Unemployment Compensation and Independent Contractors: The Motor Carrier Industry as a Case Study

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I. INTRODUCTION

Unemployment compensation is one of a series of measures under the Social Security Act[1] designed for the protection of society and enacted to alleviate the burdens of citizens resulting from unemployment.[2]

All states have enacted unemployment compensation statutes and, while seeking a common objective, they are diverse in their provisions.[3] This diversity creates a problem for businesses which operate in more than one state.

In the transportation industry, motor carriers utilizing owner/operators are faced with a particularly vexing problem of determining whether such operators[4] are within the coverage of the statutes.

Motor carriers have essentially taken the position that an owner/operator is an independent contractor and not covered by unemployment compensation statutes.[5] State agencies administering such statutes, however, in the absence of a specific exclusion,[6] have frequently construed the statutes liberally in favor of coverage.[7]

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1. 42 U.S.C. § 301 1397e (1988) [*SSA*].

2. The SSA itself is not an unemployment compensation law. Gardner v. Smith, 368 F.2d 77 (5th Cir. 1966). *See also* Richard v. Celebrizze, 247 F. Supp. 183 (D. Minn. 1965). Under the SSA and related taxing statutes, administrative costs and benefits under state unemployment compensation laws are financed by federal and state taxes imposed primarily on employers. Money accumulated in a federal unemployment trust fund consisting of federal and state contributions is invested and ultimately turned over to state authorities for the payment of unemployment benefits. *Id.*

3. For a discussion of unemployment compensation statutes *see, A Symposium on Unemployment Insurance* 8 VAND. L. REV. 179 (1955); Witte, *The Essentials of Unemployment Compensation,* 25 NAT'L MUN. REV. 157 (1935).

4. *Owner/Operators* as the term is used in this paper, are individuals who own their own equipment or hold it under a bona fide lease and; under contract with licensed motor carriers, provide a subhauling service.

5. *See* American Trucking Association, *Survey of State Unemployment Compensation Laws,* Mimeo Report (Dec. 28, 1990) [*ATA Survey*].

6. Missouri, Nebraska, New Jersey, Oklahoma, Oregon, and Virginia have specifically excluded owner/operators by statutory provisions. Arizona, Minnesota, Utah, North Carolina, Montana, Oregon, and North Dakota specifically exclude independent contractors in their statutes. ATA Survey, *supra* note 5, at 2-3.

7. It is generally held that the benefit provision would be liberally or broadly construed. *See, e.g.,* Watson, 161 S.E.2d 1 (N.C. 1968); Sinclair Refining Co. v. Unemployment Compensation Commission, 29 S.E.2d 388 (Va. 1944); Davis v. Hix, 84 S.E.2d 404 (W. Va. 1954).

This clash of positions has generated extensive legislative and judicial activity. Diversity and uncertainty still exist. Motor carriers are being subjected to substantial back taxes, penalties, and interest if a misclassification occurs.[8]

II. THE COMMON LAW

Unlike other areas of law where the issue of employment classification arises,[9] a majority of states have specific statutory definitions, and the determination of the employment classification issue involves statutory interpretation rather than application of the common law.

The issue of unemployment compensation, however, involves tax collection, as well as benefit payment. Thus, the common law is important. The Internal Revenue Service relies upon the common law to determine whether a person or entity should be making deductions and contributions under the Federal Insurance Contribution Act[10] and the Federal Unemployment Tax Act.[11]

Twenty common law factors have been developed for determining whether a worker is an employee. The factors are not given even weight, nor are they applicable in all instances. These factors form the basis of Form SS-8 which is used by the Internal Revenue Service in their analysis of the employee-independent contractor question.[12]

The twenty questions asked on Form SS-8 are:

1. Are instructions provided by the employer?
2. Is training provided by the employer?
3. Are the worker's services integrated into the general operations of the employer?
4. Are the services rendered personally?
5. Does the worker hire, supervise, and pay others who work with him in the performance of services on behalf of the employer?

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8. A misclassification of a driver who was paid $100,000 in 1989 and who is subsequently reclassified as an employee would result in the carrier being liable for $5,920.00 in back taxes, the majority dealing with employers social security tax, employee social security tax, and federal unemployment tax. American Trucking Association, *How to Survive an IRS Employment Tax Audit,* at 17 (1989). Additional taxes would be due on the state level. *Id.*

9. The employment classification issue arises in the context of numerous areas including Title VII, the Age Discrimination Employment Act, the National Labor Relations Act, the Internal Revenue Code, the Fair Labor Standards Act, the Employment Retirement Security Act, and in state statues such as workers' compensation and drug testing. *See* Clark, *Independent Contractor-Employee, What are they - Why?,* (paper delivered at the 1989 Conference Professional Program, Transportation Lawyers Association).

10. 26 U.S.C. § 3111 (1988).

11. 26 U.S.C. § 3301 (1988).

12. I.R.S. Form SS-8. Information for use in determining whether a worker is an employee for federal employment taxes and income withholding (Rev. 10-90).

6. Is there a continuing relationship between the worker and the employer?
7. Does the worker have set hours or work?
8. Does the worker work full time for the employer?
9. Does the worker work at the employer's premises or his own?
10. Does the employer specify the sequence of services to be performed?
11. Is the worker required to regularly furnish oral or written reports to the employer?
12. Is the worker paid on an hourly or weekly basis, or by the project?
13. Is the worker reimbursed for business expenses, or must he bear these expenses himself?
14. Does the employer provide materials needed to do the work, or does the worker provide these materials?
15. Does the worker have an investment in the enterprise?
16. Is it possible for the worker to either profit or lose money from his endeavors?
17. Does the worker work for a multitude of clients or just one?
18. Does the worker hold himself out to the public as being self-employed?
19. Does the worker have the right to terminate his services at any time without risking breach of contract?
20. Does the employer have the right to terminate the worker's services at any time?

While these questions appear to be easily answered, the interpretation of the answers involves subjectiveness on the part of the auditor; and industry members complain that the test has been applied unevenly and erroneously.

Some of the problems undoubtedly lie in the knowledge of the answering party, their ability to articulate clearly the facts on which the answer is predicated, and the auditor's understanding or knowledge of the industry involved.

III. COMPLIANCE WITH INSTRUCTIONS

The first question, "Are instructions provided by the employer?" is a prime example of the problems faced. If a simple answer of "yes" is provided, it is clear that an auditor would hold this as a factor against a finding of an independent contractor relationship.

However, a qualified "yes" with a reasonable explanation could have a contrary result. The key is to distinguish the type of instructions and/or the source of instructions.

Instructions can emanate from the carrier, a shipper, or a governmental entity. Instructions may also involve matters which do not bear on the critical issue of control and supervision of those matters which bear on the individual's ability to make a profit or loss and, thus, may not be a significant issue in the classification equation.

A carrier, for example, may require a contractor to telephone his location from time to time. The carrier has legitimate needs for such information because of the nature of the industry.

The location of the vehicle is necessary to advise a customer of the progress of the movement and when delivery can be anticipated to help the carrier seek or accept in advance other loads to tender to the contractor when the movement in progress ends; to assure that the load was not hijacked or delayed because of an accident; to advise if there is a reconsignment of goods in transit; and a host of other reasons.

Shippers may designate certain pickup and/or delivery times because of the need to coordinate dock personnel or to meet production requirements; may designate certain routes to follow to allow for partial loading or unloading in transit; and may require other of their special needs to be met.

Governmental directives also bear on the instructions given by carriers who frequently are duty bound to comply with and enforce statutes and/or administrative regulations. For example, logs[13] must be completed by drivers but maintained by the carrier.[14] Carriers may have to instruct the contractor to follow a particular route on occasion because the size or weight laws of a particular state may not accommodate the vehicle or load involved.

Essentially, no independent contractor, whether in the trucking industry or other industry, works without some direction or instructions. The real issue, as stated, is whether such directions emanate from, as opposed to through, the carrier engaging the contractor; and whether the contractor, as between the parties, shall exercise a substantial degree of control over both the broad outlines and the manner and means of how the contract work is performed.

Significantly, some courts and agencies do not distinguish between who exercises the control and the nature and degree of the control.[15]

There are courts and administrative agencies, however, which recognize that control resulting from a government dictate and even a cus-

13. A log is a prescribed form on which drivers must record their action during the time they are carrying a load for a carrier. When completed, it will reflect the time the driver was sleeping or resting, loading or unloading lading, actually driving, etc. *See* Hours of Service of Drivers, 49 C.F.R. Part 395 (1992).

14. 49 C.F.R. § 395.8(a), (k) (1992).

15. Hudson v. Industrial Comm'n and Pfeiffer, 529 P.2d 1340 (Colo. Ct. App. 1974) (statutory license provisions requiring "exclusive control" over an enterprise may be considered in the employment classification issue).

tomer requirement does not constitute the type of control which would otherwise indicate an employment situation.[16]

In Virginia a special exclusion exists for owner/operators if, substantially, all of seven factors are present.[17] The factor dealing with the control issue reads:[18]

> The individual generally determines the details and means of performing the services, in conformance with regulatory requirements, operating procedures of the carrier, and the specification of the shipper.

A similar exclusion evidencing the same control provisions exists in administrative rules in the state of Minnesota.[19]

This split in approach is critical in a business so highly regulated and multi-state in nature.

IV. SERVICE TO THE PUBLIC

Another example of the difficulty truckers face is that administrators frequently place significant weight on the fact that owner/operators may frequently contract with a single carrier for a long period of time.

R. L. Moore, an acknowledged government expert on the issue,[20] has stated:[21]

> The fact that a person makes his service available to the general public usually indicates an independent contractor relationship.

Continuing, he pointed out various ways in which such a "holding out" could be made:[22]

> . . . he may have his own office and assistants; he may hang out a "shingle" in front of his home or office; he may hold business licenses; he may be listed in business directories or maintain business listings in telephone di-

16. Dial-A-Messenger, Inc. v. Arizona Dep't of Econ. Sec., 648 P. 2d. 1053 (Ariz. Ct. App. 1982) and Kiddo v. California Unep. Ins. Application Bd., slip No. A048410 (Calif. Ct. App. 1991).

17. VA. CODE ANN. § 60.2-212.1(A) (Michie 1992) The statutory wording of the seven factors is exactly the same as the specific exclusion provided by administrative rule in Minn. *See* MINN R. 5224.0290 (1993).

18. VA. CODE ANN. § 60.2-212.1(A)(b) (Michie 1992). *See* ARIZ. REV. STAT. ANN. § 23-613.01(A) (1983) (example of a statutory provision which excludes legal requirements from being considered).

19. MINN. R. 5224.0292 (1993). The Ill. Dep't of Employment Sec. in May, 1992 also amended its reg. so that "direction and/or control" in a regulatory or licensing requirement shall not ". . . by operation of law or "per se," constitute a showing of "direction or control" for purposes of "the Act or Regulations." 92 ILL. ADM. CODE, Sec. 2732.203.

20. Mr. Moore is Technical Assistant to the Assistant Chief Counsel of Employee Benefits and Exempt Organizations, Internal Revenue Service.

21. Moore, *Definition of "Employee" Common Law Rules,* at 18 (paper delivered to the 1988 Safety Council Meeting of the Interstate Truckload Carrier Conference of the American Trucking Association) [*Moore*].

22. *Id.*

> rectories; or he may advertise in newspapers, trade journals, magazines, etc.

State officials have expressed similar views.[23]

In the trucking industry, there are factors which question the reasonableness of such ideological concepts. Initially, owner/operators basically operate as single person businesses. The tractor is their place of business; the kitchen table is their home office. They have one tractor which, normally, they drive themselves. If they are kept busy by the carrier to whom they contract and are content with the contractual relationship and remuneration, why would they or should they have to contract with another merely to retain their independent status?

The real criterion should be whether the owner/operator has the option to serve other carriers or to contract with one carrier. Economic and other personal reasons may dictate one method of operation over the other. If the owner/operator chooses to contract with a carrier for a specific, continuing period of time, why would he or she want to maintain a special business telephone listing or advertise in directories? Clearly, to do so would involve poor business practices.[24] Finally, government regulations and/or business realities preclude an owner/operator from switching carriers on a frequent basis.

Under the leasing regulations of the Interstate Commerce Commission, a carrier and owner/operator must enter into a written agreement in which the owner/operator gives the carrier exclusive possession and control of the vehicle during the term of the agreement.[25] Thus, for the owner/operator to serve another carrier utilizing the same vehicle, it would be necessary for the agreement to be cancelled and a new agreement entered into with the second carrier.

Although this might appear to be an easy paper transaction, there is considerably more involved. Carriers are required to identify themselves on the vehicle as operator of the leased vehicle.[26] Thus, the identification would have to be removed and the new carrier's identification attached.

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23. There are numerous publications which exist only to carry advertisements of carriers for independent contractors and driver employees. *See, e.g.*, PRO TRUCKER a monthly magazine published by Ramp Enterprises, P.O. Box 549, Roswell, GA 30077-0549. Independent contractors have no need to advertise their business.

24. *See, e.g.*, exerpts of a letter from Carol A. Lobes, Administrator, Workers' Compensation Division of the Wisconsin Department of Industry, Labor and Human Relations cited in 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, 265 (1992).

25. If the carrier is a household goods carrier, the owner/operator and the motor carrier may agree that the contract applies only during the time the equipment is operated by or for the authorized carrier. *See* Lease and Interchange of Vehicles, 49 C.F.R. § 1057.12(C)(1988).

26. *See* Identification of Motor Vehicles, 49 C.F.R. Part 1058 (1989).

Drivers of the vehicle would have to fill out a new application form; references would have to be checked; written examinations and driver's tests given; medical data checked; and, in some instances, a drug test required.[27]

Other problems may occur in the area of licenses and permits as carriers and owner/operators frequently register the vehicle with state officials jointly as a means of simplifying tax and mileage reporting. However, if an owner/operator leaves for another carrier, these arrangements can no longer exist and the owner/operator must normally be relicensed with attendant delays.

In recent years more carriers have also been transporting more cargo as contract carriers rather than common carriers.[28] The former service may, and usually does, involve making a commitment to transport a specific number of loads or meeting set pick-up and delivery times. Therefore, as a practical matter, a carrier needs to have a commitment for a set number of vehicles and to have them available for its use at a required time. To lease on a trip basis is not consistent with this objective, as the carrier would never be assured an owner/operator would be available to haul its freight because the owner/operator could be hauling for another carrier. Despite the legitimate business reasons for long-term leases, a carrier runs the risk of the owner/operator lessors in such situation being found as not engaging in service to the public.

V. OTHER FACTORS

While other factors under the common law test may give a particular carrier or carriers problems, industry members as a whole can usually establish that owner/operators are independent contractors under the common law.

Carriers would be satisfied with the common law test, except for the fact that problems are encountered when an administrator with little knowledge of the industry is considering the issue. Many of the factors are subjective in nature; and thus, varied results are possible.

VI. LEGISLATION

Carriers have attempted to eliminate some of the shortcomings of the common law test by seeking legislative and administrative relief.

Legislators in some states have given specific exclusions to owner/operators. For example, a Missouri statute reads:[29]

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27. *See* Qualifications of Drivers, 49 C.F.R. Part 391 (1989).

28. *See*, James C. Hardman, *Motor Contract Carriage in the 1980's and 1990's: An Odyssey Towards Total Legislative Deregulation*, 58 TRANSP. P.J. 206 (1991).

29. MO. REV. STAT. § 288.035 (Supp. 1992). *See also*, NEB. REV. STAT. § 48-604(q)(1988).

> Notwithstanding the provisions of Section 288.034. In the case of an individual who is the owner and operator of a motor vehicle which is leased or contracted with driver to a for-hire common or contract motor vehicle carrier operating within a commercial zone as defined in section 390.020 or 390.041, RSMo or operating under a certificate issued by the transportation division of the Department of Economic Development under the provisions of this chapter or by the Interstate Commerce Commission, such owner/operator shall not be deemed to be an employee, provided, however, such individual owner and operator shall be deemed to be in employment if the for-hire common or contract vehicle carrier is an organization described in Section 501(c)(3) of the Internal Revenue Code or any governmental entity.

In other instances, the statute will specifically set forth criteria, similar to the common law test, which must be met to constitute an individual as an owner/operator.[30] This type of legislation is relatively new and stems from the industry's concern over the application of common law concepts or other attempts to broaden coverage of the statutes.

In North Carolina and North Dakota, for example, independent contractors are specifically excluded from the definitions of "employee" and each refers to the common law rules as being applicable in the determination of who constitutes an independent contractor.[31]

In Minnesota the statute specifically excludes independent contractors from the term "employment."[32] The Minnesota Department of Jobs and Training has promulgated rules which analyze specific jobs and also set forth criteria for general situations.[33]

30. *See, e.g.*, VA. CODE ANN. § 60.2-212.1 (A)(1992).
31. N.C. GEN. STAT. § 96-8(6)(a)(1987); N.D. CENT. CODE § 52-01-01 (14)(1988).
32. MINN. STAT. ANN. § 268.04 subd. (12) (1)(c)(West 1992).
33. MINN. R. 3315.0100 (1991).

A. Employment, Special Exclusion

In the trucking industry, a specific exclusion exists for owner/operators. It reads:

> In the trucking industry, an owner/operator of a vehicle which is licensed and registered as a truck, tractor, or truck-tractor by a governmental motor vehicle regulatory agency is an independent contractor, not an employee, while performing services in the operation of his or her truck if each of the following factors is substantially present:
>
> a. The individual owns the equipment or holds it under a bona fide lease arrangement;
> b. the individual is responsible for the maintenance of the equipment;
> c. the individual bears the principal burdens of the operating costs, including fuel, repairs, supplies, vehicle insurance, and personal expenses while on the road;
> d. the individual is responsible for supplying the necessary personal services to operate the equipment;
> e. the individual's compensation is based on factors related to the work performed, including a percentage of any schedule of rates or lawfully published tariff, and not on the basis of the hours or time expended;
> f. the individual generally determines the details and means of performing the services, in accordance with regulatory requirements, operating procedures of the carrier, and specifications of the shipper; and
> g. the individual enters into a contract that specifies the relationship to be that of an independent contractor and not that of an employee.[34]

The rule has been a useful guide to the industry, and litigation on the issue has virtually ceased in the state. The approach used in Minnesota is a sage one. The administrative agency has recognized that general criteria based on the common law does not give sufficient direction to agency personnel or the public. Criteria become more useful and clear if they are developed in terms of the particular industry involved.

VII. THE ABC TEST

While many states apply the common law test and define it in a manner such as Minnesota, the majority of the states[35] follow the ABC test basically stated as follows:[36]

34. Minn. R. 3315.0525 (1991).

35. States following the "ABC" test are Alaska, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, and Wyoming. *ATA Survey*, *supra* note 5, at 1-2.

36. *ATA Survey*, *supra* note 5, at 2.

> 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.

The use of this test is contrary to what federal legislatures envisioned within the Social Security system. In *United States v. Silk*,[37] the Supreme Court established the "economic reality" test as being applicable to Social Security legislation. 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. 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 exclusive contract, that was important, but not controlling.

In essence, the consideration of these latter facts was the foundation of the ABC test. However, when the Treasury Department attempted to issue regulations embracing the ABC test developed in the decision, Congress passed a joint resolution emphasizing that only common law factors should be considered for purposes of the legislation.[38] It was felt that the *economic reality* test would mislead the public and that it was not consistent with legislative intent.[39] Despite the fact that courts, since the Resolution, have acknowledged that strict application of the common law control test should be applied,[40] the majority of states have continued to apply the *economic reality* test or, more appropriate, the ABC test.

A. Application of the ABC Test

In applying this test, the service engager has the burden of proof;[41] and all three prongs of the test must be met.[42] The ABC test is very

37. United States v. Silk, 331 U.S. 704 (1947). *See also* Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).

38. H.R.J. Res. 296, 80th Cong., 2d Sess. (1948). The present Federal Employment Tax Regulation, as a result now embraces the common law test. Employment Taxes and Collection of Income Tax at Source, 26 C.F.R. § 31 (1968).

39. *See generally* H.R. Rep. No. 1319, 80th Cong., 2d Sess. at 3-4 (1948).

40. *See, e.g.*, New Deal Cab Co. v. Fahi, 174 F.2d 318 (5th Cir. 1949), *cert. denied* 338 U.S. 818 (1949); Paity Cab Co. v. United States, 172 F.2d 87 (7th Cir. 1949).

41. *See* Ill. Rev. Stat. ch. 820, para. 405,412 and N.J.S.A. § 43:21-19(i)(6) (West Supp. 1992).

42. *See, e.g.*, Tachick Freight Lines, Inc. v. State Dep't of Labor, 773 P.2d 451 (Alas. 1989); State Dep't of Lab. v. Medical Placement Serv., Inc., 457 A.2d 382 (Del. 1982). In Trinity

difficult to pass in motor carriage because of the problems administrators have had in adapting the criteria to industry practices.

Initially, it should be noted that most courts and agencies hold that if a party were determined under the common law test to be an independent contractor, the party must still meet the ABC test to avoid coverage.[43] The criteria of the ABC test actually are part of the common law test; and thus, it appears that the legislators adopting the ABC test attempted to emphasize the three specific criteria which must be met in all instances.

While under the common law test, the issue of control is the dominant factor; and the lack of control may be an overwhelming consideration in the classification determination.[44] This is not the case if the ABC test is involved. It carries no more weight than any of the other factors which are to be considered.[45]

Prong A frequently causes problems since some courts have indicated the control test under the ABC test is not equivalent to the common law control test and have held that less control need be shown to establish an individual as an employee.[46]

B. The Usual Course of Business

Prong B of the ABC test actually involves two separate tests; and if the party satisfies either part of the test, the prong will be met.[47] The first part of the test is whether the services are performed outside the usual course of business of the employer.

Bldg. Corp. v. Rhode Island Unep. Comm'n Bd., 71 A.2d 505 (R.I. 1950), the court noted that "it is highly probable that any employer could satisfy all three [prongs] since the services contemplated by such contracts ordinarily would be performed at the owner's usual place of business or in the customary course thereof." *Id.* Thus, the test is applied less rigidly, because the court believed the legislature did not intend to destroy all common law concepts which would make every owner-operator a subject employer. *Id* at 507-08.

43. *See* Dept. of Lab. and Indus. v. Aluminum Cooking Utensil Co., 368 Pa. 276, 82 A.2d 897 (1951); Unemployment Comp. Comm'n. v. Collins, 182 Va. 426, 29 S.E.2d 388 (1944); and Software Assoc., Inc. v. State Dep't of Employment, 715 P.2d 985 (Idaho 1986). *But see* Rochester Dairy Co. v. Christgau, 14 N.W.2d 780 (Minn. 1944) (under prior statute); Commercial Motor Freight v. Elbright, 54 N.E.2d 297 (Ohio 1944).

44. Meridith Publishing Co. v. Iowa Employment Sec. Comm'n, 6 N.W. 2d 6 (Iowa 1942); Erspamer Advertising Co. v. Dep't of Lab., 333 N.W.2d 646 (Neb. 1983).

45. Nordman v. Calhoun, 51 N.W.2d 906, 909 (Mich. 1952).

46. Murphy v. Daumit, 56 N.E.2d 800 (Ill. 1944); First Nat'l Bank Ben. Soc. v. Sisk, 173 P.2d 101 (Ariz. 1946).

47. *See, e.g.*, Carpet Remnant Warehouse Inc. v. Department of Labor N.J., 593 A.2d 1177, 1186 (N.J. 1991).

The Courts have interpreted this test very narrowly. In *Times-Argus Ass'n v. Department of Employment*,[48] for example, rural route drivers delivering newspapers were found to be performing a service in the usual course of a newspaper's business because the business of the newspaper included the *distribution* of the newspaper.

In *Bluto v. Department of Employment Security*,[49] a carpenter contracted with a corporation to build an addition owned by the company which it intended to lease. The court found the carpenter was working on a project which was part of the corporation's real estate endeavors and within its usual course of business.[50]

The practical effect of rulings such as above 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 will 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 projects. The relationship with such subcontractors is normally one of an independent contractor.

48. Times-Argus Ass'n, Inc. v. Department of Employment and Training, 503 A.2d 129 (Vt. 1985).

49. Bluto v. Department of Employment Security, 373 A.2d 518 (Vt. 1977).

50. *Id.* at 521.

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.

C. Place of Performance

The second part of Prong B examines if the service is performed outside of all the places of business of the engager. Courts have gone in different directions in interpreting this test. In *In re Bargain Busters, Inc.*,[51] salesmen selling ad space for a weekly newspaper were found to be working within the company's place of business because the calls it made were within the area in which the newspaper was sold to the public.[52] In *Murphy v. Daumit*,[53] the fact that salespersons occasionally appeared at the company's office was found to defeat compliance with the test. In *Solar Age Mfg., Inc. v. Employment Sec. Dep't*,[54] however, the Court took a narrow view. It found that salespersons who sold products in people's home, at fairs, or any point where a display could be made, performed work outside the seller's place of business.[55]

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 above. If a company did a nationwide business, presumably work could never be performed outside the company's place of business.

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.

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51. *In re* Bargain Busters, Inc., 287 A.2d 554 (Vt. 1972).

52. In Bluto v. Dep't of Econ. Sec., 373 A.2d 518, 521 (Vt. 1977), the Court, in dicta, indicated any activities in the business area in which a company operated constituted its place of business.

53. Murphy v. Davmit, 56 N.E. 2d 800, 805 (Ill. 1944). *See also* Northern Oil Co. v. Ind. Comm'n, 140 P.2d 329 (Ut. 1943). *But see* Life & Casualty Co. v. Unemployment Comm'n of Va., 16 S.E.2d 357 (Va. 1941).

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

55. *Id.* at 587.

Business operations are not conducted in a vacuum. Businesspersons meet at one or the other's facilities to discuss problems, to exchange documents, to train, etc. To ignore such realities as a means of advancing the social objectives underlying the legislation is not only absurd, but unwarranted.

D. Independent Business

The absurdities which arise under Prong B of the ABC test also exist under the third prong. 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. Dep't,*[56] 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.[57] This view would not hinder a motor carrier, as in most instances owner/operators are already in business when they contract with a carrier.[58] They normally have their own equipment and make independent decisions to become an owner/operator. It is merely the choice of which carrier 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.,*[59] a *dependent* business was found because the owner/operator was dependent on the carrier for customers, trailers, insurance,[60] and operating authority.[61]

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56. *Id.*

57. *Id.* at 587.

58. In Graebel Moving & Storage of Wis. v. Labor and Indus. Rev. Comm'n, 389 N.W.2d 37 (Wis. 1986) *rev'd den.* 130 Wis.2d 544, 391 N.W.2d 210 (1986) the owner-operator was found not to be conducting an independent business because the contract, which included the tractor, was cancellable at will. The contractor has no proprietary interest or value that he alone controlled or was able to sell or give away. When the operating contractor terminated, the lease of equipment terminated. *Id.* Carrier with lease purchase plans may find it difficult to meet the test in light of this decision unless the equipment lease is distinct form the operating lease and the contractor acquires some interest or ability to purchase the equipment if he or she is no longer under contract to the carrier. For a brief discussion of lease-purchase plans *see* James C. Hardman, Motor Carriers and Independent Contractors and the Search for the Elusive Formula of Independent Financial Stability and Profitability in the Motor Carrier Industry (Paper delivered at the Independent Contractor Division of the Interstate Carrier Conference 1990 Annual Conference, March 27, 1990, Las Vegas, NV). *See also* North American Van Lines, Inc., 288 Nat'l. Lab. Rel. Bd. (1988), *rev'd* 869 F.2d 596 (D.C. Cir. 1989).

59. Stafford Trucking, Inc. v. State Dep't of Indus., Lab., and Human Rel., 306 N.W.2d 79 (Wis. Ct. App. 1981).

60. By statute and administrative regulations, the carrier-lessee is obligated to provide public liability insurance. 49 U.S.C. § 10927 (1979 & Supp.); Minimal level of financial responsibility for motor carriers, 49 C.F.R. § 387 (1992).

In some instances, the test is set forth by statute. In Oregon a business or service is considered to be independently established when four or more of the following circumstances exist:[62]

(a) The labor or services are primarily carried out at a separate location from their residence or they have set-aside a specific portion of their residence for 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;
(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 services not provided as evidenced by the ownership of performance bonds, warranties, errors and omissions insurance, or liability insurance relating to the labor or services provided.

In Utah some of the elements which are considered when applying the test are holding oneself out to the public generally as engaged in a specific business, advertising one's services, having an established clientele, having a place of business, having a contractor's or business license, having special skills as a result of an apprenticeship training, and having a substantial investment in the tools necessary to do the work.[63]

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.

There is no need to maintain a business office apart from the individual's residence. There is no need to have a business phone or listing since he or she cannot lawfully or practically offer a service to another party if under contract to a carrier regulated by the Interstate Commerce Commission. The contractor normally has one tractor and he or she drives it. The test, as applied by administrators and by the courts, ig-

61. To haul regulated commodities in interstate commerce an entity must receive a Certificate of Public Convenience and Necessity or Permit from the Interstate Commerce Commission. In some instances, similar certificates or permits are required from state agencies for intrastate freight hauling. *See* 49 U.S.C. § 10921 (1979 & Supp.).

62. Or. Rev. Stat § 670.600(8) (1991). In Oregon, a special exemption from employment exists for log haulers and lessors to certified common carriers. Or. Rev. Stat. § 657.047 (1991).

63. *See* Ellison, Inc. v. Board of Rev. of the Indus. Comm'n of Utah, Dep't of Employment Sec., 749 P.2d 1280, 1283-84 (Utah App. 1988).

nores the realities of the industry and consequently hurts both carriers and owner/operators.

VIII. SPECIAL SITUATIONS

A. MICHIGAN

Special situations exist in some states. In Michigan a separate statutory provision exists for motor carriers. The statute reads:

> . . . Service performed by an individual who by lease, contract, or arrangement places at the disposal of a person, firm, or corporation a piece of motor vehicle equipment and under a contract of hire, which provides for the individual's control and direction, is engaged by the person, firm, or corporation to operate the motor vehicle equipment shall be deemed to be employment subject to this act.[64]

Normally, service performed by an individual for remuneration in Michigan will not be deemed as employment, subject to unemployment compensation, unless the individual is under the employer's control or direction as to the performance of the service under both a contract for hire or in fact.[65]

While on the surface the test appears to be the same, for example, subject to control and direction, the fact of the matter is that the statutory provision by specifically referencing motor carriage seemingly is intended to override the decision in *Pazan v. Mich. Unep. Comp. Comm'n,*[66] and to bring the position of the agency into consistency with the provision of the State Motor Carrier Act, which dictates that all persons driving vehicles for motor carriers must be employees.[67] Further, the Motor Carrier Act provides that the operation of equipment held under lease must be conducted under the exclusive supervision, direction, and control of the holder of the operating authority.[68] Thus, a motor carrier engaged in intrastate Michigan operations cannot avoid being subject to the unemployment compensation statute.

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64. MICH. STAT. ANN. § 421.42(5)(1992).

65. *Id. See also* MICH. STAT. ANN. § 421.42(1) (1992).

66. Pazan v. Michigan Unep. Comp. Comm'n, 73 N.W. 327 (Mich. 1955) *cert. den.* 350 U.S. 1014 (1956). In this case, owner-operators were found to be independent contractors because of the risk undertaken, the lack of control exercised over their operation, and the opportunity for profit from sound management. *Id.* at 329, *quoting* U.S. v. Silk, 331 U.S. 704 (1947).

67. MICH. STAT. ANN. § 479.10 a(6). The section dictates what provisions are to be included in leases, contracts, or arrangements under which a holder of operating authority augments equipment.

68. MICH. STAT. ANN. § 470.10 a(6).

B. Illinois

The Illinois Unemployment Insurance Act[69] provides that an individual or entity must be an employing unit to be liable under the Act.[70]

An employing unit is defined as "any individual or type of organization . . . which has one or more individuals performing service for it within the state."[71]

The Illinois Department of Employment Security has taken the position that the foregoing provision is not relevant to the issue of classification and that the issue should be solely determined under the ABC test.[72] The agency argues that if an entity is an employer of any employee, it becomes an employing unit and it is not proper to make the determination in respect to each individual.[73]

However, in *Wallace v. Annunzio,*[74] the Illinois Supreme Court decided that a party was not liable for unemployment contributions because the party was not an "employing unit" with respect to the alleged employee. It was specifically stated:

> [I]t has been held that the individuals are performing services essentially for themselves rather than for an employing unit, and are, therefore, not in employment under the terms of Section 2(f)(1)[now Section 206], even without reference to the three-fold tests of Section 2(f)(1) [now Section 212] of the Act.[75]

In *Hart v. Johnson*[76] the court also made a two-step analysis. The court first determined the alleged employee performed services for an employing unit and then it proceeded to determine that the independent contractor status did not apply.[77] This was also true in *Parks Cab Co. v. Annunzio*[78] which involved cab drivers who leased their vehicles from the holder of the license authorizing such operations. The lessee cab drivers were responsible for property damage, but the cab company carried liability insurance coverage.

The court stated that unless the drivers were performing service for the cab company, coverage did not exist under the statute.[79] The court

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69. Ill. Rev. Stat. 820 § 405 (1993).
70. *Id.*
71. *Id.*
72. *Id.*
73. *See* Post Hearing Brief of Director of Employment Security, Director of Employment Security v. Pre-Fab Transit, Case No. H-10463. (Ill. Dep't of Employment Sec.).
74. Wallace v. Annunzio 103 N.E. 2d at 467 (Ill. 1952).
75. *Id.* at 470. *See also* Park Cab Co. v. Annunzio, 107 N.E.2d 853 (Ill. 1952); Hart v. Johnson, 386 N.E.2d 623 (Ill. App. Ct. 1979).
76. Hart v. Johnson, 386 N.E. 2d 623 (Ill. App. Ct. 1979).
77. *Id.* at 627-628.
78. Parks Cab Co. v. Annunzio, 107 N.E.2d 853 (Ill. 1952).
79. *Id.* at 854.

noted that the cab company was not really in business of cab operations, but was a lessor of the license authorizing cab operations; and thus, service was not performed for it.[80]

In Minnesota a similar statutory provision exists. An employing unit is defined as ". . . any individual or type of organization . . . which has . . . had in its employ one or more individuals performing service for it."[81] However, it does not appear that Minnesota courts have ever addressed the issue considered in the Illinois cases.

In North Dakota, however, the issue arose in *State By Job Service North Dakota v. Dionne.*[82] In this case a motel operator used individuals to perform cleaning services at her motel. She refused agency personnel access to her records on the basis that the workers were independent contractors and not employees and, thus, did not "perform service for it [the motel company] within the state."[83] The court held that the individuals were performing service for the motel and whether it was being done in an employment or independent contractor relationship was not relevant. The section of the statute involved[84] was not concerned with the issue of whether the workers were covered or not but whether the company was required to keep records, etc., so that the agency could determine whether the workers were within the statute.[85]

In Virginia the term "employment" has been defined as ". . . any service performed for remuneration or under a contract for hire, written or oral."[86] This statutory provision has been interpreted to accord a broader and more inclusive meaning that in the common law context of the master-servant employment relationship.[87]

In all probability, the Illinois position is an abnormality and that most courts would find that the concept of an "employing unit" is not relevant to the classification issue.[88]

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80. *Id.* at 855. The Court rejected the argument that the city ordinance make the cab company the operator of the business and that for it merely to lease the license violates the ordinance. The Court stated compliance or non-compliance was not its concern and that "economic facts as they actually exist are determinative here.

81. MINN. STAT. ANN. 268.04 Subd. 9 (Supp. 1992).

82. State By Job Serv. N.D. v. Dionne, 334 N.W.2d 842 (N.D. 1983).

83. N.D. CENT. CODE § 52-01-01-16 (Supp. 1991).

84. *Id.*

85. A separate subsection of the statute dealt with independent contractors and provided that they would be considered employed in service unless the contractors were employers themselves. 10(a) N.D. CENT. CODE § 52-01-01016(a) (Supp. 1991).

86. VA CODE ANN. § 60.1-14(1)(a)(1992 Rep. Vol.).

87. Virginia Employment Comm'n v. A.I.M. Corp., 302 S.E.2d 534 (Va. 1938).

88. This would be particularly true where the ABC test is applicable or if there is a specific exemption for owner-operators. One must question whether the legislators, in such a situation, would want a dual test to be applied.

IX. APPLICABILITY OF STATUTE

Compounding the problems which a motor carrier faces is the issue of which state law will apply. Generally, it is not the contract which will determine which state has jurisdiction, but the place where the service is performed, directed, and controlled. However, in some instances, the situs of the individual's residence will control.[89] 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 the 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 would 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.

X. POSSIBLE SOLUTIONS TO THE ROUTE TO UNIFORMITY; FEDERAL ACTION

The ideal solution would be the enactment of a federal statute which would provide uniformity. However, there is no assurance that the States would have to adopt or accept the federal view. In *Salem College & Academy, Inc. v. Employment Div.*,[90] for example, it was held that the federal act[91] did not prevent the state from extending coverage beyond the federal requirement.[92] The court noted that Congress did not undertake to create a nationally administered unemployment compensation system, but was a tax statute inducing incentive to the states to provide a system of unemployment compensation.[93]

If a state does not comply with the federal act; however, it can result in a forfeiture of federal benefits.[94] While a state might attempt to extend coverage beyond that under the federal statute, the loss of funding would

89. C.C.H. Unep. Ins. Rep. ¶ 1334. *See also* MINN. STAT. ANN. § 268.13 Subd. 1(1)(1992).
90. Salem College and Academy, Inc. v. Employment Div., 695 P.2d 25 (Or. 1985).
91. 26 U.S.C. § 3301 (1989).
92. *Salem College*, 695 P.2d at 29.
93. *Id.*
94. Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

undoubtedly be a significant barrier to a state taking contrary action. Further, the federal government and state governments have had a history of cooperation.[95]

The law is clear that in determining whether an individual is an employee for federal employment tax purposes, federal, rather than state, law is applicable.[96] Thus, the real issue is to extend the federal definition of employment coverage to state unemployment compensation statutes.

Congress should enact a specific provision which would exempt owner/operators from the coverage of federal law. This could be done by amending 26 U.S.C. § 3305 by adding the following sentence to subsection (a):

> The foregoing provision shall not be applicable if, under any act of Congress, a person is not an employee under Section 3121.

Section 3121 (b)[97] could then be amended to add a subsection concerning owner/operators to read:

> . . . service performed by an individual in the trucking industry who as an owner/operator of a vehicle which is licensed and registered as a truck, tractor, or truck tractor by a governmental motor vehicle regulatory agency while performing service in the operation of the truck, if each of the following factors is substantially present:
>
> a. The individual owns the equipment or holds it under a bona fide lease arrangement;
> b. the individual is responsible for the maintenance of the equipment;
> c. the individual bears the principal burdens of the operating costs, including fuel, repairs, supplies, vehicle insurance, and personal expenses while on the road;
> d. the individual is responsible for supplying the necessary personal services to operate the equipment;
> e. the individual's compensation is based on factors related to the work performed including a percentage of any schedule of rates or lawfully published tariff and not on the basis of the hours or time expended;
> f. the individual generally determines the details and means of performing the services, in accordance with regulatory requirements, operating procedures of the carrier, and specifications of the shipper; and
> g. the individual enters into a contract that specifies the relationship to be that of an independent contractor and not that of an employee.

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95. The federal government, under a federal employees' unemployment program, may and has entered into agreements with states to pay compensation to federal employees who have lost their jobs under the same conditions as state law. *See* 5 U.S.C. § 8502 (1988).

96. M.F.A. Mut. Ins. Co. v. United States, 314 F. Supp. 590 (W.D. Mo. 1970); Loeb v. United States, 209 F. Supp. 22 (E. D. La. 1962).

97. 26 U.S.C. 3121 (1988).

The combination of these statutory amendments would exempt owner/operators, as well as other persons already exempted under 26 U.S.C § 312 (b), from the term "employment" when engaged in interstate or foreign commerce from the federal tax. However, owner/operators engaged solely in intrastate commerce operations could still be subject to the employment classification issue.

XI. STATE SOLUTION

In such instances it would be necessary to seek a model or uniform statutory approach.

A uniform state statutory definition of "employment" and "independent contractor" would alleviate many of the problems facing motor carriers. The following is the type language which could be used.

A. Coverage

Employment involves service performed for remuneration by an individual who is not an independent contractor.

Independent Contractor is an individual who controls to a significant degree the nature, manner, and details of work performed under contract except to the extent affected by governmental laws or regulations or general requirements of the customers or clients of the contracting party.

The statute should also include an exception which addressed the owner/operator specifically. This exception should read as follows.

B. Exceptions

Employment; Special exclusion—In the trucking industry, an owner-operator or lessee of a vehicle which is licensed and registered as a truck, tractor, or truck-tractor by a governmental motor vehicle regulatory agency is an independent contractor, not an employee, while performing services in the operation of the truck, if each of the following factors is substantially present.

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;
3. the individual bears the principal burdens of the operating costs, including fuel, repairs, supplies, vehicle insurance, and personal expenses while on the road;
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 including a percentage of any schedule of rates or lawfully published tariff and not on the basis of the hours or time expended;

6. the individual 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, and
7. the individual enters into a contract that specifies the relationship to be that of an independent contractor and not that of an employee.

The model state statutory approach involves three objectives: (1) advance the concept of an independent contractor relationship as being without the term "employment"; (2) define the term "independent contractor" in common law terms and assure that "control" imposed by third parties is not considered in the classification issue; and (3) includes a special exception to cover the trucking industry because of its history and uniqueness.

The difficulties attendant to legislative reform may make it more feasible to seek administrative rules and regulations which would have the special exclusion proposed above.

If the statute of a particular state or states also require that the independent contractor have an independently established business and that it be conducted outside the usual course and location of the contracting enterprise, the following provisions should be included within proposed administrative rules:

C. Independently Established Business

If the owner/operator is found to be an independent contractor, his or her business shall be considered to be independently established if one or more of the following factors are present:

1. The individual's business may provide a means of livelihood that is separate and apart from the livelihood gained from services performed for a particular carrier;
2. the business could continue if the relationship with the carrier was terminated;
3. the individual has an ownership interest in a business that the individual may sell or give away without restriction from the carrier;
4. the individual assumes financial responsibility for defective services attributable to his or her negligence or omissions;
5. the individual holds himself or herself out as a separate and distinct business from the party with whom the contract is executed; or
6. the individual determines the type and kind of equipment or tools furnished to perform the contract service.

D. Integration of Business

If the owner/operator is found to be an independent contractor and his or her business is independently established, said business shall be considered to be performed outside the usual course of the enterprise for which service is performed or performed outside of all the places of busi-

ness of the enterprise for which service is performed if the contracting parties engage in independent operations which are integral to their individual businesses such as, but not limited to, one or more of the following factors:

1. The individual performs contract work of any nature other than that directly involved in the movement of freight for the carrier;
2. the individual performs subhauling for any other entity or hauls in his or her own name or for an entity in which an ownership equity exists;
3. the individual maintains business records at a place other than the carrier's premises; or
4. the individual uses contract or employed labor at his or her own discretion and costs to meet his or her service obligations at any facility or point other than the enterprise's facility.

These criteria address realistically the relationship existing in the motor carrier industry.

XII. CONCLUSION

Federal and State officials must recognize that industries have their own peculiarities and that general principles of law must be interpreted in light of such peculiarities. While the objectives of unemployment compensation statutes and the attempt to cover as many persons as possible are enviable, it is important that these objectives be weighed against the equally important goal of promoting small businesses.

If motor carriers cannot have reasonable direction in respect to the employment classification issue, it will handicap their use of owner/operators because of the monetary penalties which could be involved if a misclassification occurred.[98]

The demise of owner/operators in the motor carrier industry would foreclose significant opportunities for individuals to become small businesspersons and would require a substantial segment of the industry to change their modus operandi[99] and perhaps lead to a substantial

98. See discussion *supra* note 8.

99. A substantial number of carriers who haul specific commodities in truckload quantities utilize owner-operators exclusively and they constitute a majority of the driver force. In Lockridge, The Overdrive 100, *Overdrive* magazine, at 51 (Sept, 1992), it is reported that the 100 largest users of owner/operators engaged more than 44,000 independent contractors and that 77% of respondents to a recent survey by the National Accounting and Finance Counsel of the American Trucking Association used independent contractors.

decrease in available for-hire carriage.[100] Sensible classification criteria, whether statutory or administrative, are clearly necessary.

100. The reclassification of owner-operators as employees would require carriers to adjust their tariffs to reflect the new employment costs, modify or eliminate employee benefit plans, and make capital expenditures to secure equipment which would be taken from service by owner-operators who, as a general rule, do not want to operate as an employee and would not do so. Owner-Operators would generally sell their equipment or attempt to operate as a truck-line. Turmoil, at least in the short term, would prevail.