# BOND INFORMATION MEMO

## Labor and Employment Law

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## Transportation Industry Beware: New York Quietly Enacts New Legislation Targeting Worker Misclassification

New York has enacted new legislation, which will have a significant impact on the state's commercial transportation industry. The legislation was initially made effective on March 11, 2014, but was subsequently amended to incorporate some "technical corrections" and to include a new, later effective date of April 10, 2014. Known as the "Commercial Goods Transportation Industry Fair Play Act" (the "Act"), this new law is intended to curtail what New York government officials view as the "misclassification" of workers – as independent contractors, rather than employees – in the transportation industry. As summarized below, the legislation will not only significantly restrict the use of such independent contractors, but will also impose other new requirements applicable to New York businesses in the commercial goods transportation industry.

### Why is New York Taking This Action?

In addition to the Act, New York previously enacted similar legislation in the construction industry, and, more generally, has established a multi-agency "task force" designed to curb the purported misclassification of workers in New York. Through these efforts, New York government officials are seeking to recoup "lost" revenue, e.g., employment-based tax withholdings not captured where there is a non-employment relationship between the business and individual service provider. In contrast, where there is an employer-employee relationship – now presumed to be the case for commercial drivers and businesses covered by the Act – there is an affirmative obligation to withhold and pay these taxes to the state.

The Act is therefore another step in the state's effort to "crack down" on the use of independent contractors by New York businesses. It should also be noted by management that organized labor, particularly the Teamsters union, has been strongly supportive of this legislation. It can therefore be reasonably expected that the Teamsters and other unions will utilize this legislation as an aid to organizing workers in the transportation industry.

### Presumption of Employment Status for Covered Commercial Drivers

The centerpiece of the new legislation is the establishment of a presumed employment relationship for certain drivers who provide "commercial goods transportation services for a commercial goods transportation contractor." (These underlined terms are explained below.)

In other words, covered commercial drivers who provide these services are presumed to be employees under the law. It is then left to the respective business receiving such services to "rebut" this presumption by proving the driver in question is a bona-fide "independent contractor" or constitutes a "separate business entity." As explained below, businesses seeking to disclaim an employment relationship with covered drivers must satisfy specific, multi-factor tests under either prong.

Businesses failing to rebut the presumption of employment status through these tests will face significant penalties. Additionally, the misclassification of workers can raise other significant legal issues, such as workers' compensation insurance coverage failures, unemployment insurance contribution shortfalls, and improper income tax withholding and reporting.

The Act applies to all "commercial goods transportation contractors." This term is broadly defined to include:

> "[A]ny sole proprietor, partnership, firm, corporation, limited liability company, association or other legal entity that compensates a driver who possesses a state-issued driver's license, transports goods in the state of New York, and operates a commercial motor vehicle as defined in subdivision four-a section two of the transportation law."

The term "commercial goods transportation services" is defined as "the transportation of goods for compensation by a driver who possesses a state-issued driver's license, transports goods in the state of New York, and operates a commercial motor vehicle as defined in subdivision four-a section two of the transportation law." In turn, the referenced section of New York's transportation law defines a "commercial motor vehicle" as including a "motor vehicle used on a highway in intrastate, interstate or international commerce [that] has a gross vehicle weight rating or gross combination weight of ten thousand one pounds or more, whichever is greater."

### Rebutting the Presumption of Employment Status

A covered business can rebut the presumption of employment status in one of two ways.

First, the business can show the driver is a bona-fide "independent contractor." To do so, all of the following criteria must be met under the Act's so-called "A-B-C" test:

A. the individual is free from control and direction in performing the job, both under his or her contract and in fact;

B. the service must be performed outside the usual course of business for which the service is performed; and

C. the individual is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue.

Second, the business can show the driver is a "separate business entity." To establish this alternative defense, the business must specifically show that each and every part of a detailed, eleven-factor test is met.

Significantly, one of the "technical corrections" to the Act made explicit that even if one of the above tests is otherwise met, a person performing transportation services will be presumed to be an employee if his/her services are not reported on an IRS Form 1099.

### What are the Penalties for Non-Compliance?

The Act imposes new, significant penalties for businesses failing to properly treat covered drivers as employees.

Violations deemed to be "willful" are punishable by substantial civil and criminal penalties. Willful violations are defined as violations where a party "knew or should have known that his or her conduct was prohibited." Civil remedies include a penalty of $2,500 per misclassified worker for a first violation, and a penalty of $5,000 per misclassified worker for subsequent violations. Criminal penalties include up to 30 days imprisonment or a fine not to exceed $25,000 for the first violation, and up to 60 days imprisonment or a fine not to exceed $50,000 for subsequent violations.

These civil and criminal penalties may also be imposed under certain circumstances against corporate officers and against shareholders who own or control at least ten percent of the corporation's outstanding stock. Further, non-compliant businesses, as well as certain corporate officers and shareholders, may be "debarred" from public works contracts in New York for a period of up to one year for a first violation and up to five years in the event of subsequent violations.

### Agency Information Sharing

In the event of a violation, the Act additionally mandates prompt information sharing among the New York State Department of Labor ("NYSDOL"), Workers' Compensation Board, and Department of Taxation and Finance. Thus, a misclassification finding by one state agency will in all likelihood raise other significant legal issues before other state agencies.

### Other Requirements

The Act imposes other additional requirements for New York businesses in the transportation industry, some of which appear to apply regardless of whether the respective business actually uses independent contractors.

For example, the Act expressly prohibits employers and their agents from retaliating "through discharge or in any other manner against any person in the terms of conditions of his or her employment" for:

- making, or threatening to make, a complaint to an employer, co-worker or to a public body that rights guaranteed under [the Act] have been violated;
- causing to be instituted any proceeding under or related to [the Act]; or
- providing information to, or testifying before, any public body conducting an investigation, hearing or inquiry into any such violation of a law, rule or regulation by such employer.

Violations of this anti-retaliation provision are subject to the Act's civil penalty scheme discussed above and to a private cause of action.

Additionally, the Act requires all commercial goods transportation contractors to post a notice describing:

- the responsibility of independent contractors to pay taxes;
- the rights of employees to workers' compensation, unemployment benefits, minimum wage, overtime and other protections; and
- the protections against retaliation.

According to the Act, this notice must also contain contact information for individuals to file complaints or inquire with the Commissioner of the NYSDOL about employment classification status, and must be provided in English, Spanish or other languages required by the Commissioner. It is expected that the NYSDOL will soon publish a model notice on its website. Businesses failing to comply with this posting requirement will face monetary penalties of up to $1,500 for a first violation and up to $5,000 for subsequent violations.

### Conclusion

New York has significantly raised the stakes for covered businesses in the transportation industry and their use of independent contractors. These businesses should carefully consider the potential implications of such use, as well as the other requirements imposed by the Act.

Although the Act permits covered businesses to rebut the new presumption of employment status under certain, limited circumstances, management should carefully consider whether the necessary factors can indeed be met in the event of a legal challenge. Given that this legislation is brand new, it remains to be seen how the NYSDOL and other state regulators will interpret and apply these new tests.

That said, one point is clear: New York state regulators will have their "sights set" on the classification of workers as independent contractors within the commercial transportation industry. Be prepared!

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