Managing Risk
in the Moving &
Storage Industry

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The Dispatch

MOVER'S CHOICE BRIEFINGS

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Division of Specialty Program Group, LLC

The Risks of Misclassifying Independent Contractors

The moving and storage industry has long depended on truck owner-operators who work as independent contractors. Since the economic fallout of the great recession, more and more moving and storage companies have replaced their traditional, local employees with independent, self-employed workers.

The routine use of independent contractors is common in many industries, but the practice can prove to be a minefield of liabilities. Independent contractor (IC) misclassification is a significant source of lawsuits and insurance claims for industries that depend on independent contractors—including the moving and storage industry.

Who is an independent contractor, and what is IC Misclassification?

In general, an independent contractor is someone who provides services to other businesses on his or her own terms. In the transportation industry, the business is typically a motor carrier. The motor carrier determines the service to be performed while the IC determines how and when the work will be performed.

IC misclassification is when, intentionally or in good faith, motor carriers classify workers as independent contractors when the worker should be classified as an employee. For a worker to qualify as an independent contractor, the contractor needs to meet the 20 criteria set forth by the Department of Labor and there needs to be a valid contract for services between the IC and the business. The contract should clearly address the three primary categories necessary for the IC to be considered independent from the motor carrier: behavioral, financial and type of relationship.

For example, the motor carrier may be deemed to be exercising behavioral control over the IC if the motor carrier stipulates how work should be completed or how long it takes. Furthermore, if a motor carrier requires an IC to participate in the motor carrier's regular safety meetings, this practice could be construed as control over IC as to how the motor carrier wishes the work to be performed.

As respects financial control, the IC must have the ability to make a profit or incur a loss. This is typically evidenced by the IC's

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ownership of their own equipment versus the IC leasing equipment owned by the motor carrier.

Finally, in terms of the "type of relationship," the permanency of the relationship is very important. Does the motor carrier expect the IC to provide services exclusively to their company, or does the IC have the option and capability to work for other motor carriers?

If the IC cannot meet all of these tests for determining independent contractor status, the likelihood of misclassification arises. Transportation attorneys strongly recommend that motor carriers avoid converting existing or previous employees to independent contractors. Doing so has proven to be a red flag to the regulatory bodies that govern the use and classification of independent contractors.

What kind of insurance claims stem from a misclassified worker?

Most IC claims are related to work injury or workers' compensation (WC) coverage. The IC attempts to challenge his relationship with the motor carrier, alleging that he is actually an employee, in order to collect work injury benefits that he might not have had as an IC.

For example, a motor carrier contracts with an IC. The motor carrier does not require the IC to provide evidence of WC because the IC is either exempt

(as a sole proprietor) or has elected to be excluded on his own WC policy as a corporate officer, partner or managing member. The IC then suffers a serious injury while performing services under dispatch of the motor carrier. Due to the seriousness of the injury, and the fact that the IC had no insurance coverage of his own, he attempts to file a claim against the motor carrier's WC policy in order to cover medical bills and expenses. The claim alleges that IC is really an employee because he worked exclusively for the motor carrier and the motor carrier told him where to deliver and when. Plus, the IC was actually leasing a truck from the motor carrier in order to perform the stipulated services set forth in the contract and once the contract is terminated, the vehicle must be surrendered.

If the IC's challenge is successful, the door is opened to workers' compensation benefits afforded by the motor carrier's policy. Further, this is typically where litigation ensues and the IC, now an employee, files to collect back wages and other employment benefits. The motor carrier may then be liable for state or federal payroll taxes, often retroactively.

How do we know IC misclassification is a problem?

Since 2010, the IRS has cracked down on employers who have allegedly misclassified independent contractors. There have been audits of over 6,000 randomly targeted businesses nationwide, and the DOL has been targeting the transportation industry via its "Misclassification Initiative" to collect allegedly unpaid payroll taxes as well as assessing heavy fines when they determine there has been intentional misclassification. According to the California Moving and Storage Association, a mere three percent of determinations submitted to the IRS actually showed workers were independent contractors and not employees. This is a staggering and sobering statistic.

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In 2014, the Department of Labor (DOL) collected roughly $250 million in back wages from employers on behalf of over 270,000 workers. Moving forward, they expect to collect over $7 billion in the next several years by strategically targeting industries such as transportation (including moving and storage businesses) due to their history of misclassifying workers.

The moving and storage industry in California is a huge target for the Department of Labor, and the IRS, in relation to IC misclassification. Employers in California are regulated by the most complex wage & hour laws in the country, meaning costly penalties for violations. California continues to be the number one forum for all employment law class/collective actions, representing one third of all nationwide filings that have lead to significant wage & hour class and collective actions litigation.

How do companies protect themselves against IC Misclassification?

Understanding contracts, as well as the most common mistakes made by employers, are the first steps in preventing law suits related to misclassification. Here are other important recommendations:

- Review the IRS and DOL guidelines for determining an independent contractor status. For specific information visit http://bit.ly/IndieContractor.
- Consult with your accountant, transportation attorney and/or insurance broker to ensure you are classifying workers correctly.
- Regularly review your Independent contractor agreements to ensure that they are up to date and in regulatory compliance.
- An IC, who carries the proper insurance coverage in his/her own name, is considered to have required portability in order to work for other motor carriers.

Even if a motor carrier believes their workers are properly classified, defending a misclassification allegation can be extremely costly. Defense coverage can be purchased through some Employment Practices Liability policies (with wage & hour protection), as well as some Directors & Officers liability policies.

With increased scrutiny from the DOL, IRS and state agencies, moving and storage companies cannot afford to ignore this problem.

Additional resources:

- Guide to using independent contractors: http://www.moverschoiceinfo.com/BrokerResources/IndependentContractorsGuide.pdf
- Independent Contractor (Self-Employed) or Employee? https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee

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