February 3, 2014

On January 10, 2014, the New York State Commercial Goods Transportation Industry Fair Play Act was signed into law. This Fair Play Act follows another Fair Play Act that was passed in August 2010 and applied to the construction industry. This version applies to commercial trucking and delivery in New York.

To summarize the new law in the simplest terms, it requires, absent verifiable proof to the contrary, every person or company that hires truck drivers (including owner-operators) to treat those drivers like employees regardless of whether they were previously regarded as independent contractors. Before smaller companies and individual operators tune out, know that the Fair Play Act does not just target large corporations. Truck drivers themselves are not immune from being considered employers under the Fair Play Act. If the owner-operator of a trucking company has his or her own contract truckers, he or she will also be subject to the Fair Play Act as a hiring company/contractor.

Employees in New York are entitled to many protections and benefits that independent contractors are not, including employer liability insurance defense and indemnification coverage, workers' compensation insurance, unemployment benefits, social security benefits, wage protections, union rights, and health and safety protections. Under the new law, companies that hire truck drivers will be required to provide these employment benefits to many drivers who were previously viewed as independent contractors. Unfortunately, the time to muse over the many potential effects of this law and strategize about coping strategies is short. The law provides only sixty days to analyze and adjust employment and contracting practices and policies before the law becomes effective on March 11, 2014.

Although the law seemingly will place companies in a bind when it comes to making wholesale changes to their past employment and hiring practices, there are some exceptions through which some companies may escape the effect of this law. Under the Fair Play Act, New York will now presume that any truck driver transporting goods or merchandise in New York for a company (no matter the size) is an employee of the company for which the driver is hired to transport the goods or merchandise. (§ 862-B). New York will make an exception, however, and thereby relieve the individual or company of employer obligations, if the driver meets the new definition for either a "separate business entity" or an "independent contractor."

SEPARATE BUSINESS ENTITY EXCEPTION

For the truck driver to be considered a separate business entity, as opposed to an employee, all the following criteria must be met:

- the truck driver controls how the service is provided and the hiring company or individual (the "contractor") only specifies a desired result;
- if the truck driver operates as a business entity, it is not subject to cancellation or destruction if it breaks away from the contractor;
- the truck driver has invested substantial capital in his or her business, including tools and equipment;
- the truck driver owns or leases the truck and other capital goods and bears the losses and receives the profits from his or her business activities;
- the truck driver may offer similar services to the general public or other businesses whenever and however he or she chooses;
- the truck driver provides services that are scheduled, for federal tax purposes, as an independent business or profession;
- the truck driver has a written contract with the contractor that states he or she is an independent contractor or business entity;
- the truck driver pays for his or her own licenses and permits or pays for the reasonable use of the contractor's license or permit;
- the truck driver, if necessary, hires his or her own employees, is not reimbursed for those employees by the contractor, and reports those employees' incomes to the IRS; and
- the contractor does not require that the truck driver present himself or herself to customers as the contractor's employee.

Owner-operator truck drivers will often operate as an informal business entity, such as "John Doe's Trucking," which is just a name under which John Doe operates his business, as opposed to "John Doe Trucking, Inc.," which is a formal legal entity or corporation. The important reality each entity must now face is that under the new Fair Pay Act, this distinction is irrelevant and every truck driver's status should be analyzed in the same manner regardless of what form the truck driver's business takes.

Obviously, the separate business entity exception is onerous and many companies' current practices will fall short of its requirements when viewed in light of the above-outlined analysis. However, the failure to meet this exception is not always completely

determinative of the outcome. A company may still escape liability and penalties under the Fair Pay Act by meeting the newly outlined "Independent Contractor Exception."

THE INDEPENDENT CONTRACTOR EXCEPTION

If a truck driver does not meet the business entity exception, he or she may still fall short of being classified as an employee if all the following independent contractor criteria are met:

- the truck driver is free from control and direction in performing his or her job, both under the contact and in actuality;
- the transportation performed by the truck driver is not part of the usual course of business for the contractor/hiring company; and
- the truck driver customarily performs the transportation service as an independent trade, occupation, profession, or business.

The independent contractor test will potentially help companies that are not trucking or transport companies and still want exclusivity from their drivers or want to engage in some other practice that would result in a violation of the separate business entity test. Due to the second requirement, however, the separate business entity test will be one of the only ways for trucking and transport companies, including truck drivers who have hired other truck drivers to carry out or assist with a contract, to escape the effect of the Fair Play Act.

RULES, PENALTIES & RETALIATION

Those companies that pay truck drivers to transport goods in New York will be required to post a statement by the Commissioner of Labor that describes employees' and independent contractors' rights and obligations under the Fair Play Act. The poster is scheduled to be available on the Department of Labor's website on or before February 9, 2014. The failure to properly display this poster may result in a $1,500 penalty for the first infraction and $5,000 for every subsequent infraction over a five-year period.

Companies and individuals are forbidden from retaliating against their truck drivers for exercising rights provided by the Fair Play Act, for complaining about violations of the Fair Play Act, or for instituting or participating in any proceeding or investigation related to the Fair Play Act. The Fair Play Act penalizes any such retaliation as a violation of

the act (subject to the penalties discussed below) and also gives the truck driver the right to bring a lawsuit on his or her own behalf.

To give the law "teeth," the legislature included a progressive penalty structure. The Act penalizes any failure to properly classify a truck driver as an employee where the individual or company knew *or should have known* that they were in violation of the Act. The penalties start at $2,500 per misclassified employee for the first violation and $5,000 per misclassified employee for every subsequent violation within a five-year period. The Act also includes criminal penalties that may apply in addition to the above civil penalties. The criminal penalties permit up to 30 days imprisonment or a $25,000 fine for a first violation and up to 60 days imprisonment or a $50,000 fine for any subsequent violation within a five-year period.

These fines, penalties, and punishments cannot be avoided by the average corporate structuring arrangement. All the penalties, criminal and civil, may apply to any officer or shareholder in a corporation if they own at least ten percent of the corporate stock. Closely affiliated companies may also be subject to these penalties.

It is important to note, the above-outlined penalties are not the exclusive means of punishment for violations of the Act. Other penalties arising from the failure to comply with the law as a result of the misclassification of an employee will still apply. An example would include the penalties imposed for the failure to pay taxes on an employee's wages. Further, individuals, entities, and corporate officers and shareholders may be ineligible to bid on future public works contracts if they or a corporation in which they hold at least a ten percent interest is convicted under the criminal provisions of the law.

OTHER CONSIDERATIONS

It would seem that the Act does not apply to *only* truck drivers. A strict reading of the language in the Act would suggest that its provisions are also applicable to other "commercial vehicle drivers" because the Act does not limit the definition of that term. New York generally defines "commercial motor vehicles," a similar term, as vehicles that transport property and weigh at least 10,001 pounds (Transportation Law § 2.4-a). The definition of commercial motor vehicles also includes vehicles that may not meet the weight requirement, but that are used to transport hazardous materials of a certain quantity. It remains to be seen, and most likely litigated, as to whether the Court's will interpret the law as including and covering operators of other commercial vehicles.

There is also a proposed amendment to the Act already pending in the New York State legislature. Amongst other proposed changes, the amendments would extend the effective date from sixty to ninety days.

CAUTION

Our aim is to simplify the Fair Play Act as much as possible and help you understand how it might affect you, but this article should not be regarded as legal advice. If you think this law may apply to you, or you would like to discuss the facts and circumstances behind your specific concerns, please talk to your attorney for specific guidance and advice.

If you have any questions about any of these new developments, please contact any attorney of our Firm at 585-730-4773.