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# "There's Something about Owner-Operators"

## I. The Economic and Social Impact of Misclassification of Employees as Independent Contractors

David Weil (administrator U.S. Dep't of Labor, Wage & Hour Division, formerly professor of economics at Boston University), contends in an article dated July 15, 2015, that most workers in the United States should be regarded as employees, not independent contractors.

A report prepared for the National Employment Law Project, entitled "The Big Rig Overhaul" (February 2014), identifies employee misclassification as one of the underlying factors causing increased income inequality and related workplace issues. The authors find the impetus to misclassification in "fierce competition, ever increasing service requirements, a contingent workforce, poverty level wages, no health care coverage, rampant safety violations and ineffective or illusory enforcement."

Recent studies by United States Department of Labor, Internal Revenue Service, National Labor Relations Board and others support the prevalence of misclassification. For example, it is estimated that, by virtue of misclassifying drivers as independent contractors, California port trucking companies are chargeable for wage and hour violations of $850 million annually, and annually underpay workers compensation, unemployment insurance and federal estate taxes to the tune of approximately $550 million.

For their part, trucking companies argue that they are engaged in full-time cost cutting, and converting drivers into employees would mean shutting down the companies.

## II. Basic Guidelines for Classification as Employee or Independent Contractor

Most courts employ an "economic realities test" to determine if a worker should be classified as an employee or as an independent contractor. Some of the factors considered include:

1. Is work performed integral part of employer's business?

2. What are the worker's opportunities to earn profit (or suffer loss)?
3. What is the relative investment of the employer and the worker?
4. Does the work require special skills?
5. Is the employment permanent?
6. What is the degree of control exercised by the employer over the manner in which the work is performed?

Ultimately, the test is whether the worker is economically dependent on employer: if she is, she should be classified as an employee; if not, she may be classified as an independent contractor.

## III. Legal Issues Arising from Classification as Employee or Independent Contractor

### Vicarious Liability for Statutory Employee

Historically, courts have found that the motor carrier which owns or leases the vehicle is liable as a matter of law for accidents that occur while a lease (or ownership) is still in effect and its United States Department of Transportation ("USDOT") placards are displayed on the vehicle, even if the loss arises from the driver's negligence, and even if the driver embarks on an undertaking of his or her own while using the carrier-lessee's federal operating authority.

There is a growing movement which is pushing back against such broad-based vicarious liability for motor carriers. In 1992, the Interstate Commerce Commission ("ICC") modified leasing regulation, 49 **C.F.R.** § 376.12(c), by adding subsection (4) which provides:

> Nothing in the provisions required by paragraph (c)(1) of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with *49 U.S.C. 14102* and attendant administrative requirements.

In its notes concerning this new regulation, the ICC stated that some courts had interpreted the language of its control regulation in § 376.12(c)(1) to be prima-facie evidence of an employee-employer relationship. The ICC "conclude[d] that adopting the proposed amendment will reinforce our view of the neutral effect of the control regulation and place our stated view squarely before any court or agency asked to interpret the regulation's impact."

Some have argued that the effect of the amendment should be for the courts to conduct a test (presumably to be decided by the jury) in each case to see whether, in fact, at the time

of the loss it was being operated in the business of the lessee or not. *Bays v. Summitt Trucking LLC*, 691 F. Supp. 2d 725 (W.D. Ky, Feb. 25, 2010), in a dispute between the motor carrier's insurer and the driver's non-trucking coverage, went one step further and found that the amendments created only a rebuttable presumption that a leased vehicle is being used in the business of the motor carrier lessee at all times. It is possible, though, that the courts and commentators that have adopted this view misunderstood the I.C.C. changes.

**Employers Liability Exclusion in Liability Policy**

The standard ISO trucker's liability insurance policy excludes coverage for:

> **4. Employee Indemnification And Employer's Liability**
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> "Bodily injury" to:
>
> a. An employee of the "insured" arising out of and in the course of
>
> 1) employment by the "insured"; or
>
> 2) Performing the duties related to the conduct of the "insured's" business; or
>
> b. The spouse, child, parent, brother or sister of that employee as a consequence of paragraph a. above.
>
> This exclusion applies:
>
> (1) Whether the "insured" may be liable as an employer or in any other capacity; and
>
> (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.
>
> But this exclusion does not apply to "bodily injury" to domestic employees not entitled to workers' compensation benefits or to liability assumed by the "insured" under an "insured contract". For the purposes of the coverage form, a domestic "employee" is a person engaged in household or domestic work performed principally in connection with a residence premises.

Regulations of the Federal Motor Carrier Safety Administration, specifically 49 **C.F.R.** § 390.5, provide in pertinent part:

Unless specifically defined elsewhere, in this subchapter:

...

> Employee means any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle), a mechanic, and a freight handler. Such term does not include an employee of the United States, any State, any political subdivision of a State, or any agency established under a compact between States and approved by the Congress of the United States who is acting within the course of such employment.
>
> Employer means any person engaged in a business affecting interstate commerce who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate it, but such terms does not include the United States, any State, any political subdivision of a State, or an agency established under a compact between States approved by the Congress of the United States. (Emphasis added.)

Some courts, notably the federal Fifth Circuit Court of Appeals in *Consumers County Mutual Ins. Co. v. P.W. & Sons Trucking, Inc.*, 307 F.3d 362 (5th Cir. 2002), have held that the definition of "employee" in 49 **C.F.R.** § 390.5 should be applied to that term as it appears in a liability policy. Other courts, however, have expressly rejected the *Consumers County Mutual* reasoning and have refused to graft the 49 **C.F.R.** § 390.5 definition of "employee" onto trucker's liability policies. These decisions frequently distinguish *Consumers County Mutual* as a case in which the policy itself contained no definition of "employee." Other courts have distinguished *Consumers County Mutual* by finding that the 49 **C.F.R.** § 390.5 definition is applicable only when the individual in question is actually operating the motor vehicle.

**Workers' Compensation**

Exclusive Remedy

In general, state workers' compensation statutes provide that an "employee" injured in the course and scope of his employment may not bring a tort action for damages against the "employer," but may only recover statutorily-mandated workers' compensation benefits (the "exclusive remedy" provision). The application of the "exclusive remedy" provision to a claim by an injured truck driver against a motor carrier often comes down to a determination of whether the driver is an "employee" within the meaning of the applicable state workers' compensation law.

In *Judy v. Tri-State Motor Transit Co.*, 844 F.2d 1496 (11th Cir. 1988) (decided under Florida law), Judy, a truck driver who sought employment with Tri-State, was told that he had qualified to drive for Tri-State and that he should report to Tri- State's main terminal in Missouri. Upon arrival there Judy was informed that he would be working as

a "contractor's driver," meaning that he would sign an agreement to drive for a lessor of tractors to Tri-State, rather than as a "company driver," which is a driver under a standard employment contract with Tri-State. (Tri-State owned the trailers which were pulled by both its company drivers and its contractor's drivers.) Under the contract, Judy was to be paid a percentage of what the lessor received from Tri-State. He would receive no employee benefits, and he would be responsible for paying his own self-employment and other taxes. Tri-State gave him all of his dispatches, informed him of the times to pick up and drop off loads and the appropriate routes to take, inspected his rig, provided the necessary permits, and authorized cash advances. All of the tractors driven by Judy were marked with Tri-State's name or logo, as were the trailers that he pulled. Judy himself did not have an ICC permit, nor did he own a tractor, trailer, or any incidental equipment. (The lease agreement between Tri-State and the lessor also provided that Tri-State would procure workers' compensation coverage and other insurance for the lessor's drivers, and the lessor in turn reimbursed Tri-State for the insurance coverage.)

Judy was injured in a motor vehicle accident while assisting another driver, who, like Judy, was pulling a Tri-State trailer with a tractor belonging to an independent owner. Judy filed an amended complaint alleging that Tri-State had negligently maintained the trailer, allowing the securing pin to become rusty and unlubricated. The Court of Appeals, however, found that Judy was an employee of Tri-State, and that his action was barred under the exclusive remedy rules of Florida's workers compensation laws:

> In this case, the undisputed facts support the district court's conclusion that Judy was Tri-State's employee for the purposes of Florida's workers' compensation act. Judy had just delivered a Tri-State load at the time of the accident, and it seems reasonably clear that, had he not been injured, he would have continued driving for Tri-State under his contract. Similar to the truck driver in *Justice*, Judy used trailers supplied to him by Tri-State, and he was required to comply with all of Tri-State's rules and regulations, as well as with the terms of [the lessor's] lease agreement with Tri-State, which was to be carried in Judy's permit book. Tri-State issued all of Judy's dispatches, provided the times to pickup and drop off his loads, directed him as to which routes to take, provided any required permits, and authorized cash advances. In addition, Tri-State solicited customers and entered into and performed contracts with those customers without interference from Judy or [the lessor]. Accordingly, it is clear that Judy was subject to Tri-State's direction and control not only in obtaining the intended result of his work, but also in the means used to achieve that result...Moreover, Judy did not have an ICC permit, nor did he own any of his equipment.... Although we have considered that Judy was paid on a per job basis, that income taxes were not withheld from his salary, and that his contract referred to him as an independent contractor, we are not persuaded that a non-employment relationship existed, especially considering the Florida Supreme Court's admonition to look to

the "actual employment relationship" rather than to the "subjective intent of the parties." (citations omitted)

Course and Scope of Employment

Assuming that the state statute limits recovery to workers' compensation benefits for on-the-job accidents, the question becomes whether the injured truck driver was injured in the "course and scope" of his employment. The mere fact that he was not injured while making a pickup or delivery would not, arguably, be sufficient to deny benefits. On the other hand, like any other kind of employee, a truck driver's deviation from the course and scope of his employment at the time of injury could be so extreme as to justify denying him workers compensation benefits.

It should also be noted that some workers' compensation statutes deal expressly with benefits that are available to employees who travel for a living. *See*, *e.g.*, **Wis. Stat.** § 102.03 ("(f) Every employee whose employment requires the employee to travel shall be deemed to be performing service growing out of and incidental to the employees employment at all times while on a trip, except when engaged in a deviation for a private or personal purpose. Acts reasonably necessary for living or incidental thereto shall not be regarded as such a deviation. Any accident or disease arising out of a hazard of such service shall be deemed to arise out of the employees employment.").

*See also* **North Carolina Statutes** § 97-19.1 ("Truck, tractor, or truck tractor trailer driver's status as employee or independent contractor"), which provides somewhat unhelpfully that "[a]n individual in the interstate or intrastate carrier industry who operates a truck, tractor, or truck tractor trailer licensed by a governmental motor vehicle regulatory agency may be an employee or an independent contractor under this Article dependent upon the application of the common law test for determining employment status."

Which State's Law Governs Driver's Right to Workers Compensation Benefits?

As a broad statement, the workers compensation statutes of most states extend benefits to non-resident employees who are injured within the state in the course and scope of their employment. Since the burden of providing such benefits usually falls on the employer (or its insurer) in the first instance, a question could arise as to the constitutionality of a state imposing such a burden on a non-resident employer. It is settled law, however, that imposing that burden comports with due process.

Some state statutes address directly the question of whether, and/or to what extent, an out-of-state worker is entitled to benefits when injured while working in the forum state. *See*, *e.g.*, **Code of Ala.** § 25-5-35(g); **Mo. Revised Stat.** § 287.110.; **Minn. Stat.** §176.041, subd. 4; **Ariz. Revised Stat.** § 23-904. With regard specifically to motor carriers, there are certainly cases in which a truck driver was eligible for workers compensation benefits under the laws of the state where the injury occurred as well as the

state where the motor carrier employer was domiciled (and/or the state where the driver resided). *See*, *e.g.*, *Philyaw v. Arthur H. Fulton, Inc.*, 569 So.2d 787 (Fla. Ct. App. 1990) (fact of occurrence of injury in Florida sufficient to entitle truck driver, resident of Georgia and employed by Virginia motor carrier, to Florida workers compensation benefits, subject to offset for any Georgia benefits recovered)

*Wecso Insurance Co. v. Don Bell, Inc.*, 2014 U.S. App. LEXIS 14532 (11th Cir.), is also of interest for its holding that the policy definition of "employee" is irrelevant to the applicability of the worker's compensation exclusion of a truckers policy.

**Other Compensation and Benefits**

The *Craig v. FedEx*, 335 P.3d 66, case was a Kansas class action against FedEx which was designated as the lead case for all of the class actions filed against FedEx around the country by drivers who insisted that they are employees, not contractors. The case was assigned to the federal district court in Indiana. The driver argued that as employees they were entitled to reimbursement from FedEx for the various disbursements that they are required to make.

The district court in Indiana granted summary judgment to FedEx in 2010 finding that the drivers were independent contractors. The drivers appealed to the Seventh Circuit Court of Appeals, which oversees the federal courts in Indiana. The Seventh Circuit opted to certify the key questions to the Kansas Supreme Court (Craig was a Kansas resident) as follows:

1. Under the undisputed facts of the case are Craig and his fellow drivers employees of FedEx as a matter of law?

2. Even if most FedEx drivers are employees, are those who have acquired more than one service area independent contractors?

The Supreme Court pointed out that the case was close because FedEx had carefully structured its operating agreement with its drivers so that they would be considered independent contractors and not employees, in order for the company to cut costs and gain a competitive advantage. In resolving the dispute the court analyzed twenty different factors based on an IRS ruling which Kansas courts have adopted. However, the "right to control" test, separate from the twenty factors, has been emphasized by Kansas courts and played a significant role here as well.

The Kansas Supreme Court held that FedEx had established an employment relationship with its drivers which they dressed in "independent contractor clothing." The court zeroed in on FedEx's micromanagement even of the potential for entrepreneurship by its drivers: "For instance, the ability to make more than a delivery driver who is an employee is diminished, if not destroyed, by FedEx's control over the number of deliveries a driver can make, as well as essentially dictating the driver's required expenditures for vehicles, tools, equipment, and clothing. Moreover, one would

reasonably expect that independent businesspersons could decide for themselves the amount of work they 'reasonably can handle on any given day' . . . yet FedEx makes that decision for them and sets a maximum number of stops for each driver.

In response to the second certified question, the Kansas Supreme Court held that even a driver who had secured additional routes and hired additional drivers, would maintain employee status.

**Right to Collective Bargaining**

The U.S. Court of Appeals for the D.C. Circuit concluded in 2009 that the drivers for Federal Express were not employees but rather independent contractors with no rights to collective bargaining. The central basis for the court's holding was the entrepreneurial possibilities open to the drivers – they were permitted operate multiple routes by hiring additional drivers and helpers, and to sell routes without permission from FedEx. 563 F.3d 492 (2009).

FedEx has tried to duplicate its success in courts around the country but those efforts met with opposition from drivers and unions, and a mixed response from courts around the country.

The facts that the various courts looked at were largely identical. FedEx requires its drivers to pick up and deliver packages within their assigned geographic area every day that the company is open for business. Managers arrange the driver's schedule so that he or she has about 9.5 to 11 hours of work a day, but all assigned packages must be delivered that day. Deliveries must be completed within the window of time that FedEx has negotiated with its customer and the driver is required to scan details about each delivery to the company. While drivers are not obligated to follow specific routes, managers design and recommend routes to reduce travel time and maximize earnings and service. Drivers wear FedEx uniforms and must comply with company regulations related to appearance. The courts were, apparently, struck by the level of detail that FedEx looks into. Managers ride along with the drivers several times a year and report back on whether the driver uses a dolly or cart to move packages, demonstrates a sense of urgency, and places his or her keys "on the pinky finger of (the) non-writing hand" after locking the vehicle.

FedEx requires its drivers to own their own vehicles – a factor pointing to an independent contractor type relationship – but the vehicle was required to be painted "FedEx white" (there is, now, such a color manufactured by Sherwin Williams), and marked with the FedEx logo. The vehicles must be a specific size and be fitted with shelving in precisely laid out dimensions. You get the idea.

FedEx focused on the entrepreneurial opportunities that FedEx offered its employees and some of the lower courts had accepted this approach and granted judgment to FedEx validating the company's decision to ignore the union and to treat its drivers as independent contractors. However, the Ninth Circuit in *Alexander v. FedEx*

*Ground Package System, Inc.*, 765 F.3d 981 and in *Slayman v. FedEx*, 765 F.3d 1033; the Supreme Court of Kansas in *Craig v. FedEx*, 335 P.3d 66 (on a certified question from the federal Seventh Circuit); and the U.S. District Court for the Eastern District of Missouri in *Gray v. FedEx*, all rejected FedEx's argument that its drivers were independent contractors. Cases continued to proliferate around the country in 2015 for FedEx and Uber drivers.

**Preemption of State Regulation by FAAAA**

The Federal Aviation Administration Authorization Act ("FAAA") provides that states may not enact or enforce laws ***related to*** a "price, route, or service of any motor carrier … with respect to the transportation of property." 49 U.S.C. §14501(c)(1) (emphasis added). To establish grounds for FAAA pre-emption, a defendant is required to show that the plaintiff's claim: (a) derives from the enactment or enforcement of state law; and (b) relates to the defendant's prices, routes or services with respect to transportation of property.

Cases out of California have held that the FAAA does not pre-empt California meal and rest break laws, *Dilts v. Penske Logistics, LLC,* 769 F.3d 637 (9th Cir.); state law claims for unfair competition based on a trucking company's alleged violation of state labor and insurance laws, *People ex rel. Harris v. PAC Anchor Transportation, Inc.,* 2014 Cal. LEXIS 5181; or claims for misclassification of employees as independent contractors, *Robles v. Comtrak Logistics, Inc.,* 2014 U.S. Dist. LEXIS 175696 (E.D. Cal.); because the state laws at issue were not "related to" prices, routes, or services.

**FLSA Unfair Labor Practices as to Truck Drivers**

The federal Fair Labor Standards Act ("FLSA") mandates overtime pay for employees working more than 40 hours a week. Maximum hours and overtime pay for motor carriers of property, however, are governed by the Motor Carrier Act ("MCA"), and not by the FLSA, which expressly exempts motor carrier employers from having to pay overtime to covered employees.

In *Collado v. J&G Transport, Inc.,* 2014 U.S. Dist. LEXIS 169388 (S.D. Fla.), the plaintiffs filed an FLSA wage and hour claim based on misclassification and asked for conditional class certification. The court granted plaintiffs' motion and ordered the defendant to provide a list of putative class members. The defendant refused, and instead filed a Rule 68 offer of judgment and motion to dismiss based on the offer. The court was not pleased with the defendant's refusal to comply with the order. It denied the motion to dismiss, and again ordered defendants to provide a list of putative class members, along with counsel fees.

In its decision, the court distinguished between collective actions under the FLSA, which become moot when the named plaintiff's claim is resolved – because the plaintiff has no right to bring or prosecute an action on behalf of others – and class actions under

FRCP 23, which allows a plaintiff to maintain an action as a "private attorney general" for others. The court also denied the motion to dismiss because, even though an offer of judgment was made in the full amount of damages sought, the Judge had to approve the settlement, and he could decline to do so. In addition, a recent 11th Circuit case held that an offer of judgment does not extinguish a claim. Note that the Second Circuit has held to the contrary.

The court held in *Bule v. Garda CL Southeast, Inc.,* 2014 U.S. Dist. LEXIS 97225 (S.D. Fla.), that the driver of an armored car was exempt from the FLSA overtime requirements even though he worked exclusively within one state. The "interstate commerce" requirement was satisfied because plaintiff's activities, which included "transporting currency, coin, checks, and other valuables between banks, the Federal Reserve Bank, bank processing centers, check cashing facilities and other locations" involved transportation of property in interstate commerce as defined by the MCA.

The *Gordilis v. Ocean Drive Limousines,* 2014 U.S. Dist. LEXIS 110157 (S.D. Fla.), court dismissed state law minimum wage claims because the plaintiffs failed to send the employer a pre-suit notice. Under Florida law, an employee claiming violations of the Florida Minimum Wage Act cannot file suit unless he/she first sends a notice to the employer including the minimum wage demanded, an estimate of hours worked, and the total amount of unpaid wages. If the employer does not resolve the claim within 15 days after receiving the notice, the employee can file suit.

The defendant employer sought to dismiss a Florida wage claim, arguing the notice was defective because it purportedly demanded liquidated damages and counsel fees even if the full amount of the wage claim was paid. The court denied the motion, finding the notice made no mention of liquidated damages or attorney's fees, but merely included potential FLSA claims. The court also denied defendant's motion to dismiss the claim under the MCA Exemption to the FLSA, without discussion.