

Joe Morten & Son, Inc. / Great West Casualty Company

May 19, 2021 Webinar

INDEPENDENT CONTRACTORS UNDER ATTACK: WHAT SHOULD YOU DO?

Presented by Greg Feary

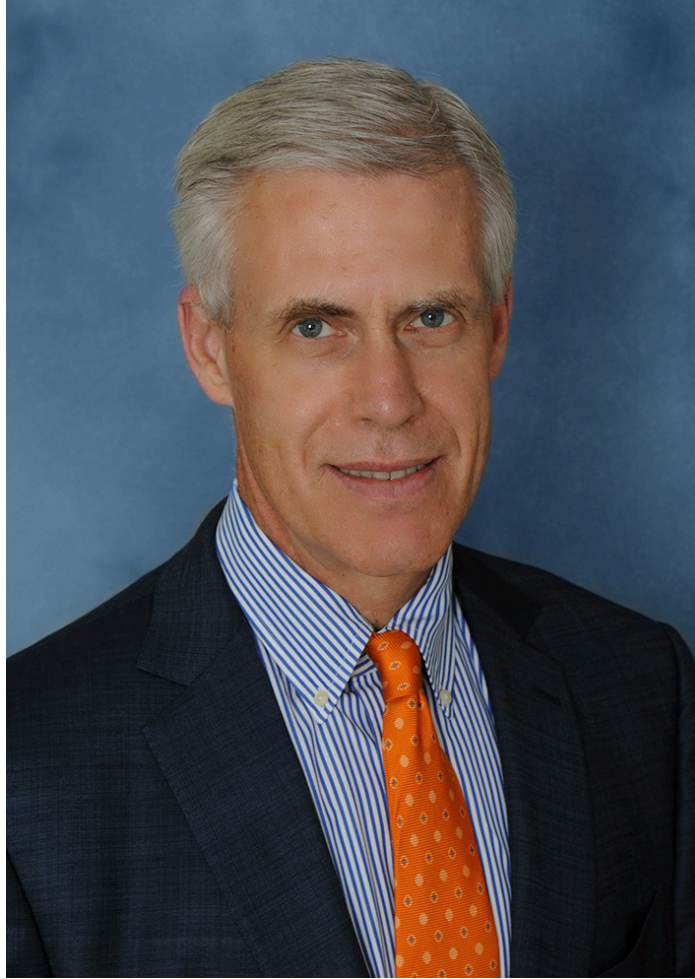
 **SCOPELITIS**
GARVIN LIGHT HANSON & FEARY

INDIANAPOLIS • CHICAGO • WASHINGTON, DC • LOS ANGELES
CHATTANOOGA • MILWAUKEE • DETROIT • SEATTLE
DALLAS/FT. WORTH • SALT LAKE CITY

Legal Disclaimer

The views and opinions expressed in this presentation are those of the speaker only and do not necessarily reflect the views and opinions of Joe Morten & Son, Inc. Further, this material is intended to be a broad overview of the subject matter and is provided for informational purposes only and is not intended to serve as legal or employment advice. Joe Morten & Son, Inc. does not provide legal or employment advice to its insureds, agents, or any other parties. Legal advice should always be sought from your legal counsel. Joe Morten & Son, Inc. shall have neither liability nor responsibility to any person or entity with respect to any loss, action or inaction alleged to be caused directly or indirectly as a result of the information contained in this presentation.

Speaker



Greg Feary

President & Managing Partner

317-492-9223

gfeary@scopelitis.com

FEDERAL DEVELOPMENTS

DOL Giveth and DOL Taketh Away

Determining IC Status under the FLSA

- ✓ Was to take effect on March 8, 2021
- ✓ Officially rescinded effective May 6, 2021
- ✓ Notable: Congressional Review Act was not used

DOL Giveth and DOL Taketh Away

Advisory Opinion on Use of Safety Technologies

- ✓ On January 19, pursuant to ATA request, DOL issued advisory opinion that safety measures are not evidence of control under the FLSA
- ✓ On January 26, DOL withdrew the advisory opinion as being issued prematurely based on the IC rule that was not yet in effect

DOL Giveth and DOL Taketh Away

Joint Employer Test under the FLSA

- ✓ New rule took effect on March 16, 2020
- ✓ In September 2020, federal district court struck down large parts of the joint employer rule; now on appeal to 2nd Circuit
- ✓ On March 11, issued a notice of proposed rulemaking to rescind the rule altogether; comment period ended April 12

Return of the Obama Era?

Prior DOL Joint Employer Interpretation (Jan. 2016)

- ✓ Advice memorandum from the Wage & Hour Division regarding joint employer status under FLSA
- ✓ Identifies “core question”
 - Whether the employee is economically dependent on the potential joint employer benefiting from the work
- ✓ Stated DOL intent
 - To shift FLSA liability upstream to “larger and more established [businesses], with a greater ability to implement policy or systematic changes to ensure compliance”

Return of the Obama Era?

Prior DOL IC Status Interpretation (July 2015)

- ✓ Advice memorandum from the Wage & Hour Division regarding IC status under FLSA
- ✓ Takes expansive view of “suffer or permit to work”
 - Focus on economic dependence
- ✓ Gives priority to whether work is integral to the hiring party’s business rather than on control
- ✓ “In sum, most workers are employees under the FLSA’s broad definitions”

Will Congress Come Bestowing Gifts?

The PRO Act

- ✓ Summary: A Christmas tree on which organized labor has hung many ornaments

- ✓ New definition of employee for purposes of the NLRA, implementing the AB 5 version of the ABC test
 - (A) individual free from control and direction;
 - (B) service performed outside the usual course of business of putative employer; and
 - (C) individual engaged in independent business

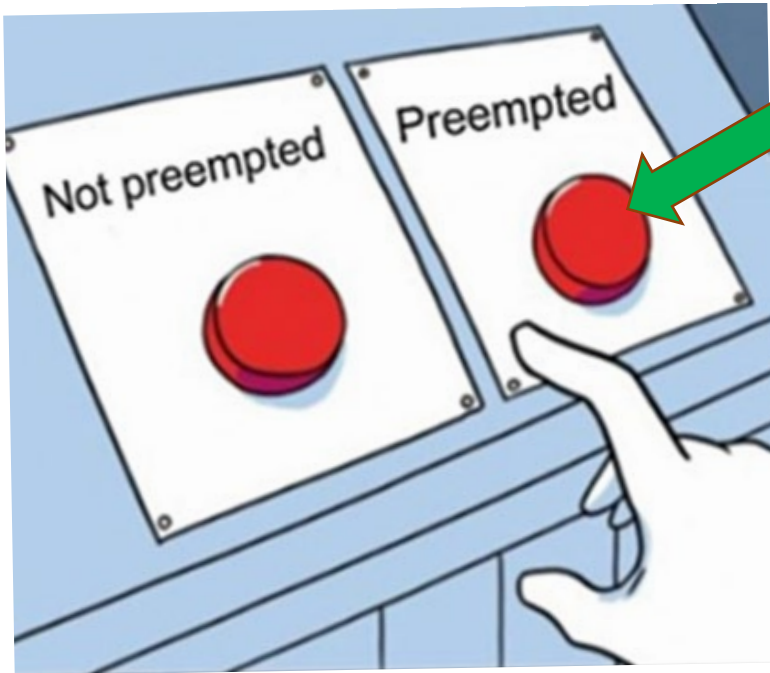
Will Congress Come Bestowing Gifts?

The PRO Act (cont.)

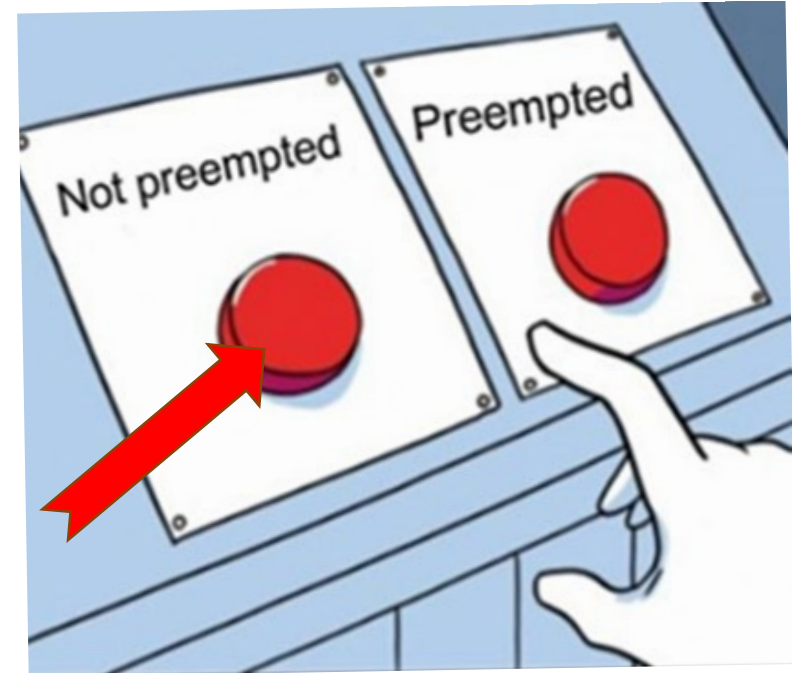
- ✓ President Biden has called on Congress to include the PRO Act as part of the infrastructure package
- ✓ Based on cosponsors, Democrats are still shy of 50 by 3 votes
- ✓ Will PRO Act provisions survive the Byrd rule if part of reconciliation?
- ✓ Will Democrats eliminate the filibuster?

CASE LAW UPDATE

Is AB-5 Preempted or Not?



CTA v. Becerra*



People v. Cal Cartage
Parada v. East Coast Transp.

CTA v. ~~Becerra~~ Bonta

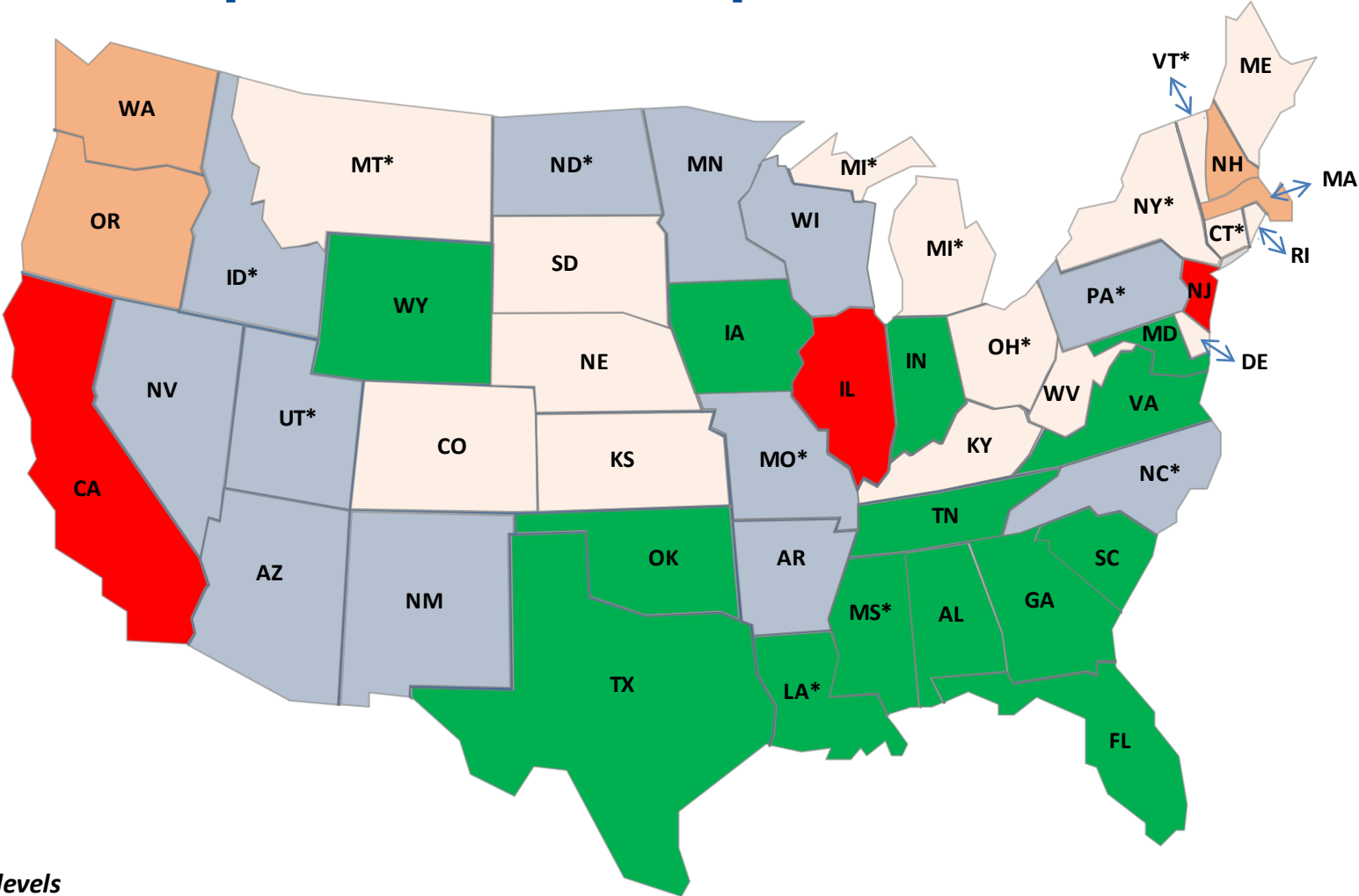
- April 28, 2021 opinion holding AB 5 not preempted as applied to motor carriers
- Petition for en banc review due May 26
 - ✓ Injunction will stay in place pending this decision
- If denied, 9th Circuit determines whether injunction remains in place
- Headed to SCOTUS
 - ✓ Need to ensure this is well funded and supported by the industry

If AB5 Becomes Enforceable

Options

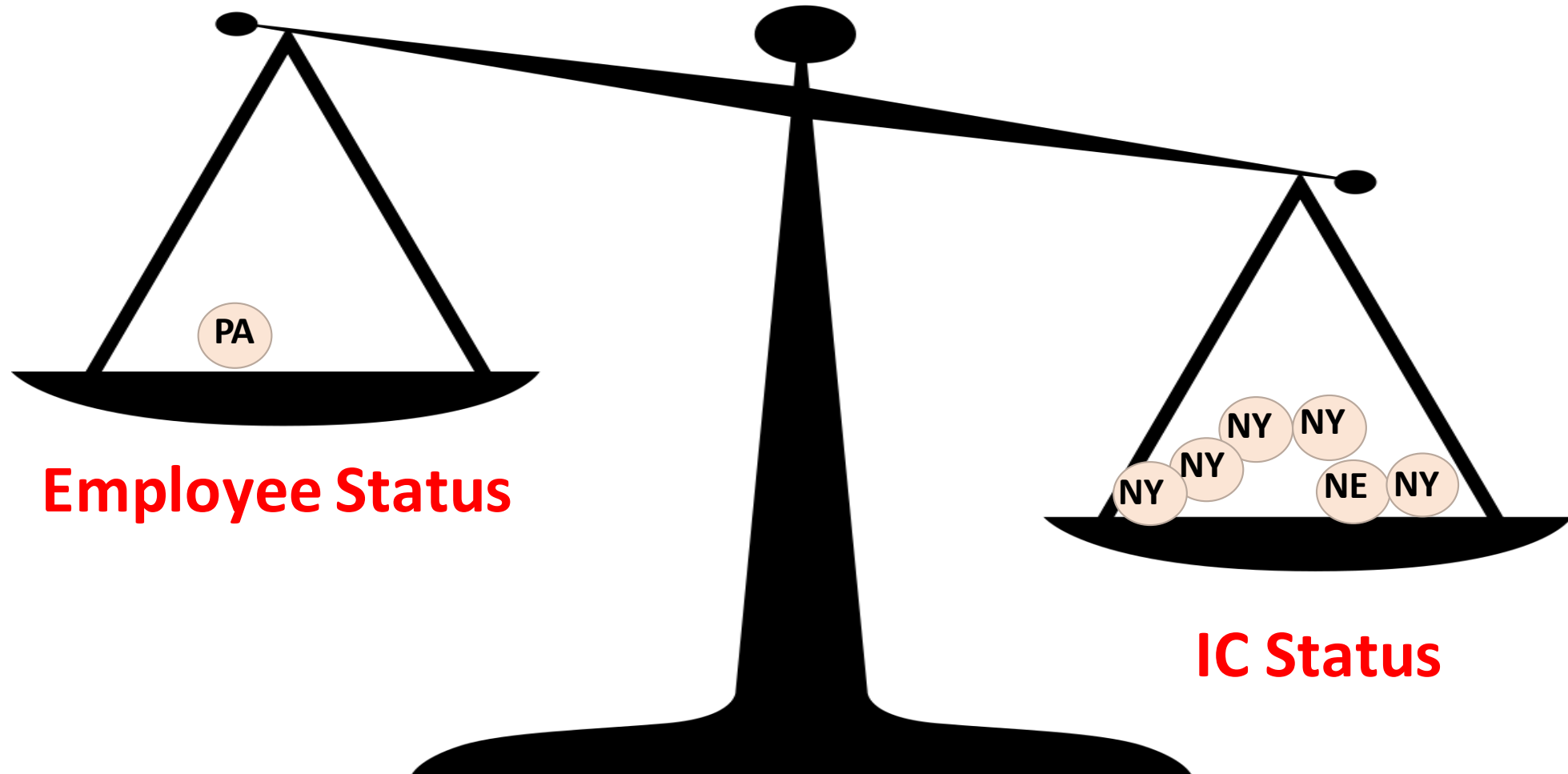
- Pivot to employee drivers
- Explore 2-check system
- Restructure to a brokerage model using small independent motor carriers
- Jurisdictional restrictions
- Modified compensation addenda to independent contractor agreement

Relative Risk of Utilizing Owner-Operators as Independent Contractors



*State teeters between two "risk" levels

Administrative Decisions Addressing IC Status Post 2020 Inauguration



Recent Unfavorable Case Law

- *SCI v. Unemp't Comp. Bd* (Pa. Commw. Ct. Dec. 16, 2020)
 - ✓ Court deemed third-party administrator employer of OO courier under **AC Test**
 - ✓ Court found evidence did not demonstrate the OO was *customarily engaged* in an independently established business because the OO did not *actually*:
 - Perform delivery services for others (though he was free to do so); and/or
 - Advertise his delivery services (though he registered for a free advertising service)

Recent Unfavorable Case Law

- *Thomas v. TXX Services* (E.D.N.Y. Mar. 15, 2021)
 - ✓ Denial of summary judgment on IC status of OO couriers for purposes of stated and federal MW and OT under **Economic Realities Test**

Economic Realities Factor	Alleged Facts Favoring Employment Status
Control	Broker controlled number of stops on route; instructed OOs as to loading vehicles, completing paperwork, using scanners, and best routes; and disciplined OOs for <i>rejecting work</i> , negotiating pay, and changing schedules
Profit or Loss	Broker controls job assignments and pay rates, vetoed use of helpers, and controlled type of vehicles used
Degree of Skill	Job did not require OOs to possess a CDL, have any previous experience, or bid on routes
Permanence	Many OOs kept the same routes for years
Integral Part of the Business	Without drivers, the broker's "business would be severely impacted" and the broker cannot "evade that fact by continuously referring to the Company as merely a broker"

Recent Favorable Case Law

- *Brant v. Schneider National* (E.D. Wis. Jan. 19, 2021)
 - ✓ Deeming OO of leased-back tractor properly classified as IC for state and federal MW purposes on motion to dismiss under **Economic Realities Test**

Economic Realities Factor	Alleged Facts Favoring IC Status
Control	OO had right to accept or reject loads, engage in trip leasing, and hire second or replacement drivers, as well as select, maintain, and insure his own equipment
Profit or Loss	OO decided how many loads to take, whether to driver personally or use a replacement driver, recruit additional drivers, decide what routes to take, and recruit new customers
Investment in Equipment	Even though OO leased tractor from carrier, OO was required to make capital investment and was responsible for all operating expenses related to the tractor, including fuel
Degree of Skill	Driving a commercial motor vehicle is a specialized skill
Permanency	Agreement was for a fixed term of one year that does not automatically renew

IC AGREEMENT BEST PRACTICES

Do the FLRs Apply?

FLR Compliance: General Applicability

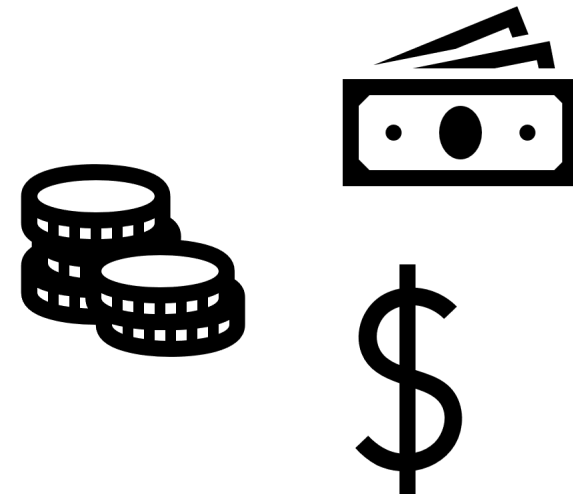
- **Motor carrier engaged in interstate commerce**
 - ✓ 49 C.F.R. 376.1 “Motor carriers registered with the Secretary to transport property under 49 U.S.C. subtitle IV, part B”
 - ✓ Services may be *interstate* even if driver never crosses state lines
- **Leasing/using equipment (and drivers services)**
 - ✓ 49 C.F.R. 376.2(b) “Equipment”
 - ✓ No exception for lightweight vehicles



Does ICOA “Catch” all Escrow Funds?

FLR Compliance: Escrow Funds

- 49 C.F.R. 376.2(l) “Money deposited by [IC] with either third party or [carrier] to guarantee performance . . . and for any other purposes mutually agreed upon by the” parties.
 - ✓ Escrow fund/account
 - ✓ Performance bond/reserve
 - ✓ Maintenance fund/account
 - ✓ Security deposit
 - ✓ Refundable down payment



Does ICOA Authorize *All* Deductions?

FLR Compliance: Charge-Back Items

- 49 C.F.R. 376.12(h) “The lease shall clearly specify all items that may be initially paid for by the [carrier], but ultimately deducted from [IC]’s compensation at the time of payment or settlement, together with a recitation as to how the amount of each item is to be computed.”
 - ✓ General categories vs. specific items and amounts
 - ✓ Markups and administrative fees
 - ✓ IC Manual and other IC-facing documents

Does IC Settlement Meet 15-Day Timing?

FLR Compliance: Settlement Timing

- 49 C.F.R. 376.12(f) Settlement “shall be made within 15 days after submission of the necessary delivery documents concerning at rip in the service of the” carrier.”
 - ✓ Necessary delivery documents
 - ✓ Independent of customer payment to carrier
 - ✓ Final settlement

Who is the IC's Customer?

Carrier is IC's Customer

- IC services are performed for carrier
- Carrier and IC *do not share* the same customer
- IC Agreement should support distinction
- Element of California AB5 B2B exemption

Does IC Have Other Customers?

IC Should Not Be Prohibited from Trip Leasing

- IC Agreement should not prohibit trip leasing
- IC's non-leased equipment
- IC's leased equipment
 - ✓ Carrier consent, insurance, placards, trip lease documentation
- Element of California AB5 B2B exemption

Does IC Provide All Equipment and Tools?

IC Should Provide its own Equipment, Tools, etc.

- Recruit/engage ICs with vehicles
- Arms-length lease-purchase option, only if necessary
- Optional carrier facilitation of tools, rental fees
- Element of California AB5 B2B exemption

LEASE-PURCHASE PROGRAMS & BUSINESS OPPORTUNITY LAWS

Business Opportunity Laws

- Target franchisors, offerors of business opportunities (e.g., multi-level marketing arrangements)
- Protect unsuspecting investors from unfair, deceptive practices
- “Business opportunity,” generally:
 - ✓ sell or lease goods or services to start a new business
 - ✓ minimum payment required
 - ✓ promises of income, buy-back if unsatisfied, or to purchase products produced by buyer



Business Opportunity Laws

BUSINESS
OPPORTUNITY



- 28 states have business opportunity laws
 - But some carve out trucking-related businesses (e.g., NC)
- FTC recently created a federal “analog” to state business opportunity laws
 - More narrow definition of “business opportunity” compared to some state laws

Takeaways

- Adopt a “wait and see” approach
 - ✓ Only one District Court order; previous rulings have been favorable
 - ✓ The court’s preemption analysis is weak, subject to review
- Consider disclaimer language in marketing, onboarding materials
 - ✓ Both base of operations and recruiting states



STATE LEGISLATION

ABC Test

- Continued efforts to adopt ABC test in states
- Broad ABC test initiatives have been introduced
- Some examples:
 - ✓ New Jersey (S 863) – Unemployment and labor
 - Prognosis unclear
 - ✓ Rhode Island (S 437) – Uniform definition (UET, Wages, WC, Disability)
 - Unlikely to pass

Prop 22?

- Expect to see an organized pushback or expansion of Prop 22?
- Case Study: Vermont H 359
 - ✓ Seeks to ensure all “service providers” are employees
 - ✓ Uses ABC test to determine IC status
 - ✓ Calls for study of portable benefits model

Q & A



SCOPELITIS
GARVIN LIGHT HANSON & FEARY

INDIANAPOLIS • CHICAGO • WASHINGTON, DC • LOS ANGELES
CHATTANOOGA • MILWAUKEE • DETROIT • SEATTLE
DALLAS/FT. WORTH • SALT LAKE CITY