

**Independent Contractor Employment Classification:
A Survey of State and Federal Laws
in the Motor Carrier Industry**

Gregory M. Feary*

| | |
|--|-----|
| I. Introduction..... | 139 |
| II. Workers' Compensation Law | 141 |
| A. Statutory Classifications | 141 |
| B. Common Law Tests | 145 |
| III. Unemployment Tax | 149 |
| A. Statutory Classifications | 149 |
| B. Common Law Tests | 152 |
| IV. Fair Labor Standards Act | 153 |
| A. Classification Under the FLSA..... | 154 |
| B. Exceptions to FLSA Overtime Requirements..... | 155 |
| C. Federal and State Law Interplay | 155 |
| V. Conclusion..... | 155 |

I. INTRODUCTION

Although the use of owner-operators, which are one-man/one-truck owners and operators of trucks under lease to motor carriers, and fleet

* Mr. Feary is the Managing Partner at Scopelitis, Garvin, Light, Hanson & Feary P.C. Mr. Feary wishes to express his gratitude to James L. Spolyar and Kelli M. Block of the firm for their significant contributions to this article.

operators, which are incorporated owner-operators, sole proprietors, or partnerships that own and operate more than one truck through the use of other drivers' services, is common throughout the 48 contiguous states, the classification of owner-operators and fleet operators as either independent contractors or employees for purposes of workers' compensation and unemployment tax varies considerably from state to state.¹ The classification varies because the trucking industry is not governed by a uniform body of federal laws for purposes of various state laws such as workers' compensation and unemployment tax.

While each state has enacted separate workers' compensation acts and unemployment tax laws, a single pre-identified state law is often the sole basis for a motor carrier's decision regarding whether to consider its owner-operators to be independent contractors. Consequently, there is an inherent conflict between the interstate nature of the trucking business and the intrastate application of workers' compensation and unemployment tax laws.

Due to this conflict, many states have enacted statutes which explicitly deem owner-operators to be independent contractors for purposes of workers' compensation or unemployment tax.² Those states which have not enacted statutes to resolve the conflict continue to approach the determination of whether owner-operators are independent contractors or employees on a case-by-case, fact-sensitive basis using common law tests.³

Conversely, the Fair Labor Standards Act (the "FLSA") uniformly applies to owner-operators who are found to be employees in any state.⁴ While the FLSA does not generally apply to truck drivers, drivers' helpers, loaders, or mechanics, motor carriers must also pay careful attention to the FLSA to avoid costly penalties associated with misclassifying individuals they employ.⁵

This Article provides an overview of the methods adopted by the 48 contiguous states to determine whether owner-operators and fleet operators are classified as independent contractors or employees for purposes of workers' compensation and unemployment tax. While there is no uniform legal test that transcends the many laws and social policies involved, this Article will discuss a number of factors favoring independent contractor status which are common to each test, the most important of which focus on the owner-operator's management of his or her own separate and independent business. This Article will also provide an overview of the FLSA and its application in the transportation industry.

1. See James C. Hardman, *Workers' Compensation and the use of Owner-operators in Interstate Motor Carriage: A Need for Sensible Uniformity*, 20 *TRANSP. L.J.* 255, 256, 261 (1992).

2. See *id.* at 261.

3. See *id.*

4. See 29 U.S.C. §§ 202-203 (2008).

5. See 29 U.S.C. § 213(b)(1) (2008).

II. WORKERS' COMPENSATION LAW

Determining whether an owner-operator is classified as an independent contractor or employee for purposes of workers' compensation tends to be one of the most litigated and contested issues in the trucking industry. This conflict is of no greater importance than when the management of a motor carrier must determine whether the motor carrier's owner-operators are independent contractors or employees for the purpose of whether to provide workers' compensation coverage or to require such coverage to be procured by the owner-operator. Moreover, a facially similar coverage known as occupational accident or work accident coverage may be an acceptable alternative in many states, but determining whether this coverage is viable as a legal alternative in most states depends on the central question of whether the owner-operator is an independent contractor.⁶ While some states have enacted legislation to provide greater certainty regarding classification, many states continue to look to the common law for guidance.

A. STATUTORY CLASSIFICATIONS

As of January, 2008, twenty-one states had enacted owner-operator statutes within their workers' compensation acts.⁷ Although the twenty-one statutory states provide greater certainty regarding whether owner-operators, and in some cases employees of fleet operators (e.g. second drivers), are considered independent contractors or employees vis-à-vis the motor carriers to which they are leased for purposes of workers' compensation, limiting criteria or "loopholes" still exist in most of the owner-operator statutes.⁸ Consequently, under some circumstances, an owner-operator, even in these statutory exemption states, may be subject to a case law determination regarding his status as an independent contractor or employee. The legislation enacted in the statutory states can be generally categorized as either following a (1) "Blanket Approach" or (2) "Multi-Factor Approach."

The Blanket Approach describes those statutes which deem an owner-operator to be an independent contractor within a relatively simple definition. Currently, thirteen states, Alabama,⁹ Georgia,¹⁰ Indiana,¹¹ Kansas,¹²

6. Hardman, *supra* note 1, at 269.

7. The twenty-one states include Alabama, Colorado, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Washington, and Wyoming.

8. *See, e.g.*, WASH. REV. CODE § 51-08.180 (2008); KAN. STAT. ANN. § 44-503c (2006).

9. ALA. CODE § 25-5-1(4) (2007).

10. GA. CODE ANN. §§ 34-9-1, 40-2-87 (2007).

11. IND. CODE ANN. § 22-3-6-1 (b)(8) (2007).

12. KAN. STAT. ANN. § 44-503c (2006).

Louisiana,¹³ Mississippi,¹⁴ Missouri,¹⁵ Montana,¹⁶ Oklahoma,¹⁷ Oregon,¹⁸ Tennessee,¹⁹ Texas,²⁰ Washington,²¹ and Wyoming,²² subscribe to the Blanket Approach. The Blanket Approach provides a broad standard and takes into consideration most segments of the trucking industry.²³ Motor carriers seeking to classify owner-operators as independent contractors are well served to operate in states subscribing to this approach. While the Blanket Approach is preferred by most motor carriers, limiting criteria is imbedded in some of the blanket statutes which may result in the disqualification of the application of the independent contractor statute.²⁴ Consequently, motor carriers should be diligent in understanding the scope of a statutory exemption, rather than presuming the exemption grants immunity from providing workers' compensation coverage.

A simple example of the limiting criteria found in statutes subscribing to the Blanket Approach is present in the Washington statute, which provides interstate owner-operators are independent contractors, but intrastate owner-operators are not.²⁵ In Kansas, the statute requires owner-operators not to be treated as employees for *tax purposes*.²⁶ The Kansas statute further provides owner-operators are to be covered by an occupational accident insurance policy.²⁷ A third form of limiting criteria is found in Texas, where the statute requires a form to be completed by the owner-operator and filed with the Texas Workers' Compensation Commission.²⁸

13. LA. REV. STAT. ANN. § 23:1021 (10) (2008).

14. MISS. CODE ANN. § 71-3-5 (2008).

15. MO. REV. STAT. § 287.020 (2008).

16. MONT. CODE ANN. § 39-71-417 (2007). A fifteen-factor test is provided in MONT. ADMIN. R. 24.35.302 (2008).

17. OKLA. STAT. tit. 85 § 3 (2007).

18. OR. REV. STAT. § 656.027(15) (2005).

19. TENN. CODE ANN. § 50-6-106 (2008).

20. TEX. LAB. CODE ANN. § 406.122(c) (2007).

21. WASH. REV. CODE § 51.08.180 (2008).

22. WYO. STAT. ANN. § 27-14-102(a)(vii) (2007).

23. *See e.g.*, KAN. STAT. ANN. § 44-503c(c) (2006): "[O]wner-operator' means a person, firm, corporation or other business entity that is the owner of one or more motor vehicles that are driven exclusively by the owner or the owner's employees or agents under a lease agreement or contract with a licensed motor carrier."

24. *See id.*: "[P]rovided that neither the owner-operator nor the owner's employees are treated under the term of the lease agreement or contract with the licensed motor carrier as an employee for purposes of the federal insurance contribution act, 26 U.S.C. 3101 et seq., the federal social security act, 42 U.S.C. 301 et seq., the federal unemployment tax act, 26 U.S.C. 3301 et seq., and the federal statutes prescribing income tax withholding at the source, 26 U.S.C. 3401 et seq."

25. WASH. REV. CODE § 51.08.180 (2008).

26. KAN. STAT. ANN. § 44-503c (2006).

27. § 44-503c.

28. TEX. LAB. CODE § 406.123 (2005).

2008] *Independent Contractor Employment Classification* 143

Oklahoma also follows the Blanket Approach, but its statute provides owner-operators are not classified as independent contractors if there is a truck purchase leaseback arrangement between the motor carrier and the owner-operator.²⁹ A purchase leaseback arrangement generally involves a transaction in which a motor carrier sells or rents a truck to an owner-operator who then, under the owner-operator contract, leases it back to the motor carrier together with the driving services of the owner-operator.³⁰ A final example of limiting criteria sometimes imbedded in the Blanket Approach is found in Mississippi, where the statute provides owner-operators must be covered by either a policy of occupational accident coverage of \$1,000,000 or workers' compensation insurance.³¹

The Multi-Factor Approach describes those statutes which deem owner-operators to be independent contractors if several enumerated factors are met. Currently, eight states, Colorado,³² Florida,³³ Iowa,³⁴ Maryland,³⁵ Minnesota,³⁶ Montana,³⁷ North Carolina,³⁸ and South Dakota,³⁹ subscribe to the Multi-Factor Approach. Some factors often found in the statutes include whether the owner-operator (1) is responsible for the maintenance of the vehicle; (2) bears the principal burden of the vehicle's operating costs; (3) receives compensation based on factors related to the work performed, and not on the basis of the hours or time expended; and (4) is *free from control*, or *freely* determines the details and means of performing the services.⁴⁰

The Multi-Factor Approach narrows the field of owner-operators who will be classified as independent contractors because each factor must be met. Consequently, the Multi-Factor Approach is more likely to disqualify owner-operators in certain sub-segments of the trucking industry from being automatically deemed independent contractors.

For example, in Iowa, the statute provides a statutory pitfall which seems to negate the automatic application of the statute to deem owner-operators as independent contractors by including a very fact-sensitive factor which requires

29. OKLA. STAT. tit. 85 § 3(9) (2007).

30. See "leaseback" in BLACK'S LAW DICTIONARY (8th ed. 2004).

31. MISS. CODE ANN. § 71-3-5 (2008).

32. COLO. REV. STAT. § 40-11.5-102 (2007).

33. FLA. STAT. § 440.02(15)(d)(4) (2007).

34. IOWA CODE §§ 85.61 (11)(g)(2), (3)(a)-(f) (2008).

35. MD. CODE ANN., LAB. & EMPL. § 9-218 (2008).

36. MINN. R. 5224.0290(2)(A)-(G) (2007-2008) (providing alternate tests to determine whether owner operators are independent contractors or employees).

37. MONT. CODE ANN. § 39-71-417 (4)(a)(i)-(ii) (2007); see also MONT. ADMIN. R. 24.35.302(1)(a)-(o) (2008) (providing fifteen factor test).

38. N.C. GEN. STAT. § 97-19.1(a)-(b)(i)-(ii) (2007).

39. S.D. CODIFIED LAWS § 62-1-10 (2004).

40. See, e.g., IOWA CODE § 85.61(11)(g)(3)(a)-(b), (d)-(e) (2008).

owner-operators to supply the “details and means of performing the services.”⁴¹ While it is possible the Iowa legislature intended for this factor to open up the independent contractor status to inquiry via due process, Iowa courts have generally held owner-operators to be independent contractors and litigation does not seem unusually frequent.⁴²

Although the North Carolina statute does not clearly enumerate the factors required to classify owner-operators as independent contractors, it appears the statute requires that an owner-operator possess motor carrier interstate operating authority, which very likely limits the number of owner-operators classified as independent contractors.⁴³ Conversely, the Minnesota Rules are quite clear, but the requirement that independent contractors must be paid on a productivity basis likely hampers certain motor carriers’ use of bonuses that may not be directly tied to the rendering of a service.⁴⁴

A final example of a factor which proves to limit the number of owner-operators who will be classified as independent contractors is found in the Montana statute, which creates a certification process through which an owner-operator is required to file an application asserting he is free from control; this application must be approved before an owner-operator is deemed an independent contractor for purposes of workers’ compensation.⁴⁵

On a final note with respect to statutory classifications, the statutory states generally only deem owner-operators, and not employees of fleet operators, to be independent contractors.⁴⁶ However, four of the statutory states, Alabama,⁴⁷ Louisiana,⁴⁸ Tennessee,⁴⁹ and Texas,⁵⁰ include fleet operators in their statutes in the context of deeming certain employees (e.g. second drivers) to be independent vis-à-vis the motor carriers to which their services are leased. While these statutes do not explicitly deem fleet drivers to be independent contractors, the statutes do provide that motor carriers are not responsible for providing workers’ compensation coverage to these second/feel

41. § 85.61(11)(g)(3)(e).

42. See, e.g., *Finch v. Schneider Specialized Carriers, Inc.*, No. 03-1012, 2004 Iowa App. LEXIS 1076, at *8-9, 15-16 (Iowa Ct. App. Sept. 29, 2004) (holding owner-operator was independent contractor when six-factor test met), *vacated by* 700 N.W.2d 328 (Iowa 2005).

43. N.C. GEN STAT. § 97-19.1(b)(i)-(ii).

44. MINN. R. 5224.0290(2)(E) (2007-2008). Such restrictions are likely to create difficulty for package carriers during peak seasons. R. 5224.0290(2)(E). The restriction might also affect home delivery companies that pay a bonus to owner operators in rural areas. R. 5224.0290(2)(E).

45. MONT. CODE ANN. § 39-71-417(4)(a)(i), (7)(a) (2007); MONT. ADMIN. R. 24.35.302(1)(a)-(o) (2008) (providing fifteen factor test that evidences control when deeming owner-operator is an independent contractor).

46. Hardman, *supra* note 1 at 26.

47. ALA. CODE § 25-5-1(4) (2007).

48. LA. REV. STAT. ANN. § 23:1021(10) (Supp. 2008).

49. TENN. CODE ANN. § 50-6-106(1)(A) (2005 & Supp. 2007).

50. TEX. LAB. CODE ANN. § 406.122(c) (2006).

2008] *Independent Contractor Employment Classification* 145

drivers in some circumstances.⁵¹

Of course, even if an owner-operator is not statutorily deemed to be an independent contractor, it may be argued (except for a few states) the owner-operator meets the common law definition of independent contractor; consequently, even in the statutory states, motor carriers should be well-informed regarding the common law tests to determine whether a worker is an independent contractor.

B. COMMON LAW TESTS

As referenced above, the states that have not enacted statutes specifically deeming owner-operators to be independent contractors continue to make such a determination on an extremely fact-sensitive case-by-case basis.⁵² While some common law decisions are very broad, such that there will be very few circumstances outside of the scope of the precedential decision, others are more fact-sensitive; thus, the precedential value of such cases creates less guidance regarding the issue of whether owner-operators will be classified as independent contractors or employees for purposes of workers' compensation. The following common law analysis is even useful in those states that provide statutory exemptions for owner-operators because owner-operators who are not statutorily deemed to be independent contractors may meet the common law definition of independent contractor.⁵³

The methods of analysis adopted by the courts in the states which look to common law in making the independent contractor classification can be divided into four categories. The four categories of analysis are: (1) Right of Control Analysis; (2) Modified Right of Control Analysis; (3) Relative Nature of the Work Analysis; and (4) Restatement of Agency Analysis.

The Right of Control Analysis generally requires the court to determine whether the motor carrier or the owner-operator controls the daily details of the owner-operator's work duties.⁵⁴ The vast majority of the states consistently apply the Right of Control Analysis; these states include: Arizona,⁵⁵

51. See LA. REV. STAT. ANN. §§§§ 23:1021(10); 25-5-1(4); 50-6-106(1)(A)-(B); 406.122(a), (c).

52. See, e.g., *White v. Henshaw*, 363 So. 2d 986, 988 (Ala. Civ. App. 1978) (finding decisions whether owner operators are independent contractors depends on the facts of each case); 41 AM. JUR. 2d Indep. Contractors § 5 (2008) (stating the determination of whether a person is an employee or an independent contractor is made on the particular facts of the case).

53. See, e.g., *Liberty Mut. Ins. Co. v. D&G Trucking, Inc.*, 966 So. 2d 266, 268 (Ala. Civ. App. 2006) (citing *White v. Henshaw*, 363 So. 2d 986, 988 (Ala. Civ. App. 1978)).

54. See, e.g., *Special Fund of Indus. Comm'n of Arizona v. Catalina Trucking Co.*, 658 P.2d 238, 240 (Ariz. Ct. App. 1982).

55. See ARIZ. REV. STAT. ANN. § 23-902(B)-(D) (Supp. 2007); *State Comp. Fund v. Yellow Cab Co. of Phoenix*, 3 P.3d 1040, 1043-44 (Ariz. Ct. App. 1999); *Catalina Trucking Co.*, 658 P.2d at 240-41.

Connecticut,⁵⁶ Idaho,⁵⁷ Illinois,⁵⁸ New Jersey,⁵⁹ New Mexico,⁶⁰ New York,⁶¹ North Dakota,⁶² Ohio,⁶³ Pennsylvania,⁶⁴ Rhode Island,⁶⁵ South Carolina,⁶⁶ Utah,⁶⁷ Vermont,⁶⁸ Virginia,⁶⁹ West Virginia,⁷⁰ and Wisconsin.⁷¹ Although Alabama,⁷² Georgia,⁷³ Iowa,⁷⁴ Kansas,⁷⁵ Louisiana,⁷⁶ Minnesota,⁷⁷ Maryland,⁷⁸ Mississippi,⁷⁹ Missouri,⁸⁰ Montana,⁸¹ and Wyoming.⁸² These are

56. See *Hanson v. Trans. Gen., Inc.*, 716 A.2d 857, 860 (Conn. 1998); *Seymour's Sand and Stone, Inc. v. Cogswell*, No. 123967, 2002 Conn. Super. LEXIS 3892, at *11 (Conn. Super. Ct. Nov. 26, 2002).

57. *Smith v. Sindt*, 405 P.2d 959, 963 (Idaho 1965) (classifying owner-operator as independent contractor; *but see* *Beutler v. MacGregor Triangle Co.*, 380 P.2d 1, 4, 6 (Idaho 1963) (classifying owner operator as employee)).

58. See *Roberson v. Indus. Comm'n*, 866 N.E.2d 191, 199-00 (Ill. 2007) (classifying owner-operator as employee under six-factor test); *Peesel v. Indus. Comm'n*, 586 N.E.2d 710, 711, 715 (Ill. App. Ct. 1992) (finding coverage waived only if evidence shows owner operator was an independent contractor).

59. *Tofani v. Lo Biondo Bros. Motor Express, Inc.*, 200 A.2d 493, 497, 499 (N.J. 1964), *aff'd* 205 A.2d 736 (N.J. 1964); *but c.f.* *Kertesz v. Korsh*, 686 A.2d 368, 370 (N.J. Super. Ct. App. Div. 1996) (citing *Tofani v. Lo Biondo Bros. Motor Express, Inc.*, 200 A.2d 493, 484-92 (N.J. 1964) (recognizing New Jersey courts utilize the alternative Relative Nature of Work analysis)); *see infra* note 93.

60. *Celaya v. Hall*, 85 P.3d 239, 242 (N.M. 2004).

61. *In re Short*, 233 A.D.2d 676, 677 (N.Y. App. Div. 1996).

62. *In re Griffin*, 466 N.W.2d 148, 150 (N.D. 1991); *see infra* note 95.

63. *Commercial Motor Freight, Inc. v. Ebright*, 54 N.E.2d 297, 301 (Ohio 1944).

64. *Universal Am-Cam, Ltd. v. Workers' Comp. Appeals Bd.*, 762 A.2d 328, 333 (Pa. 2000).

65. *Beany v. Paul Arpin Van Lines Co.*, 200 A.2d 592, 594 (R.I. 1964). Rule 3.2(a), and Rule 10.1.

66. *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 638 S.E.2d 109, 113-14 (S.C. Ct. App. 2006).

67. See UTAH CODE ANN. § 34A-2-103(2)(b)(i)(B) (Supp. 2007); *Averett v. Grange*, 909 P.2d 246, 249, 251 (Utah 1995).

68. *Falconer v. Cameron*, 561 A.2d 1357, 1358 (Vt. 1989).

69. *Intermodal Servs., Inc. v. Smith*, 364 S.E.2d 221, 224 (Va. 1988).

70. *Mountain Lodge Ass'n v. Crum Forster Indem. Co.*, 558 S.E.2d 336, 342, 344 (W. Va. 2001).

71. See WIS. STAT. ANN. § 102.07(8)(b)(3) (Supp. 2007); *Jarrett v. Labor & Indus. Review Comm'n*, 607 N.W.2d 326, 332 (Wis. Ct. App. 2000).

72. *Liberty Mut. Ins. Co. v. D&G Trucking, Inc.*, 2006 WL 3335451, *1 (Ala. Civ. App. Nov. 17, 2006) (citing *White v. Henshaw*, 363 So.2d 986, 988 (Ala. Civ. App. 1978)).

73. See *C. Brown Trucking, Inc. v. Rushing*, 595 S.E.2d 346 (Ga. Ct. App. 2004).

74. See *Towers v. Watson Bros. Transp. Co.*, 294 N.W. 595, 596 (Iowa 1940). Although this case was decided prior to the enactment of the statute, it provides useful guidance regarding the analysis which would occur if an owner-operator fails to meet the statutory exemption.

75. *Lund v. Knight Transp., Inc.*, 2005 WL 104671 (Dkt. No. 1,019,840 2005).

76. See *Fontenot v. J.K. Richard Trucking*, 696 So.2d 176, 180 (La. Ct. App. 1997).

77. *Hix v. Minn. Workers' Comp. Assigned Risk Plan*, 520 N.W.2d 497 (Min. Ct. App. 1994).

78. *Williams Const. Co. v. Bohlen*, 56 A.2d 694, 696 (Md. Ct. App. 1948). Although this case was decided prior to the enactment of the statute, it provides useful guidance regarding the analysis which would occur if an owner-operator fails to meet the statutory exemption.

79. *McCary v. Wade*, 861 So.2d 358, 361 (Miss. Ct. App. 2003).

2008] *Independent Contractor Employment Classification* 147

statutory states, the Right of Control analysis may be deferred to by the court if the owner-operator does not meet the statutory definition of independent contractor.

The factors that are most often referenced in the case law regarding whether owner-operators are to be classified as independent contractors or employees include: (1) forced dispatch; (2) equipment ownership; (3) length of route/opportunity to make detail decisions; (4) delivery time deadlines; (5) reporting to dispatch requirements; (6) protocol for hiring/firing other workers; (7) personal appearance standards; and (8) discipline protocol.⁸³

Most of the aforementioned factors are more persuasive when used to find an owner-operator to be an employee, rather than an independent contractor. The first two factors, forced dispatch, and lack of equipment ownership, tend to be the most persuasive factors in a determination an owner-operator is an employee. Consequently, if a judge determines a motor carrier requires the owner-operator to accept every load tendered by dispatch or the motor carrier owns the trucking equipment, the owner-operator will most likely be considered to be controlled by the motor carrier.

The second category of common law classification has been coined the Modified Right of Control Test. In the states subscribing to this analysis, it is clear the Right of Control Analysis is used as a predominant factor in determining the work status of an owner-operator; however, an additional factor, *whether the owner-operator is in an independent trade, occupation, or profession*, is also an important element of the work status determination.⁸⁴ Currently, seven states have adopted the Modified Right of Control Analysis. These states include: California,⁸⁵ Colorado,⁸⁶ Kentucky,⁸⁷ Maine,⁸⁸ Massachusetts,⁸⁹ North Carolina,⁹⁰ and Oregon.⁹¹

80. *Wilmeth v. TMI, Inc.*, 26 S.W.3d 476, 480 (Mo. Ct. App. 2000). Although this case was decided prior to the enactment of the statute, it provides useful guidance regarding the analysis which would occur if an owner-operator fails to meet the statutory exemption.

81. *Doig v. Graveley*, 809 P.2d 12, 13 (Mont. 1991).

82. *Franks v. Indep. Prod. Co., Inc.*, 96 P.3d 484, 494 (Wyo. 2004).

83. *See generally* *Hardman*, *supra* note 1.

84. *See Albillo v. Intermodal Container Serv., Inc.*, 8 Cal.Rptr. 3d 350, 355 (Cal. Ct. App. 2003); *see also* CAL. LAB. CODE § 5705 (2008).

85. *See Albillo*, 8 Cal. Rptr. 3d at 355; *see also* § 5705.

86. *See USF Distribution, Inc. v. Inds. Claim Appeals Office*, 111 P.3d 529, 531 (Co. Ct. App. 2004); *see also* COLO. REV. STAT. § 40-11.5-102 (2008).

87. *See Broughton v. Quality Carriers*, 2006 WL 2382747, *3 (Ky. Ct. App. 2006); *see also* KY. REV. STAT. ANN § 342.640 (2007).

88. *See West v. C.A.M. Logging*, 670 A.2d 934, 936 (Me. 1996); *see also* ME. REV. STAT. ANN. tit. 39-A, § 102(13) (2007).

89. *See Ferullo's Case*, 121 N.E.2d 858, 859 (Ma. 1954); *see also* MASS. GEN. LAWS ch. 152, § 1(4)(g) (2003).

90. *See Hughart v. Dasco Transp., Inc.*, 606 S.E.2d 379, 382-83 (N.C. Ct. App. 2005).

The third category of common law classification, the Relative Nature of the Work Analysis, is currently employed by Nevada,⁹² New Jersey,⁹³ New York,⁹⁴ North Dakota,⁹⁵ Tennessee⁹⁶ and the District of Columbia.⁹⁷ The Relative Nature of the Work Analysis provides a two prong test that is generally difficult to overcome. First, the work performed by the owner-operator must be sporadic and not permanent; second, the work performed by the owner-operator must be incidental to, and not a principle part, of the motor carrier's business.⁹⁸ As this test is so difficult to overcome, three of the four states that use it are known to be the most unfavorable for classifying owner-operators as independent contractors. Conversely, North Dakota uses the Relative Nature of the Work Analysis, but case law has found owner-operators not to be independent contractors.⁹⁹ There has however, been some recent administrative rulings that suggests a greater possibility in New York for an owner-operator to be found an independent contractor.¹⁰⁰

The final category of common law classification is the Restatement of Agency Analysis. The Restatement of Agency Analysis is a ten-factor test¹⁰¹ which includes the Right of Control Analysis as one factor, but also examines nine additional factors, which include: (1) whether the one employed is engaged in a distinct occupation or business; (2) whether, in the locality, the work is usually done under the direction of the employer; (3) the skill required in the particular occupation; (4) whether the employer supplies the instrumentalities, tools, and the place of work for the person doing the work; (5) the length of time for which the person is employed; (6) the method of payment, whether by the time or by the job; (7) whether or not the work is a part of the regular business of the employer; (8) whether or not the parties believe they are creating the relation of master and servant; and (9) whether or

91. OR. REV. STAT. § 656.027(15) (2007).

92. *See Hays Home Delivery, Inc. v. Employer Ins. Co. of Nev.*, 31 P.3d 367, 370 (Nev. 2001).

93. *See Tofani v. Lo. Biondo Brothers Motor Express, Inc.*, 200 A.2d 493, 497-98 (N.J. 1964); *see supra* note 46 and accompanying text as New Jersey alternately utilizes the Right of Control Analysis.

94. *See Lipary v. Rochester Monroe County Emergency Work Bureau*, 244 A.D. 858 (N.Y. App. Div. 1935).

95. *See Griffin v. N.D. Workers' Comp. Bureau*, 466 N.W.2d 148 (N.D. 1991); *see also* N.D. CENT. CODE § 65-01-03 (2007).

96. *See Cromwell Gen. Contractor, Inc. v. Lytle*, 439 S.W.2d 598, 601 (Tenn. 1969).

97. *Munson v. Hardy & Son Trucking Co.*, 2000 D.C. Wrk. Comp. LEXIS 71, *8-9 (Mar. 17 2000).

98. *Tofani*, 200 A.2d at 502.

99. *Griffin*, 466 N.W.2d at 151.

100. *CRST Trucking*, No. 7030 2106, 2005 WL 1416627 (N.Y. Work Comp. Bd. June 8, 2005); *Go lub v. Roadlink East*, No. 0072 7653 (N.Y. Work Comp. Bd. Jan. 3, 2008).

101. Some states do not consider the tenth factor, whether the putative employer is engaged in business, in the analysis of whether an owner-operator is an independent contractor or employee.

2008] *Independent Contractor Employment Classification* 149

not the putative employer is engaged in business.¹⁰² The states which currently subscribe to the Restatement of Agency Analysis include Arkansas,¹⁰³ Delaware,¹⁰⁴ Florida,¹⁰⁵ Indiana,¹⁰⁶ Nebraska,¹⁰⁷ and Texas.¹⁰⁸

III. UNEMPLOYMENT TAX

Determining whether an owner-operator is classified as an independent contractor or employee for purposes of unemployment tax has proven to be a second key area of dispute for many motor carriers. In much the same way the various states' workers' compensation acts and case law provide guidance on the issue of owner-operators' status as independent contractors, state unemployment tax laws also do the same. Yet, it is important to remember that the statutory schemes and case law in any given state may not agree regarding whether an owner-operator is considered an independent contractor. In a similar response to workers' compensation issues, some states have enacted legislation to provide greater certainty regarding classification, while other states continue to look to the common law for guidance.

A. STATUTORY CLASSIFICATIONS

As of January, 2008, fourteen states had enacted owner-operator exemptions within their unemployment tax law. These states are Florida,¹⁰⁹ Georgia,¹¹⁰ Illinois,¹¹¹ Indiana,¹¹² Kansas,¹¹³ Maryland,¹¹⁴ Minnesota,¹¹⁵ Missouri,¹¹⁶ Nebraska,¹¹⁷ New Jersey,¹¹⁸ Oklahoma,¹¹⁹ Oregon,¹²⁰ Texas,¹²¹

102. *Draper v. Conagra Foods, Inc.*, 92 S.W.3d 220, 229-30 (Ark. Ct. App. 2005).

103. *Id.*

104. DEL. CODE ANN. tit. 19 § 2311(a) (2008).

105. *See* FLA. STAT. § 440.02(15)(d) (2008).

106. *See* *Nickels v. Bryant*, 839 N.E.2d 1211, 1215 (Ind. Ct. App. 2005).

107. *Anthony v. Pre-Fab Transit Co.*, 476 N.W.2d 559, 561 (Neb. 1991).

108. *See* *Limestone Prod. Distribution, Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002).

109. *See, e.g.*, FLA. STAT. § 443.1216.

110. GA. CODE ANN. § 34-8-35 (n)(17).

111. ILL. COMP. STAT. 405 / 212.1.

112. IND. CODE § 22-4-8-1(a).

113. KAN. STAT. ANN. § §44-703 (4)(y).

114. MD. CODE ANN., LAB. & EMPL. § 8-206(d) (2008).

115. MINN. STAT. § 268.035 (25)(b) (2007).

116. MO. ANN. STAT. § 288.035 (2008).

117. NEB. REV. STAT. ANN. § 48-604(Q) (2007).

118. N.J. STAT. ANN. §43:21-19 (2007).

119. OKLA. STAT. ANN. tit. 40, § 1-208.1 (2007).

120. OR. REV. STAT. § 657.047 (2005).

121. TEX. LAB. CODE ANN. §§ 201.041, 201.073 (2007).

and Virginia.¹²² Those states which do not have a specific statutory exemption for owner-operators generally have adopted various industry exemptions from the definition of employment for unemployment tax purposes. The statutory owner-operator exemptions vary greatly in their specificity and application among the states. New Jersey, for example, offers the exemption only to owner-operators who operate vehicles weighing 18,000 pounds or more.¹²³ Illinois maintains a very detailed owner-operator exemption requiring a number of factors to be met.¹²⁴ These factors include a prohibition of truck lease-purchase agreements involving the motor carrier or related entity.¹²⁵ The exemption is further limited to operators of “trucks, truck-tractors, or tractors.”¹²⁶ Accordingly, it is extremely important for motor carriers to closely scrutinize the exemptions in any of the states in which owner-operators are utilized to assure compliance.

Some of the states which have enacted a statutory exemption subscribe to an ABC Test, which is a three prong test that deems an owner-operator to be an employee unless the motor carrier can demonstrate that all three prongs are met.¹²⁷ Although owner-operators are not specifically referenced in each, the following states use an ABC Test to determine whether a worker may be classified as an independent contractor: Arkansas,¹²⁸ Colorado,¹²⁹ Connecticut,¹³⁰ Delaware,¹³¹ Idaho,¹³² Louisiana,¹³³ Maine,¹³⁴ Massachusetts,¹³⁵ Nevada,¹³⁶ New Mexico,¹³⁷ Pennsylvania,¹³⁸ South Dakota,¹³⁹ Tennessee,¹⁴⁰ Utah,¹⁴¹ Vermont,¹⁴² Washington,¹⁴³ and West

122. VA. CODE ANN. § 60.2-212.1 (2008).

123. N.J. STAT. ANN. § 43:21-19 (2007).

124. ILL. COMP. STAT. 405 / 212.1 (2008).

125. 405 / 212.1.

126. 405 / 212.1.

127. *See, e.g.*, ARK. CODE ANN. § 11-10-210 (e) (2008).

128. § 11-10-210(e).

129. COLO. REV. STAT. § 8-70-115 (2007).

130. CONN. GEN. STAT. § 31-222 (2008).

131. DEL. CODE ANN. tit. 19, § 3302 (10) (2008).

132. IDAHO CODE ANN. § 72-1316 (4) (2008).

133. LA. REV. STAT. ANN. § 23:1472 (2008).

134. ME. REV. STAT. ANN. tit. 26, § 1043 (11) (2007).

135. MASS. GEN. LAWS ch. 151A § 2 (2008).

136. NEV. REV. STAT. ANN. § 612.085 (2007).

137. N.M. STAT. ANN. § 51-1-42 (2008).

138. 43 PA. CONS. STAT. ANN. § 753 (2007).

139. S.D. CODIFIED LAWS § 61-1-11 (2008).

140. TENN. CODE ANN. § 50-7-207(e) (2008).

141. UTAH CODE ANN. § 35A-4-204 (2007).

142. VT. STAT. ANN. tit. 21, § 1301(6) (2007).

143. WASH. REV. CODE § 50.04.140 (2008).

2008] *Independent Contractor Employment Classification* 151

Virginia.¹⁴⁴ While some states use a test that compresses the three prongs into a two prong, or AB Test,¹⁴⁵ the general analysis remains the same.

In general, the three prongs typically include: (A) the individual has been and will continue to be free from control or direction over the performance of the services both under the individual's contract of service and in fact; (B) the service is either outside the usual course of business for which the service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the contract of service.¹⁴⁶ These ABC or AB tests tend to make it unlikely an owner-operator will be classified as an independent contractor rather than an employee.

Prong "A" of the ABC Test typically requires an owner-operator to be free from the direction and control of the motor carrier in order to be deemed an independent contractor.¹⁴⁷ Similar to the Right of Control Analysis discussed with respect to workers' compensation, direction and control is universally deemed to be the most important factor in determining independent contractor status.¹⁴⁸

Although it is a fact-sensitive analysis, it is generally likely a putative employer will be able to demonstrate it does not exercise direction and control over the owner-operator.¹⁴⁹ The remaining prongs, however, prove much more difficult to overcome.

Prong "B" of the ABC Test, which requires the owner-operator to perform a service that is outside the usual course of business for which the service is performed, can be much more difficult to overcome if it is strictly interpreted.¹⁵⁰ For example, some state unemployment tax regulators define the "service" of both motor carriers and owner-operators to be that of transportation; consequently, owner-operators would categorically fail to meet Prong "B" of the ABC test.

Finally, the "C" prong of the ABC Test, which requires the owner-operator to be engaged in an independently established trade, tends to be the most averse to classifying an owner-operator as an independent contractor.¹⁵¹ This prong is difficult to overcome because state unemployment tax regulators

144. W. VA. CODE ANN. § 21A-1A-16 (2007).

145. *See, e.g.*, 43 PA. CONS. STAT. ANN. § 753 (2007); IDAHO CODE ANN. § 72-1316 (4) (2008).

146. NEV. REV. STAT. § 612.085 (2007).

147. Hardman, *supra* note 1 at 25.

148. *Id.*

149. *See, e.g.*, Danielle Viktor, Ltd. v. Dep't of Labor & Indus., 892 A.2d 781, 791 (Pa. 2006).

150. *E.g.*, NEV. REV. STAT. § 612.085 (2007).

151. *E.g.*, § 612.085.

often require the motor carrier to demonstrate the owner-operator is performing services for other motor carriers or is not otherwise dependent upon the motor carrier for the owner-operator's livelihood.¹⁵² Although independent contractor agreements are often drafted to make it clear the owner-operator is not required to operate solely for the motor carrier, it is common for owner-operators to only perform service for a single motor carrier, especially when ample freight delivery opportunities are available.¹⁵³ Moreover, federal leasing regulations require that an owner-operator's truck be under the "exclusive possession, control, and use" of the motor carrier for the duration of the lease.¹⁵⁴ This however does not preclude trip-leasing (an arrangement between the primary motor carrier and a motor carrier offering the owner-operator a backhaul opportunity), nor an owner-operator leasing a second truck to another motor carrier.¹⁵⁵

Although contrary case law exists,¹⁵⁶ viewing the factors as a whole, those states which subscribe to the ABC Test are more likely to classify owner-operators as employees, rather than independent contractors.

B. COMMON LAW TESTS

The states that have not enacted statutes either generally utilizing the ABC Test for purposes of determining employment status or specifically exempting owner-operators from the definition of employee for purposes of unemployment tax subscribe to a common law analysis to determine whether owner-operators are classified as independent contractors or employees for purposes of unemployment tax. Although this common law analysis has generally developed through case law, some states codified it into a general statutory test. Some states which have codified the common law factors include: Arizona,¹⁵⁷ California,¹⁵⁸ Florida,¹⁵⁹ Iowa,¹⁶⁰ Louisiana,¹⁶¹ North Dakota,¹⁶² Ohio,¹⁶³ Rhode Island,¹⁶⁴ and Wisconsin.¹⁶⁵

While the common law analysis subscribed to by each state varies, a

152. See, e.g., *Danielle Viktor*, 892 A.2d at 797-98.

153. See, e.g., *id.* at 796-98.

154. 49 C.F.R. § 376.12 (2008).

155. See § 376.12.

156. See, e.g., *Danielle Viktor*, 892 A.2d at 801.

157. ARIZ. ADMIN. CODE § R6-3-1723 (2007).

158. CAL. CODE REGS. tit. 22, § 4304-1 (2008).

159. FLA. STAT. § 443-1216(1)(a)(2) (2007).

160. IOWA ADMIN. CODE r. 871-23.19(96) (2008).

161. LA. REV. STAT. ANN. § 23:1472 (2008).

162. N.D. ADMIN. CODE 27-02-14-01 (2007).

163. OHIO ADMIN. CODE 4141-3-05 (2008).

164. R.I. GEN. LAWS § 28-42-7 (2007).

165. WIS. STAT. ANN. § 108.02(12) (2007).

2008] *Independent Contractor Employment Classification* 153

number of common factors typically arise. In general, the factors subscribed to are the same as the factors considered in the Restatement of Agency Analysis discussed with respect to workers' compensation.¹⁶⁶ In Kentucky, for example, the common law test includes the following factors: (1) "the extent of control"; (2) whether "the one employed is engaged in a distinct occupation or business;" (3) the kind of occupation involved; (4) the skill required; (5) who supplies the tools; (6) "the length of time for which the person is employed;" (7) "the method of payment"; (8) whether "the work is a part of the regular business of the employer;" (9) whether "the parties believe they are creating" a master-servant relationship; and (10) "whether the principal is or is not in business."¹⁶⁷

Iowa administrative code has adopted the general common law test for determining independent contractor status, but it specifically indicates employment status, rather than independent contractor status, is presumed.¹⁶⁸ However, Iowa also includes whether the worker has the right to employ assistants as a factor weighing toward an independent contractor classification.¹⁶⁹

Again, determining whether an owner-operator will be classified as an independent contractor or employee for purposes of unemployment tax using the common law analysis is fact-sensitive. Nevertheless, as compared to a strict construction of the statutory ABC Test, the common-law analysis states likely provide a greater opportunity for successfully defending the independent contractor classification of owner-operators.

IV. FAIR LABOR STANDARDS ACT

Among other things, the FLSA requires employers to pay overtime to employees who work in excess of 40 hours during a workweek.¹⁷⁰ However, the FLSA does not generally apply to truck drivers, drivers' helpers, loaders, and mechanics.¹⁷¹ Nonetheless, the same people who are concerned with the above discussion about classification of owner-operators as either independent contractors or employees for the purposes of worker's compensation and unemployment must also pay careful attention to the FLSA to avoid costly penalties associated with misclassifying individuals they employ. Many motor carriers mistakenly believe that, like their drivers, helpers, loaders, and mechanics, all of their salaried employees are exempt from the FLSA's

166. Ky. Unemployment Ins. Comm'n v. Landmark Cmty. Newspapers of KY, Inc., 91 S.W.3d 575, 579 (Ky. 2002).

167. *Id.* (quoting Am. Law Inst., Restatement (Second) of Agency § 220(2) (2007)).

168. IOWA ADMIN. CODE r. 871-23.19(96) (2008).

169. R. 871-23.19(96).

170. 29 U.S.C. § 207(a) (2008).

171. *See* 29 U.S.C. § 213(b)(1) (2008).

overtime requirement. That is simply not the case.

A. CLASSIFICATION UNDER THE FLSA

Only employees, and not independent contractors, are covered by the FLSA.¹⁷² The FLSA exempts from application of its overtime requirement those employees whose hours of service are governed by Federal Motor Carrier Administration (“FMCSA”) regulations.¹⁷³ FMCSA hours of service regulations apply to truck drivers who either cross state lines or make intrastate transportation of shipments that originate in or are bound for another state or country.¹⁷⁴ Because the bulk of a motor carrier’s workforce is exempt from application of the FLSA, it is common for carriers to underestimate the impact of the FLSA on their wage and hour practices. As an employer of exempt employees, non-exempt employees, and independent contractors, a motor carrier must have a thorough understanding of the FLSA, and its test to determine which individuals are covered by its provisions and which are not.

As a federal enactment subject to interpretation by far fewer courts than the provisions discussed in Parts II and III, above, determination of an individual’s status as either an independent contractor or employee under the FLSA tends to be more uniform than the state-specific tests associated with worker’s compensation and unemployment law. Federal courts apply an “economic reality test,” which generally examines between four and six factors, to determine the status of the individual in question.¹⁷⁵ The factors considered by the courts are: (1) the extent of the individual’s investment in equipment and facilities; (2) the individual’s opportunities for profit or loss; (3) the degree of control exercised by others over the individual’s work; (4) the permanency of the relationship between the individual and the persons for whom he or she performs work; (5) the skill required of the individual in performing his or her work; and (6) the extent to which the individual’s work is an integral part of the operation.¹⁷⁶

None of the factors, standing alone is dispositive. Similarly, contractual labeling of an individual as either an independent contractor or employee is immaterial.¹⁷⁷

172. *Brennan v. Lauderdale Yacht Basin, Inc.*, 493 F.2d 188, 190-91 (5th Cir. 1974); *Reab v. Electronic Arts, Inc.*, 214 F.R.D. 623, 627-28 (D. Colo. 2002).

173. 29 U.S.C. § 213(b)(1) (2008).

174. 49 U.S.C. § 31502(a) (2008); 49 C.F.R. § 390.5 (2008).

175. MONICA GALLAGHER, 2007 CUMULATIVE SUPPLEMENT TO THE FAIR LABOR STANDARDS ACT 38 (Ellen C. Kearns, ed., 2007).

176. *Id.* at 44-50.

177. *Id.* at 80.

2008] *Independent Contractor Employment Classification* 155**B. EXCEPTIONS TO FLSA OVERTIME REQUIREMENTS**

Employers may use “white collar exemptions” to avoid paying overtime to bona fide executives and administrative employees that fit certain criteria.¹⁷⁸ Two common tests to determine which employees fit the exception are the “salary basis test” and the “duty test.”¹⁷⁹

Generally, under the salary basis test, an employee is exempt from overtime if he or she receives regular compensation in an amount of at least \$455 per week, regardless of the quantity or quality of work performed.¹⁸⁰ To satisfy the duty test, an employee must direct the work of two or more full-time employees and exercise discretion and independent judgment in the performance of office or non-manual work related to management policies or general business operations.¹⁸¹

C. FEDERAL AND STATE LAW INTERPLAY

The FLSA provides federally-mandated entitlements for non-exempt employees.¹⁸² States having jurisdiction over motor carriers, however, may have wage and hour laws which increase the entitlements due to qualifying employees.¹⁸³ For example, 32 states currently have higher minimum wages than that provided in the FLSA, while 10 states match the FLSA minimum wage.¹⁸⁴ Other state wage and hour laws provide entitlements not mentioned in the FLSA, such as mandatory employee rest breaks.¹⁸⁵ Motor carriers must therefore pay careful attention to not only the FLSA, but the laws of the individual states in which they operate.

Although the classification of owner-operators as either independent contractors or employees generally does not impact a motor carrier’s liability under the FLSA, carriers still face exposure from classification of other individuals they employ. A motor carrier should periodically consult counsel to review the classification of its non-exempt employees in order to avoid the costly fines associated with violating the law.

V. CONCLUSION

Although the information provided in this Article is merely intended to

178. 29 U.S.C. § 213(a) (2008).

179. *E.g.*, 29 C.F.R. § 541.100 (2008).

180. 29 C.F.R. §§ 541.600(a), 541.602(a) (2008).

181. 29 C.F.R. §§ 541.100(a)(3), 541.200-541.202 (2008).

182. *E.g.*, 29 U.S.C. § 206 (a) (2008).

183. *See* U.S. Department of Labor, *Minimum Wage Laws in the States*, Jan. 1, 2008, <http://www.dol.gov/esa/minwage/america.htm>.

184. U.S. Department of Labor, *supra* note 183.

185. CAL. CODE REGS. tit. 8, § 11040 (2008).

provide an overview of (1) the various methods adopted to determine whether owner-operators should be classified as independent contractors or employees for purposes of workers' compensation and unemployment tax and (2) the FLSA and its application to the transportation industry, the various considerations discussed in this Article should be looked into in depth by motor carriers before making decisions regarding the classification of owner-operators and other workers they employ.