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Attorneys at Law

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The *InterConnect* FLASH!
Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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FLASH NO. 51
THE MOTOR CARRIER EMPLOYER AMNESTY PROGRAM OF CALIFORNIA: A WOLF IN SHEEP'S CLOTHING?

Starting January 1, 2016, eligible motor carrier's performing drayage services in California can apply for relief under the Motor Carrier Employer Amnesty Program of California (the "Program"). Under the Program, provided an eligible motor carrier enters into a settlement agreement with the Labor Commissioner (the "Commissioner") and agrees to reclassify its drivers as employees, the carrier may be relieved of liability for certain statutory or civil penalties associated with its classification of the reclassified commercial drivers as independent contractors. Of course, with any government program, the devil is in the details. And, in this case, the fact that the enacted bill was born of a partnership between the California State Legislature and the California Teamsters, alone calls for a double-dose of careful consideration.

To be eligible, a carrier must not, as of the date it applies to participate in the Program, have a civil lawsuit pending against it in state or federal court involving the misclassification of a commercial driver that was filed on or before December 31, 2015. Further, the carrier must not have been assessed a final penalty under Section 1128 of the Unemployment Insurance Code (the "UIC").

An eligible carrier must submit an application to the Commissioner establishing its eligibility, and report the results of a self-audit consistent with the Commissioner's guidelines. Carriers that reclassified drivers prior to January 1, 2016, either voluntarily or as a result a "final disposition" in a civil proceeding, must also submit: (a) documents proving the worker reclassification, including when the reclassification commenced, (b) the identity of each driver reclassified, the amounts paid to each reclassified driver for misclassification, (c) the pre-reclassification time periods for which each payment to reclassified drivers applied, (d) a self-audit for all reclassified drivers, and (e) a separate self-audit for any drivers subject to reclassification that are not identified under (b) above. The Commissioner will determine whether to provide relief to the misclassified drivers based upon the information provided on the prior reclassification. Once the application has been submitted, a proceeding under Sections 2698-2699.5 of the Labor Code cannot be initiated unless the eligible carrier's application is denied.

Prior to January 1, 2017, the Commissioner may enter into a settlement agreement with an eligible carrier which requires the eligible carrier to: (i) pay all wages, benefits, and taxes related to its reclassified drivers from the first date of misclassification to execution of the settlement agreement; (ii) maintain converted positions as employee positions; (iii) consent that future drivers performing the duties of the misclassified drivers have employee status; (iv) immediately secure and provide proof of the required worker's compensation coverage for reclassified drivers; (v) pay the required costs of the Commissioner and Employment Development Department for their review, approval, and compliance monitoring of the settlement agreement; (vi) and perform any other necessary requirements.

(continued)

An eligible carrier's performance under a settlement agreement acts as a shield against civil or statutory penalties that might have become due and payable for the time period covered by the settlement agreement except: (1) a penalty under Section 1128 of the UIC that is final on the date the settlement agreement is executed (unless reversed), (2) a penalty assessed based on the carrier's intent to evade reporting requirements or regulations, and (3) a penalty based on Division 3 of the Labor Code or Division 6 of the UIC, provided the carrier was on notice of a criminal investigation, or a criminal proceeding had been initiated against the carrier.

In addition, compliance with the settlement agreement relieves the carrier of liability for any unpaid penalties or interest pursuant to §§ 1112.5, 1126, and 1127 of the UIC resulting from nonpayment of tax liabilities resulting from the misclassification and reclassification of its drivers for the tax reporting periods for which the agreement is applicable. Nevertheless, penalties and interest resulting from any pre-agreement assessments are not waived.

Reclassified drivers will receive the recovery obtained by the Commissioner pursuant to the settlement agreement so long as the driver executes a release of all claims existing against the carrier for the misclassification. A driver does not have to accept the agreement; however, the driver will still be reclassified, will be barred from pursuing a claim for civil or statutory penalties for the period covered by the agreement, and the carrier is excused from paying the amount due to the driver under the settlement agreement.

As renowned economists have often quipped, though, "there is no such thing as a free lunch." Participation in the Program requires eligible carriers to agree to certain painful concessions. First, the settlement agreement must include a vague representation providing that the carrier will "perform any other requirements or provisions the Labor Commissioner and the department deem necessary to carry out the intent of [the] section, the program, or to enforce the settlement agreement." Second, if the eligible carrier contracts with any workers in the future as independent contractors, the carrier has a virtually insurmountable burden to prove "by clear and convincing evidence" that the workers are not employees in any administrative or judicial proceeding in which employment status is at issue.

Third, the statute of limitations for a misclassification claim asserted against a carrier will be tolled from the date of the application through the date of denial, or noncompliance with the settlement agreement. Fourth, if the Commissioner commences a civil action to enforce the settlement agreement, judgment may be entered within 60 days, plus costs and attorneys' fees, and the judgment does not preclude an action to recover additional civil and/or statutory penalties.

Fifth, the Program provides that if an application is denied by the Commissioner, neither the application or its submission shall be treated as an admission by the motor carrier that it misclassified drivers as independent contractors, and shall not be construed as an evidentiary inference that the carrier failed to properly classify drivers as employees. However, this purported "safe harbor" provision does not preclude the use of the application, or its submission, as evidence in any proceeding involving the employment status of a carrier's drivers.

We will continue to monitor the Program closely as implementation and execution will begin January 1, 2016. In the meantime, if you have any questions regarding this new development or how it may impact your independent contractor operations, the Benesch Transportation & Logistics team would be happy to help.

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