means that there is increased sharing of information between state and federal government agencies on employers that are allegedly misclassifying employees. Thus, the potential array of targets has increased significantly. It is important to note that there have been no substantive changes to the FLSA or Pennsylvania law that has triggered the focus on this issue. Rather, as in other states, the focus on misclassification in trucking appears to have been promoted by organized labor and the plaintiffs' bar.

Needless to say, this increased scrutiny and investigation/enforcement efforts are a cause for concern and should be taken seriously. A determination that an individual was intentionally misclassified as an independent contractor rather than an employee can result in fines under both state and federal law. It should be noted that it is still permissible to identify an individual as an independent contractor; however, there is now increased pressure to ensure that is the correct classification. Unfortunately or fortunately, depending on how you look at it, there is no finite rule or procedure by which to classify an individual as an employee versus an independent contractor. In fact, contractual efforts to misclassify an employee as an independent contractor have been found to be invalid, even if the employee is in agreement. Instead, the determination of whether an individual is an employee or an independent contractor is a decision left to the courts, and the courts have established through ever-developing case law that there are numerous factors to consider in making that determination.

The determination of whether an individual is an employee or an independent contractor is made on a case-by-case basis. While there are primarily six factors generally considered in this making determination, none of these factors are alone controlling. Instead, the courts in examining these factors are attempting to determine whether an individual is economically dependent on his or her relationship with the employer, such that he or she is bound to it as an employee. The less an individual is controlled by an employer and the more the individual is economically self-reliant, the greater the likelihood that the classification of independent contractor is appropriate. Issues such as the method of payment, the location of an individual's work (whether offsite or at home) and "common industry practices" are not generally relied upon in making this determination. The best course of action for an employer in dealing with this issue is to work with counsel to rely upon case law precedent in crafting a plan for its employees versus independent contractors.

In regards to commercial transportation, in particular, an employer needs to pay attention to the right it has to control the work completed and the manner in which it is completed. In the landmark Pennsylvania Supreme Court case of Universal Am-Can, Ltd. v. WCAB (Minteer), 762 A.2d 328 (2000), the Court

specifically dismissed the argument that an individual driver's compliance with commercial motor vehicle regulations, such as safety inspection protocol and rest time requirements, may be considered in determining whether the driver is an independent contractor or an employee. The Court held that the fact that the individual through his or her employer was complying with government regulations was not indicative of the employer demonstrating control over the individual; instead, it showed the government's control over drivers/motor carriers. As the driver was unable to establish the motor carrier controlled his work/manner of how his work was completed, the Court held that the driver was not an employee, but an independent contractor. Commercial motor carriers, and their counsel, should keep this argument in mind if trying to establish an independent contractor classification.

Commercial motor carriers should also be aware of the potential applicability of the Construction Workplace Misclassification Act (CWMA), P.S. 933.1-.17. This particular statute has significantly limited the application of independent contractor status in many cases in the construction field. Specifically, the CWMA has provided more stringent requirements that an individual needs to meet before he or she can be properly identified as an independent contractor. This regulation begs the question as to when a commercial motor carrier is engaged in the construction business and these strict criteria for an independent contractor classification apply. Motor carriers are cautioned to keep in mind what raw materials and/or machinery they are transporting, as an argument can be made that if it relates to construction the CWMA applies. In that scenario individuals who would in other, non-construction cases, be classified as independent contractors may very well be deemed employees.

Overall, the collaboration of the U.S. DOL and the Commonwealth of Pennsylvania on the issue of employee misclassification will continue to result in increased scrutiny of employers' designations of their workers as independent contractors versus employees. Employers need to consider the relevant factors on a case-by-case basis and be mindful of the amount of control employers assert over their workers as that will be a considerable, although non-controlling factor in this determination.

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