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New York Law Could Impose Personal Liability for Misclassifying Drivers as Independent Contractors

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On January 10, 2014, New York enacted the Commercial Goods Transportation Industry Fair Play Act. The Act amends New York's labor law to create a presumption that operators of commercial motor vehicles (defined as vehicles in excess of 10,000 lbs under N.Y. Transportation Laws) are employees, unless the employer can demonstrate that the operator can satisfy either the "separate business entity test" or the "independent contractor test."

The "Separate Business Entity Test" requires the trucking company to demonstrate that the operator is a separate business entity (e.g., a corporation, partnership, LLC or sole proprietorship) and compliance with each of 11 factors: (1) the business entity is performing the service free from the direction or control over the means and manner of providing the service, subject only to the right of the commercial goods transportation contractor for whom the service is provided to specify the desired result or federal rule or regulation; (2) the business entity is not subject to cancellation or destruction upon severance of the relationship with the commercial goods transportation contractor; (3) the business entity has a substantial investment of capital in the business entity, including but not limited to ordinary tools and equipment; (4) the business entity owns or leases the capital goods and gains the profits and bears the losses of the business entity; (5) the business entity has an option to make its services available to the general public or the business community on a continuing basis; (6) the business entity includes services rendered on a federal income tax schedule as an independent business or profession; (7) the business entity performs services for the commercial goods transportation contractor pursuant to a written contract, under the business entity's name, specifying their relationship to be as independent contractors or separate business entities; (8) when the services being provided require a license or permit, the business entity pays for the license or permit in the business entity's name or, where permitted by law, pays

for reasonable use of the commercial goods transportation contractor's license or permit; (9) if necessary, the business entity hires its own employees, subject to applicable qualification requirements or federal or state laws, rules or regulations, pays the employees without reimbursement from the commercial good transportation contractor and reports the employees' income to the internal revenue service; (10) the commercial goods transportation contractor does not require that the business entity be represented as an employee of the commercial goods transportation contractor to its customers; and (11) the business entity has the right to perform similar services for others on whatever basis and whenever it chooses.

The "independent contractor test," is essentially the ABC test followed in a number of jurisdictions, which requires demonstrating that each of the following are satisfied: (a) the individual is free from control and direction in performing the job, both under his or her contract and in fact; (b) the service must be performed outside the usual course of business for which the service is performed; and (c) the individual is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue.

New York has not followed the ABC test, so it is unclear whether New York courts will broadly or narrowly interpret each of those factors.

One of the most important changes in the Act is the potential for personal civil and/or criminal liability of owners and managers of companies that improperly classify operators as independent contractors. While the Act does not authorize operators to bring lawsuits personally against trucking companies or their owners; operators who believe they are wrongly classified can file complaints with the N.Y. Department of Labor. If workers are deemed to be misclassified, civil penalties up to $1,500 for the first offense and up to $5,000 for any subsequent offense within 5 years can be imposed. If it is determined that the misclassification is willful, criminal penalties, including up to 30-days imprisonment, and a $25,000 fine for the first offense. Company officers, directors and shareholders who control at least 10% of the company stock also can be held personally liable if found to have knowingly permitted the company to misclassify employees.

Given the serious consequences for violating the new Act, New York companies should review their relationships with their operators and determine whether they are properly classified.