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**US DOL Issues Opinion Letter Addressing Independent Contractors Setting Standards  
Determining Contractors Status**

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On January 19, 2021, the U.S. Department of Labor, Wage and Hour Division (“DOL”), issued Opinion Letter FLSA2021-9, directly addressing independent contractors and owner-operators under the newly issued rule published on January 7, 2021 (effective March 8, 2021) setting forth the standard for determining independent contractor status. In the Opinion Letter, the DOL addressed two questions: (1) whether requiring tractor-trailer drivers to implement safety measures that are required by law constitutes control by the carrier for purposes of determining whether the drivers are independent contractors or employees, and (2) whether, based on the factual scenario provided, owner-operators are properly classified as independent contractors.

With regard to the question (1), the DOL noted that carriers are responsible for ensuring driver compliance with the FMCSARs and that the Federal Truth-in-Leasing regulations also “prescribe conditions under which drivers may lease trucks and provide services to a carrier, requiring the carrier to assume responsibility for the operation of the equipment. These regulations impose safety requirements for the operation of trucks for which both the driver and carrier are responsible.” The DOL was then presented with four (4) scenarios:

- Carrier requires drivers to install and use a video-based onboard safety system with the carrier paying for same;
- Carrier requires drivers to install an onboard safety monitoring system that monitors sensor and engine data with the carrier paying for same;
- Carrier requires driver to install and use a GPS-based speed limiter with the driver paying for same; and
- Carrier has mandatory monthly safety meetings and quarterly reviews and requires successful completion by driver of a quarterly online safe-driving course at the carrier’s expense.

The DOL stated, for the limited scenarios provided above, that “insisting on adherence to certain rules to which the worker is already legally bound’ says nothing about whether the worker is an employee or independent contractor.” As such, because Congress and federal regulators have placed these responsibilities on carriers for their contractors, unlike other industries, each of the scenarios presented “do not suggest control indicative of employee status.”

In reference to the question (2) presented, there was again a limited set of facts presented to the DOL. Specifically, the DOL was asked whether owner-operators were employees under the FLSA in the following circumstances:

- Employee drivers are provided all equipment by provider and are reimbursed for expenses. Owner-operators are required to furnish their own tractors and are not reimbursed for expenses, while also being responsible for insurance, capital investments and all other costs related to the tractor.
- Employee drivers shifts, hours worked, rates of pay, paid time-off requests, and the duration and location of home time are determined by the provider. Owner-operators choose the jobs they wish to work through an online portal (i.e. can choose whether to work for multiple providers or not at all).
- Employee drivers must ship the freight selected by the provider and follow the route the provider determines. Owner-operators can select which freight they would like to ship through the aforementioned online portal and choose their own routes. Further, the owner-operators may assign jobs to their employee drivers.
- Employee drivers must drive tractors with the provider's name on them, comply with a dress code, and attend ongoing training and meetings regarding the provider's policies and procedures. Owner-operators do not.
- Owner-operators sign a one-year contract with no automatic renewal, and the contracts may be terminated by either party upon fifteen (15) days' written notice or immediately, for cause.
- Provider ensures both employees and owner-operators comply with safety regulations.

Based on these facts, the DOL hedged and concluded the owner-operators were likely independent contractors. Notably, the DOL said the indicia of control was lacking as owner-operators had full control of their schedules and could work for competitors. The opportunity for profit or loss also pointed toward independent contractor status as owner-operators determined what freights to select, whom to hire, how to insure their trucks, and what type of capital investments to make. Finally, for the secondary factors, the DOL found that the skill required (i.e. having a commercial driver's license and no training by the provider), the sporadic nature of the work, and that owner-operators were segregable from the employer's production business as the company also provided logistics, were indicative of independent contractor status. However, the DOL did acknowledge the transportation aspect was identical to the providers. With that said, the DOL stated they did not have to weigh this factor as the two primary factors suggested independent contractor status.

While there clearly are still more developments to take place (including whether the new Democratic administration will allow the underlying rule to go into effect), this guidance from the DOL can certainly be considered welcome news for the trucking and logistics industry. Please note though, that DOL guidance is not binding on the courts, and some states, like New Jersey, Massachusetts, and California, have stricter requirements for determining independent contractor statuses.

If you have any questions or require any additional information, please not hesitate to reach out to any member of Becker's Trucking and Logistics' Group.



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