Who's the Boss? Addressing the Increasing Controversies Associated with the Owner-Operator/ Employee Dichotomy

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I. INTRODUCTION

The classification of workers as employees or independent contractors, given all of the associated uncertainties, ambiguities and perils, has been and continues to be problematic for the trucking industry through the years. Indeed, trucking companies have been litigating the issue since the first half of the last century.[1] Suffice it to say that this is not a new concern. However, worker classification issues have recently generated an explosion of activity at various levels and in numerous areas of state and federal government.[2] Several states have recently passed or are considering legislation on the issue, either globally or in specific areas of law.[3] Most of the recent legislation involves classification issues pertaining to responsibility for workers' compensation insurance or state employment taxes.[4] Some states specifically allow for workers' compensation coverage to be replaced by owner/operator-purchased "occupational disability" policies,[5] while some specifically prohibit and condemn the practice.[6]

The federal government has also demonstrated concern about worker classification, specifically as it relates to the responsibility for, and

1. Myers v. Maurer & Myers, 19 A.2d 579, 580 (Pa. Super. Ct. 1941); Firestone v. Indus. Comm'n, 59 N.E.2d 147, 149 (Ohio 1945).

2. *See* Illinois Employee Classification Act, 820 ILL. COMP. STAT. ANN. 185/1-999 (2008); North Carolina Workers' Compensation Act, N.C. GEN. STAT. ANN. § 97-19.1 (2008); New Jersey Construction Industry Independent Contractor Act, N.J. STAT. ANN. § 34:20-1 (2008); Utah Independent Contractor Database Act, 2008 Utah Laws 189 (introducing legislation in the General Session which would "reduce costs to the state resulting from the misclassification of workers as independent contractors"), *available at* http://le.utah.gov/~2008/bills/sbillint/sb0189.pdf; Independent Contractor Proper Classification Act of 2007, S. 2044, 110th Cong. (2007), *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:S.2044:.

3. *See* Illinois Employee Classification Act, 820 ILL. COMP. STAT. ANN. 185/3 (2008); North Carolina Workers' Compensation Act, N.C. GEN. STAT. ANN. § 97-19.1 (2007); New Jersey Construction Industry Independent Contractor Act, N.J. STAT. ANN. § 34:20 (2007); Utah Independent Contractor Database Act, S.B. 189.

4. *Id.*

5. *See* MISS. CODE ANN. § 71-3-5 (2008) (stating that "[a]n owner/operator, and his drivers, must provide a certificate of insurance of workers' compensation coverage to the motor carrier or proof of coverage under a self-insured plan or an occupational accident policy. . .Coverage under the motor carrier's workers' compensation insurance program does not terminate the independent contract status of the owner/operator under the written contract or lease agreement. Nothing shall prohibit or prevent an owner/operator from having or securing an occupational accident policy in addition to any workers' compensation coverage authorized by this section.").

6. *See* COMPENSATION RATING AND INSPECTION BUREAU, NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE, ADVISORY BULL. NO. 10A, OCCUPATIONAL ACCIDENT INSURANCE AS AN ALTERNATIVE TO WORKERS' COMPENSATION (2005) (noting that while alternative coverage is acceptable in some jurisdictions, "the New Jersey Workers' Compensation Law. . .states that workers' compensation insurance, as provided by the standard policy, is intended as the exclusive remedy for work related injuries."), *available at* http://www.njcrib.com/circulars/AdvisoryBulletin10A.pdf.

payment of, taxes.[7] The Internal Revenue Service recently announced the "Questionable Employment Tax Practice (QETP) initiative," wherein it has agreed with at least twenty-nine states "to exchange data, thereby leveraging resources and encouraging businesses to comply with federal and state employment tax requirements."[8]

One piece of troubling Congressional legislation proposed by Presidential candidate Barack Obama, would have monumental, and potentially devastating, impact upon countless businesses who classify workers as independent contractors.[9] Ultimately, it would restrict the freedom of thousands of workers and business owners to freely contract. Senator Obama, and six co-sponsors, introduced the legislation on September 12, 2007.[10] This broad, sweeping legislation seeks, among other things, to require the establishment of a procedure for workers to petition for a determination of their status as employees or independent contractors.[11] It would also prohibit businesses from retaliating against workers who file status petitions and require the Secretary of Labor to identify and track complaints involving worker misclassification for purposes of enforcing wage and hour laws and investigate industries identified by the Internal Revenue Service as violators.[12] Another provision would direct the Secretary of Labor to include on workplace posters required by the Fair Labor Standards Act a notice informing workers of their right to seek a status determination from the Internal Revenue Service.[13] The legislation, if passed as proposed, would require businesses to notify the independent contractors with whom they do business of the workers' federal tax obligations, the labor and employment protections inapplicable to independent contractors, and the workers' rights to seek a status determination from the Internal Revenue Service, and would further require businesses to maintain for three years a list of all independent contractors with whom they do business, including the names and tax identification numbers thereof.[14] From a motor carrier perspective, this proposed legislation could make it cost prohibitive for some to use the independent contractor model, which may very well be the underlying intent.

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7. STAFF OF J. COMM. ON TAXATION, 110TH CONG., REPORT ON PRESENT LAW AND BACKGROUND RELATING TO WORKER CLASSIFICATION FOR FEDERAL TAX PURPOSES JCX-26-07 (Comm. Print 2007), *available at* http://www.house.gov/jct/x-26-07.pdf.

8. INTERNAL REVENUE SERVICE, PRESS RELEASE, IR-2007-184, IRS AND STATES TO SHARE EMPLOYMENT TAX EXAMINATION RESULTS (2007), *available at* http://www.irs.gov/newsroom/article/0,,id=175457,00.html.

9. Independent Contractor Proper Classification Act of 2007, S. 2044, 110th Cong. (2007).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

All of these new laws and proposals will undoubtedly generate countless hours of litigation, as well as legal battles on other fronts, in the future. Penalties for improper classification vary, but can be significant, not only for the company, but also for its officers, individually.[15] The uncertainty associated with this eruption of federal and state legislation, as well as the constant flow of inconsistent common law decisions, make it difficult, if not impossible, for the industry to gauge future financial performance.[16] Parties will inevitably seek clarification, limitation, expansion, and in some instances, condemnation, of laws which they perceive to be ineffective, oppressive, or perhaps unconstitutional.

In 2006, the trucking industry in the United States employed an estimated 3.4 million drivers, approximately nine percent of whom were owner-operators.[17] These numbers are expected to climb by approximately eight percent over the next decade.[18] These circumstances, along with the current nationwide driver shortage, which is only expected to get worse, make it more important than ever for trucking industries to maximize the utility of the workforce.[19] There is no question that the trucking industry will be heavily impacted by state and federal legislation and the resulting litigation across the country, regarding worker classification.

Given these current trends and circumstances, it is critical that industry attorneys be fully prepared to address these issues and controversies, whether it be through litigation, administrative practice, or one or more forms of alternative dispute resolution. Knowing which route to pursue

15. *See* MASS. GEN. LAWS ANN. ch. 149, § 27C (2008) (imposing harsh criminal and civil penalties against violators with and without willful intent for improper classification); MASS. GEN. LAWS ANN. ch. 149, § 148B (2008) (dispensing liability to officers or corporate managers for improper classification); 820 ILL. COMP. STAT. ANN. 185/40 (2008) (imposing civil penalties to employers for violations of the Employee Classification Act); 820 ILL. COMP. STAT. ANN. 185/45 (2008) (punishing willful violators "for penalties up to double the statutory amount").

16. Companies are compelled to alert potential investors to the risks associated with the uncertain classification of workers. *See* SIRVA, Inc., Registration Statement (Form S-1) at 16 (May 7, 2004) (stating that "owner/operators are currently not considered to be employees by taxing and other regulatory authorities. Should these authorities change their position and consider our owner/operators to be our employees, our costs related to our tax, unemployment compensation and workers' compensation payments could increase significantly"), *available at* http://sec.edgar-online.com/2004/05/07/0001047469-04-016483/Section10.asp; US 1 Indus., Inc., Annual Report (Form 10-K) (Mar. 19, 2007), *available at* http://sec.edgar-online.com/2007/03/19/0000351498-07-000003/Section3.asp.

17. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK: TRUCK DRIVERS AND DRIVERS/SALES WORKERS (2008), *available at* http://www.bls.gov/oco/ocos246.htm#projections_data.

18. *Id.*

19. *See* GLOBAL INSIGHT, INC., U.S. TRUCK DRIVER SHORTAGE: ANALYSIS AND FORECASTS (2005), *available at* http://www.truckline.com/NR/rdonlyres/E2E789CF-F308-463F-8831-0F7E283A0218/0/ATADriverShortageStudy05.pdf (concluding that estimated driver shortfall could rise to 111,000 in 2014).

in a given situation, its ramifications and how to address the issues at hand in any particular arena is crucial to the competent and effective representation of clients.

II. Setting the Stage

Motor carriers can, to some extent, control some of the risk associated with classification disputes by considering and negotiating the parameters for such disputes on the front end, including specific terms for the same in the leasing agreement or other related agreements. Negotiated terms can include forum selection clauses, choice of law provisions, and language requiring arbitration or other alternatives for dispute resolution.[20]

Forum selection clauses and choice of law provisions can, to some extent, allow contracting businesses a measure of certainty and predictability as to the laws under which their contracting relationships will be scrutinized. Such provisions will likely be enforced in classification disputes "so long as the contract bears a substantial relationship to the chosen state and so long as the parties' choice does not thwart a fundamental policy of the state whose law would otherwise be applied."[21] The fact that one of the parties to the agreement is headquartered or incorporated in the selected state will typically result in a finding that such state has a substantial relationship to the parties and their transaction.[22]

Relegating classification disputes to arbitration or some other form of alternative dispute resolution may also provide some measure of protection. Assuming that the parties cannot reach an agreement and must have someone else make the decision for them, it is, in most instances, preferable to leave that final decision to an independent arbiter, rather than to a government official whose employer may have a direct stake in the outcome. Arbitration will typically provide some parameters for the issues in dispute, thereby limiting potential exposure for the business.[23]

20. It is, of course, important for such terms to be negotiated at "arm's length" to ensure later enforcement. *See* Servewell Plumbing, LLC v. Fed. Ins. Co., 439 F.3d 786, 788 (8th Cir. 2006); Feldman v. Google, Inc., 513 F. Supp. 2d 229, 245 (E.D. Pa. 2007); Atl. Floor Serv., Inc. v. Wal-Mart Stores, Inc., 334 F. Supp. 2d 875, 877 (D. S.C. 2004) (citing Sterling Forest Assoc., Ltd. v. Barnett-Range Corp., 840 F.2d 249, 250 (4th Cir. 1988)).

21. *See* Mary Kay Inc. v. Woolf, 146 S.W.3d 813, 816 (Tex. App. 2004), *cert. denied*, Woolf v. Mary Kay Inc., 544 U.S. 1061 (2005), (citing DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677 (Tex. 1990) (adopting rule of Restatement (Second) of Conflict of Laws § 187 (1971)); *see also* Oestreicher v. Alienware Corp., 502 F. Supp. 2d 1061, 1066 (N.D. Cal. 2007).

22. *See* Papa John's Intern. Inc. v. Specktacular Pizza Inc., No. 305CV515H, 2005 WL 3132337, at *4 (W.D. Ky. Nov. 21, 2005) (citing Wallace Hardware Co., Inc. v. Abrams, 223 F.3d 382, 391 (6th Cir. 2000)); Ciena Corp. v. Jarrard, 203 F.3d 312, 324 (4th Cir. 2000); S. Union Co. v. Sw. Gas Corp., 165 F. Supp. 2d 1010, 1027 (D. Ariz. 2001) (citing Consul Ltd. v. Solide Enter. Inc., 802 F.2d 1143, 1147 (9th Cir. 1986)).

23. In a recently overruled decision, the Mississippi Employment Security Commission

Furthermore, any alternative dispute resolution process will usually provide the advantage of at least some measure of confidentiality. Much of the recent nationwide litigation and agency action regarding FedEx's classification of its employees[24] has surely had an effect, not only to the image and bottom line of FedEx, but also on the public awareness of classification issues, and hence the national and state movements regarding same.

Claims under most federal employment laws are arbitrable.[25] In owner-operator classification disputes, counsel for purported employees are likely to argue that the Federal Arbitration Act specifically excludes employment contracts pertaining to workers involved in the transportation of goods in interstate commerce.[26] There is conflicting authority on this issue. Some jurisdictions have held that this exclusion does not apply to owner-operators, because their agreements with motor carriers are not "contracts of employment."[27] However, others have held that the exclu-

found in favor of an individual worker, but then unilaterally applied its ruling to "similarly situated" persons who had contracted with the purported employer. The effect on the purported employer would have been potentially devastating.

24. *See* Jane Roberts, *Case to Decide Whether FedEx Drivers are Employees*, *available at* http://www.commercialappeal.com/news/2007/aug/19/b19ground/ (Aug. 19, 2007); Ann Belser, *"Independent Contractor" Work Status Challenged*, *available at* http://www.post-gazette.com/pg/07308/830748-28.stm (Nov. 4, 2007); Mary Jane Credeur & Mary Schlangenstein, *FedEx Says Ground Drivers are Properly Classified (Update 2)*, *available at* http://www.bloomberg.com/apps/news?pid=20601103&sid=abt5Jx2kooQg&refer=us (Jan. 10, 2008); John Drinkwater, *Attorney General Coakley's Officer Hits Federal Express with Fine for Misclassifying Drivers*, *available at* http://www.massaflcio.org/attorney-general-coakley%E2%80%99s-office-hits-federal-express-fine-misclassifying-drivers (Dec. 28, 2007); Ed Frauenheim, *IRS Deals Blow to FedEx on Use of Contractors*, *available at* http://www.redorbit.com/news/business/1227906/irs_deals_blow_to_fedex_on_use_of_contractors/ (Jan. 24, 2008); Greg Morcroft, *IRS Orders FedEx to pay $319 mln*, *available at* http://www.marketwatch.com/news/story/irs-orders-fedex-pay-319/story.aspx?guid=%7B4270B177-25A2-4939-8535-A3C3749F7AEB%7D (Dec. 22, 2007).

25. *See* Campbell v. Gen. Dynamics Gov't. Sys. Corp., 407 F.3d 546, 554-55 (1st Cir. 2005) (holding that Title VII claims subject to arbitration); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991) (holding that employment contracts can make claims under the Age Discrimination in Employment Act subject to arbitration); Miller v. Pub. Storage Mgmt., Inc., 121 F.3d 215, 218 (5th Cir. 1997) (holding that ADA and Title VII suits are subject to the Federal Arbitration Act).

26. The Act provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (2008). This exclusion provision "is limited to transportation workers, defined . . . as those workers 'actually engaged in the movement of goods in interstate commerce.'" Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 112 (2001) (quoting Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465, 1471 (D.C. Cir. 1997). The Court went on to state that the exclusion is reflective of Congress's "concern with transportation workers and their necessary role in the free flow of goods . . . ." *Circuit City Stores, Inc.*, 532 U.S. at 121. The Court then concluded that "[i]t would be rational for Congress to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation." *Id.*

27. Davis v. EGL Eagle Global Logistics, LP, No. 06-31019, 2006 WL 2631966, at *3 (E.D.

sion applies in this context.[28] In any event, the party seeking to avoid application of the Federal Arbitration Act always has the burden of establishing that it does not apply to their particular claim.[29] Of course, businesses will not have any control over the when and where of some disputes, especially those brought by governmental agencies. In those cases, arbitration and forum selection clauses are of little value. However, proper planning and foresight in negotiating agreements with owner-operators can serve to minimize exposure to these risks.

III. Common Issues and Perils

A. Lack of Knowledge by Judges and Other Officiants

When defending a motor carrier's position regarding the independent contractor status of its owner-operators, the biggest obstacle to overcome is often the lack of experience of the decision maker of the intricacies of the Federal Motor Carrier Safety Regulations. It is, of course, always incumbent upon counsel to emphasize any law or facts necessary for an informed decision. However, this is especially true when dealing with industry-specific practices, regulations and other issues.[30] It cannot be assumed that an administrative law judge who deals solely with workers' compensation issues or unemployment matters, a United States Tax Court judge, or even a federal district judge, will have any understanding of the nuances of motor carrier regulations. While this consideration is present in many forms of complex litigation, it is especially crucial in the context of motor carrier worker classification disputes. As is discussed *infra*, many factors which typically counsel in favor of classification of a worker as an employee are automatically present in disputes involving motor carriers due to the specific requirements of the federal "truth-in-leasing" regulations.[31] Some measure of education must be undertaken to ensure that those already present factors are not counted against the carrier in the final analysis. Thus, in trying these issues, one must be fully prepared to wear the hats of both advocate and professor.

La. Sep. 12, 2006); *See* Owner-Operator Indep. Drivers Ass'n. v. Swift Transp. Co. Inc., 288 F. Supp. 2d 1033, 1035-36 (D. Ariz. 2003); *See also* Roadway Package Sys., Inc. v. Kayser, No. 99-MC-111, 1999 WL 817724 (E.D. Pa. Oct. 13, 1999), *aff'd*, 257 F.3d 287 (3rd Cir. 2001), *cert. denied*, 534 U.S. 1020 (2001).

28. *See* Owner-Operator Indep. Drivers Ass'n. Inc. v. C.R. England, Inc., 325 F. Supp. 2d 1252, 1258 (D. Utah 2004); Gagnon v. Serv. Trucking Inc., 266 F. Supp. 2d 1361, 1367 (M.D. Fla. 2003).

29. *See Gilmer*, 500 U.S. at 26.

30. Darwin S. Williams, *An Interview with U.S. District Court Judge Patrick J. Schiltz*, Barrister (Ramsey County Bar Ass'n, St. Paul, MN), April 2007, at 3.

31. 49 C.F.R. § 376.12 (2006).

B. Influence of Public Policy Considerations and Natural Presumptions

There can really be no question that the classification of workers has certain public policy considerations.[32] When a decision requires subjective determinations, the risk is presented that what would otherwise be a "tie" under the appropriate analysis will be decided in favor of sound public policy, or more accurately, the welfare of the forum state (or federal government). The best defenses against such adverse action are education of the decision maker on the applicable standards and the creation of a sound record for appeal. Also working against the motor carrier in classification cases is the natural tendency of persons, be they lay people or learned judges, to presume that an individual performing work for a business is an employee of that business. This is especially so when the terms of that individual's work are so meticulously regulated such as is the case in the motor carrier context.[33]

C. Potential for Collective-Action Effect

Many classification disputes will be brought as collective-action litigation in which a ruling is sought to be applied not only to the prosecuting party, but also to all similarly situated workers.[34] In such instances, the motor carrier at least has the benefit of knowing what is at stake from the outset. The more dangerous, and potentially disastrous, situation arises where a judge, or more often an agency, hears the claim of an individual, and then chooses to unilaterally apply its findings as to that claim to all "similarly situated" workers.[35] Again, when the risk of such a ruling is present, it is absolutely crucial to ensure the development of a proper record for appeal.[36]

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32. *See* Slavin v. Xenon Corp., No. 94-4284, 1995 WL 808893, at *2 (Mass. Super. Jan. 5, 1995) ("[T]he proper classification of workers as employees or independent contractors serves an important public policy. Proper classification is required for appropriate payroll deductions, including state and federal income tax, and Social Security and Medicare contributions, and also affects the provision of health insurance and other benefits. These taxes and benefits impact not just the individual worker, but also impact the collection and payment of taxes and the provision of health and other benefits, which are matters of public concern.").

33. 49 C.F.R. § 376.12.

34. *See* Prater v. Commerce Equities Mgmt. Co., Inc., No. H-07-2349, 2007 WL 4146714, at *7 (S.D. Tex. Nov. 19, 2007) (citing Holbrook v. Smith & Hawken, Ltd., 246 F.R.D. 103, 106 (D. Conn. 2007)) ("Collective-action treatment is proper for misclassification claims when the employees have essentially the same basic job responsibilities."); *See also* Narayan v. EGL, Inc., No. C-05-04181 RMW, 2007 WL 2021809 (N.D. Cal. July 10, 2007); Walker v. Bankers Life & Cas. Co., No. 06 C 6906, 2007 WL 2903180 (N.D. Ill. Oct. 01, 2007); Parker v. Rowland Express, Inc., 492 F. Supp. 2d 1159 (D. Minn. 2007).

35. *See* discussion *supra* note 24.

36. These considerations are certainly not meant to be all-inclusive. Each classification case will pose different problems and issues. There are numerous other potential obstacles that may

IV. Preparation for Trial or Hearing

A. Review and Develop Understanding of Any and All Relevant Statutory Provisions, Regulations and Common Law Authorities

Early identification of the specific criteria to be considered by the trier in making the worker status determination is crucial, as those criteria will determine the nature and scope of the proof that will be required at the trial or hearing. The United States Supreme Court established a common law agency test[37] that is used by various jurisdictions in making classification determinations for application of certain federal social legislation.[38] Others utilize the six factor "economic realities" test.[39] The Internal Revenue Code defines the term "employee" for purposes of responsibility for Social Security, Medicare and unemployment tax withholding, and has provided a set of twenty criteria to be considered in making the appropriate classification.[40] Fortunately, the Internal Reve-

present themselves, depending upon the type of case involved in the dispute. For instance, in a workers' compensation action involving a significant injury, certainly sympathy for the purported employee could lead to an adverse decision on a close call. In cases where this potential exists, one method for minimizing the risk of such an outcome is to seek bifurcation of the classification issue from the damages portion of the hearing, provided that the procedural rules of the presiding entity allow for bifurcation.

37. The common law agency analysis requires the consideration of numerous factors, including 1) the hiring party's right to control the manner and means by which the product is accomplished; 2) the skill required by the hired party; 3) the duration of the relationship between the parties; 4) the hiring party's right to assign additional projects; 5) the hired party's discretion over when and how to work; 6) the method of payment; 7) the hired party's role in hiring and paying assistants; 8) whether the work is part of the hiring party's regular business; 9) the hired party's employee benefits; and 10) tax treatment of the hired party's compensation. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989).

38. Shah v. Deaconess Hosp., 355 F.3d 496, 499 (6th Cir. 2004) (Age Discrimination in Employment Act case); Johnson v. City of Saline, 151 F.3d 564, 567-69 (6th Cir. 1998) (Age Discrimination Act matter); Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111, 113 (2d Cir. 2000) (Title VII case).

39. The "economic realities" test is comprised of the following factors: 1) the degree of the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; and 6) whether the service rendered is an integral part of the alleged employer's business. Ruiz v. Affinity Logistics Corp., No. 05CV2125 R(CAB), 2006 WL 3712942, at *2 (S.D. Cal. 2006) (Fair Labor Standards Act case); *see* Bonnetts v. Arctic Express Inc., 7 F. Supp. 2d 977, 981 (S.D. Ohio 1998) (Family Medical Leave Act dispute).

40. *See* Rev. Rul. 87-41, 1987-1 C.B. 296 (The set of criteria are: (1) instructions; (2) training; (3) integration; (4) services rendered personally; (5) hiring, supervising, and paying assistants; (6) continuing relationship; (7) set hours of work; (8) full time required; (9) doing work on employer's premises; (10) order or sequence set; (11) oral or written reports; (12) payment by hour, week, month; (13) payment of business and/or traveling expenses; (14) furnishing of tools and materials; (15) significant investment; (16) realization of profit or loss; (17) working for

nue Service has previously determined that owner-operators are independent contractors and not employees.[41] Some states have adopted these criteria for use in applying their own statutes,[42] while others have established completely different sets of criteria for classifying workers, depending upon the purpose of the classification.[43] Depending upon the applicable criteria, it may or may not be necessary to present testimony from certain management personnel with the company, such as a member of the human resources department or a regulatory compliance officer.

Specific knowledge of all applicable federal regulations governing the relationships between motor carriers and owner-operators[44] is also necessary for effective representation. Many of the criteria typically utilized in a classification analysis are addressed in the regulations. The specific language in the regulations has been used to support findings of both independent contractor[45] and employee[46] status. It is certainly important

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more than one firm at a time; (18) making service available to general public; (19) right to discharge; and (20) right to terminate.).

41. *See* Rev. Rul. 76-226, 1976-1 C.B. 322.

42. *See* K & D Auto Body, Inc. v. Div. of Employment Sec., 171 S.W.3d 100, 104-13 (Mo. Ct. App. 2005) (applying an in depth analysis of the IRS factors and holding that the factors are "routinely applied" in classifying workers for the purpose of tax liability); *see* Longmire v. Ind. Dep't of State Revenue, 638 N.E.2d 894, 897 (Ind. Tax 1994).

43. In Mississippi, for example, there are different sets of statutory criteria to be utilized when the determination is being made for workers' compensation purposes. Miss. Code Ann. §71-3-3(r) (2007) ("Independent contractor means any individual, firm or corporation who contracts to do a piece of work according to his own methods without being subject to the control of his employer except as to the results of the work, and who has the right to employ and direct the outcome of the workers independent of the employer and free from any superior authority in the employer to say how the specified work shall be done or what the laborers shall do as the work progresses, one who undertakes to produce a given result without being in any way controlled as to the methods by which he attains the result."). Mississippi common law complements this statutory definition with the 'control test' and the 'nature of the work' test. Davis v. Clarion-Ledger, 938 So. 2d 905, 908-09 (Miss. Ct. App. 2006). Mississippi has a subsidiary statute for employment tax and unemployment compensation. Miss. Code Ann. §71-5-11(J)(14) (2007) ("Services performed by an individual for wages shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the department that such individual has been and will continue to be free from control and direction over the performance of such services both under his contract of service and in fact; and the relationship of employer and employee shall be determined in accordance with the principles of the common law governing the relation of master and servant."). Mississippi common law, in turn, provides seven criteria to be considered in employment tax cases: "(1) The extent of control exercised over the details of the work; (2) Whether or not the one employed is engaged in a distinct occupation or business; (3) The skill required in the particular occupation; (4) Whether the employer supplies the tools and place of work for the person doing the work; (5) The length of time for which the person is employed; (6) The method of payment, whether by the time or by the job; and (7) Whether or not the work is a part of the regular business of the employer." Miss. Dep't of Employment Sec. v. Prod. Connections, LLC, 963 So. 2d 1185, 1187 (Miss. Ct. App. 2007).

44. *See* 49 C.F.R. § 376.1-376.42 (1997).

45. *See* Hernandez v. Triple Ell Transp., Inc., 175 P.3d 199, 203 (Idaho 2007) (Affirming a workers' compensation referee who found that a classification dispute involving motor carrier

to determine whether the particular venue of the dispute has ever addressed the issue before, and if so, to what result. Where no precedent exists, the argument should be made that purpose of the "Truth-in-Leasing" regulations[47] is "to promote full disclosure, eliminate opportunities for . . . illegal and/or inequitable practices, and to promote the stability and economic welfare of owner-operators," not to establish an employment relationship between motor carrier and owner operator,[48] and that utilizing the leasing requirements set forth in the federal regulations to support a finding of an employment relationship would be unconscionable, especially in light of the clear language in the regulations cautioning against it.[49]

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and owner-operator "was partially affected by a federal law that regulated the professional relationship between motor carriers and owners of leased equipment. She reasoned that because 49 CFR § 376.12(c)(4) mandated that [motor carrier] engage in activities that normally would favor a finding of an employer-employee relationship, this federal regulation eliminated many of the traditional factors used to determine employment status. The factors were eliminated, she held, because they were already required by federal law and therefore did not affect the level of control that [motor carrier] could exert over [owner-operator]."); *see also* Universal Am-Can, Ltd. v. Workers' Comp. Appeal Bd., 762 A.2d 328, 331 (Pa. 2000) ("[W]e agree with [motor carrier] that based upon the unequivocal language contained in § 376.12(c)(4), the regulation found at § 376.12(c)(1), relating to possession, control, and use does not mandate a determination of employee status.").

46. W. Ports Transp., Inc. v. Employment Sec. Dep't of State, 41 P.3d 510, 519 (Wash. Ct. App. 2002) ("On their face, these regulations are designed to fix responsibility for the safe operation of leased vehicles-with-drivers in interstate commerce on the carrier, and to provide a paper trail by which such responsibility can be audited; they are not designed to protect motor carriers from responsibility under state laws governing unemployment benefits. . . . We assume without holding that [the owner-operator] did qualify as an independent contractor under federal motor carrier regulations governing interstate commerce, and did qualify as an independent contractor under common law principles." The court concluded, however, that "an individual may be both an independent contractor for some purposes, and engaged in 'employment' for purposes of Washington's exceedingly broad definition of covered employment."); Oliver & Iverson v. Honeycutt, 798 N.E.2d 890, 894 (Ind. Ct. App. 2003) ("[N]o longer are courts and the Worker's Compensation Board bound to the determination that if a lease which is entered into meets the requirements of the leasing regulations as established by the Federal Motor Carrier Safety Administration that it is conclusive proof that the injured driver was an employee of the common carrier. Rather, we are to look to the factors which are traditionally applied by the fact-finder when determining whether an employee-employer relationship exists.").

47. 49 C.F.R. § 376, officially titled "Lease and Interchange of Vehicles," is commonly referred to collectively as the "Truth-in-Leasing" regulations. Owner-Operator Indep. Drivers Assoc. v. Mayflower Transit, Inc., 161 F. Supp. 2d 948, 953 (S.D. Ind. 2001).

48. Putnam v. Olympic Transp., Inc., Civil No. 06-2149 (RHK/RLE), 2007 WL 1388202, at *4 (D. Minn. 2007) (citing Lease and Interchange of Vehicles, 131 M.C.C. 141, 142 (1979)).

49. 49 C.F.R. § 376.12(c)(4) ("Nothing in the [leasing] provisions . . . 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.").

B. Know and Formulate the Presentation Around the Applicable Standard of Proof

Given that the line between employee and independent contractor will often be very thin, there is a good chance that any given classification dispute will turn on the standard of proof to be applied to the evidence. Because of public policy considerations, workers' compensation laws typically provide that any doubt will be resolved in favor of a finding of an employer/employee relationship, and thus coverage.[50] The same is generally true for unemployment compensation laws.[51] However, jurisdictions have noted that these disputes involve responsibility for payment of an excise tax, and have modified the burden to resolve any doubts in favor of the taxpayer.[52] Formulating case presentation to address—and in some instances—utilize, the standard of proof can be very effective. Typically, the taxing jurisdiction will point to tort-oriented cases that follow a

50. D & M Constr. Co. v. Archer, 686 S.W.2d 799, 800 (Ark. Ct. App. 1985); Gaston v. J.H. Ware Trucking Inc., 849 S.W.2d 70, 74 (Mo. Ct. App. 1993); Nelson v. Yellow Cab Co., 564 S.E.2d 110, 112 (S.C. 2002); C & H Taxi Co. v. Richardson, 461 S.E.2d 442, 448 (W. Va. 1995); Burdick v. Thornton, 712 P.2d 570, 572 (Idaho 1985); *see* Atlas Constr. Co., v. Pena, 602 S.E.2d 151, 152-53 (Ga. Ct. App. 2004); *see* Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991).

51. Alaska Contracting & Consulting, Inc. v. Alaska Dep't of Labor, 8 P.3d 340, 346 (Alaska 2000); Metric Man, Inc. v. Unemployment Ins. Appeals Bd., 69 Cal. Rptr. 2d 569, 572 (Cal. Ct. App. 1997); Mattatuck Museum-Mattatuck Historical Soc'y v. Adm'r, Unemployment Comp. Act, 679 A.2d 347, 350 (Conn. 1996); AFM Messenger Serv. v. Dep't Employee Sec., 763 N.E.2d 272, 282-83 (Ill. 2001); Beal v. Indus. Comm'n, 535 S.W.2d 450, 458 (Mo. Ct. App. 1975); *In re* BKU Enters., v. Job Serv. N.D., 513 N.W.2d 382, 384 (N.D. 1994); Lorain County Auditor v. Ohio Unemployment Comp. Review Comm'n, 863 N.E.2d 133, 140 (Ohio 2007); Va. Employment Comm'n v. Porter-Blaine Corp., 497 S.E.2d 889, 894 (Va. Ct. App. 1998); *W. Ports Transp., Inc.*, 41 P.3d at 516. *But see* Miss. Employment Sec. Comm'n v. PDN, Inc., 586 So.2d 838, 840 (Miss. 1991) ("[E]mployment security contribution assessments are an excise tax and, therefore, every doubt as to their application must be resolved in favor of the taxpayer and against the taxing power.").

52. Vaughan v. Warner, 157 F.2d 26, 31 (3rd Cir. 1946); Brown v. LaNasa, 152 So. 2d 33, 35 (La. 1963) ("It would appear to us that . . . the two lower courts, impressed with the beneficent purposes of the act, have given it the broad and liberal construction permissible when such legislation is being viewed from the standpoint of an 'employee' claiming benefits thereunder, and have completely overlooked the fact that before such benefits can come into being a compulsory contribution (or excise tax) must first be paid by an 'employer,' and that this can only be levied by the taxing authority under a statute that is clear and unambiguous and, strictly construed, leaves no question but that such tax is due and payable, the rule prevailing in such instances being that every doubt as to its application must be resolved in favor of the taxpayer and against the taxing power. In this respect the taxing and the beneficent sections of the act are considered to be entirely separate and distinct."); *Miss. Dep't of Employment Sec. v. Prod. Connections, LLC*, 963 So. 2d at 1187 (While the burden of proof is upon the party seeking to show that the worker is not an employee, "employment security contribution assessments are an excise tax and, therefore, every doubt as to their application must be resolved in favor of the taxpayer and against the taxing power." (quoting *Miss. Employment Sec. Comm'n v. PDN, Inc.*, 586 So. 2d at 840)).

different standard than that applicable to the taxing authority.[53] For instance, in cases where any doubt is to be resolved in favor of the tax paying motor carrier, and against the taxing power, special emphasis should be placed upon ambiguities in the applicable statutes and common law.[54] When such favor is not present for the client, the presentation should concentrate more on the lease agreement and the specific relationship between the motor carrier and the owner-operator.[55]

C. Consider the Potential Application of Federal Preemption in State Cases

Motor carriers enjoy some protection from interference in their business by the several states by way of the Federal Aviation Administration Authorization Act of 1994 ("FAAAA").[56] Arguably, the application of unemployment or workers' compensation assessments upon motor carriers, despite the clear intentions of those carriers and the owner-operators with whom they contract to establish independent contractor relationships, is in contravention of the FAAAA and the Lease and Interchange Regulations,[57] which specifically recognize and provide for the establishment of such independent contractor relationships.[58]

The United States Supreme Court ruled recently that the FAAAA preempted a law enacted in Maine which sought to impose certain "recipient-verification" requirements upon carriers who transport tobacco products.[59] The Michigan Court of Appeals struck down a regulation

53. *See Lorain County Auditor v. Ohio Unemployment Comp. Review. Comm'n*, 863 N.E.2d at 138 (citing Salzl v. Gibson Greeting Cards, Inc., 399 N.E.2d 76, 78-79 (Ohio 1980) (holding that the Unemployment Compensation Act should be construed liberally when plaintiff has been terminated against his will).

54. *See* Yellow Transp., Inc. v. Michigan, 537 U.S. 36, 47 (2002).

55. A good article for use in "teaching" the court or administrative body about the history of the industry, the leasing concept and its details is found in a prior article by Jessica Goldstein. *See* Jessica Goldstein, *The Lease and Interchange of Vehicles in the Motor Carrier Industry*, 32 Transp. L.J. 131 (2005) (explaining how the Regulations work and why the current provisions are in place).

56. 28 U.S.C. § 14501(c)(1) (2005) ("[A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.").

57. *See id.*; 49 C.F.R. § 376.

58. 49 C.F.R. § 376.12(c)(4).

59. Rowe v. N.H. Motor Transp. Ass'n, 2008 WL 440686, No. 06-457, *991 (U.S. Feb. 20, 2008). Maine law required state-licensed tobacco shippers to utilize a delivery company that provides a recipient-verification service that confirms that the buyer is of legal age, and, further, charged knowledge to carriers where the package shipped is marked as originating from a Maine-licensed tobacco retailer, or if it is received from a distributor on an official list of unlicensed tobacco retailers. *Id.* In finding preemption, the Court noted that "motor carriers will

which prohibited the use of leased tractors from independent business persons on the basis of preemption.[60] However, the Ninth Circuit has found that California's Prevailing Wage Law was not preempted from application to motor carriers by the FAAAA.[61] With the Supreme Court's recent decision, it is likely that preemption arguments will become more and more prevalent in motor carrier worker classification disputes.

D. The Written Lease Agreement

Classification disputes are, by their nature, heavily fact-driven.[62] Each case will turn on the application of the pertinent classification test to the facts present.[63] Although the criteria utilized by various agencies and jurisdictions vary greatly, it is widely recognized that the right to con-

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enjoy 'the identical intrastate preemption of prices, routes and services as that originally contained in' the Airline Deregulation Act". *Id.* at *994-95 (quoting H.R. Rep. No. 103-677, at 83 (1994) (Conf. Rep.)). The Court then applied a previous decision interpreting the Airline Deregulation Act and found that "[t]he Maine law . . . produces the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands for 'competitive market forces' in determining (to a significant degree) the services that motor carriers will provide." *Id.* at *995 (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1994)). The Court went on to note that "[t]o interpret the federal law to permit these, and similar, state requirements could easily lead to a patchwork of state service-determining laws, rules, and regulations. That state regulatory patchwork is inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace"). *Id.* at 996 (citing H.R. Rep. No. 103-667, at 87 (1994) (Conf. Rep.)).

60. *In re* Federal Preemption of Provisions of the Motor Carrier Act, 566 N.W.2d 299, 308 (Mich. Ct. App. 1997). The challenged statute read as follows: "The lease, contract, or arrangement shall provide that the vehicle, at all times, while being operated under the lease, contract, or arrangement, shall be operated only by persons who are employees of the holder who stand in relation to the holder as employee to employer." *Id.* (citing Mich. Comp. Laws § 479.10a(6) (2002)). The statute was stricken on the basis that it was "'related to' the costs and ability of many motor carriers to provide their service in Michigan," and that it was "clear" the regulation affected routes and services and "most probably" affected prices. *Id.* at 309.

61. *See* Californians for Safe & Competitive Dump Truck Transp. v. Mendonca, 152 F.3d 1184 (9th Cir. 1998). In *Mendonca*, a group of public works trucking contractors challenged California's Prevailing Wage Law ("CPWL"), arguing that it was preempted by the FAAAA's general preemption provision because it "increases its prices by 25 [percent], causes it to utilize independent owner-operators, and compels it to re-direct and re-route equipment to compensate for lost revenue." *Id.* at 1189. The group sought to show its rates for "'services'" were based on costs, performance factors and conditions including prevailing wage requirements. *Id.* The Ninth Circuit rejected these arguments, finding that, although the prevailing wage law was "in a certain sense . . . 'related to' [plaintiff's] prices, routes, and services," its effect was "no more than indirect, remote, and tenuous" and it did not frustrate the purpose of deregulation by acutely interfering with the forces of competition. *Id.* (citing Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 334 (1997)).

62. *See* Roberson v. Indus. Comm'n (P.I. & I. Motor Exp., Inc.), 866 N.E.2d 191, 200 (Ill. 2007) (In a workers' compensation dispute, the Illinois Supreme Court noted that "[n]o rule has been, or could be, adopted to govern all cases in this area." (citing Henry v. Indus. Comm'n, 106 N.E.2d 185, 187 (Ill. 1952)).

63. *See id.*

trol the manner and means of the work performed is generally the single most important factor in any worker classification dispute.[64] Any classification dispute arising between a motor carrier and an owner-operator will likely turn on the specific language in their agreement because the specific rights and duties of the motor carrier and the owner-operator are generally set forth in that agreement. As noted *supra*, many of the typical common law factors applied in making a worker classification determination are addressed in the Truth in Leasing Regulations.[65] Given the elements of control that the Regulations require motor carriers to exert over owner-operators, whether as employees or independent contractors, the classification of a particular driver, or class of drivers, may very well turn on whether the trier of fact chooses to disregard those required elements of control for purposes of the classification[66] or rely on them specifically for a finding of sufficient control.[67]

There are four factors that are widely used in determining whether a

64. *See* Salamon v. Our Lady of Victory Hosp., 512 F.3d 217, 228 (2d Cir. 2008) (quoting Metcalf & Eddy v. Mitchell, 269 U.S. 514, 521 (1926) *and* Comty. for Creative Non-Violence v. Reid, 490 U.S. at 751); Trustees of Resilient Floor Decorators Ins. Fund v. A & M, 395 F.3d 244, 249 (6th Cir. 2005) (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992)) (ERISA); EEOC v. Sidley Austin Brown & Wood, 315 F. 3d 696, 705 (7th Cir. 2002) (quoting *Darden*, 503 U.S. at 323) (ADEA); Mazzei v. Rock-N-Around Trucking, Inc., 246 F.3d 956, 963 (7th Cir. 2001) (quoting *Darden*, 503 U.S. at 323) (ERISA); Aberman v. J. Abouchar & Sons, Inc., 160 F. 3d 1148, 1150 (7th Cir. 1998) (quoting Knight v. United Farm Bureau Mut. Ins. Co., 950 F.2d 377, 378 (7th Cir. 1991)) (ADA); Brewster v. CNH Am. L.L.C., 2008 WL 111332, at *6 (E.D. Wis. 2008) (quoting *Knight*, 950 F.2d at 380) (Title VII); Sherwood v. Evans, 422 F. Supp. 2d 181, 184 (D.D.C. 2006) (quoting Spirides v. Reinhardt, 613 F.2d 826, 831-32 (D.C. Cir. 1979)) (ADEA); Frank C. Klein & Co. v. Colo. Comp. Ins. Auth., 859 P. 2d 323, 326-27 (Colo. Ct. App. 1993) (citing Carpet Exchange v. Indus. Claim Appeals Office, 859 P.2d 278, 281 (Colo. Ct. App. 1993) and 1B A. Larson, *Workmen's Compensation Law* §§ 44.21 to 44.23 (1992)) (Workers' Compensation); Netzel v. Indus. Comm'n, 676 N.E.2d 270, 273 (Ill. App. Ct. 1997) (citing Wenholdt v. Indus. Comm'n, 447 N.E.2d 404, 407 (1983)) (Workers' Compensation); Travelers Indem. Co. of Ill. v. Challenger Fence Co., 119 P.3d 666, 668-69 (Kan. App. 2005) (quoting McCubbin v. Walker, 886 P.2d 790, 795 (1994)) (Workers' Compensation); Baltimore Harbor Charters, Ltd. v. Ayd, 780 A.2d 303, 316 (Md. 2001) (citing Restatement (First) of Agency § 220 (1933)) (Maryland Wage Act); State Ins. Fund v. Circus Man Ice Cream Corp., 721 N.Y.S.2d 717, 719 (N.Y. 2001) (citing *In re* Morton, 30 N.E.2d 369 (N.Y. 1940)) (Workers' Compensation).

65. 49 C.F.R. 376.12. *See also Hernandez*, 175 P.3d at 202; *see Roberson*, 866 N.E.2d at 202.

66. *See Hernandez*, 175 P.3d at 203-05; *see also* Universal Am-Can, Ltd. v. Workers' Comp. Appeal Bd., 762 A.2d at 334-35 (stating that "In applying the traditional test for determining whether a workers' compensation claimant is an independent contractor or employee, we must consider control over the work to be completed and means of performance. Factors which demonstrate compliance with government regulations do not assist in the application of the test. The existence of the regulations precludes a motor carrier and an owner-operator of leased equipment from negotiating any terms subject to the regulations. Neither party has bargaining power, or the ability to control the work to be done, when dealing with matters subject to regulation.").

67. *See Oliver & Iverson*, 798 N.E.2d at 894 (citing GKN v. Magness, 744 N.E.2d 397, 402 (Ind. 2001)); *W. Ports Transp., Inc.*, 41 P.3d at 518-19.

"right to control" exists.[68] These include direct evidence of the right to control, the method of payment, furnishing major items of equipment and the right to terminate the employment relationship at will and without liability.[69] In considering the right to control, the key inquiry for many jurisdictions is whether the agreement gives the right to control the "time, manner and method of executing the work, as distinguished from the right merely to require certain definite results."[70]

In reviewing the written lease agreement, consider whether the agreement equates to a "lease of a vehicle," with operational personnel to be provided by the lessor, or whether it is a "personal service contract" with the operator of the vehicle. Where the agreement merely provides for the lease of the vehicle, along with the furnishing of any qualified driver, as opposed to requiring that the owner-operator himself drive the vehicle, the owner-operator certainly maintains control and discretion over at lease some portion of the method of executing the work.[71]

The issue of corporate markings on the leased vehicle is often made an issue in the classification analysis.[72] In the context of motor carrier contracts, such markings are a federal requirement.[73] The argument

68. *See* Ward v. Gordon, M.D., 999 F.2d 1399, 1403 (9th Cir. 1993) (citing Pichler v. Pacific Mech. Constructors, 462 P.2d 960, 963 (Wash. Ct. App. 1969)); *Hernandez*, 175 P.3d at 202 (quoting *Burdick*, 712 P.2d at 572); Am. Agrijusters Co. v. Mont. Dep't of Labor and Indus., 988 P.2d 782, 787 (Mont. 1999) (citing Sharp v. Hoerner Waldorf Corp., 584 P.2d 1298, 1301-02 (Mont. 1978)); Houghland v. Grant, 891 P.2d 563, 566 (N.M. Ct. App. 1995) (citing Savinsky v. Bromley Group, Ltd., 740 P.2d 1159, 1160 (N.M. Ct. App. 1987)); Youngblood v. N. State Ford Truck Sales, 364 S.E.2d 433, 439 (N.C. 1988) (citing 1C A. Larson, *The Law of Workmen's Compensation* § 44.00); Stamp v. Dep't of Consumer & Bus. Services, 9 P.3d 729, 731 (Or. Ct. App. 2000) (citing Kaiel v. Cultural Homestay Inst., 879 P.2d 1319, 1322 (Or. Ct. App. 1994)); Nelson v. Yellow Cab Co., 538 S.E.2d 276, 280 (S.C. Ct. App. 2000) (citing S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 459 S.E.2d 302, 303 (1995)); Chavis v. Watkins, 180 S.E.2d 648, 649 (S.C. 1971) (citing Tharpe v. G.E. Moore Co., 174 S.E.2d 397, 399 (S.C. 1970)).

69. *See id.*

70. Lawyers Title Ins. Corp. v. Phillips Title Agency, 361 F. Supp. 2d 443, 449 (D. N.J. 2005) (quoting American Tel. & Tel. Co. v. Winback and Conserve Program, Inc., 42 F.3d 1421, 1435 (3d Cir. 1994)); Fisher v. Townsends, Inc., 695 A.2d 53, 59 (Del. Super. Ct. 1997) (citing Gooden v. Mitchell, 21 A.2d 197, 200-01 (1941)); Blackmon v. Tenet Healthsystem Spalding, Inc., 653 S.E.2d 333, 337 (Ga. Ct. App. 2007) (quoting Hodges v. Doctors Hosp., 234 S.E.2d 116, 117 (Ga. Ct. App. 1977)); *Hernandez*, 175 P.3d at 202 (quoting Kiele v. Steve Henderson Logging, 905 P.2d 82, 84 (Idaho 1995)); *Nelson*, 538 S.E.2d at 282 (quoting Golash v. Cherokee Cab Co., 176 S.E.2d 925, 926 (Ga. 1970)); Home Design, Inc. v. Kan. Dept. of Human Res., 2 P.3d 789, 794 (Kan. Ct. App. 2000) (citing *American Tel. & Tel. Co.*, 42 F.3d at 1435).

71. NLRB v. A. Duie Pyle, Inc., 606 F.2d 379, 382-83 (3d Cir. 1979).

72. Hernandez, 175 P.3d at 203-04 (citing *Universal Am-Can, Ltd.*, 762 A.2d at 332).

73. Federal Motor Carrier Marking of CMVs Requirements, 49 C.F.R. § 390.21(b) (2007) provides that:

> The marking must display the following information: (1) The legal name or a single trade name of the motor carrier operating the self-propelled CMV, as listed on the motor carrier identification report (Form MCS-150) and submitted in accordance with § 390.19. (2) The motor carrier identification number issued by the FMCSA, preceded

should be made that adherence to this federal requirement should not be held against the motor carrier in the classification analysis, as it is not an indicia of control on the part of the motor carrier.[74] Ultimately, there is no room for negotiation regarding the control and marking required by the Regulations, and thus, neither party is in a bargaining position on these issues.

Where the lease agreement does not clearly address a particular criterion to be considered by the judge or officiant, or does not do so adequately, it will be necessary to produce testimony or other evidence as to how the motor carrier conducts its operation and why. For example, it is often required that owner-operators communicate with the motor carrier on a daily basis, or at the time of reaching certain periods in the contract work. Such could potentially be seen as the exertion of control by the motor carrier over the owner-operator. To avoid a finding of control, it may be necessary to produce testimony that the purpose of such communications is not to exert control over the owner-operator, but rather to more efficiently conduct the business which the parties contracted to conduct. Justification for such communications could include determining when the driver makes a delivery and whether the driver would be able to haul another load in compliance with the federally mandated hours of service regulations.[75] Other reasons for such regular communications could include assuring that the operator did not suffer an adversity due to hijacking, injury, illness or otherwise, passing on any emergency information that operator's family desires to be relayed to the operator, advising the operator of any deviation of freight to an alternate delivery point desired by the shipper, advising the operator of any severe weather reports and road closing notices received from local or state officials in the area of transport, and monitoring the progress and location of the shipment at shipper's request or direction.

Where applicable, it will also be helpful to develop testimony and/or evidence indicating that the owner-operator exerts control over numerous aspects of the "time, manner and method" of how the work contem-

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by the letters "USDOT". (3) If the name of any person other than the operating carrier appears on the CMV, the name of the operating carrier must be followed by the information required by paragraphs (b)(1), and (2) of this section, and be preceded by the words "operated by."

Id. at 390.21(c) (2007) provides further that:

The marking must— (1) Appear on both sides of the self-propelled CMV; (2) Be in letters that contrast sharply in color with the background on which the letters are placed; (3) Be readily legible, during daylight hours, from a distance of 50 feet (15.24 meters) while the CMV is stationary; and (4) Be kept and maintained in a manner that retains the legibility required by paragraph (c)(3) of this section.

74. *Hernandez,* 175 P.3d at 203-04 (citing *Universal Am-Can, Ltd.,* 762 A.2d at 332).

75. Federal Motor Carrier Hours of Service of Drivers Safety Regulations, 49 C.F.R. § 395 (2007).

plated under the lease is executed.[76] Indicia of such control can include choice of equipment by make, model, color, which qualified person will drive the vehicle, whether to use helpers, loaders/unloaders, or co-drivers, specific hours of operation and the method and manner of payment of fuel and highway use taxes.

Another area of inquiry in determining the right to control is the furnishing of "major items of equipment."[77] It is important to establish that the owner-operator is providing a tractor or vehicle of significant value. A new tractor can reflect an investment in excess of $100,000. Used tractors can also have significant value, depending on year and condition. Further, the written lease agreement may require the owner operator to provide a trailer as well. In some areas of the industry, such as refrigerated freight, iron and steel, and flatbed operations, a trailer could have a value in excess of $30,000. The significant value of the over-the-road equipment furnished by the owner-operator reflects the owner's business investment, and therefore, should be emphasized in the motor carrier's proof.

V. Presenting the Case

As discussed *supra*, it should always be presumed that the trier of fact has little or no knowledge of motor carrier operations or law.[78] With that in mind, organize the testimony and evidence so that trier of fact is not required to jump back and forth between exhibits and subjects. For example, one phase of the presentation should, in most instances, focus around the written lease agreement, as discussed *supra*. Initially, the doc-

76. *See Hernandez*, 175 P.3d at 202 (quoting *Kiele*, 905 P.2d at 84); *accord Fisher*, 695 A.2d at 59; *accord Blackmon*, 653 S.E.2d at 337 (quoting *Hodges*, 234 S.E.2d at 117); *accord Lawyers Title Ins. Corp.*, 361 F. Supp. 2d at 449 (quoting *American Tel. & Tel. Co.*, 42 F.3d at 1435); *accord Nelson*, 538 S.E.2d at 282; *accord Home Design, Inc.*, 2 P.3d at 794 (quoting *Am. Tel. & Tel. Co.*, 42 F.3d 1421 at 1435).

77. *Hernandez*, 175 P.3d at 202 (quoting *Burdick*, 712 P.2d at 572); *see also Stamp*, 9 P.3d at 731 (citing *Kaiel*, 879 P.2d at 1323; *Nelson*, 538 S.E.2d at 280 (citing *S.C. Workers' Comp. Comm'n*, 459 S.E.2d at 303; *Tharpe*, 174 S.E.2d at 399); *Am. Agrijusters Co.*, 988 P.2d at 787 (citing *Sharp*, 584 P.2d at 1301); *Houghland*, 891 P.2d at 566-67 (citing *Savinsky*, 740 P.2d at 1160); *Ward*, 999 F.2d at 1403; *Youngblood*, 364 S.E.2d at 439; *Chavis*, 180 S.E.2d at 649 (citing *Tharpe*, 174 S.E.2d at 399 and S.C. Indus. Comm'n v. Progressive Life Ins. Co., 131 S.E.2d 694, 695 (S.C. 1963).

78. *See* "An Interview with U.S. District Court Judge Patrick J. Schiltz," Williams, Darwin S., 19 RCBA Barrister No. 4, p. 3 (April, 2007) ("[G]ood advocates are great teachers. They are able to see their cases through the eyes of a busy judge who likely knows little about, say, the industry practices or legal doctrines at issue. They build up the judge's knowledge, step-by-step – clearly, smoothly, logically."). Darwin S. Williams, *An Interview with U.S. District Court Judge Patrick J. Schiltz*, Ramsey County Bar Association Barrister, April, 2007 at 3. ("[G]ood advocates are great teachers. They are able to see their cases through the eyes of a busy judge who likely knows little about, say, the industry practices or legal doctrines at issue. They build up the judge's knowledge, step-by-step – clearly, smoothly, logically.").

ument should be introduced as the underlying agreement between the parties, as required by federal regulations.[79] Then discuss each provision, establishing whether or not it is required by the regulations.[80]

Make sure that your witnesses use terminology that the decision maker will understand and which are consistent with your case theme. Prepare your witnesses and work with them to avoid using industry specific terms such as "deadhead" and "bobtail." When the use of such terms cannot be avoided, make sure that their meanings are clearly explained as they arise.

VI. CONCLUSION

Advocating the position of a motor carrier lessor requires a fundamental understanding of the intricacies of the Federal Motor Carrier Safety Regulations and common law interpretation thereof, the specifics of the written lease agreement(s) executed by the motor carrier, and the involved owner-operator(s) and the reasons underlying the provisions of the agreement. This basic knowledge is crucial for the advocate's cogent, effective articulation of how the agreement relates to the actual operations of the motor carrier, the needs of the carrier's customers, government regulations.

If the decision maker first understands the important interrelationship of these factors, the law and the business model of the specific motor carrier, then the motor carrier's likelihood of success will be optimized.

79. *See* 49 C.F.R. pt. 376.
80. *See id.*