

January 14, 2021

**Via U.S. Mail and Email [danielle.williams@dwd.wisconsin.gov](mailto:danielle.williams@dwd.wisconsin.gov)**

Joint Enforcement Task Force on Payroll Fraud and Worker Misclassification  
c/o Ms. Danielle Williams  
Assistant Deputy Secretary & Task Force Member  
Department of Workforce Development  
201 E. Washington Ave., P.O. Box 7946  
Madison, WI 53707

Re: Independent Contractor Classification in Transportation

Dear Ms. Williams and Task Force Members:

We respectfully submit for the Task Force's consideration, the following comments. This submission is on behalf of several of our transportation industry clients.

DeWitt clients were involved in the early 1980s in establishing the Wisconsin Supreme Court's precedents that set the standard for independent contractor classification in transportation. Later in the 1980s, DeWitt and its clients assisted in the consultations that led to the adoption of DWD 105, specific criteria for the classification determinations for transportation and subject to the Wisconsin Supreme Court's rulings. Those principles have since been adopted by most courts across the nation.

Transportation differs significantly from the other industries addressed in the Task Force's 2020 Report. By way of example:

- Transportation abounds in historic examples of businesses begun by an owner-operator, evolving into fleet operator and, thence, into for-hire carrier. Today, the pattern, if anything, is more pronounced than in the past.
- Today in transportation, as a result of information technology, particularly mobile communications, it is not at all unusual for an owner-operator or drivers employed by contract operators to be engaged by different carriers within a single day's tour of duty and to have standing master contracts with more than one for-hire carrier simultaneously.
- Truth-in-Leasing regulation (49 CFR Part 376) was established in the late 1970s and combined with the marketplace to curb most potential abuses. Even those exempt from Truth-in-Leasing regulations, by force of the markets for their sale of transportation services, are able to sell transportation to for-hire carriers under written leases that conform to Truth-in-Leasing. A right

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of private action for Truth-in-Leasing violations was added in 1996. In the cases where abuses do occur, the regulations and the courts provide ready remedies, which have included class action certifications and recovery of attorneys' fees.


- Transportation is predominated by interstate enterprises, even when many of the enterprise's trips originate and terminate within a single state. Such enterprises are often subject to federal preemption either by statute or by the U.S. Constitution's Commerce Clause, or by both.
- Some of the metrics in the Task Force's 2020 report appear to assert levels of misclassification in transportation based on audit and settlement results or uncontested claims. The Task Force may wish to submit the following questions for further consideration by the Department or those who provided information for the report:
  - In how many of those situations did the carrier settle with the Department based on nuisance value (cost of defending exceeding the penalty)?
  - In how many instances were benefits claims involving initial determinations of misclassification uncontested, not appealed by the carrier, for the same reason, nuisance value?
  - In how many instances in 2020 did the Department block CARES Act benefits to independent contractors who filed with the Department solely to satisfy the CARES Act requirements for independent contractors to access such benefits determined by the Department to be employees rather than the independent contractors they claimed to be?

The Department's systems were over-stretched in 2020 due to COVID. Regardless of COVID, however, the Department's systems of taxing for unemployment are ill-suited to dealing with contract operators, as we have described, who may be engaged by multiple for-hire carriers within a single day's tour of duty for the driver.

For these reasons, if the Task Force believes there is reason to investigate and take action against alleged misclassification in transportation, we respectfully request the Task Force separately address classification in the transportation industry and provide opportunities for the industry to expand upon and detail the examples provided in this short summary.

Sincerely,

DeWitt LLP

  
John Duncan Varda