Benesch
Attorneys at Law

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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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Only one law firm per practice area in the U.S. is receiving this recognition, making this award a particularly significant achievement. This honor would not have been possible without the support of our clients, who both enable and challenge us every day, and the fine attorneys of our Transportation & Logistics Practice Group.

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FLASH NO. 44
2014 … A YEAR IN REVIEW

2014 was uncomfortably *fast.* When did you last write 2013 on a check or a letter by mistake? If you did, rest assured that you are not alone. So, while we still have a few weeks before we have to face the start of a new year (and learn to write 2015), let's reflect on a few of the events from 2014 that may have a lasting impact on your businesses.

New York's Commercial Goods Transportation Industry Fair Play Act was signed into law on January 10, 2014. Governor Cuomo signed the bill subject to some "technical corrections" that were passed by the New York Legislature before the Act went into effect on April 10, 2014. The "technical corrections" appear to have made the Act applicable to not only motor carriers with a physical presence in the State of New York, but also those with drivers that merely transport freight through the State of New York under a license issued by another state.

The California Labor Commission ruled in favor of by seven port drayage drivers in a worker classification case resulting in a $2.2 million judgment against Pacer Cartage. Emboldened, drayage drivers staged several strikes in Los Angeles and Long Beach in attempts to strong arm motor carriers. To make matters worse, in September, the Department of Labor awarded $10.2 million in grants to 19 states "to implement or improve worker misclassification detection and enforcement initiatives in unemployment insurance programs."

The Colorado Supreme Court (*W. Logistics, Inc. v. Indus. Claim Appeals Office*) and the U.S. District Court for the Western District of Washington (*Moba v. Total Transp. Servs.*) issued decisions that provide a welcomed basis to argue for a broader-based totality of the circumstances test in worker classification cases.

The U.S. Supreme Court's declined to review the Swift worker misclassification case, which brought up a lot of questions on the viability of arbitration provisions in independent contractor agreements. While the Swift case was not as positive as the industry would have liked to have seen, it certainly did not compel the end of arbitration provisions in independent contractor agreements.

The NLRB's General Counsel announced that he would name McDonald's U.S.A. LLC as a "joint employer" in dozens of unfair labor practice cases filed on behalf of employees of McDonald's franchisees, an announcement that could have a significant impact in the trucking industry. Also, as predicted, the NLRB adopted a new final rule on December 12, 2014, that will take effect on April 14, 2015, making it even more difficult for employers to disseminate a union-free message prior to an election.

The Ninth Circuit ruled that FedEx Ground drivers were employees as a matter of law under California's right-to-control test. While not a positive result, the decision can be used offensively

to engineer, or re-engineer, a motor carrier's approach to its business relationships with individuals or entities that it treats as independent contractors/owner-operators, thanks to the Court's very specific discussion of the indicia of control upon which its decision was based.

The First Circuit reversed a decision that the Massachusetts Independent Contractor Law was not preempted for motor carriers under the Federal Aviation and Administration Authorization Act of 1994 (FAAAA). Since the Massachusetts "ABC Test" could affect a motor carrier's prices, routes, or services, and concerns a motor carrier's transportation of property, the Court returned the case to the District Court to determine whether the statute satisfied the broad FAAAA preemption based upon the record of the case.

So, as we draw the curtain on 2014, with visions of administrative action, more and more regulation, and judicial activism hammering in our heads, know that vigilance is key. Periodic review, analysis, and updating of your contract documentation, practices, and procedures is the most proactive way to ward off attacks under either state or federal law. The Benesch Transportation Logistics Practice Group is very experienced in this area of the law and can certainly provide counsel and assistance as required. We welcome the opportunity to partner with you in 2015 to help you meet your goals in this ever-changing and challenging environment.

Additional Information

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