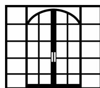

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OWNER-OPERATOR INSURANCE PROGRAMS AND STATUS OF OWNER-OPERATOR

REV. MAY 1, 2008

A concern often expressed by motor carriers regarding chargebacks and/or debits of owner-operator settlement checks with respect to occupational accident, physical damage, non-trucking liability and/or health insurance is whether this practice may cause a deterioration of the independent contractor status between the motor carrier and owner-operators who receive coverage under one or more of these policies. As a result, certain motor carriers have expressed reluctance to facilitate, participate, or in any other way become involved in such programs from the standpoint of facilitating the flow of premiums, insurance costs, or other such remuneration between the owner-operator and providers of the insurance.

In short, the facilitation of insurance and the practice of settlement check deductions on behalf of owner-operators will not in and of itself create an employment relationship. A variety of factors are considered in the analysis, and a balance must be maintained between certain operational realities and a conservative but appropriate legal perspective of the nexus between a motor carrier's facilitation of insurance and the work status of an owner-operator.

With the exception of health coverage, the facilitation of insurance coverages generally presents relatively little concern if properly constructed and executed (although in *Estrada v. FedEx Ground Package System, Inc.*, a California superior court and court of appeals misinterpreted occupational accident insurance as if it was workers' compensation insurance, although such a misinterpretation is not a common occurrence). The fact that facilitating insurance is contemplated in the federal motor carrier regulations (*see* 49 CFR Part 376.12(j)) provides a compelling argument that such an act is part and parcel of practices within the trucking industry. Interstate Commerce Commission ("ICC") decisions have also addressed this practice as customary and usual. Setting aside a misinterpretation of the policy language (as referenced above), the practice of settlement deductions for insurance by motor carriers with respect to its owner-operator workforce is not generally cited as an indicia of employment upon which legal decisions are based or supported.

The trucking industry struggles to resolve a need for health insurance that can be made available at an affordable rate to the owner-operator workforce. Issues of owner-operator recruiting and retention create critical tension with seemingly opposing issues of providing "employment-like" programs that may superficially tend to define an owner-operator more as an employee and less as an independent contractor. The pure legal answer may well be to avoid any indicia, regardless of how superficial, that may tend towards an employment definition. That said, the facilitation of health insurance through limited involvement via settlement deduction in a manner consistent with the federal leasing regulations (including 49 C.F.R. 376.12(h), (i) and (j)) does not pose an undue threat to the legal status of an owner-operator as an independent contractor provided the parameters of a motor carrier's involvement are within acceptable limitations. Those "acceptable limits" stop well short of the

motor carrier (1) endorsing the program, (3) retaining a portion of "premiums," (c) subsidizing a portion of the cost of insurance, or (4) allowing an owner-operator to participate in a health plan that the motor carrier maintains for its true employees. These same caveats actually apply to any of the other programs mentioned herein. The four over-arching concerns are separately addressed below:

1. **NO ENDORSEMENT.** If a motor carrier "endorses" insurance, it may expose itself to regulatory and tort liabilities. The regulatory liability involves a convenient interpretation by factions in the trucking industry that tend to interpret, in a self-serving manner, a motor carrier's involvement in advertisement, communication, or other "endorsement-like" communications as though the motor carrier is engaging in the unlicensed business of insurance brokerage. Many state insurance laws, regulations, and case law broadly define those activities that constitute the business of insurance brokerage and require a license. As a result of such broad licensing requirements, express endorsements or advertisements by a motor carrier can readily be interpreted (or misinterpreted) as an aspect of insurance brokerage. Misrepresentations that proximately cause damage (*e.g.*, a coverage gap) could result in negligence allegations aimed at the motor carrier and licensed insurance broker. Consequently, motor carriers should not lend their names to programs or in any other way imply the motor carrier is suggesting an approval of the program. The motor carrier should remain in a position to assist the owner-operators with the settlement deduction process for a single program and avoid the administrative burdens of a settlement deduction for multiple programs.

2. **AVOID PREMIUM RETENTION.** Motor carriers should also avoid retaining any portion of the premium. Typically, "premium" is a defined term in a state's insurance code. Yet, the federal leasing regulations referenced above use the term "cost of insurance" in a generic fashion. ICC decisions focus on the "cost to the contractor" for the insurance as being the primary concern. In at least one case, the ICC analyzed a retrospective rated workers' compensation program that involved a motor carrier charging back owner-operators for their participation in the program. In that context, the ICC recognized that disclosure of the cost to the contractor for the insurance was the critical disclosure (particularly in a retrospective rated program) because the actual premium remitted to the insurance broker and insurance carrier was not ascertainable at the time of charge back and not of pivotal concern as long as the contractor understood his cost. Consequently, to the extent the amount paid by a contractor for an insurance program is defined as a "premium" in documents provided to the contractor by the insurance broker, no such amounts should be retained by the motor carrier. Reasonable arguments can be made that an administrative cost by the motor carrier to offset its expenses related to the settlement deduction process is allowed, but such amounts should be separately disclosed as administrative fees and not directly related to "premium."

3. **NO SUBSIDY.** Motor carriers should not subsidize insurance programs. Unfortunately, this advice is not often practical regarding health insurance given the high cost of coverage. The reality of "adverse selection" plays an important factor in health insurance programs. Adverse selection is pragmatically defined as "those persons who are sick tend to buy health insurance and those persons who are not are not

interested in the extra cost associated with such insurance." Therefore, "adverse selection" creates a circumstance within a few short years where insurance losses eclipse insurance premiums. Some motor carriers, in the interest of recruiting and retention, subsidize the cost of insurance such that even the healthy contractors become interested in purchasing coverage. If a health program can add a substantial number of healthy insureds, it may avoid "adverse selection" and a negative premium to loss ratio. The motor carrier often justifies its involvement and supplements as being consistent with good business because such involvement on the part of the motor carrier may reduce contractor turnover and allow the motor carrier to retain and attract the best contractors. Unfortunately, a motor carrier's contribution to the cost of the insurance tends to blur the line between group health insurance for employees and separately purchased health programs merely facilitated by the motor carrier via settlement deductions for contractors. Given that many health programs available to contractors conveniently misuse "employment" terms of legal significance, the issue of independent contractor versus employment mentioned earlier in this letter can become quite problematic if mixed with a financial subsidy on the part of the motor carrier.

4. **DISQUALIFICATION OF EMPLOYER PLANS.** Finally, motor carriers should not allow their owner-operators to participate in the same health programs that the motor carrier sponsors for its true employees. This fourth point goes beyond the first three scenarios where the motor carrier was limited to facilitating the flow of premiums, but given the potential consequences, this issue requires separate attention. If a motor carrier maintains a qualified health program for its employees and also allows its owner-operators to participate in that same plan, the motor carrier may be regarded as having violated ERISA's "Exclusive Benefit Rule" set forth in Internal Revenue Code § 401(a)(2). Under this rule, an employer cannot use employee plan assets for non-employees. If this is done, the employer who maintains the qualified health program runs the risk of having the entire plan disqualified for tax purposes and all pre-tax contributions and benefit payments may be subject to income tax. A related problem is that because ERISA's Exclusive Benefit Rule states that only true employees can participate in an employer-sponsored plan, if a motor carrier allows its owner-operators to participate in the same plan this may increase the possibility that the owner-operators may be recharacterized as employees.

Motor carriers should also avoid self-funded or partially self-funded programs in the area of health insurance. Such programs are readily defined as multiple employer welfare arrangements ("MEWA"). Typically, health insurance programs that are self-insured depend upon federal preemption under ERISA to insulate the program from insurance regulation by the states. A MEWA, however, is not an exempted program and can be regulated by the state insurance authorities. The essence of the applicable state regulations tend to create a requirement that a self-funded program must meet the typical requirements of a fully insured program. The realities are that few if any self-funded programs can meet such rigorous financial standards.

This memo should not be relied upon as specific legal advice. It addresses only a few of the critical issues related to the facilitation of insurance and should not be construed as suggesting that a motor carrier should avoid facilitating insurance in every instance. Rather, a motor carrier can facilitate such programs within a carefully controlled environment and subject to the limitations outlined above, but each scenario must be analyzed independently.