Back to the classroom on independent contractor misclassification

By: Mimi Geswein, Esquire

Editor’s Note: The pro-union bias of President Obama is well documented. White House records revealed that Obama’s single most frequent visitor during the first year of his administration was a labor leader, the chief of SEIU. Since 2009, the National Labor Relations Board has been particularly active in support of regulations that would make it easier for unions to organize workers in private industry. Only a few decades have passed since nearly all logistic service providers were organized by an international union. Because it could happen again, the content of Mimi Geswein’s article deserves your very close attention. KBA

September marks back-to-school time and a return to the classroom for our students. While students are brushing up on their study skills, now is the time for you to study your independent contractor relationships to ensure that these individuals are truly functioning as independent contractors, rather than as employees. Truck drivers, delivery personnel and warehouse employees are all among groups frequently treated as independent contractors in the transportation and warehousing industries.

A long legal debate

Independent contractor misclassification is at the forefront of legal debate for several reasons. First, it is an important economic issue. Independent contractors are not subject to the requirements of the Fair Labor Standards Act (“FLSA”), which requires employers to pay overtime compensation and minimum wages. Independent contractors are typically responsible for paying for their own insurance, medical benefits and taxes. Thus, the independent contractor status typically results in a reduction of labor costs for employers.

Presidential politics

Misclassification has also become a political issue. The Obama Administration has made it a priority by increasing its focus on middle class wage earners, resulting in heightened scrutiny from governmental agencies and federal and state regulators.

For example, the U.S. Department of Labor (“DOL”) created the “Misclassification Initiative,” with the mission of investigating and rooting out independent contractor misclassification. According to the DOL, “misclassified employees often are denied access to critical benefits and protections to which they are entitled, such as the minimum wage, overtime compensation, family and medical leave, unemployment insurance, and safe workplaces.” The DOL’s Misclassification Initiative is not purely altruistic, but is clearly economically motivated. The DOL’s website explains that “employee misclassification generates substantial losses to the federal government and state governments in the form of lower tax revenues, as well as to state unemployment and workers’ compensation funds.”

Internal Revenue Service is involved

The DOL is working with the IRS and many states to share information and coordinate enforcement. According to the DOL, this collaboration resulted in the recovery of more than $79 million in back wages for more than 109,000 misclassified workers in fiscal year 2014. Several states have also passed laws imposing large penalties upon employers who misclassify employees.

Litigation

The misclassification debate has made its way into the courts, where misclassified workers have recently won several major victories. Courts across the country have broadened the definition of “employee” under the FLSA, and have relaxed the legal standards for finding that individuals are, in fact, acting as employees, rather than as independent contractors.

The recent Fed Ex litigation has gained notoriety and resulted in potentially major economic consequences for the transportation industry. Fed Ex drivers have filed lawsuits across the country alleging that Fed Ex misclassified them as independent contractors, when they should have been treated as employees.

On July 8, 2015, the Seventh Circuit Court of Appeals ruled that the delivery drivers are employees, not independent contractors. The case was remanded to the court below, which will likely result in a very significant damage award for the drivers. In California, for example, Fed Ex paid nearly $230 million to settle a class action filed by drivers who claimed to be misclassified. There are over 20 similar cases pending against Fed Ex across the country.
Defining "independent" contractors

Notably, the Fed Ex drivers prevailed notwithstanding their operating agreement, which clearly defined the drivers as independent contractors. The Court employed the "economic realities test," which focuses on whether the worker is economically dependent on the business to which he or she renders service. This test includes the following factors:

- The degree of control exerted by the alleged employer over the worker;
- The worker’s opportunity for profit or loss;
- The worker’s investment in the business;
- The permanence of the working relationship;
- The degree of skill required to perform the work;
- The extent to which the worker is an integral part of the alleged employer’s business.

The Court also considered whether the employer has the power to hire and fire employees, supervises and controls employee work schedules or conditions of employment, determines the rate and method of payment, and maintains employment records. None of the individual factors are dispositive; instead, the Court employs a totality of the circumstances approach.

After balancing all of these factors, the Court found that FedEx’s actions spoke louder than its words. The Court was persuaded that Fed Ex has directed the manner and means of the drivers performing their jobs including: directing delivery days and times; delivery methods; reporting requirements; vehicle identification, specifications, and maintenance; and driver appearance (down to the color of their socks and even the style of their hair).

It has been reported that Fed Ex has reduced its labor costs by as much as 40% by classifying its drivers as independent contractors rather than as employees. The Fed Ex litigation will undoubtedly have a significant impact on consumers across the country – namely, in higher shipping costs.

Will the court decision be overturned?

There is a possibility, and probably a likelihood, that FedEx will file a writ of certiorari requesting review by the U. S. Supreme Court. However the US Supreme Court has discretion to accept or reject appeals. So even if a petition is filed, there is no guarantee that the Supreme Court will review the case.

If Obama is succeeded by a Republican in 2017, we may see a backslide in the US Department of Labor’s enforcement. The next president can effect change through new appointments, policy and legislative changes. But the court's decision cannot be altered solely by a change in the White House.

What you should do

Fed Ex is learning an expensive lesson. The takeaway is clear — do your homework now and review the relationships which you are treating as independent contractors. Take steps to audit your current practices to ensure that your contractors are truly independent. Employing sound risk management practices on the front end is crucial to avoiding potentially costly misclassification lawsuits down the road.

Defining "independent" contractors

Gordon Bethune is the man who turned around Continental airlines in the mid-90s. He turned loss into profit with the same people and the same airplanes. “So it wasn’t anything wrong with the employees: it was the management and it always is.” When Bethune was at Continental, he practiced MBWA (management by walking around). He visited employees in the crew room, the break room the baggage room and the aircraft cockpit. His purpose was simply to say hello and thank you. On the high stress days of Thanksgiving and Christmas, Bethune went to an airport and loaded bags, worked behind the counter, and greeted customers. “You can’t imagine how much good-will that you earn when your team knows that you’re willing to give up your holiday because you are asking them to give up theirs.”

Warehousing Tips

“You can’t outsource employee relations

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Labor board rules in Browning-Ferris case

The NLRB published a decision during the last week of August that will affect logistics service providers. An employer and a third party temporary employment/labor service company may now be considered joint employers of a single workforce for the purpose of collective bargaining. The suit against Browning-Ferris was filed by the Teamsters Union. The New York Times on 29 August observed that the ruling "could significantly change the relationship between companies and their subcontractors....The decision could threaten the business model of staffing agencies and other firms that provide their customers with temporary workers."

Mark Ford, an attorney close to this case says "as an employer, you have just heard the other shoe drop."
There are no easy answers to the shortage of people to fill certain occupations such as truck driving. It is easier to say what won’t work than what will.

Saying farewell

In some organizations, a person who leaves the company suddenly ceases to exist. Perhaps the departure is an embarrassment, or occasionally it may be a disciplinary termination. Regardless of the circumstances, there is something to be said for providing an opportunity to say farewell. Tourists in post-Soviet Russia will note the scarcity of any photos or other references to Karl Marx or Vladimir Lenin. It seems that many in the Russian scene found it prudent to erase any traces of the individuals who created the Soviet system. As a tourist several years ago, a guide apologized to me while showing a tourist site in Siberia that still had statues of these two men. She expressed shame at the fact that the images of these two had not been removed. Marx and Lenin played an important part in world history, and there is no reason why they should be completely forgotten. Recognition does not imply approval.

On a much smaller scale, when someone leaves your warehousing organization, do you always provide the opportunity for that person to say farewell? There can be times when the process could be awkward, but in most cases it provides a closure which is healthy for everyone in the organization.

Can you pay temporary workers on a piece work basis?

Consultant Steve Mulaik makes the case for paying temporary workers on a per unit basis rather than an hourly rate. We agree, but it is important to note the dangers of a rate that is either too high or too low. If it is too low, a worker who is devoting extraordinary effort will end up without being fairly compensated. If the rate is too high, the worker may go at half speed and still be very well-paid. If your staffing supplier offers per-unit rates, recognize that a great deal of engineering is required to be sure that the per-unit fee is neither too high nor too low.

Convergence: Is it déjà vu all over again?

We are amused by several essays about dissolving the silos between carriers, warehouse operators and freight brokers. There was a time, long before the development of supply chain management, when freight companies did a little bit of everything. The first company I worked in was founded early in the last century as a “truck and storage company” in a small town. Its services included household goods storage, trucking, industrial warehousing, customs bonded storage and cold storage. Convergence was not an issue, because a small company in a small town had to be a generalist in order to survive.
CILT and the driver shortage

Chartered Institute of Logistics & Transport is the British equivalent of CSCMP. This article reports the proceedings of a task force convened to address the shortage of truck drivers. 74% of respondents indicated that they are experiencing a current driver shortage, and 80% believe that it is private industry that must find a solution. Improvement in pay and improvement of the industry image are the most widely mentioned things that industry can do to attract new drivers. Some firms are using advertisements in foreign languages to attract immigrants. The task force that was convened was the first, and we anticipate news as additional meetings are held in Britain.

Partnering with an energy services company for energy use management

The author is founder of Cambridge Engineering Inc. This article points out that an experienced energy services company can identify true owning cost and potential ways to save with existing heating, ventilating and lighting systems. At the same time, the firm can identify grants and rebates available from municipalities and utilities that reward users for improving energy usage. Kramer suggests that studying the present system is best done before it breaks down and forces the owner to make a quick decision.

Technology to regulate blunt force object

While many motorists think of the 18 wheeler as a blunt force object, the newest rigs are essentially computers with steering wheels. The regulatory body is FMCSA (Federal Motor Carrier Safety Administration). The trucking industry is largely self-regulating when it comes to safety. Accidents are bad for business, and no carrier wants a bad safety record. Carriers complain that FMCSA is driven by politics, since the agency is accountable to Congress.

Logistics Academy opens in Liverpool
*Logistics & Transport Focus*, August 2015, pg. 5.

We have noted that the UK is taking steps to deal with the talent shortage in the logistics field. Most recently, the city of Liverpool has sponsored a training school to help students acquire the skills they need to pursue a career in logistics. The city of Liverpool College is working with a training firm, Transline Group and three major employers. With the development of Liverpool as a super-port, experts predict thousands of new jobs.

7 ways to optimize an existing WMS

Here are the seven different ways:
- Use the WMS as an analytics tool to predict future volumes.
- Support the omni-channel trend.
- Adapt the WMS as a mobile information tool.
- Use the WMS for directed put away and replenishment.
- Use the system to enhance warehouse automation, such as robotics.
- Use WMS for better workforce optimization. The system can make warehouse work more attractive in a tight labor market.
- If you have a labor management system (LMS), fold the two systems together.

3PLs can deliver big benefits to small companies

The author is a vice president of a logistics service provider. He describes ways in which small businesses can bring in a service provider to act as shipping manager. This can mean the management of freight claims, insurance, and even rate negotiation. E-commerce has fundamentally changed and expanded the number of customers small businesses can reach. However, many smaller companies lack the resources to provide the kind of service offered by retail giants such as Walmart and Amazon. The logistic service provider can fill this gap.

A peek into Goodyear’s ergonomic sandbox

The company has a demonstration materials handling area in Fayetteville, NC. There are few, if any, widely used consumer products that have as little mechanization of handling as passenger tires. Even today, most are moved by hand, one tire at a time. The main goal of the experimental facility is to reduce ergonomic incidents. Little detail is provided about the techniques that are used.

Goods-to-person automation: the basics
By Mark Dickinson, *Supply Chain Brain*, August 2015, pg. 27.

Conventional picking systems produce 60 to 100 lines per hour, but a goods to person system can support picking of 500 to 600 lines. The systems eliminate the need to travel up and down aisles. The author predicts that these systems will be particularly suited for e-commerce fulfillment. The carousel is perhaps the oldest technology, and there are several newer variations.