# The Employment Classification Issue in the Motor Carrier Industry

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TABLE OF CONTENTS



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## I. INTRODUCTION

The trucking industry has a long history of using independent contractors based not only on a number of sound business reasons, but also because the industry offers opportunities for persons who want to be their "own boss," a means of establishing a business within an industry with a history of success stories.

"Independent contractors" include an individual who owns a motor vehicle or holds it under a bona fide lease, or otherwise has lawful possession of the vehicle and leases such vehicle to a motor carrier with driver service to be used in moving freight under bills of lading or other shipping documents indicating the lessor of the equipment as the motor carrier of the freight transported. The terms "independent businessperson," "owner-operator" and "contractor" are used interchangeably.

Contrary to the flawed concept that drivers are forced to become independent contractors rather than driver-employees, alternative opportunities exist in the industry.

The federal and state governments are responsible for the problem that exists in employment classification by passing so many diverse laws and regulations related to employment that it is an overwhelming burden on smaller businesses.[1]

This contradictory legislative and administrative action accounts for the morass of confusing and conflicting decisions that are rendered under such laws and regulations.

1. *See* John Enright & William Dale, *Entrepreneurial Independent Contractors vs. The State*, 56 HEARTLAND POLICY 1-2, 6,15-16, 18, 24 (1993).

The trucking industry has, in the past twenty-five years, been one in which relatively all motor carriers operated on low profit margins, if not incurring losses, and thus motor carriers have had need to control the costs of operations.[2]

While the use of independent contractors allows motor carriers to avoid employee benefits costs, unemployment and workers' compensation insurance, as well as unemployment taxes, it should not be assumed that independent contractors are necessarily "worse off" from an economic standpoint.

Independent contractors receive contract payments which reflect a substantial amount over a driver-employee basic wage and benefits, and if the independent contractor operates his business competently, the difference could allow him or her to end up with a monetary advantage and with the freedom to reach the goal of being an "independent" businessperson.

If the monetary rewards as an independent contractor were so "bad" as opposed to that of a driver-employee, the contractor has the opportunity to switch to an employee position, and this has not been occurring or, if so, to an insignificant degree.[3]

At this time, industry members and individuals desiring to establish or validate an independent business relationship are confused because of the diversity of definitions and tests that are used on the federal and state levels to answer the question "employee or independent contractor?"

If two adults desire to contract and they understand the substance of the relationship being created or have reasonable access to determine it, and if there are clear and sensible guidelines available to the parties to follow, there is no reason why their choice should not be recognized and accepted.

The following discussion of the employment classification issue in various segments of the regulatory system will hopefully establish why motor carriers and independent contractors are concerned about current government actions that could lead to the demise of the independent contractor relationship and why legislators and administrators fail to address the real and critical issues involved.[4]

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2. Shippernet.com, *How Shippers can Reduce Freight Costs by 15% or more?, A White Paper*, http://www.shippernet.com/White%20Paper.pdf (last visited February 16, 2010).

3. *See generally Critical Issues in the Trucking Industry – 2009*, (American Transportation Research Institute), Oct. 2009, at 6 (discussing the commercial driver shortage); *See also* every owneroperatorjob.com, Trucking Magazines and Publications, http://www.everyowneroperator job.com/resources/owner-operator-magazines.html (last visited Feb. 19, 2010) (listing representative publications directed to independent contractors and which carry advertisements for opportunities for driver employment or independent contractor opportunities).

4. *See generally* Ari Karen, *Independent Contractors: A Thing of the Past, or Just a More Cautious Future? Labor and Employment White Paper* (2008), http://www.venable.com (follow

## II. Employment Classification in General

### A. Introduction

The issue of whether an individual is an "employee or independent contractor" arises in many areas of trucking operations. After examination of many skirmishes before courts and administrative agencies, it must be asserted that there is no magic formula that can be prescribed to assure success in creating or protecting an independent contractor relationship.

At best, only some facts can be given about the seemingly present position of the law and hints as to what should be done or not done to stay on the cutting edge of the law and to achieve one's business objective.

### B. Diversity of Classification Tests

The classification issue is relevant in many areas of law including the following:

| Federal Level | State Level |
|---|---|
| Federal Taxes – IRS | State Revenue Departments |
| Title VII — Discrimination | Workers' Compensation |
| Age Discrimination in Employment Act | Unemployment Compensation |
| ERISA (including COBRA) | Misc.: |
| NLRA | Child Support |
| FLSA | Garnishment |

The issue of whether an individual is an employee or an independent contractor is difficult to determine because no standardized test exists at the federal or state level.

Contrary to the use of the common law factors by the IRS, which is dictated by the Gearhart Resolution passed by Congress in 1948,[5] other federal and state agencies have proceeded in different directions in adopting tests determining the classification issue.

Various tests are used. The more common tests are:

a. The "Economic Realities" test

b. The "Totality of Circumstances" test

c. Combination of "Economic Realities/Control" tests

by searching Venable.com for "Independent Contractors: A Thing of the Past, or Just a More Cautious Future?").

5. H.R.J. Res. 296, 80th Cong. (1948).

d. "Principles of Agency" test

e. "ABC" test

The following summarizes which test or tests one can expect to be applied in a particular type of case.

| Statute | Test(s) |
|---|---|
| NLRA[6] | Common Law/Control/Totality of Circumstances |
| Title VII[7] | Common Law/Economic Realities/ Agency |
| ERISA[8] (including COBRA) | Plan Definition/Common Agency |
| FLSA[9] | Economic Realities |
| ADEA[10] | Common Law/Economic Realities |
| Workers' Compensation | Common Law |
| Unemployment Compensation | Common Law/ABC |

These tests can be simply described as follows:

Economic Realities Test – Is the service provider as a matter of economic reality dependent upon the business to which he or she renders service? The test emphasizes that where an individual becomes "economically dependent" upon one entity, that individual is an employee.[11]

Totality of Circumstances – No one common law factor is controlling. You must consider all factors and reach a decision on the basis of all factors.[12]

Agency Test – Application of the ten factors set forth in the Restatement (Second) of Agency § 220 (1958) which basically shadows the common law test.[13]

ABC Test – Service performed by an individual for remuneration (or wages) shall be employment irrespective of the common law unless and until it is proven that (a) the individuals are "free from control" as to the means and methods with which they accomplish tasks; (b) the services are performed "outside the usual course of business" of the employer or the employee performs such services outside of all the places of business of the party engaging the service; and (c) the individuals are "engaged in an independently estab-

6. National Labor Relations Act, 29 U.S.C. § 152(3) (2009).

7. Civil Rights Act of 1964, 42 U.S.C. § 2000(e)(f) (2009).

8. Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1002(6) (2009).

9. Fair Labor Standards Act, 29 U.S.C. § 203(e) (2009).

10. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630(f) (2009).

11. Charles J. Muhl, *What is an Employee? The Answer Depends on the Federal Law*, 125 MONTHLY LAB. REV. 6-7 (2002).

12. *See* Fedex Home Delivery v. Nat'l Labor Relations Bd., 563 F.3d 496, 496 (D.C. Cir. 2009) (explaining that "all the common law factors" are analyzed in a totality of the circumstances test).

13. RESTATEMENT (SECOND) OF AGENCY: DEFINITION OF SERVANT § 220 (1958).

lished trade, occupation, profession or business."[14]

It should also be noted that the tests are not applied consistently throughout the United States.

The Age Discrimination in Employment Act[15] serves as a prime example. The Courts are not in agreement as to what test to apply. Various courts of appeals that have dealt with the issue of whether sales representatives were employees or independent contractors applied the following tests:

2nd CA– Right to Control test[16]

3rd CA– Right to Control test[17]

5th CA– Economic Realities test[18]

10th CA– Economic Realities/Right to Control test[19]

The 2nd Circuit Court of Appeals found the sales representatives involved to be employees, while the other Courts found similar sales representatives to be independent contractors.[20]

In the state law area you will also find similar diversity which will be discussed in more detail in relation to workers' compensation and unemployment compensation.

"Employment classification" remains a major issue in motor carrier law and particularly in terms of owner-operators.

## III. The IRS

### A. In General

While historically the trucking industry has mainly been involved with the Internal Revenue Service in employment classification issues, this is no longer true because the IRS has done an incredibly good job of educating industry members and its own staff of the principles it felt were relevant and material under the common law test,[21] and also because Congress took steps to assure that industry members were protected from

14. 81 C.J.S. *Social Security and Public Welfare* § 333 (2009).

15. 29 U.S.C. § 630(f).

16. Frankel v. Bally, Inc., 987 F.2d 86, 89-90 (2d Cir. 1993).

17. EEOC v. Zippo Mfg. Co., 713 F.2d 32, 38 (3d Cir. 1983).

18. Hickey v. Arkla Indus., Inc., 688 F.2d 1009, 1011, 1013 (5th Cir. 1982), *vacated and corrected*, 699 F.2d 748, 753 (5th Cir. 1983).

19. Oestman v. Nat'l Farmers Union Ins. Co., 958 F.2d 303, 305 (10th Cir. 1992).

20. *Frankel*, 987 F.2d at 91, *remanded*, No. 90CIV.0815 (LLS), 1994 WL 409461 (S.D.N.Y. Apr. 11, 1994); *Oestman*, 958 F.2d at 306; *Zippo*, 713 F.2d at 38; *Hickey*, 668 F.2d at 1013.

21. *See* 26 C.F.R. § 31.3121(d)-1(c) (2009) (providing the common law test applicable to IRS proceedings).

the application of tests which exceeded the common law.[22]

"Over the years, the IRS and the Social Security Administration compiled a list of [20] factors" applied administratively and litigated in court "to determine a worker['s] status."[23] The result was the adoption of 20 factors to be considered which are sometimes referred to as the Twenty Factor Test.[24]

While the legal test remains whether the service engager has the right to direct and control the means and details of the work, the Twenty Factor Test was a somewhat helpful analytical total to make the determination.[25] The Twenty Factor Test is not industry specific and was used to determine worker status in all industries and, while it was helpful, it had significant problems as no relative weight was given to the specific factors and in some instances some factors were not applicable to some industries.[26] IRS auditors varied in determining the weight given to individual factors, and in some cases, the auditors would simply give equal weight to each factor and made a determination on the basis of how many of the twenty factors indicated "employment" as compared to "non-employment."[27]

Slowly, the IRS became aware of the difficulties in achieving consistent and relevant application of the factors in all industry situations, and in the case of trucking, a Technical Guideline was issued to focus attention on the criteria which were relevant and material to the trucking industry.[28]

The IRS determined that a strong inference existed that a contractor operator is an independent contractor when the following six factors were present:

(a) He owns the equipment or holds it under a bona fide lease arrangement;

(b) He is responsible for the maintenance of the equipment;

(c) He bears the principal burden of the operating costs, including fuel, repairs, supplies, insurance, and personal expenses to operate the equipment;

(d) He is responsible for supplying the necessary personal services to operate the equipment;

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22. *See* James C. Hardman, *Administrative Bulls in the Delicate China Shop of Motor Carrier Operations Revisited*, 18 TRANSP. L.J. 115, 120 (1989) (citing 26 C.F.R. § 31.3121(d)-1(c)).

23. I.R.S. Training Materials, Independent Contractor or Employee?, 3320-102 (10-96), at 2-3 (Oct. 30, 1996).

24. *Id.*; *see also* I.R.S. Fed. Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding (Dec. 2009) (providing the twenty factor criteria in question form).

25. *See* I.R.S. Training Materials, *supra* note 23, at 2-3.

26. *Id.* at 2-4.

27. *Id.* at 2-6.

28. *See* I.R.S. Publ'n 15-A, Employer's Supplemental Tax Guide, at 7 (Jan. 25, 2010).

(e) His compensation is based upon a division of the gross revenue or a fee based upon the distance of the haul, the weight of the goods, the number of deliveries, or combination thereof; and

(f) He generally determines the details and means of performing the services, in conformance with regulatory requirements, operating procedures of the carrier, and specifications of the shipper.[29]

The IRS later initiated a program to make a thorough study of specific industries and to discuss the employee classification issue with industry personnel in some depth, and in effect, assign weight to the Twenty Factor Test.[30]

One study involved a household goods motor carrier, and while so designated, after review it is clear that the study results could be applicable to "trucking" in general.[31] The study cleared up many issues which were inadequately or even incorrectly decided in decisions based on the Twenty Factor Test.[32] The study is fairly detailed and complete and serves as a valuable guide to motor carriers.

A similar program, Market Segment Specialization Program (MSSP), existed and produced a document on "trucking," but was generally directed to "audit" procedures related to the trucking industry and did not focus on or discuss the employment classification issue.[33]

A review of the IRS' Training Manual[34] on workers classification also demonstrates that the IRS has realized that the issue is a complex one and that many of the problems in the past have arisen from the Twenty Factor Test, which was confusing to their personnel as well as to industry personnel.

### B. SECTION 530

Apart from the above legal test and analytical tools, motor carriers should be aware of what is commonly referred to as Section 530 Safe Harbor.[35]

Section 530 allows a putative employer to classify and treat an individual as an independent contractor without the tax consequences of misclassification if the following requirements are met:

(1) The taxpayer must have filed requisite federal tax returns (including information returns) consistent with the treatment of the individuals in question as independent contractors;

29. *See id.* at 6-7.
30. *See id.* at 7.
31. *Id.*
32. *Id.*
33. I.R.S. Mkt. Segment Specialization Program, Trucking Indus., at 1-1 (Sept. 1995).
34. *See* I.R.S. Training Materials, *supra* note 23.
35. Revenue Act of 1978, Pub. L. No. 95-600, § 530, 92 Stat. 2763, 2885 (1978).

(2) The taxpayer must have treated all persons holding substantially similar positions as independent contractors; and

(3) The taxpayer must have had a reasonable basis for treating the individuals in question as independent contractors when engagement occurred.[36]

While the first and second requirements are relatively clear, the third test involves a showing by the motor carrier of classifying the individuals relied upon:

(a) Judicial precedent, published rulings, technical advice with respect to the taxpayer, or a letter ruling to the taxpayer;

(b) Past Internal Revenue Service audit of the taxpayer in which there was no assessment attributable to the treatment (for employment tax purposes) of the individuals holding positions substantially similar to the position held by this individual; or

(c) Long-standing recognized practice of a significant segment of the industry in which such individual is engaged.[37]

However, because courts interpreted the provision in the third test differently, Congress supplemented Section 530 by adding the following provision:

[I]n no event shall the significant segment requirement of subparagraph (C) thereof be construed to require a reasonable showing of the practice of more than 25 percent of the industry (determined by not taking into account the taxpayer), and . . . . in applying the long-standing recognized practice requirement of subparagraph (C) thereof—

(i) such requirement shall not be construed as requiring the practice to have continued for more than 10 years, and

(ii) a practice shall not fail to be treated as long-standing merely because such practice began after 1978.[38]

Motor carriers faced with an audit related to the classification of operators of motor vehicles under the carrier's operating authority or otherwise should assess the applicability of Section 530 as a safe harbor.[39]

### c. Challenges to Section 530

On the horizon is the Taxpayer Responsibility, Accountability, and Consistency Act of 2009 which is pending before Congress and which would alter how the propriety of a classification is determined and imposes serious repercussions for motor carriers and others using indepen-

36. Hardman, *supra* note 22, at 118.

37. I.R.C. § 3401 note (a)(2) (2010).

38. *Id.* at note (e)(2).

39. *See* Bridgette M. Miller, *Obama's Bill to Close Safe Harbor Provisions in Section 530*, 35 Transp. L.J. 189, 192 (2008).

dent contractors.[40]

The trucking industry is concerned with this proposal because many carriers operate under Section 530 protection.[41] While the American Trucking Association and the Truckload Carriers Association have brought it to the attention of their members, it is yet to be seen what their strategy and efforts will be to defeat the proposed legislation.

### D. IRS Summary

While in recent years the IRS has been relatively quiet in pursing employment classification audits and cases, primarily because of Section 530 safe-harbor and the IRS' promulgation of reasonable and clear guidelines relative to the employment classification in the trucking industry, the new political climate, evidenced by the above-referenced "Classification Act" and similar-type action in state legislatures, portends that a change in terms of the number of IRS audits and increased judicial and administrative litigation will seriously evolve if the proposed legislation is enacted.

## IV. Workers' Compensation

### A. In General

Workers' compensation coverage has been a significant problem in the motor carrier industry for the simple reason that there has been little uniformity among the fifty states.[42]

The wide-spread use of independent contractors by motor carriers has led to significant litigation of the "employment classification" issue since with minimal exceptions, workers' compensation coverage only applies to an employer-employee relationship.[43]

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40. S. 2882, 111th Cong. (introduced Dec.19, 2009). A companion Bill, H.R. 3408, was introduced on Sep. 30, 2009 in the same session of Congress. Each legislative proposal would: (1) require businesses that pay any amount greater than $600.00 during the year to corporate providers of property and services to file Form 1099; (2) significantly increases the penalties for failing to file Form 1099; (3) allow an individual to petition the IRS for a determination of their "employment" status; and requires mandatory reporting of misclassifications to the Department of Labor.

41. *See* S. 2882.

42. *See* James C. Hardman, *Workers' Compensation and the Use of Owner-Operators in Interstate Motor Carriage: A Need for Sensible Uniformity*, 20 Transp. L.J. 255, 271-72 (1992) (discussing the lack of uniformity).

43. There are exceptions. N.C. Gen. Stat. Ann. § 97-19.1 (West 2009) (independent contractors involved in motor carriage must be afforded workers' compensation coverage). USF Distrib. Serv., Inc. v. Indus. Claim Appeals Office, 111 P.3d 529, 532 (Colo. Ct. App. 2004) (independent contractors must be covered by workers' compensation or comparable occupational accident insurance).

### B. FEDERAL REGULATIONS

The relationship of motor carriage utilizing independent contractors in interstate commerce is governed by regulations promulgated by the Federal Motor Carrier Safety Administration (FMCSA).[44]

Part of the Regulations requires the motor carrier-lessee to:

> Acquire exclusive possession, control, and use of the equipment for the duration of the lease, and
>
> Assume responsibility for the operation of the equipment.[45]

These two requirements led courts and administrative agencies to find that this provision established a conclusive showing of control and direction as conceived under common law evidencing an employer-employee relationship.[46]

While the specific language, on its face, could be found to support such findings, the FMCSA entertained a review of the underlying reason for these provisions since the administrative agency and some courts held that a carrier must control the service performance, but need only control the vehicle to the extent necessary to be responsible to the shipper, the public, and the administrative agency for the transportation.[47]

Eventually, because of confusion caused by the provision, the Interstate Commerce Commission[48] promulgated an additional provision reading:[49]

> (4) 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.[50]

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44. Hours of Service of Drivers, 68 Fed. Reg. 22,456, 22,511 (Apr. 28, 2003) (to be codified at 49 C.F.R. pt. 385).

45. 49 C.F.R. § 376.12(c)(1) (2009).

46. *See* Hardman, *supra* note 42, at 257-58. In the case of North Carolina, its Supreme Court found the provision per se precluded a finding of an independent contractor relationship. *See* Brown v. L.H. Bottoms Truck Lines, 42 S.E.2d 137 (1947). Since that decision, the legislature enacted legislation which says the classification issue should be resolved by the "common law." *See* N.C. GEN. STAT. ANN. § 97.19.1. However, it is a meaningless provision because the legislature also imposes workers' compensation coverage on independent contractors in the trucking industry within the same section.

47. *See* Petition to Amend Lease and Interchange of Vehicle Regulations, 57 Fed. Reg. 32,905 (July 24, 1992) (to be codified at 49 C.F.R. pt. 1057).

48. The Interstate Commerce Commission ["ICC"] was the predecessor agency under which the Leasing and Interchange Regulations were promulgated. The FMCSA now has jurisdiction over the Regulations.

49. 49 C.F.R. § 376.12(c)(4).

50. *Id.*

While this clarification has alleviated the problem, occasionally, it is still raised in cases involving the employment classification issue in workers' compensation cases as well as in other areas of the law.[51]

### c. Serving the "Public"

The typical problem relates to the issue of independent contractor not being able to serve other carriers or the "public."

Essentially, the persons advancing such argument or the body politic or courts accepting the argument, do not understand that the agreement between the parties is a lease of equipment with driver service. The lease need not and generally does not designate which individual or individuals should or would, in fact, drive the vehicle. Further, the contract payment under the agreement is made to the lessor of the vehicle and generally does not split the payment between the equipment and driver service.

If the lessor decides to drive the leased vehicle and meets government qualifications, he could drive the vehicle, or if he decides to engage a third party to do so, the third party could do so with the caveat that such person would have to meet government qualifications.[52]

The independent contractor, whether he decides to drive the leased vehicle or not, would have the following opportunities to serve the public:

1. He could choose to become a driver-employee or an owner-operator at another carrier or carriers, including competitors;

2. He could lease another tractor or vehicle to other motor carriers, including competitors of the lessee-motor carrier;

3. He could hold himself out to handle exempt commodities with another tractor or vehicle;

4. He could acquire a registration from the FMCSA and operate as an independent motor carrier.

The independent contractor, however, could not use the vehicle he leased to the lessee-motor carrier because of the government dictate that the lessee-carrier must have "exclusive possession for the duration of the lease."[53]

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51. *See, e.g.*, Penn v. Va. Int'l Terminals, Inc. 819 F. Supp. 514, 523 (E.D. Va. 1993), *and* Parker v. Erixon, 473 S.E.2d 421, 424 (N.C. Ct. App. 1996).

52. The safety qualification provisions appear at 49 C.F.R. § 391.1 (2009).

53. The Leasing and Interchange Regulations do provide that the lessor vehicle can be used in "trip leasing" operations under § 376.22 with the lessor's permission. *See* § 376.12(c)(2). However, such trip leasing involves a lease between registered carriers and thus, from the standpoint of the lessor to the motor carrier, it becomes essentially a "subcontractor." Significantly, the issue of "trip leasing" arises in many proceedings and is not generally understood or developed of record.

### D. State Statutory or Administrative Oversight

Apart from the problem raised by federal regulations under workers' compensation statutes, carriers are frequently obligated to have the employment classification issue determined under a morass of state statutory or administrative criteria.

The criteria are frequently based on the common law test,[54] but, in slowly-growing numbers, states have promulgated criteria that are industry-specific and give direction to carriers and independent contractors in terms of how to fashion, create, and maintain an independent contractor relationship.[55]

The ideal situation is to have a simple exemption as is done in various states[56] including Indiana, where the relevant provision reads:[57]

> (8) An owner-operator that provides a motor vehicle and the services of a driver under a written contract that is subject to IC 8-2.1-24-23, 45 IAC 16-1-13, or 49 C.F.R. 376 to a motor carrier is not an employee of the motor carrier for purposes of IC 22-3-2 through IC 22-3-6 ["Workers' Compensation"]. The owner-operator may elect to be covered and have the owner-operators' drivers covered under a workers' compensation insurance policy or authorized self-insurance that insures the motor carrier if the owner-operator pays the premiums as requested by the motor carrier. An election by an owner-operator under this subdivision does not terminate the independent contractor status of the owner-operator for any purpose other than the purpose of this subdivision.[58]

However, even where these general exclusions have been adopted, one must be aware that there are some exceptions or some limitations that may still exist such as the type of carriage, type of commodities involved, equipment acquisition from the carrier or a related party, and other limiting exclusions. For example, in Tennessee the exemption only

54. The common law test is essentially that if a person is controlled, or subject to the "right" of control, as to means by which a result is accomplished, the person is an employee. If a person is subject to control only as to the result to be accomplished, the individual is an independent contractor. *See* the Common Law Test as set forth in 26 C.F.R. § 3121(d)-1(c) (2010) of the Federal Employment Tax Regulations. Various agencies and courts have promulgated different versions of the "common law" test. *See* James C. Hardman, *Administrative Bulls in the Delicate China Shop of Motor Carrier Operations – Revisited*, 18 Transp. L.J. 115, 121-27 (1989). The application of the "common law" test is one that is often confusing to motor carriers, individuals, auditors, administrators, and courts.

55. In Minnesota, the Department of Labor and Industry promulgated Rules setting forth specific criteria for approximately 24 distinct industries including the trucking and the messenger/courier industries and general criteria for undefined industries. *See* Minn. R. § 5224.0010 (2009). In 2009, the criteria that covered the two cited industries was combined, slightly modified, and enacted as a statutory provision. *See* Minn. Stat. Ann. § 176.043 (West 2009).

56. For example, Alabama, Georgia, Indiana, Louisiana, Missouri, Tennessee, and Texas.

57. Ind. Code Ann. § 22-3-6-1(b)(8) (West 2009).

58. *Id.*

applies to "common" carriage.[59]

### E. Forum Shopping

The variations which exist between states in determining the employment issue also creates forum shopping on the basis of the economic advantages between the states[60] or other state-specific provisions. For example, in Virginia a maximum burial allowance would be $10,000, whereas in Montana the maximum allowed would be $4,000.00.[61] Many motor carrier operations are small businesses with a limited number of employees, and compulsory workers' compensation coverage is frequently predicated on the number of employees employed.[62] Mississippi, for example, makes coverage compulsory for businesses with five or more employees.[63] Otherwise, coverage is optional.[64]

The most prevailing goal in forum shopping is to avoid any state with a broad exemption for owner-operators or sage guidance criteria, and file in a state which adopted the common law which reflects a liberal interpretation of what constitutes "employment."

The author served as a consultant in a fairly recent workers' compensation case in South Carolina involving the death claim of an owner-operator who fell asleep at the wheel and was killed when hitting a bridge pillar.

The owner-operator was a resident of Georgia who entered into the lease of the vehicle in Texas with a carrier having a facility in that state, and picked up the load being hauled in Florida. All three states exempt independent contractors from workers' compensation coverage.

The load was destined to Virginia which adopted the common law. The only connection with South Carolina was the scene of the accident.

South Carolina decided that the case fell under the workers' compensation common law of the state, which historically was very unfavorable in terms of motor carriers and the use of owner-operators.

These variations in state laws and decisions obviously encourage forum shopping and make it difficult, if not impossible, for a motor carrier and insurers to determine their risks and costs. Until some uniformity exists, the most motor carriers can do is take advantage of "choice of law" clauses to the extent they are allowable or recognized.

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59. Tenn. Code Ann. § 50-6-106 (West 2009).

60. *See* U.S. Chamber of Commerce, 2006 Analysis of Workers' Compensation Laws (2006).

61. Mont. Code Ann. § 39-71-725 (2009).

62. *See* Miss. Code Ann. § 71-3-5 (West 2009).

63. *Id.*

64. *See* U.S. Chamber of Commerce, *supra* note 60.

### F. Choice of Law Provisions

Choice of law provisions involve two contracting parties agreeing that any claim or dispute arising under the contract shall be resolved under a particular state's law. These clauses can, in the context of workers' compensation, avoid forum shopping. However, only a minority number of states have approved such clauses by statute[65] and others will only enforce a properly-drafted and adopted provision in the absence of a state statute.

In drafting a choice of law provision or a separate agreement, it would be important to express that the "choice" issue arises only if, for any reason, the independent contractor were to file a workers' compensation claim arising from the employment classification issue, and is not designed to avoid liability, and that the putative employee has knowingly agreed to the choice.

In Ohio, and in other states, a specific statutory form has to be filed with the Ohio Workers' Compensation Bureau.[66]

In the absence of a statutory right to adopt a "choice of law" agreement, the validity will be decided under common law and the determination could well depend upon the specific facts relative to the claim.

### G. Other Miscellaneous Considerations

Some motor carriers, because of the problems which arise with workers' compensation, reportedly have ceased contracting with sole proprietors and will only contract with partnerships, corporations, or LLCs where some relief is more likely.

This is not an assured position as while some states exempt corporate officers or partners, such exemptions are not universal.[67] Thus, the motor carriers could still be responsible for workers' compensation coverage if the corporation, LLC, or partnership does not provide it.[68]

Some motor carriers require sole proprietors, as a condition of contract, to elect workers' compensation coverage.[69]

Conditioning self-coverage of sole proprietors as a pre-requisite to entering a lease may not fully protect a motor carrier since some statutes

65. Memorandum from Gregory M. Feary, Partner, Scopelitis Garvin Light & Hanson P.C. to ATA Workers' Compensation Task Force, prepared for the American Trucking Associations, Inc. Management Conference & Exhibition Workers' Compensation Task Force, Oct. 25-28, 1992 (Oct. 27, 1992)(Appendix 1, 1-26 from *Workers' Compesation Law Survey Extraterritorial Coverage Coice of Jurisdiction Agreements;* Alabama, Alaska, Delaware, Idaho, Kentucky, Missouri, Ohio, Pennsylvania, Texas, Washington, and West Virginia).

66. Ohio Rev. Code Ann. § 4123.54 (West 2009).

67. U.S. Chamber of Commerce, *supra* note 60.

68. *See id.* at 17-29.

69. *See* N.C. Gen. Stat. Ann. § 97-19 (West 2009).

preclude coverage of sole proprietors even if the individual desired to "opt" into the system.[70]

Likewise, if the individual were found to be an "employee" and entitled to workers' compensation as such, the motor carrier could be subject to fines and an award of damages to the "sole proprietor" based on premiums paid.[71]

### H. Summary and Conclusion — Workers' Compensation

The real solution to the problem, which involves the "employment classification" issue in terms of workers' compensation, may lie in a federal legislative solution that would essentially define the terms of employment in the context of the trucking industry and that the test would be mandatory within the state's system,[72] or seek further explicit exclusions or a model or uniform provision on a state-by-state basis.[73]

## V. Unemployment Compensation

### A. In General

The diversity of unemployment compensation laws enacted by states, like workers' compensation laws, has caused considerable problems for motor carriers and particularly motor carriers utilizing independent contractors to move loads tendered to them by shippers, brokers,[74] or other carriers in interchange service,[75] or trip leasing.[76]

While some states specifically exclude independent contractors in their statutes,[77] and, as a matter of logic, the other statutes should be limited to "employees," the problem arises when the motor carrier is confronted with the filing of a unemployment compensation claim after the lease is terminated and/or the independent contractor is decertified as an

70. *See generally* Hardman, *supra* note 42 (discussing problems with the lack of uniformity in state statutes).

71. U.S. Chamber of Commerce, *supra* note 60, at 17-29; *see also* Hardman, *supra* note 42, at 270.

72. *See* Hardman, *supra* note 42, at 270-72.

73. *See* American Trucking Association, American Trucking Association Proposal RE Workers' Compensation (The American Trucking Association ("ATA") has adopted model language to use on a federal or state-by-state effort) (the proposal is contained below in appendix 1).

74. *See* 49 C.F.R. pt. 371 (2010) (for regulations and definition of "Broker"); *see also* James C. Hardman, *Legal, Practical, and Economic Aspects of Third-Party Motor Carrier Services: An Overview*, 34 Transp. L.J. 237 (2007) (for extensive discussion of motor carrier-broker operations).

75. 49 C.F.R. § 376.2(c) (2010) (defining "Interchange").

76. 49 C.F.R. § 376.22 (2010) (covering "Trip Leasing").

77. *See, e.g.*, Minn. Stat. Ann. § 268.035 subdiv. 25(b) (West 2009).

operator and the individual decides he or she was, in fact, an employee or if for some reason an audit arises.

In many, if not most instances, the carrier will face a hearing officer who sincerely believes that all "workers" should be covered by unemployment compensation and that the party who engages the individual, despite the contractual status, is an "employer." This position also occurs, to a large extent, because specific language indicates that coverage under the statute is to be interpreted liberally or broadly construed.[78]

Although the "employment classification" issue has been litigated in many administrative and judicial cases, uncertainty still exists among motor carriers as to the law, exposing them to awards and perhaps to extensive damages by a claim being filed.

### B. Tests Utilized

Minnesota,[79] along with Florida, Georgia, Illinois, Indiana, Kansas, Maryland, Nebraska, New Jersey, Oklahoma, Texas, and Virginia have some legislative version of an owner-operator exemption.[80]

In Minnesota, the legislature recently passed a provision, which duplicated the test to be utilized under the states' workers' compensation statute, and made the test applicable to the messenger/courier industry as well as to the trucking industry.[81] Motor carrier industry-specific tests in Minnesota have existed under statute or administrative rules since 1991.[82]

The exemption reads as follows:

> Subd. 25b. Trucking and messenger/courier industries; independent contractors. In the trucking and messenger/courier industries, an operator of a car, van, truck, tractor, or truck-tractor that is licensed and registered by a governmental motor vehicle agency is an employee unless each of the following factors is present, and if each factor is present, the operator is an independent contractor:
>
> (1) The individual owns the equipment or holds it under a bona fide lease arrangement;
>
> (2) The individual is responsible for the maintenance of the equipment;

78. *See, e.g.*, Miss. Code Ann. § 71-5-3 (West 2009).

79. Minn. Stat. Ann. § 268.035 subdiv. 25(b).

80. *See, e.g.*, Fla. Stat. Ann. § 443.1216(13)(w) (West 2009); Ga. Code Ann. § 34-8-35(n)(17) (West 2009); 820 Ill. Comp. Stat. Ann. 405/212.1 (West 2009); Ind. Code Ann. § 22-4-8-1(a) (West 2009); Kan. Stat. Ann. § 44-703 (i)(4)(y) (2009); Md. Code Ann., Lab. & Empl. § 8-206(d) (West 2009); Neb. Rev. Stat. § 48-604(6)(q) (2009); N.J. Stat. Ann. § 43:21-19 (i)(7)(X) (West 2009); Okla. Stat. Ann. tit. 40, § 1-208.1 (West 2009); Tex. Lab. Code Ann. § 201.041 (Vernon 2009); Tex. Lab. Code Ann. § 201.073 (Vernon 2009); Va. Code Ann. § 60.2-212.1 (West 2009).

81. Minn. Stat. Ann. § 268.035 subdiv. 25(b).

82. Minn. R. 3315.0100 (1991) (repealed 2004).

> (3) The individual is responsible for the operating costs, including fuel, repairs, supplies, vehicle insurance, and personal expenses. The individual may be paid the carrier's fuel surcharge and incidental costs, including, but not limited to, tolls, permits, and lumper fees;
>
> (4) The individual is responsible for supplying the necessary personal services to operate the equipment;
>
> (5) The individual's compensation is based on factors related to the work performed, such as a percentage of any schedule of rates, and not on the basis of the hours or time expended;
>
> (6) The individual enters into a written contract that specifies the relationship to be that of an independent contractor and not that of an employee; and
>
> (7) The individual substantially controls the means and manner of performing the services, in conformance with regulatory requirements and specifications of the shipper.[83]

### C. THE ABC TEST

In other states such as one of Minnesota's neighbors, South Dakota, the ABC Test is used.[84] The test can be described as follows:

> Service performed by an individual for remuneration (or wages) shall be employment irrespective of the common law unless and until it is proven that (a) the individuals are free from control as to the means and methods with which they accomplish tasks; (b) the services are performed outside the usual course of business of the employer or the employee performs such services outside of all the places of business of the party engaging the service; and (c) the individuals are engaged in an independently established trade, occupation, profession, or business.[85]

The use of this test is contrary to what federal legislators envisioned with the Social Security system.[86] In *United States v. Silk*, the Supreme Court established the "economic reality" test as being applicable to Social Security legislation.[87] It held that two groups of owner/operators were small, independent businessmen as a matter of economic reality, chiefly because of their investment in equipment, hiring of helpers, and their opportunity for profit depended upon their own efforts.[88] The Court considered the facts that owner/operators are integral to the carrier's business and that, in one instance, the owner/operator was under an

83. MINN. STAT. ANN. 268.035 subdiv. (25)(b).

84. S.D. CODIFIED LAWS § 61-1-11. (2009).

85. James C. Hardman, *Unemployment Compensation and Independent Contractors: The Motor Carrier Industry as a Case Study*, 22 TRANSP. L.J. 15, 25 (1994).

86. United States v. Silk, 331 U.S. 704, 713 (1947).

87. *Id.* at 713-14.

88. *Id.* at 719.

exclusive contract was important, but not controlling.[89]

In essence, the consideration of these latter factors was the foundation of the ABC test. However, when the Treasury Department attempted to issue regulations embracing the ABC test developed in the decisions, Congress passed a joint resolution emphasizing that only common law factors should be considered for purposes of the legislation.[90] Congress felt that the *economic reality* test would mislead the public and was not consistent with legislative intent.[91] Despite the fact that federal courts, since the Resolution, have acknowledged that strict application of the common law control test should be applied, the majority of states have continued to apply the *economic reality* test or, more appropriate, the ABC test.

In applying the test, the carrier has the burden of proof[92] and all three prongs of the test must be met.[93]

### *1. Prong A — Control*

Although this prong is literally the common law control test which, if met under the common law test, would establish an independent contractor relationship or at least be a dominant factor in the determination,[94] this is not necessarily the case in unemployment compensation cases.

Some courts have indicated that the control test in the ABC Test is not equivalent to the Prong A test and have held that less control needs be shown to establish an individual as an employee, and further, that Prong A carries no more weight than any other factors.[95]

### *2. Prong B — Usual Course of Business*

It will be noted that this prong involves separate tests and satisfaction of either part of the test will satisfy the prong.[96]

The first test under this prong is whether the services are performed outside the usual course of the employer's business.[97]

Administrative agencies and courts have frequently interpreted this

89. *Id.*

90. H.R.J. Res. 296, 80th Cong. 2d Sess. (1948).

91. *Id.* The current Federal Employment Tax Regulation now embraces the common law test. Employment Taxes and Collection of Income Tax at Source, 26 C.F.R. § 31 (1968).

92. *See, e.g.*, 820 ILL. COMP. STAT. ANN. 405/212 (West 2009).

93. *See, e.g.*, Tachick Freight Lines, Inc. v. State, 773 P.2d 451, 453 (Alaska 1989).

94. *See, e.g.*, Meredith Pub. Co. v. Iowa Employment Sec. Comm'n, 6 N.W.2d 6, 10 (Iowa 1942); Murphy v. Daumit, 56 N.E.2d 800, 805 (Ill. 1944).

95. *See, e.g.*, Nordman v. Calhoun, 51 N.W.2d 906, 909 (Mich. 1952); *Murphy*, 56 N.E.2d at 803-04.

96. *See, e.g.*, Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor, 593 A.2d 1177, 1186 (N.J. 1991).

97. *Id.*

test very narrowly and considered carriers and owner-operators as being in the same business, for example, transportation.[98]

In 1994, the author made the following comments on this position:

> The practical effect of rulings . . . is to eliminate subcontracting or any type of joint venture. A particular company may desire to have a third party do part of the work it initially performed or held itself out to do. The ability to do so should not be conditioned on the company accepting the subcontractor as an employee.
>
> It is difficult to conceive that legislators had this in mind when adopting the test. A company's use of subcontractors may be based on many legitimate purposes, none of which is the avoidance of unemployment compensation responsibility. Similarly, persons may desire to work as an independent contractor for legitimate business reasons.
>
> In motor carriage, carriers may desire to utilize owner/operators because they do not have sufficient capital to purchase or lease tractors; they may believe owner/operators as entrepreneurs may perform the actual transportation function more effectively; or the employment market may not provide sufficient numbers of driver-employees to meet their needs.
>
> What real difference is there if an individual performs the transportation aspects of a carrier's business or if the carrier engages a lawn service to cut and maintain its lawn? This distinction is really one without substance. In other industries subcontractors are freely used and held to be independent contractors.
>
> In the construction area, for example, the general contractor assumes responsibility for constructing a building. Essential to the construction of that building is the laying of a foundation, steelwork, masonry, plumbing, and electrical work. Subcontractors are engaged for specific parts of the project. The relationship with such subcontractors is normally one of an independent contractor.
>
> There does not appear to be anything unique about the "usual course of business" which should determine whether an individual is an employee and entitled to coverage. If a motor carrier chooses to subcontract a portion of its obligation, the furnishing of a vehicle and driver and the physical movement of the goods, this should not preclude the subcontractor from being classified an independent contractor.[99]

These comments are still applicable at this time.

### 3. *Prong B – Place of Performance*

The second part of Prong B examines if the service is performed outside of all places of business of the service engager.[100]

98. *See, e.g.*, Stafford Trucking, Inc. v. State, 306 N.W.2d 79, 81 (Wis. Ct. App. 1981).
99. Hardman, *supra* note 85, at 27-28.
100. *Carpet Remnant Warehouse, Inc.*, 593 A.2d at 1186.

Courts have gone in different directions in interpreting this test to the point where a motor carrier is faced with the concept that any activities in the business area in which a company operated constitutes its place of business.[101]

In 1994, the author made the following comments on this position, and as stated above, stands by these comments today:

> While one would agree that the test does not mean simply the home office or headquarters of a company, it is difficult to conceive that the test would be as broad as applied .... If a company did a nationwide business, presumably work could never be performed outside the company's place of business.cr
>
> A motor carrier could never meet the test as the vehicles of the owner/operator would be moving from the carrier's terminal or a shipper or customer's site to another customer's site all within the state or states in which the carrier operates.
>
> Similarly, picking up a semi-trailer at a carrier's terminal should not constitute doing business at the place of the engager any more than if a manufacturer contracts with an independent businessperson to repair parts utilized in the production process and that person picks up the broken parts at the factory and, after repairs, returns them to the factory.[102]

*4. Prong C — Independent Business*

This test essentially attempts to determine if the individual is an entrepreneur and service is performed by him or her in that capacity.

In *Solar Age Mfg., Inc. v. Employment Sec. Dept.*, the court noted that the adverb "independent" modified the word "established" and meant that the trade, occupation, profession, or business was established independently of the employer.[103] This view would not hinder a motor carrier, as in most instances owner/operators are already in business when they contract with a carrier. They normally have their own equipment and make independent decisions to become an owner/operator. It is merely the choice of which carriers to contract with that occurs when the contract is executed.

However, some courts take a much more literal view. In *Stafford Trucking, Inc. v. State Dep't. of Indus., Lab. and Human Rel.*, a dependent business was found because the vehicle lessor was dependent on the carrier for customers, trailers, insurance, and operating authority.[104]

In some instances, the test is set forth by statute.[105] In Oregon, a

101. *See Murphy*, 56 N.E.2d at 805.

102. Hardman, *supra* note 85, at 28.

103. Solar Age Mfg. v. Employment Sec. Dep't, 714 P.2d 584, 587 (N.M. 1986).

104. *Stafford Trucking, Inc.*, 306 N.W.2d at 84.

105. *See, e.g.*, COLO. REV. STAT. ANN. § 8-70-115(1)(C) (West 2003); OR. REV. STAT. ANN. § 670.600(3) (West 2009).

business or service is considered to be independently established when four or more of the following circumstances exist:

> (a) The labor or services are primarily carried out at a location that is separate from the residence of an individual who performs the labor or services, or are primarily carried out in a specific portion of the residence, which portion is set aside as the location of the business;
>
> (b) Commercial advertising or business cards as is customary in operating similar businesses are purchased for the business, or the individual or business entity has a trade association membership;
>
> (c) Telephone listing and service are used for the business that is separate from the personal resident listing and service used by an individual who performs the labor or services;
>
> (d) Labor or services are performed only pursuant to written contracts;
>
> (e) Labor or services are performed for two or more different persons within a period of one year; or
>
> (f) The individual or business entity assumes financial responsibility for defective workmanship or for service not provided as evidenced by the ownership of performance bonds, warranties, errors and omission insurance or liability insurance relating to the labor or services to be provided.[106]

This prong, if it embraces such concepts as having an "office" advertising one's service, having established clientele, a telephone listing separate from the personal resident listing, and serves two or more different persons in a period of one year, would clearly create problems for a motor carrier.

These latter versions of the third prong of the ABC Test create problems for the motor carrier. Owner/operators are essentially engaged in a one-person operation. The business is one in which he or she purchases products or services from others, whether it be tractor repairs, fuel, or bookkeeping services.

The test, as applied by administrators and by the courts, frequently ignores the realities of the industry and consequently hurts both carriers and contractors.

### D. Applicability of State Statutes

Compounding the problems which a motor carrier faces is the issue of which state law will apply. Generally, it is not the lessee which will determine which state has jurisdiction, but the place where the service is performed, directed, and controlled are the determinates.[107] However, in

106. Or. Rev. Stat. Ann. § 670.600(8). *But see* Or. Rev. Stat. Ann. § 670.600(3) (reflecting revisions to Or. Rev. Stat. Ann. § 670.600(8) (West 1999)).

107. *See, e.g.*, EVCO v. Jones, 409 U.S. 91, 93 (1972) (showing jurisdiction established to tax through performance); Northwood Constr. Co. v. Township of Upper Moreland, 856 A.2d 789,

some instances, the situs of the individual's residence will control.[108] Owner/operators frequently contract with a carrier at the carrier's headquarters or branch locations. They generally do not report to a carrier location on a regular basis, and they go from shipper site to shipper site. The owner/operator may be receiving dispatch information from a central location or from multiple locations depending where he or she is operating at the time or the operating procedures of the carrier.

Contract payments may be sent by mail or at multiple locations, one of which is chosen by the owner/operator. No taxes are withheld or remitted to the federal government or a state government. Operations could occur in all states or be concentrated in one or more states, frequently at the choice of the owner/operator, and without conscious knowledge of the motor carrier. Thus, a carrier must anticipate that claims might arise in any state and that it might be forced to defend under any one of the various tests discussed. There is no feasible way to avoid the problem under the existing statutory scheme.

### E. Exchange of Information and Its Implications

Finally, a warning is proper concerning motor carriers' past approaches to unemployment claims.

Although motor carriers and their attorneys will defend their "employment classification" decision in disputes and litigation with the IRS and state revenue departments because of the severity of the back-taxes due, interest, and penalties, they will often not contest an employment compensation claim on the basis that the costs of paying such compensation are not significant, particularly considering the cost of litigation which would be incurred.

However, a motor carrier must now give greater thought to unemployment claims made by independent contractors who, at contract end, say that they were really an "employee" and assert such under an unemployment statute.

In 2007, the IRS and the United States Department of Labor, Employment and Training entered into a "Memorandum of Understanding[109] with a fair number of states[110] including Minnesota to facilitate information sharing and other collaboration for tax administration pur-

804 (Pa. 2004) (showing jurisdiction established to tax through directing and controlling of activities from taxing state).

108. *See, e.g.*, George M. Brewster & Son, Inc. v. Borough of Bogota, 90 A.2d 58, 60 (N.J. Super. Ct. App. Div. 1952).

109. Hereinafter, "MOU".

110. As of February 1, 2008, it appears that all other states except eleven have done so. IRS.gov, *Information on the Questionable Employment Tax Practices Memorandum of Understanding*, Nov. 25, 2007, http://www.irs.gov/newsroom/article/0,,id=175455,00.html.

poses in conjunction with Questionable Employment Practices.[111]

To some degree, federal and state agencies have shared information in the past, but the MOU portends that the practice will be much more formal and intense.[112]

While there is no uniformity at this point in time as to what specific information will be shared by the states, Minnesota has agreed to send its determination to the IRS as have its bordering states of Iowa, North Dakota, South Dakota, and Wisconsin.[113]

It can be expected that if the claimant in an unemployment compensation audit or a legal suit is found to be an employee and has been misclassified as an independent contractor, this information will be sent to the IRS which might lead to an IRS audit regarding income and/or employment taxes.

### F. Summary – Unemployment Compensation

The unemployment compensation situation suffers the same infirmities as with the employment tax and workers' compensation situations, and similar to what was concluded in examination of those areas, the only sensible resolution of the "mess" which exists is to have a federal act or a model or uniform legislative exemption or a test to determine the employment classification issue.[114]

## VI. Conclusions

The foregoing areas of law discussed in detail are merely examples of what confusion and problems exist in determining "employment classification." It is a sad commentary of our legal system that the statutes, administrative rules, and court decisions are so voluminous, incoherent, and inconsistent that all participants in the motor carrier arena are unable to reach a reasonable, if not infallible, answer to the question "employees or independent contractors?"

The "employment classification" issue is, in reality, a more-pressing issue in the trucking industry than securing and retaining drivers.[115]

Because of the number of "drivers" being utilized under indepen-

111. *See id.* A copy of the Minnesota Agreement can be acquired by contacting the Minnesota Department of Economic Development.

112. *Id.*

113. *Id.*

114. *See* Hardman, *supra* note 85, at 34-38.

115. In 2007, a representative sample of motor carriers indicated a shortage of "drivers" remains to be the number one issue facing the industry. American Transportation Research Institute, *Hours-Of-Service Leads Top Ten List Of Trucking's Concerns*, Oct. 21, 2007, http://www.atri-online.org/index.php?option=com_content&view=article&id=170:hours-of-service-leads-top-ten-list-of-truckings-concerns&catid=41:atri-in-the-news. The attack on the indepen-

dent contractor leases, the demise of the independent contractor relationship would cause significant upheaval and problems. Many, if not most, motor carriers could not convert to a driver-employee operation because of the capital costs in doing so. The cost of reverting to a driver-employee operation would involve, for example, the necessity of the carrier to purchase or lease equipment (without driver); acquire equipment repair and maintenance facilities; acquire land for parking of tractor vehicles; and increase cost of human resource functions, etc.

The real issue of how many independent contractors who want to be independent businesspersons would continue as driver-employees if the independent contractor status is crimped.

Motor carriers and other entities and individuals cannot and should not sit back and not challenge the present and projected adverse action taken on the employment classification issue. Legal scholars, experienced and knowledgeable businesspersons, federal and state legislators and administrators, and other interested parties must *Stand Up and Be Heard* in the political arena.

dent contractor and how many contractors who would leave the industry rather than operate as driver-employees has not been quantified yet, but it could be a substantial number.

# Appendix 1

# American Trucking Association Proposal RE Workers' Compensation

CHAPTER 49 — LIABILITY FOR INJURIES TO DRIVER-EMPLOYEES

§ • LIABILITY OF CARRIERS OF PROPERTY BY MOTOR VEHICLE IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO DRIVER-EMPLOYEES

Every carrier of property by motor vehicle within the jurisdiction of Title 49, United States Code, while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable to its driver-employees for compensation in every case of work related injuries, death, or occupational diseases arising out and in the course of employment without regard to the question of negligence, unless otherwise excluded or not covered by applicable state law.

§ • APPLICABILITY OF STATE LAW

The liability of a carrier, subject to the provisions of this chapter, shall be determined under the workers' compensation law of the state in which the carrier has its principal place of business (except to the extent inconsistent with the provisions of this chapter) and such law shall be recognized and enforced by any and all state agencies and courts which assume jurisdiction of causes of action under this chapter.

§ • DRIVER-EMPLOYEE DEFINED

Any employee of a carrier, any part of whose duties as such employee shall involve operating a motor vehicle in the furtherance of interstate or foreign commerce, or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

§ • INDEPENDENT CONTRACTOR DETERMINATION

A person operating a motor vehicle for a carrier of property under

this chapter shall be considered an independent contractor and not an employee if each of the following factors is substantially present:

a. The person makes a significant investment or incurs a significant obligation related to equipment contracted to the carrier and used in performing service.

b. The person has direction and control in meeting and performing contract obligations subject to conformance with governmental dictates, lawful requirements of third parties relative to transport or other contractual obligations undertaken, and any reasonable administrative and clerical procedures needed for contract administration.

c. The person has the principal burden of any operating costs and personal expenses related to contract work.

d. The person's compensation is based primarily on factors related to contract work and not on number of hours worked and affords the person the opportunity to realize a profit or loss based on the relationship of business receipts and expenditures.

e. The person is responsible for hiring or otherwise engaging and paying the necessary personnel to operate the equipment and meet any contract obligations related to it.

f. A written contract governs the relationship and specifies the relationship of the parties to be that of independent contractor and not an employer-employee relationship.

A person meeting the foregoing criteria shall not be covered under the provision of this chapter or under any state statute or regulation relating to the subject matter of liability relative to work injuries, death, or occupational diseases except as hereafter provided.

§ • ELECTION OF COVERAGE

To the extent the workers' compensation act of a state having jurisdiction pursuant to Section – of this Chapter allows corporate officers, corporate directors, sole proprietors, and partners of partnerships to elect coverage, such an election may be made under this Chapter by an independent contractor without costs to a carrier if qualified under any such classification.

§ • EXCLUSIVE NATURE OF REMEDY

This chapter is exclusive and not cumulative.

§ • NON-IMPAIRMENT OF DUTIES, LIABILITIES, OR RIGHTS

Nothing in this chapter shall be held to limit the duties or liabilities of carriers or to impair the rights of their employees under any other Act or Acts of Congress.

## Proposed Factor Test/State

INDEPENDENT CONTRACTOR DETERMINATION

A person operating a motor vehicle for a carrier of property under this chapter shall be considered an independent contractor and not an employee if each of the following is substantially present:

a. The person makes a material investment or incurs a material obligation related to equipment contracted to the carrier and used in performing services.

b. The person has direction and control in meeting and performing contract obligations subject to conformance with governmental dictates, lawful requirements of third parties relative to the transport or other contractual obligations undertaken and any reasonable administrative and clerical procedures needed for contract administration.

c. The person has the principal burden of any operating costs and personal expenses related to contract work.

d. The person's compensation is based primarily on factors related to contract work and not on number of hours worked and affords the person the opportunity to realize a profit or loss based on the relationship of business receipts and expenditures.

e. The person is responsible for hiring or otherwise engaging and paying the necessary personnel to operate the equipment and meet any contract obligations related to it.

f. A written contract governs the relationship and specifies the relationship of the parties to be that of independent contractor and not an employer-employee relationship.

## Proposed Blanket Exemption/Federal and State

GENERAL EXEMPTION:

An independent contractor is an individual who owns or holds under a bona fide lease a motor vehicle which the individual leases to a motor carrier and who personally operates such leased equipment under a written agreement with the motor carrier that specifies that such operations involve an independent contractor relationship.

## Optional Provisions For Use With Factor and Blanket Exemptions

OPTION ONE — STATUTORY EMPLOYMENT LANGUAGE:

No motor carrier shall be held responsible for the liabilities of an independent contractor exempted under Section _____ to the indepen-

dent contractor's employees under the workers' compensation laws of any[116]/ state where the motor carrier has taken reasonable steps to ensure the independent contractor has secured its responsibilities to the independent contractor's employees by obtaining a certificate of workers' compensation for any such employees at the time the independent contractor is engaged and where no notice of cancellation of such coverage has been received by the motor carrier.

OPTION TWO — CHARGEBACK LANGUAGE:

A motor carrier and an independent contractor meeting the criteria contained in Section ____ may agree in writing that the independent contractor and any of the independent contractor's employees may be covered by the motor carriers' workers' compensation policy and that the independent contractor and any of its employees would be deemed to be employees of the motor carrier for purposes of workers' compensation only. The motor carrier may charge the independent contractor for any premiums, or if self-insured, for any equitable assessments for such coverage. Such election shall not affect the employment status of the independent contractor for any purpose other than for workers' compensation.

116. For use at state level, the word "any" should be replaced with the word "this".