



MOSELEY
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LAW GROUP

Independent Contractor Update September 14, 2022

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The Basics: Employee or IC

- ▶ Employee
 - Factory worker
 - Secretary
 - Cashier
- ▶ Independent Contractor
 - Landscaper
 - Plumber

The Basics: Employee or IC

- ▶ Employee or IC?
 - “I pay him on a 1099, so he’s an IC.”
- ▶ Not the answer!

Valid IC Lease Agreement

- ▶ Governed by 49 CFR 376.12
- ▶ Lease of Power Unit (not a driver)
- ▶ Detailed provisions
 - Where did yours come from?
 - Who wrote it?
 - When was it written?

Overview

- ▶ Independent Contractor Equipment Lease Agreement
 - Aka owner operator contract
 - Review of key provisions

- ▶ Insurance Concerns
 - Hold harmless/motor carrier coverage form
 - Other independent contractor insurance issues
 - Non-trucking liability
 - Physical damage

Control Test: Wilkinson v. Palmetto State Transport

- ▶ Contractor killed in accident
- ▶ Elements of Control
 - Right to Control
 - Furnishing of Equipment
 - Right to Fire
 - Method of Payment

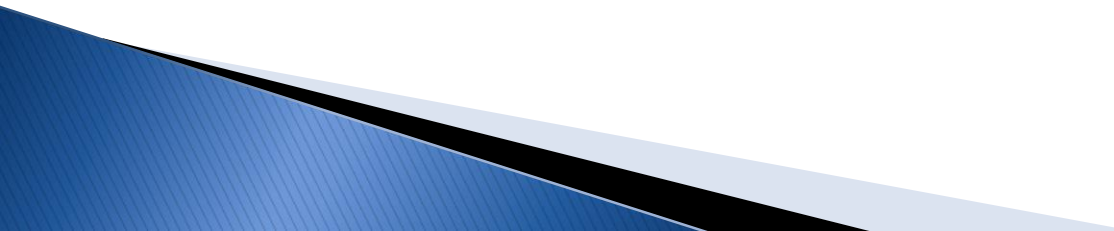
Wage and Hour Division Interpretation No. 2015-1

- ▶ Test for Misclassification for FLSA
- ▶ Agency moving from Control Test to Economic Realities
 - Focus on the dependence on the employer
 - Factors
 - Integral Part of the Employer's Business
 - Manage to Profit or Loss
 - Relative Investment of the Parties
 - Special Skill
 - Permanent or Indefinite
 - Nature and Degree of Control
- ▶ Limited application to trucking

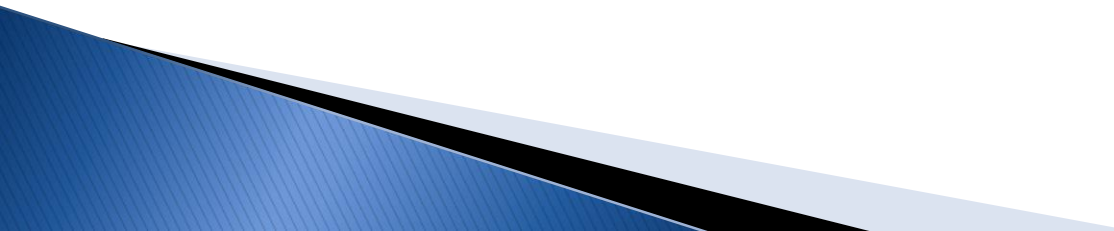
Biden Changes

- ▶ Withdrawn Trump proposals
 - Safety exemption withdrawn
 - 5/6/2021: DOL published Final Rule withdrawing Trump Administration's proposed revised Independent Contractor test for FLSA (never went into effect)
 - Looks to totality of the circumstances (all 7 factors considered)
 - Extent to which services rendered are integral part of principal's business – B Prong
 - Permanency of relationship between worker and business
 - Amount of alleged contractor's investment in facilities/equipment
 - Nature and degree of control by principal
 - Alleged contractor's opportunity for profit and loss
 - Amount of initiative, judgment, or foresight in open market competition required for success of alleged contractor
 - Degree of independent business organization and operation

IRS 20 Point Test

1. Instruction
 2. Training
 3. Integration
 4. Services Rendered Personally
 5. Hiring, Supervising, and Paying Assistants
 6. Continuing Relationships
 7. Set Hours for Work
 8. Full Time Required
 9. Performing Work in Employer's Premises
 10. Order of Sequence Set
- 

IRS 20 Point Test

11. Oral or written reports
 12. Payment by hour, week, or month
 13. Payment of business travel expenses
 14. Furnishing of tools and materials
 15. Significant investment
 16. Realization of profit and loss
 17. Working for more than one firm at a time
 18. Making Services available to general public
 19. Right to discharge
 20. Right to terminate
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Other tests

- ▶ Technical Guidance
- ▶ Six part test
 - Owns equipment or bona fide lease
 - Responsible for Maintenance
 - Bears costs
 - Responsible for providing personal services
 - Compensation based on revenue or division of profits
 - Determines means of performance

ABC Test: Dynamex / AB5

- ▶ (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and*
- ▶ (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and*
- ▶ (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

ABC Test: Dynamex California

- ▶ (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and*
- ▶ (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and*
- ▶ (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

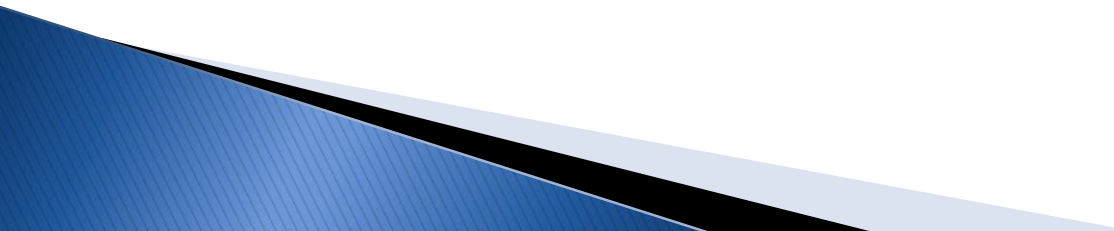
ABC Test: Dynamex California

- ▶ Motor Carriers cannot meet prongs B and C

California AB5

- ▶ Was delayed with injunction
- ▶ Now in place
- ▶ Uber and Lyft beat it with a referendum

Statute of Limitations for California Labor Code and Wage Claims

- ▶ AB5 is retroactive
 - ▶ Claims for unpaid wages under California Labor Code: 3-year statute of limitations
 - ▶ Statute of Limitations can be extended to 4 years if Plaintiff includes a claim under California's Unfair Competition Law.
 - ▶ Statute runs from date of most recent violation.
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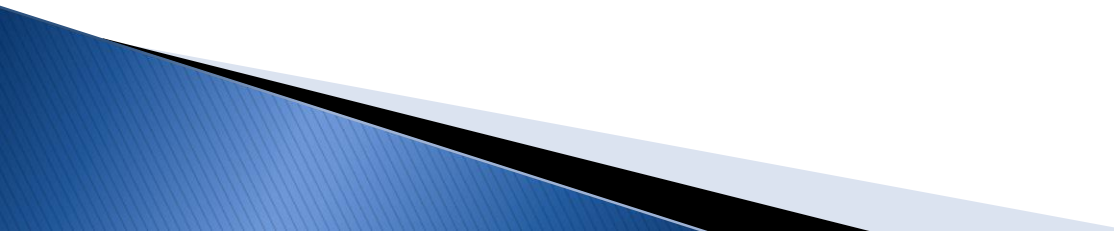
Exemptions to California AB5

- ▶ Industry Specific Exemptions under AB 2257
 - Business to Business Exemption: two separate businesses contract with each other, business service provider not subject to AB5
 - Very specific criteria need to be met
 - Likely unworkable unless IC has own motor carrier authority and is incorporated
 - Referral Agency Exemption: specifically states this exemption cannot be used by the transportation industry

Changing Brands

- ▶ All about satisfying B prong of ABC Test
- ▶ Brand as a company operating through independent contractors in order to provide transportation to customers, not actually providing transportation
- ▶ Broker freight to independent contractors, requires ICs convert to motor carriers
 - If 10k pounds or less and non-Hazmat, IC does not need to convert to motor carrier
- ▶ App Based Program

Possible Solutions

- ▶ Convert all California ICs to employees
 - ▶ Formation of separate California Motor Carrier with employee drivers and terminal for cross docking right outside California line
 - ▶ Two Check System: Pay California ICs as employees and rent the IC's equipment with second check
 - ▶ Pull Out of CA?
- 

Bad States for IC

- ▶ Arkansas
- ▶ ******CALIFORNIA**
- ▶ Maine
- ▶ Massachusetts
- ▶ Nevada
- ▶ New Jersey
- ▶ New York
- ▶ North Carolina
- ▶ North Dakota
- ▶ Utah
- ▶ Vermont
- ▶ West Virginia

North Carolina: NC 97-19.1

- ▶ Every driver has to have comp
- ▶ Narrow exception
- ▶ No small employer exception
- ▶ Brokers have exposure
- ▶ Increased Enforcement
 - Letter, warning, fine, criminal charges

Good IC States

- ▶ Still have to do it right
- ▶ Good IC Agreement (Part 376)

Follow Through

- ▶ Good contract – still have to implement it

Tips

- ▶ Allow ICs to refuse loads
- ▶ Allow hauling for others via trip leases
- ▶ No forced purchases
- ▶ Minimize loans and settlement deductions to ICs (don't be Mother)
- ▶ Don't specify routes, refueling vendors/stops, work hours/rest periods, maintenance timing/vendors
- ▶ Don't require pagers, cell phones, or frequent calls
- ▶ No uniforms or requiring painting of truck

Dual Operations with Company Drivers and Owner Operators

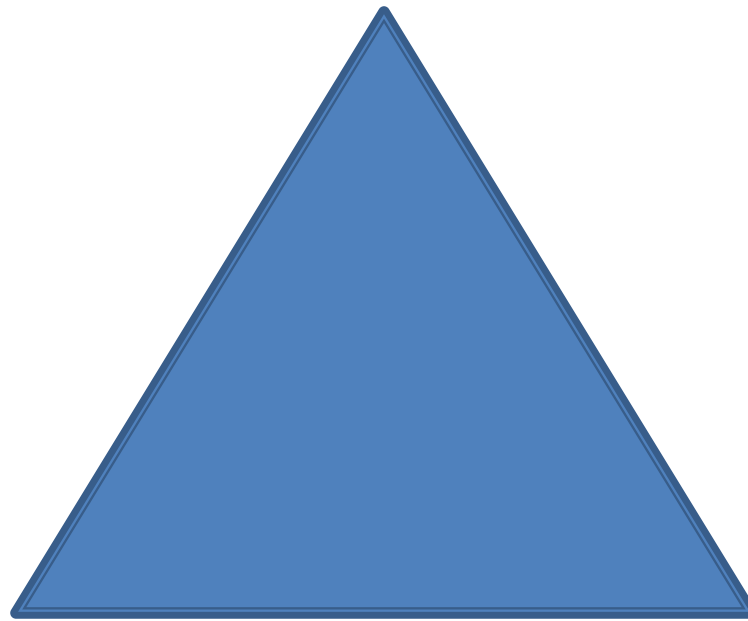
- ▶ *Treat ICs differently from company drivers*
 - Training and Safety Meetings
 - Dispatch
 - Compensation & Reimbursements
 - Performance Evaluations and Discipline (use bonuses instead)
 - Paperwork
 - No Policy or Safety Manuals
- ▶ **Split companies?**

What About the Truck?

- ▶ Who provides the Truck?
 - Driver owns = OK
 - Driver leases from Penske = OK
 - Company provides to driver = NOT OK
 - Company “leases” to driver = NOT OK

2 Different Leases

Leasing Company



Motor Carrier

Driver

Lease Purchase

- ▶ *If vehicle leased from affiliate:*
 - Allow O–O to lease vehicle to other carriers (1) permanently (w/cARRIER’S consent) or (2) trip lease (portability)
 - Allow O–O to purchase at anytime for FMV
 - Amortization tax issue
 - Minimize use of “full–service” leases
 - Third Party Companies

Lease Purchase

- ▶ New rulings require all revenue to be booked at outset
- ▶ FASB's Lease Accounting Guidance ("ASC 842").
- ▶ Applies to public companies for fiscal years beginning after December 15, 2018 and private companies for fiscal years beginning after December 15, 2019.
- ▶ Will require updates to lease purchases
- ▶ www.emagcloud.com/ata/NAFC_Newsletter_May_2018/page_3.html.

South Carolina

- ▶ 42-1-360 (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 of this title and for no other purposes.



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