State Back-To-Work Orders and The Impact of Covid-19 Policies and Safety Precautions on Worker Classification: *How Much Is Too Much When It Comes To Owner-Operators?*

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The economy and a majority of businesses are experiencing dire economic consequences as the result of COVID-19. In response, states are beginning to explore reopening and back-to-work options and procedures. In most instances, this is nothing new to those in the transportation and logistics industries, who have been operating as essential critical infrastructure businesses throughout the pandemic. At the same time, COVID-19 wrongful death litigation has already begun, with allegations of negligence and liability assigned to business owners providing essential services.[1] With these developments, business owners are devising and implementing policies and procedures to protect workers – and protect against liability. This presents another issue not unique to, but certainly prominent in, the transportation and logistics industries. How do business owners enforce COVID-19 policies and procedures without threatening the independent contractor classification of some workers?

The issue is becoming more complex, as different states enact varying legislation and regulations speaking to worker classification. The majority of states utilize multi-factor tests, with varied criteria, to be applied on a case-by-case basis. Whereas some states have tried to simplify matters by reducing the number of factors to be considered (*e.g.*, the ABC Test[2]), litigation and ensuing injunctive relief preempting enforcement have called into question whether a streamlined classification process is even possible. Thus, it is becoming apparent that classification of workers as independent contractors or employees will depend on a fact-intensive investigation, with varying results from operation to operation.

Most factors and criteria being considered take into account, to one degree or another, the concept of right to control. For instance, the U.S. Department of Labor, for one of the factors comprising its test, considers the nature and degree of control by the principal. Likewise, the IRS looks at 11 factors, within three areas, two of which are primarily concerned with control over the worker and control over aspects of the worker's job. Some states utilize similar tests or implement their own, depending on the issues presented (*i.e.*, vicarious liability, worker's compensation claims, etc.).

In light of the COVID-19 pandemic, business owners are faced with implementing policies and procedures to satisfy laws, orders, and regulations, as well as avoid claims for wrongful death and personal injury, among other things. With respect to an independent contractor working as an owner-operator in the transportation industry, both at and away from a carrier's facilities, each policy or procedure creates the potential for an inference of control by the carrier and ensuing misclassification claims. As inferences of right-to-control mount, it becomes more likely independent contractors may be classified as employees.

It comes to workers in the work place, most states and the federal government, to one extent or another, have implemented social distancing and mitigation requirements in response to COVID-19. Many rely upon guidance from the CDC as a platform for developing mandatory policies and procedures affecting various aspects of a carrier's business. With respect to a carrier's owner-operators, that business entails contact with surfaces and persons, any of whom could be a potential source of COVID-19 exposure for the owner-operator. At the same time, customers expect some degree of caution, as well as established (and enforced) policies and procedures to protect their own operations and employees from exposure to an infected owner-operator.

In the cab, a carrier's owner-operators are relatively insulated and safe from the threat of contagion. Driving a truck, however, by its very nature exposes drivers to shipper facilities and personnel, roadside stops and fueling points, and the consignee's facilities and personnel. It begs the question, therefore, how does a carrier uphold the safety and wellbeing of its owner-operators, customers, and the carrier's business itself, without being exposed to worker misclassification claims. In the same token, what steps can or should a carrier take to protect against claims while preserving the independent contractor relationship with its owner-operators?

As a result of these diverse and plentiful expectations, Carriers are pressured into exercising some modicum of control over owner-operators to ensure compliance with safety precautions and guidelines. As these precautions and guidelines become

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more prominent and invasive, carriers enforcing them run the very real risk of triggering a number of control-related factors, considered by regulatory agencies and courts in determining driver classification. Depending on the state involved, it may not take much in the way of control to serve as a triggering event.

Thankfully, most state policies and procedures, put in place to protect individuals and the general public from exposure to COVID-19, have taken the form of mandates and executive orders. Thus, there is little question that businesses, including carriers, operating in the age of COVID-19 are subject to the safety requirements contained therein. The more these requirements are included in executive orders and state codes, the easier it is for carriers to focus more on ***compliance*** with laws and less on control over owner-operators.

Federal and state guidance and regulations are helpful in this respect, because ensuring compliance with regulatory and safety requirements is typically ***not*** evidence of a carrier's right to control its owner-operators.[4] Federal law has long required compliance by owner-operators with a plethora of safety regulations, and development of state safety regulations, premised upon federal guidelines from the CDC and U.S. Department of Homeland Security, could be seen as an extension of this premise. Continued focus on compliance should be apparent in carrier policies and safety guidelines to minimize the perception of control.

So how does a carrier safely and effectively enforce rules without exercising too much control? Several trends are emerging, most of which start with a carrier revisiting its lease agreements with owner operators. Some suggestions include:

1. Revisit the underlying lease agreement. Does it clearly require an owner-operator's compliance with all applicable laws, rules, regulations, and orders. Most lease agreements contain general references to compliance, but circumstances today warrant a more robust compliance provision.
2. Ensure that the lease agreement clearly identifies the nature of the relationship between carrier and owner-operator and identify as many aspects of the driver's work as possible that remain within the driver's sole discretion and control. Linking the owner-operator's financial success to these aspects also supports an independent contractor relationship.
3. Consider an addendum and terminal posters outlining CDC-imposed and state-adopted guidelines and requirements. Some states, like Illinois, require worksite postings as it is, so adhering to this suggestion may be a matter of necessity rather than an option.
4. Reference one of several 50-state surveys outlining COVID-19 guidelines, requirements and restrictions for the states in or through which an owner-operator will travel and include it with the driver's packet for each shipment. Educate owner-operators on accessing these resources and determining applicability, depending on the jurisdictions the owner-operators choose to traverse.
5. Make available, free of charge, sanitizing products and facemasks. Clarify to owner-operators they are free to utilize their own equipment and sanitizing products.
6. Request that shippers provide written guidance for on-site operations and required conduct of shipper personnel and visitors, as well as similar guidance for facilities and personnel of the consignee.

The foregoing list is by no means exhaustive, and transportation attorneys would do well to consult with each of their respective clients to determine appropriate steps to protect against the claims contemplated herein. With sufficient planning and coordination, carriers can reduce risks associated with worker misclassification claims, as well as claims arising from COVID-19 exposure and illnesses, all while fostering a safe and healthy work environment.

Endnotes

[1] Law makers at both the federal and state levels are beginning to weigh whether some sort of immunity for hiring entities is appropriate, where distancing and mitigation requirements are followed, but a worker still contracts COVID-19. In addition, states, like Illinois, are grappling with issues surrounding worker's compensation claims stemming from COVID-19, not the least of which is determining where the claimant contracted the virus.

[2] The ABC Test has been the subject of extensive review, analysis, and litigation. This test presumes workers are employees, unless the business owner can prove:
(a) The worker is free from control and direction in the performance of services;
(b) The worker is performing work outside the usual course of the business of the hiring company; and
(c) The worker is customarily engaged in an independently established trade, occupation, or business.
The second of these criteria, commonly referred to as the "b-prong," is impossible to satisfy for transportation companies utilizing owner-operators, since owner-operators perform work germane to a business owner's usual course of business. Under these circumstances, owner-operators become employees, instead of independent contractors. The exclusionary nature of this version of the ABC Test and its strict b-prong have given rise to claims of preemption under the Federal Aviation Administration Authorization Act, which claims have led to injunctive relief precluding enforcement of the test. *See, California Trucking Ass'n v. Becerra,* 2020 U.S. Dist. LEXIS 7707, 2020 WL 248993 (S.D. Cal. Jan. 16, 2020).

[3] In Ohio, for instance, businesses are required to, among other things, "Comply with all applicable guidance from the U.S. Centers for Disease Control and Prevention ["CDC"] and the Ohio Department of Health regarding social distancing." Ohio also implemented sector-specific COVID-19 requirements for various industries, including those involved with manufacturing, distribution, and construction. Illinois, in addition to imposing requirements governing social distancing and mitigation, like the mandatory use of face coverings, ordered all businesses to post guidance on workplace safety during the COVID-19 emergency.

[4] *See, e.g., Reed v. Indus. Comm'n.,* 534 P.2d 1090 (Ariz. App. 1975) (government regulations imposed on carriers who, in turn, enforce them as to owner-operators is not evidence of carriers' control); *Sida of Hawaii, Inc. v. NLRB,* 512 F.2d 354, 359 (9th Cir. 1975) ("fact that a putative employer incorporates into its regulations controls required by a government agency does not establish an employer-employee relationship."); *Pouliot v. Paul Arpin Van Lines, Inc.,* 292 F. Supp. 2d 374, 383 (D. Conn. 2003) (leasing regulations have no impact on the type of worker relationship existing between a carrier and its owner-operators); *Tamez v. S.W. Motor Transp., Inc.,* 155 S.W.2d 564, 573 (Tex. Civ. App. 2004) (existence of a lease does not affect the relationship between an owner-operator and carrier); *Hernandez v. Triple Ell Transp., Inc.,* 175 P.3d 199, 205 (Idaho 2007) (adherence to law was not evidence of a carrier's control over an owner-operator); *Wilkinson v. Palmetto State Transp. Co.,* 676 S.E.2d 700, 705 (S.C. 2009), *cert. denied,* 130 S. Ct. 741 (2009) (federal regulation "is not intended to affect" the independent contractor determination under state law).