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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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FLASH NO. 58
CONTRACT, CONDUCT, AND COMMON SENSE CAN SAVE YOU MONEY

You have undoubtedly heard countless times that "an apple a day keeps the doctor away." Preventive health care is a big deal. Search Google for preventive medicine and it will return approximately 22.4 million results in about half a second. Did you know there is preventive medicine related to your independent contractor workforce? It is a remarkably simple algorithm: contract reflects conduct + conduct reflects contract + common sense = success (or at least a daily apple for your business).

The notion of preventive medicine resonated during an internal discussion regarding a recent Georgia Court of Appeals[1] decision involving B-H Transfer Company ("B-H"). B-H operates in a variety of segments within the industry with tank, vans, and flatbed trailers, and is also involved in intermodal drayage. The Court's decision is a really somewhat underwhelming insofar as it stands for the proposition that for plaintiffs to recover damages under the Federal Leasing Regulations, 49 CFR § 376.11 et seq. (the "Truth-in-Leasing Regulations"), each plaintiff must show an actual loss due to reliance upon on an inaccurate or incomplete disclosure. For carriers operating with independent contractors ("ICs"), this proposition is not new and has been the standard since the OOIDA/Landstar decision in 2012.

What is really shocking about the B-H case, though, is that it was originally filed in **2003**! B-H was granted summary judgment on plaintiffs' breach of contract claim in July 2012, but the alleged violations of the Truth-in-Leasing Regulations disclosure requirements took another four years to resolve. Unfortunately, that distracting waste of time and money could have been avoided if the motor carrier heeded the preventive advice suggested above (*i.e.*, the contract reflects the operations, the operations reflect the contract, and common sense prevails).

In the B-H case, the service contract between B-H and its ICs stated that B-H could make certain deductions from payments otherwise due to the IC. Specifically, B-H could deduct amounts for which the IC was indebted to B-H, including actual costs incurred by B-H due to an IC's failure to complete service as dispatched. However, B-H only ever deducted $25.00 when an IC failed to complete a delivery and B-H had to pay another motor carrier to do so, even though it actually cost B-H $36.00 to complete the delivery. The trial court found, and the Court of Appeals affirmed, that the contractual provision violated 49 C.F.R. § 376.12(h) (charge-back items) since the contract failed to state how the charge-back would be calculated. But, since B-H never deducted more than $25.00 – less than the amount allowed by the contractual term – plaintiffs were not damaged. Plaintiffs, of course, argued that the regulatory violation rendered the contractual provision invalid, and, therefore, every time fees were deducted from their compensation under the invalid provision, those deductions constituted their damages.

The Court of Appeals disagreed and, relying on OOIDA/Landstar, ruled that for plaintiffs to recover damages, each plaintiff must show that he suffered a loss because he relied

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on an inaccurate or incomplete disclosure. Plaintiffs had provided no evidence of such reliance. Likewise, there was no evidence that had the deduction been disclosed more fully, Plaintiffs would not have taken jobs under the B-H service contracts, and the amount of the deductions would have been less than the $25.00 that was deducted.

Nonetheless, it is utterly amazing that it took 13 years to reach that point. It all could have been avoided had the motor carrier more carefully aligned its operational conduct with the service contract provisions. In other words, B-H should have clearly explained that each IC service failure cost B-H $36.00 and, at most, B-H would deduct a portion of the cost of that service failure – up to a maximum of $25.00 – from the IC's compensation.

In addition, as discussed in our last installment of the *FLASH* (violations under 49 C.F.R. § 376.12(i) related to the prohibition of requiring an IC to purchase any goods or services from the motor carrier), the Truth-in-Leasing Regulations are not being forgotten. Operating an effective IC program is not just about taking steps to ensure proper worker classification, it also requires careful compliance with the Truth-in-Leasing Regulations. Thus, as charge-backs occur, whether related to on-board communication devices, baseplate programs, insurance coverages, *etc.*, it just makes sense to pay attention to the regulations, make certain that your IC contracts comply with the regulations, and, of course, confirm that your actual operational conduct reflects the terms of your IC contracts.

So, as we put a bow on 2016, if you are operating an IC program you may want to consider an internal self-check and save yourself 13 years of expense and needless distraction. The Benesch Transportation & Logistics Practice Group certainly has the capability and experience to assist and would be happy to do so.

[1] Hall, et al. vs. B-H Transfer Company, 2016 Georgia App. Lexus 647. Decided November 15, 2016.

For more information, contact:

J. Allen Jones at ajones@beneschlaw.com or (614) 223-9323
Allen is a partner with Benesch's Transportation & Logistics Practice Group. He focuses his practice on the representation of companies located throughout the country in virtually all segments of the transportation industry, including, among others, truckload carriers, overweight/over-dimensional carriers, bulk and tank carriers, dray carriers, and third-party logistics providers in matters involving, among other things, independent contractor/owneroperator issues, lost, damaged or stolen freight, freight charge collection, and transportation related service agreements.

Richard A. Plewacki at rplewacki@beneschlaw.com or (216) 363-4159
Richard is a partner with the firm's Litigation and Transportation & Logistics Practice Groups. He has been in the transportation and logistics industry, both as a businessman and an attorney, for over 40 years during which he has been heavily involved with the IC model within the trucking industry. His practice also includes advising and representing motor carriers, leasing companies, third party logistics providers, national shippers, large private fleets and water carriers in the domestic, non-contiguous trade lanes.

Additional Information

For additional information, please contact:

Transportation & Logistics Practice Group

Michael J. Barrie at (302) 442-7068 or mbarrie@beneschlaw.com
Marc S. Blubaugh at (614) 223-9382 or mblubaugh@beneschlaw.com
Matthew D. Gurbach at (216) 363-4413 or mgurbach@beneschlaw.com
James M. Hill at (216) 363-4444 or jhill@beneschlaw.com
Jennifer R. Hoover at (302) 442-7006 or jhoover@beneschlaw.com
J. Allen Jones III at (614) 223-9323 or ajones@beneschlaw.com
Thomas B. Kern at (614) 223-9369 or tkern@beneschlaw.com
Peter N. Kirsanow at (216) 363-4481 or pkirsanow@beneschlaw.com
David M. Krueger at (216) 363-4683 or dkrueger@beneschlaw.com
Christopher J. Lalak at (216) 363-4557 or clalak@beneschlaw.com
Stephanie V. McGowan at (317) 685-6161 or smcgowan@beneschlaw.com
Andi M. Metzel at (317) 685-6159 or ametzel@beneschlaw.com
Kelly E. Mulrane at (614) 223-9318 or kmulrane@beneschlaw.com
Lianzhong Pan at (86 21) 3222-0388 or lpan@beneschlaw.com
Martha J. Payne at (541) 764-2859 or mpayne@beneschlaw.com
Stephanie S. Penninger at (317) 685-6188 or spenninger@beneschlaw.com
Joel R. Pentz at (216) 363-4618 or jpentz@beneschlaw.com
Richard A. Plewacki at (216) 363-4159 or rplewacki@beneschlaw.com
Matthew J. Selby at (216) 363-4458 or mselby@beneschlaw.com
Brittany L. Shaw at (317) 685-6118 or bshaw@beneschlaw.com
Peter K. Shelton at (216) 363-4169 or pshelton@beneschlaw.com
Clare R. Taft at (216) 363-4435 or ctaft@beneschlaw.com
Jonathan Todd at (216) 363-4658 or jtodd@beneschlaw.com
Eric L. Zalud at (216) 363-4178 or ezalud@beneschlaw.com

Labor & Employment Practice Group

Maynard Buck at (216) 363-4694 or mbuck@beneschlaw.com
Joseph Gross at (216) 363-4163 or jgross@beneschlaw.com
Rick Hepp at (216) 363-4657 or rhepp@beneschlaw.com
Christopher J. Lalak at (216) 363-4557 or clalak@beneschlaw.com
Peter Kirsanow at (216) 363-4481 or pkirsanow@beneschlaw.com

www.beneschlaw.com