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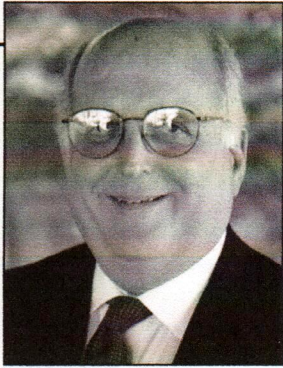


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# A Proposal to Solve the INDEPENDENT CONTRACTOR/EMPLOYEE CLASSIFICATION PROBLEM IN THE TRUCKING INDUSTRY



—David Popowski\*—

The issue of whether a truck driver that owns or leases his or her tractor is an employee or independent contractor has plagued the trucking industry since I began my career in logistics law as an Interstate Commerce Commission attorney in 1975. It has been litigated before the National Labor Relations Board, Internal Revenue Service, federal courts, state courts, state unemployment agencies, state workers compensation commissions, et al. The debate has intensified in the last few years, most prominently in two cases: (1) *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (9<sup>th</sup> Cir. 2014); and (2) *Slayman v. FedEx Ground Package System, Inc.*, 765 F.3d 1033 (9<sup>th</sup> Cir. 2014).<sup>1</sup> There, in companion cases, the Ninth Circuit engaged in a time-honored analysis and found the drivers were employees and not independent contractors noting (*Alexander, supra* 765 F.3d at 984; and *Slayman, supra*, 765 F.3d at 1037):

The drivers must wear FedEx uniforms, drive FedEx-approved vehicles and groom themselves according to FedEx's appearance standards. FedEx tells its drivers what packages to deliver, on what days and

at what times. Although drivers may operate multiple delivery routes and hire third parties to help perform their work, they may do so only with FedEx's consent.

Time has come to broadly and definitively resolve this time-consuming and costly issue.

I shall borrow from statutes of my own state of South Carolina to propose a national solution that is solely grounded on the non-motor carrier independent contractor bearing the financial risk for the tractor by ownership or lease.

The South Carolina Workers' Compensation Law, 42-1-10 *et seq.* Code of Laws of South Carolina (1976 As Amended), defines an independent contractor in the trucking industry as follows:

**SECTION 42-1-360.** Exemption of casual employees and certain other employments from Title.

This title does not apply to:

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(9) an individual who owns or holds under a bona fide lease-purchase or installment-purchase agreement a tractor trailer, tractor, or other vehicle, referred to as "vehicle", and who, under a valid independent contractor contract provides that vehicle and the individual's services as a driver to a motor carrier. For purposes of this item, any lease-purchase or

installment-purchase of the vehicle may not be between the individual and the motor carrier referenced in this title, but it may be between the individual and an affiliate, subsidiary, or related entity or person of the motor carrier, or any other lessor or seller. Where the lease-purchase or installment-purchase is between the individual and an affiliate, subsidiary, or related entity or person of the motor carrier, or any other lessor or seller, the vehicle acquisition or financing transaction must be on terms equal to terms available in customary and usual retail transactions generally available in the State. This individual is considered an independent contractor and not an employee of the motor carrier under this title. The individual and the motor carrier to whom the individual contracts or leases the vehicle mutually may agree that the individual or workers, or both, is covered under the motor carrier's workers' compensation policy or authorized self-insurance if the individual agrees to pay the contract amounts requested by the motor carrier. Under any such agreement, the independent contractor or workers, or both, must be considered an employee of the motor carrier only for the purposes

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of this title and for no other purposes.

The South Carolina Department of Employment and Workforce, 4-27-10, Code of Laws of South Carolina (1976 As Amended), the unemployment statutes, has a more compressed definition:

**SECTION 41-27-260. Exempted employment.**

The term "employment" as used in Chapters 27 through 41 of this title does not include:

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(19) An individual or entity who owns, or holds under a bona fide lease purchase or installment-purchase agreement, a tractor trailer, tractor, or other vehicle and who, under a valid independent contractor contract provides services as a driver of the tractor trailer, tractor, or other vehicle to a motor carrier.

Drawing on those definitions, I propose the following federal statute that will override all Federal statutes, regulations and court decisions, and pre-empt all such State laws:

49 U.S.C § 13102 shall be amended to add to the following with the subsequent provisions in that section to be re-numbered:

(15) **Motor carrier independent contractor.** The term "motor carrier independent contractor" means a person, other than a motor carrier, transporting property by commercial motor vehicle (as defined in section 31132) that is the registered owner or is the lessee of a motor vehicle and contracts with a motor carrier pursuant to 49 U.S.C §14102. **Leased motor vehicles**, to provide transportation for compensation.

The common factors employed to distinguish independent contractors from employees, such as whether the independent contractor wears a uniform, is subject to the motor carrier's employee or service handbooks, cannot refuse a load, etc., will no longer be relevant. The test will be simple – if the person or entity has custody and control of the tractor by bona fide ownership or lease then he or she is an independent contractor and not an employee. The inquiry begins and ends there.

I understand that my proposal is only a starting point for discussion, but my goal is to begin the conversation. The trucking industry needs to finally dispatch this issue to its archives. I welcome your comments. I will also be contacting my congressman and senators to begin the education process and urge you to do the same. 

**Endnote**

1. Petitions for rehearing and rehearing en banc were denied on October 20, 2014, and no appeal has been taken to the United States Supreme Court.