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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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FLASH NO. 35
FOCUSING ON SOLUTIONS RATHER THAN THE PROBLEM

As we flip the page on the calendar to close out the year, the title of the recent editorial in the *Arkansas Trucking Report*, "Good Things Come to Those Who Change," really hit home. The editorial focused on the idea of planning to succeed by embracing regulatory changes affecting the trucking industry. Its conclusion was that the regulatory arena will likely produce changes, which in turn will change supply and demand but ultimately produce a more productive and profitable trucking industry for those who embrace these changes.

The same can be said with respect to the operations of transportation service providers using a variable cost structure to transport goods. When the words "variable cost structure" are used in the context of the trucking industry, we typically think of the traditional independent contractor/owner-operator operating model which, as we well know, has been under attack, both in litigation and legislation. Therefore, as we start looking at a new year, it may be useful to take a hard look at implementing solutions as opposed to dwelling on the problems associated with the attacks on the variable cost independent contractor model.

Earlier this year, we had a glimmer of hope from various lawsuits raising federal pre-emption under the Federal Aviation Administration Authorization Act ("FAAAA"), but that glimmer of hope, if it is not dwindling, will take a fair amount of time to resolve itself. In the *American Trucking Associations v. City of Los Angeles* litigation, the U.S. Supreme Court held that the FAAAA pre-empted the concession agreements governing the relationship between the Port of Los Angeles and trucking companies, which was welcomed as good news. However, just prior to that decision, the U.S. Supreme Court clarified in the *Dan's City Used Cars v. Pelkey* case that FAAAA does not pre-empt state law claims where a statute does not relate to "the movement of property." With that back drop, we have the *Massachusetts Delivery Association v. Coakley* matter on appeal from the District Court decision indicating that *Dan's City* provides the appropriate guidance when analyzing the "Prong B" of the Massachusetts Independent Contractor statute. Plus, there is the *Sanchez v. Lasership* case that ruled that the FAAAA **did** pre-empt the Massachusetts statute; however, in *Schwann v. FedEx Ground*, and *Martins v. 3PD*, the courts have said that the Massachusetts statute does not relate to the movement of property and FAAAA cannot pre-empt it. There also is the pending appeal in *Dilts v. Penske Logistics*, which is a California lunch and rest break, overtime payment compensation class action suit, where the focus is on the FAAAA pre-emption issue. Thus, the landscape would suggest that there will be no quick-fix with respect to the application of federal pre-emption as it applies to worker classification disputes under state law.

That being said, we also witnessed a flurry of independent contractor classification-related legislation this year in the states of New York and Connecticut, which adopted specific legislation and, of course, the state of New Jersey where the Governor used his power to veto

legislation which would significantly impact the drayage and the parcel segments. Other states have been reporting that while things may be quiet for the moment, there is unrest, and initiatives to be more aggressive in the worker classification arena under particular state laws, specifically in Minnesota, Missouri and Rhode Island, and Colorado, among other states, are working diligently to keep aggressive administrators at bay.

Thus, enough about the problem. As indicated, there are conflicting judicial decisions with respect to the scope of the application of FAAAA. That aside, we as an industry should not let legislators or jurists, who may have social or political agendas, dictate how transportation service providers will operate, particularly if the motor carriers are interested in operating with a variable cost model in many segments of the industry. Thus, it makes sense to focus more on solutions rather than the challenges and the problems. There are ways to effectively operate a variable cost model, which have been addressed in prior *FLASH* publications, and others that are worthy of considering. There are certainly the **Transportation Agent Model** and the **Freight Forwarder Model**, which have been previously presented and which remove two substantive obstacles from the motor carrier-owner-operator relationship: to wit, (1) positioning the driver and/or equipment resource in a trade or business which is different and distinct from motor carriers' trade or business, and (2) providing the independent contractor/owner-operator a viable ability to work for others. Recently, there has been more public discussion about the freight forwarder model (now sometimes being referred to as "2PL") and its applicability to various segments within the industry along with the advantages and potential disadvantages. Additionally, there are other proprietary approaches which we, and others in the marketplace, have provided to clients. One in particular that has emanated under the MAP 21 regulations involves the application of a property broker license in conjunction with motor carrier operation that does not disrupt the supply chain relationship between a shipper and the underlying motor carrier.

Legally-supportable solutions are available that, with some patience and persistence, and attention to detail, can be very effective, and, can, at the same time, provide a variable cost solution and be seamless with respect to customers. Therefore, with no litigation-based solution on the horizon regarding FAAAA pre-emption and the constant rumblings of state legislators, motor carriers that are serious about operating with a variable cost model should give serious consideration to addressing alternative hybrid approaches that would fit their segment and operational needs, rather than bemoan the current litigation and legislative landscape. The harsh reality is that if the Massachusetts and California appeals go the wrong way, they will deliver a very serious negative blow as to the usefulness of FAAAA pre-emption in the context of worker classification and everyone is back to ground zero in seeking solutions.

The Transportation & Logistics Group within Benesch regularly provides guidance and services, in an attorney-client privileged environment, to transportation service providers using the **Transportation Agent Model** (for use with resources providing both equipment and drivers, or merely drivers) or the **Freight Forwarder Model** (with different iterations for varying segments of the industry), in addition to the **application of the property broker license**, to effect positive change in a manner that is seamless to the customer, and thus, we are well positioned to serve as a resource going forward. As our friends in Arkansas have proffered, good things come to those who change, and a more productive and profitable trucking industry awaits those who embrace these changes.

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