GIVE US A BREAK! NAVIGATING EMPLOYMENT ISSUES IN THE TRUCKING INDUSTRY

Transportation & Logistics Law
Employment, Labor & Benefits Law

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Our Program – Hot Issues

- Employed Driver and Owner/Operator Issues
- Hours of Service
- Meal and Rest Breaks
- Q&A
Trucking Employment Law & Regulations

- Hiring and management
  - Background checks
  - Skill and licensing confirmation
  - Drug & alcohol testing
  - Training and Safety Management
Independent Contractor vs. Employee
Independent Contractor?

- State and federal laws have strict requirements covering who qualifies as an independent contractor.
Control Test

- Extent of employer’s control over performance of work.
- Focus on substance, not corporate forms, titles, labels, or paperwork.
WA Economic Dependence Test

- Key inquiry is whether the alleged employee is, as a matter of economic reality, dependent upon the business to which he or she renders service.

*Anfinson v. FedEx, 174 Wn.2d 851 (2012).*
L&I Test

- Are you hiring someone for more than personal labor?
- Are you supervising?
- Do they have an established business of their own?
IRS Test

- **Behavioral**: Does the company control or have the right to control what the worker does and how the worker does his or her job?

- **Financial**: Are the business aspects of the worker’s job controlled by the payer?

- **Type of Relationship**: Are there written contracts or employee type benefits? Will the relationship continue and is the work performed a key aspect of the business?
DOL Test

- The extent to which the work performed is an integral part of the employer’s business.
- The worker’s opportunity for profit or loss depending on his or managerial skill.
- The extent of the relative investments of the employer and the worker.
- Whether the work performed requires special skills and initiative.
- The permanency of the relationship.
- The degree of control exercised or retained by the employer.
Employed Driver v. Independent Contractor (Owner Operator)

- All about control!
- Nature of industry complicates analysis
- Truth in Leasing Regulations (49 CFR Part 376) contemplate independent contractor relationships
Employed Driver v. Independent Contractor (Owner Operator)

- State claims and lawsuits
- Driver claims and lawsuits (OOIDA)
- Bad PR/loss of business
Employed Driver v. Independent Contractor (Owner Operator)

Freedom to:

- Haul for other motor carriers (and have shorter lease terms)
-Terminate lease on specified notice
-Refuse loads (without repercussion)
-Engage own drivers
-Choose Routing
-Freedom to purchase essentials: insurance, tolls, road services, fuel cards; repairs, etc.
-The less in escrow the better!
Employed Driver v. Independent Contractor (Owner Operator)


- Driver wage claim based on Washington Minimum Wage Act
- Are owner operators disguised employees?
Employed Driver v. Independent Contractor (Owner Operator)


- No!
- *Moba* is like a roadmap
- Lease written well. Court ruled:
- The lease “not only explicitly states Plaintiffs are independent contractors, but its terms and conditions reflect the independent contractor status.
  - “Lessor is not obligated to accept shipments offered by Lessee, or be available every business day.”
  - “Lessor has complete control over Lessor’s working conditions and the manner in which the load is transported.”
  - “Lessor may voluntarily accept or reject each shipment offered by Lessee without reprisal.”
  - Motor carrier “shall have no right to, and shall not control the manner, or determine the method, of accomplishing Lessor’s services.”
  - Drivers “are not required to be on-call, and the record does not suggest Plaintiffs are required to attend an orientation session or wear a uniform.”
Employed Driver v. Independent Contractor (Owner Operator)


“[Because drivers] do not have a salary or fixed commission, compensation varies according to which jobs they accept. … [They] can increase their profits several ways: “… buy more than one truck and hire drivers in order to accept and complete more jobs[,]” and “increase their profit by accepting longer-haul jobs.”

The drivers’ opportunity for profit and loss is determined “largely on his or her skill, initiative, ability to cut costs, and understanding of the courier business.”
Employed Driver v. Independent Contractor (Owner Operator)


- Drivers invest in the majority of their own equipment and have the ability to hire employees.
- Drivers “supply all tools and instrumentalities required to perform the services under” the lease.
- “Specialized skill required. Here, drivers were required to go to a school “for truck driving and took a course for one month, and then took a license and then started the job.”
Practical Tips To Avoid Misclassification

- Make sure leases are well written
- Review duties, not just contracts or job descriptions
- Monitor actual interactions in O/O relationships
- Conduct a workforce and management audit
- Keep updated on the latest litigation and news
Meal Periods & Rest Breaks
Rest Breaks – Federal Law

- Fair Labor Standards Act does not require rest breaks, but if they are offered, they are considered compensable work time.
Rest Breaks – State Law

- Paid – “on the employer’s time”
- Cannot be waived
- Can be used as worker chooses (in accordance with employer policy)
- 10 minutes for each 4 hours worked
- No later than the end of the 3rd hour of the shift
- If work during all or part of rest period, get remainder within same four hours
- If don’t get entire period, remainder must be paid; can trigger overtime
- However: Scheduled rest breaks are not required if the nature of the work allows employees to take intermittent rest breaks equivalent to the required standard.
Meal Periods - Federal Law

- Bona fide meal periods (typically lasting at least 30 minutes) are not work time and are not compensable.
Meal Periods – State Law

- 30+ minutes
- Provided between 2\textsuperscript{nd} and 5\textsuperscript{th} hour
- Additional meal period (5 hours after 1\textsuperscript{st} one) if working 3+ extra hours
- Usually unpaid
Meal Periods – Paid Or Unpaid?

- Paid if employee on duty; unpaid if completely free from duties
- Unpaid even if required to stay on premises
- Unpaid if keep page/cell phone on – so long as no obligation to respond or return to work
- If meal period interrupted, gets the rest of the 30 minutes, and all is paid
- Beware of overtime requirements
Meal Periods – Can Employee Waive?

- Yes, if employer agrees
- Employee can request meal period anyway
- Get it in writing
But the trucking industry is different …

- Driver compensation
  - Salary
  - Hourly
  - By job
  - Percentage of freight charge
  - Per mile
- How and when they take breaks and eat
- Lack of detailed oversight
Intersection of Federal and State Law

- Doesn’t Federal law trump state law? Don’t be so sure!
CA Litigation

- The beginning: *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014)
CA Litigation

- Recent Settlements
  - Jan. 2017 - Penske Logistics - $750,000; 350 drivers/installers
  - Jan 2017 - Walmart - $54 million; 800 drivers
  - Sept. 2016 - Con-way Freight Inc. - $3.5 million; 1,000 drivers
The beginning – agricultural workers

The theory was applied to the trucking industry…

“Justice for Washington State Truck Drivers: Paid by the mile?? You may be entitled to backwages and penalties for loading and unloading time! You also may be entitled to inspections, cleaning and fueling time and rest break time! You can recover from any company you worked for in the past four years! Call us!”
WA Litigation


- **Settlements: well into six figures**
Federal Legislation In the Works

- 2016: proposed bill (Denham Amendment) to block states from enacting and enforcing their own work rules for interstate truck drivers, leaving such regulation to the Secretary of Transportation.

- 2017: continued lobbying efforts

"States may not enact or enforce laws that require a motor carrier that pays employees on a piece-rate basis to pay those employees separate or additional compensation, provided the compensation is equal to or greater than the applicable hourly minimum wage of the state."
Hours of Service Regulations

- 49 CFR Part 395
- Safety oriented
- Designed to reduce accidents caused by driver fatigue
- Enforcement issues
- Logbook requirements
Hours of Service Regulations

- **11-Hour Driving Limit**
  May drive a maximum of 11 hours after 10 consecutive hours off duty.

- **14-Hour Limit**
  May not drive beyond the 14th consecutive hour after coming on duty, following 10 consecutive hours off duty. Off-duty time does not extend the 14-hour period.

- **Rest Breaks**
  May drive only if 8 hours or less have passed since end of driver’s last off-duty or sleeper berth period of at least 30 minutes [short haul exceptions]

- **60/70-Hour Limit**
  May not drive after 60/70 hours on duty in 7/8 consecutive days. A driver may restart a 7/8 consecutive day period after taking 34 or more consecutive hours off duty.
**On-duty** time is all time from when a driver begins to work or is required to be in readiness to work until the driver is relieved from work and all responsibility for performing work.

- All time at a … facility…of a motor carrier or shipper … waiting to be dispatched…
- All time inspecting, servicing, or conditioning any CMV at any time.
- Crossing a border.
- All time … in or upon any CMV (except time spent resting in a sleeper berth).
- All time loading or unloading a CMV … remaining in readiness to operate the CMV, or in giving or receiving receipts for shipments loaded or unloaded.
- All time repairing, obtaining assistance … upon a disabled CMV.
- All time spent providing a breath sample or urine specimen…
- Performing any other work in the capacity, employ, or service of a motor carrier.
- Performing any compensated work for a person who is not a motor carrier.
Practical Tips and Strategies - Documentation

- Time in sleeper berth
- Employees: track time and breaks, e.g. log sheets with written verification
- Employers: provide itemized wage statements
Practical Tips and Strategies – Calculating Hourly Rate

- WAC 296-126-021 – converting piece rate to hourly wage

- Piece Rate Only: Wages earned per week / total number of hours worked during that period = regular rate of pay, which must be no less than minimum wage.

- Piece Rate plus other compensation: Piece rate wages + other forms of compensation / total number of hours worked = regular rate of pay, which must be no less than minimum wage.
### EXAMPLE 1 (worker’s regular rate of pay is *more* than minimum wage):

Note: The employer has promised to pay 50 cents for every pound (unit) of strawberries picked.

<table>
<thead>
<tr>
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<th></th>
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</tr>
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<tbody>
<tr>
<td>Units (bins/trees/pounds/etc.)</td>
<td>0</td>
<td>253</td>
<td>249</td>
<td>210</td>
<td>195</td>
<td>183</td>
<td>172</td>
<td>1262 total units</td>
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<tr>
<td>Total Hours of Work (include rest periods)</td>
<td>0</td>
<td>11</td>
<td>11</td>
<td>10</td>
<td>10</td>
<td>10</td>
<td>8</td>
<td>60 total hours</td>
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<tr>
<td>Subtract Rest Periods</td>
<td>0</td>
<td>20 min. (10 x 2)</td>
<td>20 min. (10 x 2)</td>
<td>20 min. (10 x 2)</td>
<td>20 min. (10 x 2)</td>
<td>20 min. (10 x 2)</td>
<td>8 min. (2.0 hours)</td>
<td>120 minutes</td>
</tr>
<tr>
<td>Active Hours of Work</td>
<td>0</td>
<td>10 hours 40 min.</td>
<td>10 hours 40 min.</td>
<td>9 hours 40 min.</td>
<td>9 hours 40 min.</td>
<td>9 hours 40 min.</td>
<td>7 hours 40 min.</td>
<td>58 hours</td>
</tr>
</tbody>
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**For the above example:**

1262 units x $.50 per unit = $631.00

$631.00 ÷ 58 active work hours = $10.88 per hour. This regular rate of pay is *more* than minimum wage ($9.47 in 2016).

$10.88 per hour x 2 hours (rest period total) = $21.76. The worker must be paid this additional amount to compensate for rest periods.

$631.00 + $21.76 = $652.76. The worker must be paid $652.76 in gross wages for the workweek.
Practical Tips and Strategies – Negotiating Break Pay

- Can negotiate separate rate of pay for rest breaks, so long as within parameters of state regulations (not below minimum wage or the employee’s regular rate of pay, whichever is greater).
- Document in writing
Questions and Answers?
Foster Pepper PLLC