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TO: Larry Pursley
FROM: Phil Talmadge
RE: Owner/Operators

Various state agencies (and the IRS) have concerns about the use of owner/operators. Some WTA members assume that merely by calling someone an owner/operator, it is enough. That is not true. To the extent that a company treats an owner/operator more as an employee than as a separate business with whom they are dealing at arms length, the company is asking for trouble with DOLI, DES, and the IRS. This memorandum will address the legal issues involving owner/operators under state law.

(1) Worker Compensation

Historically, Washington law has broadly defined employment subject to its worker compensation laws. For example, RCW 51.12.095 and WAC 296-17-35203(3) state that common or contract carriers doing business in this state that are engaged exclusively in interstate commerce or foreign commerce must still provide coverage for their Washington employees, unless such an employer has furnished worker compensation coverage under the laws of another state to its employees. RCW 51.12.095(1). *See generally, Stelter v. Dep't of Labor & Indus.*, 147 Wn.2d 702, 57 P.3d 248 (2002).¹

¹ Sole proprietors and partners are generally not covered under Washington's worker compensation law. RCW 51.12.020(5). *See, Dep't of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 849 P.2d 1209 (1993); *Dosanjh v. Bhatti*, 85 Wn. App. 769, 934 P.2d 1210, *review denied*, 133 Wn.2d 1016 (1997). This is the reason owner/operators, if they are truly a legitimate separate business, are not covered under Washington's worker compensation laws. However, an owner/operator may decide to elect coverage under the worker compensation act for himself. RCW 51.12.095(2) states:

A person who is domiciled in this state and who owns and operates a truck engaged in intrastate, interstate, or foreign commerce, or any combination thereof, may elect coverage under this title in the manner provided by RCW 51.32.030, whether or not the truck is leased to a common or contract carrier.

Washington law also broadly defines a “covered worker” for worker compensation purposes. Simply because a person is not an employee does not mean that they are exempted from coverage. A person is a covered worker if they are an employee of the company *or* if they are an independent contractor the essence of whose contract is personal labor:

Every person in the state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in the state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment, or as an exception to the definition of worker, a person is not a worker if he or she meets the test set forth in subsections (1) through (6) of RCW 51.08.195 . . .

RCW 51.08.180 (definition of a worker). RCW 51.08.195 establishes an alternative definition of a worker for purposes of Washington’s worker compensation law. It is probably wise for a company to be certain that most, if not all, of these factors are met in any owner/operator agreement:

(1) The individual has been and will continue to be free from control or direction over the performance of the service, both under the contract of service and in fact; and (2) the service is either outside the usual course of business for which the service is performed, or the service is performed outside all of the places of business of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed; and (3) 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, or the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes; and (4) on the effective date of the contract of service, the individual was responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the Internal Revenue Service for the type of business the individual is conducting; and (5) on the effective date of the contract of service, or within a reasonable period after the effective date of the contract, the individual has established an account with the department of revenue, and other state agencies as

required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and as registered for an received a unified business identifier number from the state of Washington; and (6) on the effective date of the contract of service, the individual is maintaining a separate set of books or records that reflects all items of income and expenses of the business which the individual is conducting.

Washington's worker compensation law must be liberally construed in favor of coverage for workers. RCW 51.12.010; *McIndoe v. Dep't of Labor & Indus.*, 144 Wn.2d 252, 256-57, 26 P.3d 903 (2001).

Numerous cases both before the Washington courts and the Board of Industrial Insurance Appeals have found independent contractors to be covered under Washington's worker compensation law, requiring the employer to pay premiums for them. For example, in *Dep't of Labor & Indus. v. Tacoma Yellow Cab Co.*, 31 Wn. App. 117, 639 P.2d 843, *review denied*, 97 Wn2d 1015 (1982), a cab company leased cabs to drivers in an elaborate relationship calculated to avoid coverage. The courts cut through the relationship and determined that the essence of the lease contract was the personal labor of the drivers. The drivers "leasing" the cabs performed essentially the same functions as those few employees of the cab company who regularly drove the taxis for it. *See also, Lloyd's of Yakima v. Dep't of Labor & Indus.*, 33 Wn. App. 745, 662 P.2d 391 (1982) (carpet installers); *Jamison v. Dep't of Labor & Indus.*, 65 Wn. App. 125, 827 P.2d 1085 (1992) (tree cutters); *Peter M. Black Real Estate Co. v. Dep't of Labor and Indus.*, 70 Wn. App. 482, 854 P.2d 46 (1993)(real estate agents).

Washington law since 1982 has recognized a special exception for owners/operators, exempting them from the definition of a covered worker under Washington law:

...a person is not a worker for the purpose of this title, with respect to his or her activities attendant to operating a truck which he or she owns, and which is leased to a common or contract carrier.

RCW 51.08.180.

The issue of whether owner/operators are covered workers has been considered by the courts and the Board. In *Dep't of Labor & Indus. v. Mitchell Brothers Truck Line, Inc.*, 113 Wn. App. 700, 54 P.3d 711 (2002), the court held that owner/operators were not covered under Washington's worker

compensation law where the company subleased its trucks to 24 independent truck drivers for a 48-month term. At the end of the term, the owner/operator had the option to purchase the leased truck for the truck's residual value. Upon executing the lease, the owner/operator immediately re-leased the same truck back to the company for a term of one year which renewed automatically unless the lease was terminated. The owner/operator could opt to purchase the truck at the end of the 48-month term. The owner/operator was compensated on a cents per mile basis. The court concluded that because the owner/operators bore all of the responsibility and cost of maintenance, repair, and replacement for the truck and the costs of its operation such as fuel, taxes, and insurance, there were enough to indicate a legitimate separate business for the owner/operators to satisfy the requirements of RCW 51.08.180. Crucial to the Court's analysis was the fact that the owner/operators effectively owned the trucks in question.

However, in a 2006 Board decision *In re Namon E. Martin Trucking, LLC*, the Board concluded that "owner/operators" were, in fact, employees of the business rather than independent business people. The drivers there leased the truck from the company, in theory, but the lease had no end date or specification of payment. The company had an unwritten policy regarding the purchase of the truck at the conclusion of the lease. The company took care of regular maintenance and major repairs on the vehicles and paid for fuel. In fact, the company leased the same four trucks to 26 different drivers.

Similarly, the 2008 Board decision of *In re Dale Sanders Trucking Co.* is very telling. There, the carrier had a lease/purchase arrangement similar to the one in *Mitchell Bros.* Nevertheless, the Board found the owner/operators were covered workers under the Act because the agreements were mandatory. Dale Sanders Trucking had no employees other than owner/operators and the carrier treated the owner/operators like employees. No driver had ever purchased a truck and some did not know they had the right to do so. They did not claim truck depreciation on their taxes. The drivers never hauled goods for anyone but Dale Sanders Trucking. The drivers had no UBI numbers or accounts with the Department of Revenue. The carrier, not the drivers, paid for insurance, maintenance, fuel, and license fees. The drivers had no separate place of business or records. Some drivers even received a monthly bonus from the carrier for on-time deliveries.

In recent years, WTA has seen many cases involving owner/operators in which the relationship between the company and the alleged owner/operators is far from that of separate businesses. For example, in one instance, the company celebrated an owner/operator's 20-year anniversary as an "employee" with the company.

(2) Unemployment Compensation

DES utilizes largely the same standards as DOLI in addressing whether an employer must pay unemployment compensation premiums on independent contractors, although there is no specific statutory exemption from coverage for owner/operators as is true in the industrial insurance context. RCW 50.04.100 establishes the general test for coverage in the unemployment compensation system. An employer must pay premiums for persons it “employs.” “Employment” is defined as

personal service, of whatever nature, unlimited by the relationship of master and servant as known to the common law or any other legal relationship, including service in interstate commerce, performed for wages or under any contract calling for the performance of personal service, written or oral, express or implied.

RCW 50.04.100. Thus, even if a person is described as an “independent contractor,” there may still be coverage for such a person if personal services are rendered to the employer. *Affordable Cabs, Inc. v. Dep’t of Employment Security*, 124 Wn. App. 361, 101 P.3d 440 (2004) (cab drivers described as independent contractors are covered by unemployment). Again, the Act must be liberally construed in favor of the unemployed worker.

RCW 50.04.140 sets forth the factors under which an independent contractor is not performing personal services. That statute is very similar to RCW 51.08.195, which addresses independent contractors in the industrial insurance setting.

Washington courts have addressed the application of unemployment compensation laws to truck drivers in *Penick v. Employment Security Dep’t*, 82 Wn. App. 30, 917 P.2d 136, *review denied*, 130 Wn.2d 1004 (1996) and *Western Ports Transportation, Inc. v. Employment Security Dep’t*, 110 Wn. App. 440, 41 P.3d 510 (2002). In *Penick*, the Court of Appeals held that the exception for independent contractors in RCW 50.04.140 did not apply where the carrier compelled its employees to sign independent contractor agreements. The carrier continued to own and operate the trucks its “independent contractors” drove. The carrier paid for fuel, repairs, maintenance, licensure, and insurance on the trucks. The carrier could fire a driver and controlled load assignments. The carrier also used more traditional owner/operators who owned their trucks. The Commissioner of Employment Security found the contract drivers were covered, but the owner/operators met the test of RCW 50.04.140 and were not covered. 82 Wn. App. at 39.

In *Western Ports*, the carrier used owner/operators described in the opinion as “trucks-with-drivers.” An owner/operator who drove exclusively for the carrier and had his own UBI number was nevertheless held to be entitled to unemployment benefits when the carrier terminated his contract. The Court detailed the owner/operator’s relationship to the carrier as follows:

Mr. Marshall was required to operate his truck exclusively for Western Ports, have Western Ports’ insignia on his truck, purchase his insurance through Western Ports’ fleet insurance coverage, participate in all the company’s drug and alcohol testing programs, obtain Western Ports’ permission before carrying passengers, notify Western Ports of accidents, roadside inspections and citations, keep his truck clean and in good repair and operating condition in accordance with all governmental regulations, and submit monthly vehicle maintenance reports to Western Ports. Western Ports determined Mr. Marshall’s pickup and delivery points and required him to call or come in to its dispatch center to obtain assignments not previously scheduled, and to file daily logs of his activities.

Mr. Marshall received “flat-rate” payments for each container he moved. Western Ports’ customers made their payments for Mr. Marshall’s services directly to Western Ports, and those funds belonged to Western Ports until disbursed. By the terms of the ICA, Mr. Marshall was paid twice per month.

Mr. Marshall did not attempt to negotiate the terms of his ICA, although he may have been able to negotiate some of them. The record indicates that other contractors have, in the past, obtained alteration of the exclusivity and insurance provisions in the standard ICA.

Western Ports had broad rights of discharge under the ICA, and could terminate the contract or discipline Mr. Marshall for tardiness, failure to regularly contact the dispatch unit, failure to perform contractual undertakings, theft, dishonesty, unsafe operation of his truck, failure of equipment to comply with federal and state licensing requirements, and failure to abide by “any written company policy.”

Id. at 446-47.

Thus, there is authority for the proposition that carriers may be required to cover owner/operators under Washington’s unemployment compensation laws.

There is no definitive Supreme Court decision on this question, and, to a degree, the decisions of Division I in *Western Ports*, and Division II in *Penick* are at odds. The issue for unemployment compensation is whether the services provided are “personal.” I find it difficult to see how services are “personal” when an owner/operator provides a truck to the carrier.

(3) WISHA

Washington’s Industrial Safety & Health Act (WISHA) requires an employer to

furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees: PROVIDED, That no citation or order assessing a penalty shall be issued to any employer solely under the authority of this subsection except where no applicable rule or regulation has been adopted by the department covering the unsafe or unhealthful condition of employment at the work place; and

RCW 49.17.060(2). WISHA defines an employer as

any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person or persons and includes the state, counties, cities, and all municipal corporations, public corporations, political subdivisions of the state, and charitable organizations: PROVIDED, That any person, partnership, or business entity not having employees, and who is covered by the industrial insurance act shall be considered both an employer and an employee.

RCW 49.17.020(4). *See also*, WAC 296-360-080. WISHA does not have a statutory exemption for carriers using owner/operators, but its definition of employer, covering employers of independent contractors the essence of whose contract is personal labor, bears a remarkable resemblance to the statutory definition of employer in the Industrial Insurance Act, Title 51 RCW.

There do not appear to be reported decisions involving the application of WISHA to owner/operators. However, the general rule in Washington is that a person who engages an independent contractor has no responsibility under WISHA to the employees of that independent contractor. *Smith v. Myers*, 90 Wn.

App. 89, 950 P.2d 1018 (1998) (homeowner employing independent contractor to construct pre-fab house); *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 750 P.2d 1257 (1988) (building owner hiring roofing contractor); *Craig v. Washington Trust Bank*, 94 Wn. App. 820, 976 P.2d 126 (1999) (bank employing janitorial service). It is noteworthy, however, that in the construction context, Washington courts have held that job site owners and general contractors may have broader duties to employees of contractors and subcontractors under WISHA. *See, e.g., Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 52 P.3d 472 (2002).

(4) Conclusion

At a *minimum*, WTA members should work with their legal counsel to ensure that their owner/operator agreements are in writing and enforceable. The relationship between a carrier and its owners/operators must be at arm's length, recognizing the owner/operators as a *separate* business. For example, the owner/operator should have a separate UBI number and account with the Department of Revenue. The owner/operator should bear the cost of operating the truck and the carrier should avoid treating owner/operators like they are employees. Although there are special legal requirements that apply to carriers, such as WAC 480-140-090 and 100 that require a common carrier's name to be on a truck, it is vital that the owner/operator be treated as a separate business despite such requirements.

Finally, this memo does not address federal tax issues. WTA members should carefully consult with their counsel and accounting professionals about the appropriate treatment of owner/operators for federal tax and FICA purposes.