



The InterConnect FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

FLASH NO. 11 A HYBRID “APPROACH” TO THE IC MODEL

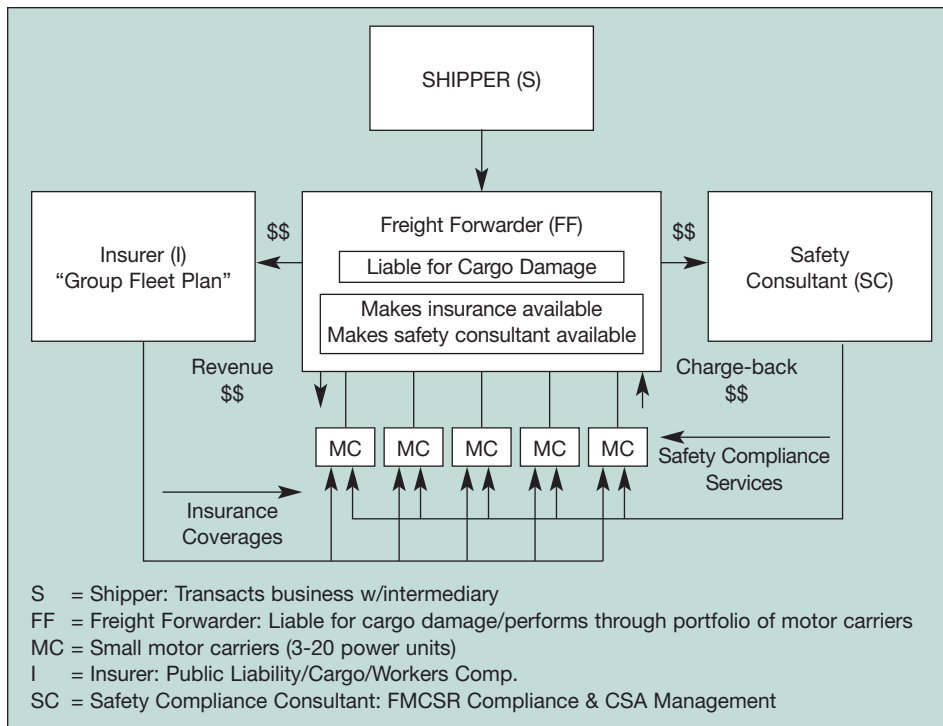


Figure 1

With the price of gasoline and diesel approaching \$4.00 a gallon, innovative solutions and hybrids are gaining ever increasing momentum. The purpose for a hybrid approach is to reduce or avoid exposure to increased costs and other volatilities and still effectively operate a vehicle. In the same vein, there is activity going on with “hybrids” in the area of independent contractor operating arrangements. This *FLASH* is one of a two part series that will present two types of hybrids that we are seeing in the market place as they relate to independent contractors. The first is the

Freight Forwarder Model and the second is the Transportation Agent Model. At this juncture we are not certain whether either of these is truly an emerging trend or whether one or the other will gain any significant market acceptance.

The Freight Forwarder Model is a hybrid in the sense that it is analogous to two separate situations: a property broker with respect to the shipper/transportation service provider relationship, and a motor carrier using independent contractor owner-operators to do the actual transport of the cargo under the Federal Leasing Regs. From a shipper’s

perspective, the relationship appears straight forward and the primary decision for the shipper is whether it prefers to operate through an intermediary like a freight forwarder or directly with an asset-based motor carrier.

In the Freight Forwarder Model, the transportation service provider is attempting to satisfy the needs of a shipper while removing itself from certain responsibilities related to public liability insurance, CSA compliance and measurements, and workers’ compensation insurance coverage. The freight forwarder creates “more distance” between itself and the actual operating functions so as to better insulate itself from worker classification (employee/independent contractor) related issues.

Neither a freight forwarder nor a property broker actually haul any cargo. A property broker merely “arranges for” the transportation of shipments by motor carrier with little or no other strings attached. A freight forwarder, on the other hand, is required to (i) assemble and/or consolidate shipments; (ii) perform, or provide, break bulk and distribution operations; and (iii) use federally licensed motor carriers for the transportation function with respect to such shipments. The big difference from a shipper’s prospective is that the freight forwarder is liable to the shipper for cargo loss or damage as a matter of law as opposed to a broker who is generally not liable for cargo loss or damage, unless the property broker

affirmatively accepts that responsibility in a contract with the shipper.

As indicated in Figure 1, the Freight Forwarder Model is more complicated and has several related “moving parts.” Typically, the freight forwarder contracts with a portfolio of motor carriers who are generally unaffiliated small fleet owners with three to twenty power units and their own US DOT operating authority. Like most small carriers, these small fleet owners struggle with respect to obtaining and maintaining adequate insurance coverages and complying with ever increasingly complex safety compliance regulations such as CSA. Thus, to assist the small fleet owner, the contract between the freight forwarder and the motor carrier is structured so that public liability and other insurances are available through the freight forwarder as well as the services of a safety consultant, allowing the small fleet owners to have access to a competent safety compliance resource. In exchange for these additional “features,” the cost of which are charged back to the motor carriers, the freight forwarder requires that the motor carrier be “dedicated” to the freight forwarder, tying the fleet owner to the services of the freight forwarder. This “tying arrangement” is the analogous hybrid aspect of an independent contract/owner-operator model, wherein the owner-operator provides a tractor, operates under the motor carrier’s operating authority, and has the opportunity to receive insurance coverages by or through the motor carrier.

At a glance, the Freight Forwarder Model seems attractive from a transportation service provider perspective since it can easily satisfy a shipper (provided that the shipper is comfortable with dealing with intermediaries) while the freight forwarder can relieve itself of public liability exposure and safety compliance functions. Also, the freight forwarder relieves itself of the direct expense of operating the power units and has more of a variable cost model (again much

like a motor carrier operating with independent contractors under the Federal Leasing Regs.). Arguably, the Freight Forwarder Model would establish greater insulation from liability for the risk of worker misclassification as opposed to the motor carrier operating with independent contractors under the Federal Leasing Regs.

As we regularly mention in this *FLASH* publication, the “devil is always in the detail.” Depending on how the actual “moving parts” are implemented between and among the freight forwarder, the portfolio small fleet owners, the insurer, and the safety consultant, the perceived benefits may or may not be all that a transportation service provider implementing this model may expect.

We unfortunately live in an environment in our industry where risk as to public liability exposure is never bullet proof, as evidence by the recent verdict upheld against CH Robinson. Thus, the details of the relationships between the freight forwarder and the portfolio of small fleet owners is extremely important. There is the real possibility that in the event of an action by an employee of a small fleet owner, whether in the context of worker compensation, discrimination, or other work place related causes of action, the freight forwarder may find itself as a “co-employer” with the small fleet owner. Finally, depending on the actual freedom of choice that the small fleet owners have with respect to accepting or rejecting the service offerings of the insurer or the safety consultant, the entire “house of cards” may come crumbling down. This is simply an overview to share an emerging model that we are seeing in the market place and for your general awareness. The model may indeed have merits and at the same time it may have shortcomings. In the event you have any interest in this approach we at Benesch can certainly assist in getting it right.

As a reminder, this Advisory is being sent to draw your attention to issues and is not to replace legal counseling.

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