AERIE
Law and Consulting

THE DEVIL (REALLY) IS IN THE DETAILS

Progressive Fleet & Specialty Programs
Claims & Safety Event
September 18, 2024 - Carmel, IN

Carrie L. Palmer, Esq.

About the Presenter:

Carrie L. Palmer

AERIE
Law & Consulting
Vision + Strategy = Power

Carrie is a frequent speaker on topics concerning the Transportation Industry including Business Health, Risk Analysis and Mitigation; Affiliated Entities and Corporate Structure; IC/OO Contracts and Leasing Programs; Litigation Preparedness / Management; and the use of Real-Time Data.

Despite the law degree, Carrie's passion is prevention. A champion of business risk management and strategy, with more than 25 years of experience, Carrie has served as outside litigation/trial defense counsel in major litigation matters; as outside (flat-fee'd) General Counsel for companies in industries including transportation (Broker, Carrier, Shipper, and Vendor), sales and professional services, technology, manufacturing, and franchise, and as a contracted executive (Strategy / Risk). Carrie is specially trained in the early evaluation and management of catastrophic trucking events, consults with and trains managers and executives, Safety Departments, Expert Witnesses, and specialized groups on corporate strategy, mergers, cross-referral and joint ventures, multi-entity corporate structure and shared services, risk assessment (identification, avoidance, management); IC/OO Contracts / Programs and Equipment Leasing arrangements; high stakes deposition preparation; litigation prevention / preparedness; legal services / litigation / claims management. She is a firm believer in fee transparency and lawyers who operate like business operates.

“Think from the end, to find the beginning.”

- After the Lawsuit is Filed
- Investigation & Anticipation of Litigation
- Litigation Preparedness
- Prevention

Vicarious Liability – Q&A

AERIE Law & Consulting

Discovery Issues: they may keep you up at night…

AERIE
Law & Consulting
Vision + Strategy = Power

- **<u>Discovery in the age of technology</u>**
- **Websites**
  - What do you say
    - "Partner" "Joint" "Merge" "The best"
- **Social Media**
  - Your pages (monitored, responses, emojis/likes, etc.)
  - Pages that aren't yours, but are about you
  - Social media use/responsibility policy for EEs
- **Review Sites** – Glassdoor, Jobcase, Comparably
- **Way Back Machine**
- **IOT**
  - Satellite, GPS, EE badge tracking, phone records, texts
  - Wearables (there is also a security risk…)
- **On premises/in cab telematics/machinery data collection**

Documents

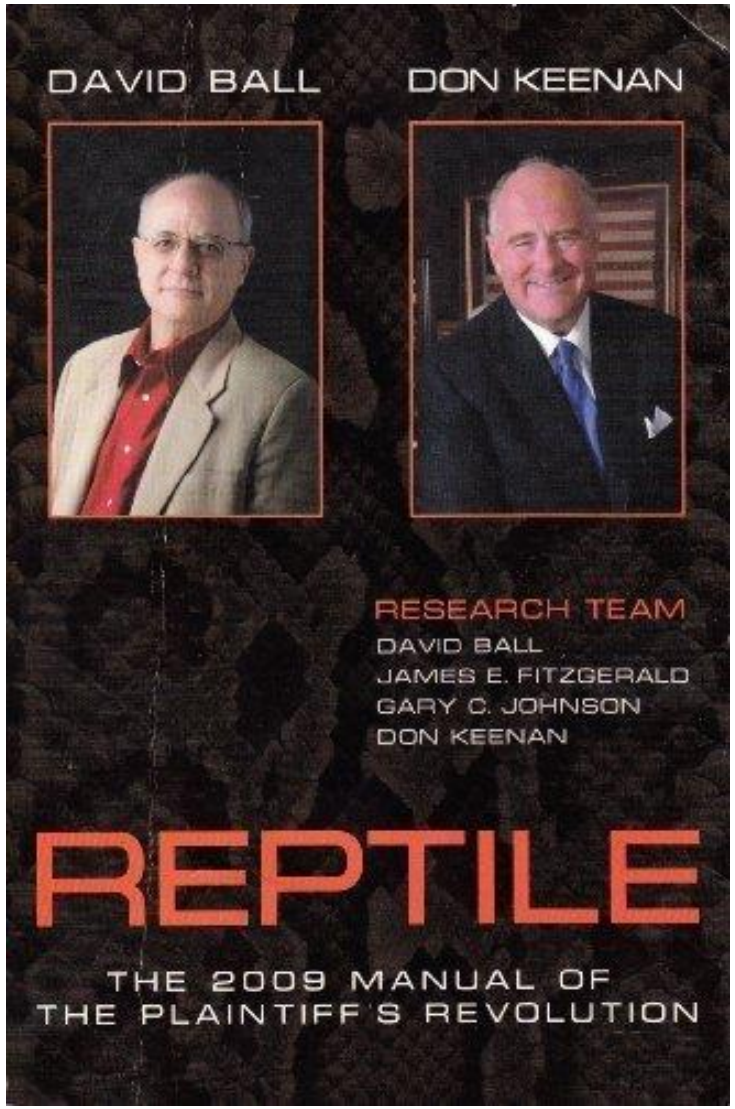
- **The Cardinal Sin** – A policy is only as good as its enforcement is consistent.
  - Documents, Policies, Procedures, Handbooks, Contracts, that you have but don't follow, enforce or update
  - "Somebody wrote that policy, but no one follows it."
- **Please, just don't…**
  - Put 14 people on every email
  - Have documents that don't make sense, aren't complete, are contradictory, are old and don't match the way the company does business today…
    - "It's a template, we've used it forever."
    - "We haven't looked at that contract in forever, we just do the business."
    - Especially audits, performance criteria, and KPI/benchmark requirements
- **Confidentiality** – Courts will enforce to the same degree you protect it.
  - "…and today, we're a 100m company!"
  - "… we have regular meetings where we discuss…"

AERIE
Law & Consulting
Vision + Strategy = Power

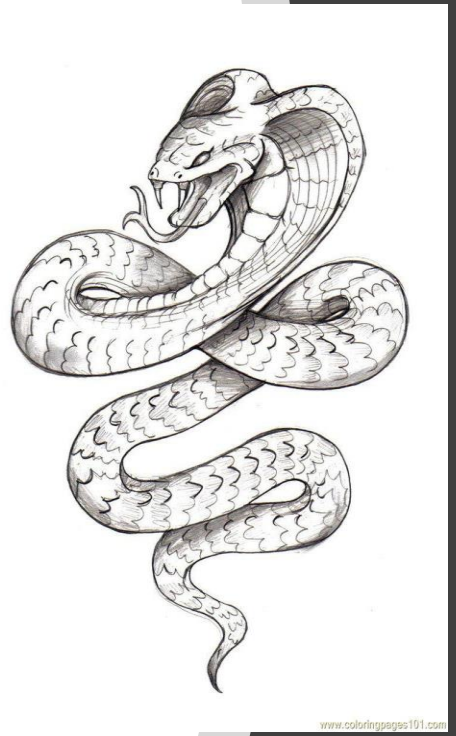
Trends in Discovery:

- CURATE your Discovery: ask the right questions for your particular case.
- Social Media: Yeah, Yeah, we know… but what other apps can paint a picture of the "real" plaintiff? We see you, GroupMe / WhatsApp, Slack (work), payment apps…
- TBI is the injury de jour
- Plaintiff's medical billing experts
- It's (still) NOT about the accident facts…

AERIE
Law & Consulting
Vision + Strategy = Power



Corporate Reps/ESI Witnesses



The Reptile – it's Alive!!

- Corporate reps and fact witnesses are not the same, and both can bind your company in some circumstances.
- Protecting the Apex Witness… it's in your hands!!
  - Press releases, interviews, signing contracts/documents, etc.
  - Analyze & monitor before / Challenge Errors
- Advance identification and selection of, for deposition – do it in advance / hire for it!!
- Life Preservers / Stress Management
- The new strategy: Straight to the Corporate Veil.

AERIE
Law & Consulting
Vision + Strategy = Power

How/Why to manage insurance appointed defense counsel

- They are super busy
- They are focused on this one incident, not your business, your past, your future, or the next case
- Protect your business relationships, reputation, trade secrets, public/private information
- Corporate implications: affiliates, future litigation, M&A, IPOs, hiring, bank/loan documents
- Creation of public records and other discoverable information
- During litigation you should be identifying risks, learning the lessons and fixing the problems, not just responding to the claims

AERIE
Law & Consulting

Defense Counsel

Vet your insurance appointed counsel at the outset, have a conversation, check references & trusted sources, set expectations for approvals/input, and timetables for updates.

Managing Counsel

Consider engaging Managing Counsel to oversee the litigation and liaison with your company and all insurance appointed counsel, maintain consistency across all litigation/forums, and assist with assessing risk and implementing new processes.

Stay Engaged

If you can't do it, make sure someone in your company is doing it – ask questions and seek updates, especially if there are multiple pieces of ongoing litigation, regulatory inquiry, or upcoming M&A/IPO, etc.

Invest in Preparation

Do not be miserly when preparing witnesses (added bonus: leadership skills!!)

After the Lawsuit is Filed
"Takeaways"

AERIE
Law & Consulting
Vision + Strategy = Power

Incident/Accident Investigation and Documentation

“Houston, we have a problem…”

- The phone call
  - The first 60m to 72 hours is most critical
  - Who makes up the response team or investigation group
  - Keep it “need to know basis” only
  - Know what you Don’t Know and be open-minded and inquisitive
- Rapid Response – Yes, even in a “minor” accident
  - What it used to be vs. What it is today
  - Why do it
    - Gather and Protect relevant evidence and documentation of physical/scene evidence that would otherwise be lost
    - Law Enforcements/official reports
    - Most people just “want to know the truth”
    - Internally: reduce risk of cover-up, minimizing, or downplaying
    - Later: we took it very seriously, we did X, Y, Z; we brought in experts in the field; etc.
- The Early Bird gets the worm!
  - Getting to know the potential claimant, grabbing social media, potentially doing surveillance, etc.
  - Preservation demand, vehicle / ECM, phone records, onboard insurance monitoring, etc.

AERIE
Law & Consulting
Vision + Strategy = Power

Protect Investigations: Attorney Client and Anticipation of Litigation Privileges, Attorney Work Product Doctrine

- When to retain counsel
  - Litigation counsel
  - Corporate counsel
- What retaining counsel gets you, and what it might not…
  - Start from the end to find the beginning…
  - Anticipation of Litigation vs. Normal business practices
  - Litigation/Insurance counsel v Corporate counsel
    - When the lines cross… pros and cons of in- house counsel vs. outside counsel
    - Suspension of normal business activities (like root-cause/preventability in non-OSHA incidents)
- Conducting larger investigations / training during litigation
- To Terminate or Not to Terminate (the EE / driver involved)

AERIE Law & Consulting

Creating the incident report

The incident report is art and science, it is likely to be an exhibit, craft it that way.

"If it didn't get written down, it didn't happen."

Don't overwork it. Don't underwork it. Check the details of that form! WORDS MATTER.

If you don't know 100%,

YOU DON'T KNOW

Don't be afraid of "I don't know."

Don't forget to update it when you do know

If you are going to suspend normal business activities (like root-cause/preventability in non-OSHA incidents), document that decision

You must tend to/document your "concern for the subject," balanced against early investigation needs

AERIE
Law & Consulting
Vision + Strategy = Power

Accident/Investigation "Takeaways"

- Have a plan and escalation protocol for first **60m** response and for the **60m-72hr** response to various levels of incidents. Follow it.
- Have a list of people: experts, PR, and lawyers to call if there is an incident, and know what type of incident needs what response.
- **Control the Story**
  - Keep the investigation group small; Remind everyone else that loose lips sink ships, don't speculate – we don't know until we know **100%**
    - Update your team at an appropriate time to minimize gossip, with a statement you can live with in litigation later
  - Issue press releases before the media gets their spin on it
  - The incident report is art and science, it is likely to be an exhibit, craft it that way
- Gather and protect relevant data.
- **OUR WORDS MATTER.**

AERIE
Law & Consulting
Vision + Strategy = Power

Litigation Preparedness

Thinking ahead to the inevitable. How to protect your company from the things you hadn't thought could hurt you…

- Prior lawsuits
- Newspapers, TV, online news sources and third-party websites
- Marketing, corporate social media, press releases, interviews, company websites [Admissions. FRE 801 (d)(2)]
- Wayback Machine – "Internet Archive"
- Agency inquiries, hearings, and appeals
- Unprepared Corp Witnesses
- ESI / Retention
- Litigation Hold

AERIE
Law & Consulting

Prior Lawsuits

- The present lawsuit is tomorrow's prior lawsuit… yesterday's lawsuits can be today's nightmares…
- Discovery and pleadings from prior or ongoing cases in other jurisdictions
- The unprepared witness is the worst witness when you have to live with it later…
- Managing counsel should maintain a databank of discovery, depositions and pleadings

Real Time Data

- Satellite, GPS fleet tracking, collision mitigation, reviews, employee engagement apps, employee badge in/out, EE RFID, geo-fencing, etc.
- You can’t have it and not work it!
- Importance of escalation protocol

AERIE
Law & Consulting
Vision + Strategy = Power

Documentation and record keeping

- Retention Schedules. 3,5,7; industry specific
- Have a plan
  - If it's not important enough for a lit hold, its not "in anticipation of litigation"
  - Catastrophic vs. Other Criteria, or All
  - Do we, or do we not, retain information?
    - Keeping it: you will have to produce it if it's properly asked for
    - Not retaining it: you won't have it if you need it, you may be subject to criticism for not retaining it
      - Have a clear in-house retention schedule and stick to it
      - Have a good reason for your decision that is documented
    - Readily Accessible vs. Not reasonably Accessible (Can't create that problem…)
    - Legacy data/hardware

AERIE
Law & Consulting

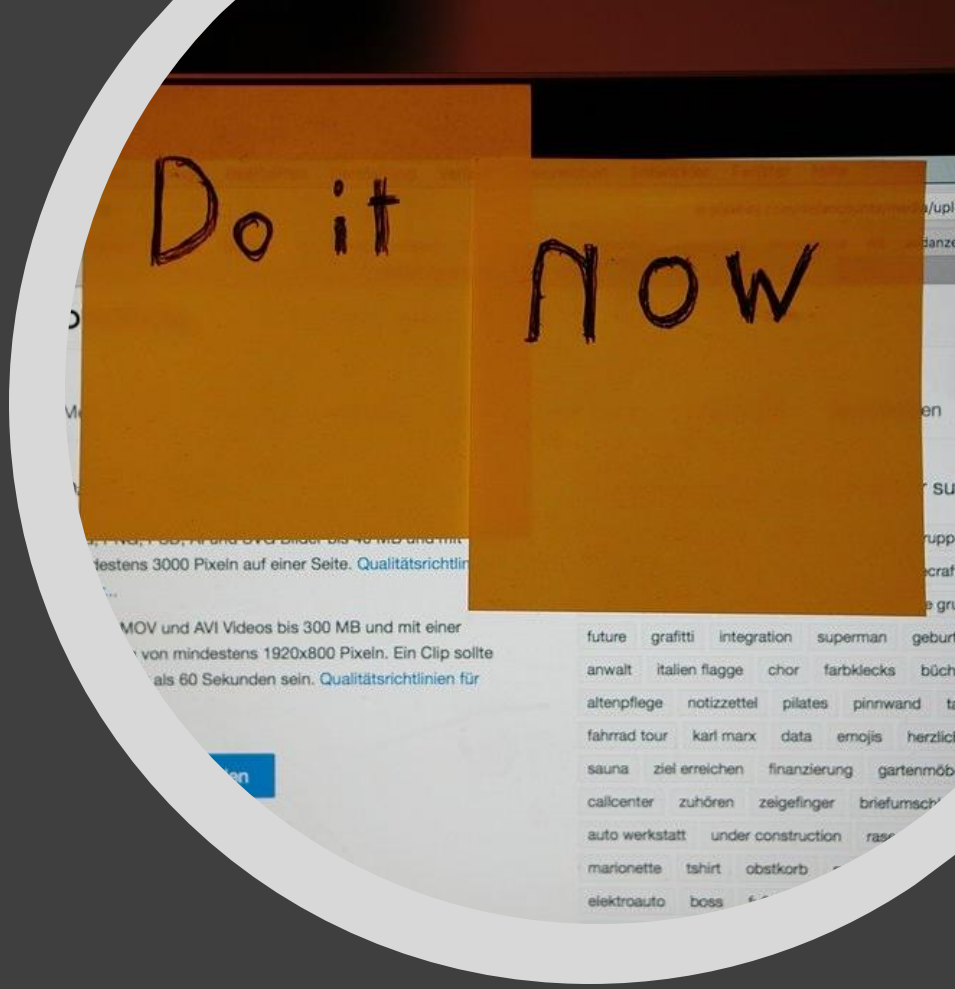
Preservation demand

- Difference between LH and PD? Offensive vs. Defensive
- “Before litigation begins, courts agree that the receipt of demand letter, a request for evidence preservation, a threat of litigation, or a decision to pursue a claim will all trigger the duty to preserve evidence.” *In re Ethicon, Inc. Pelvic Repair Systems (2014)*
- A pre-suit demand letter will be overly broad, if it does not accommodate the day to day needs of a business or demands the Defendant take actions beyond its legal duty. *Turner v. Resort Condominiums Int’l. (2006)*

AERIE
Law & Consulting
Vision + Strategy = Power

Litigation Hold:

- "Once a party reasonably anticipates litigation, it must suspend its routine document retention and destruction policies and put in place a litigation hold to ensure preservation of relevant documents." *Zubulake v. UBS Warburg (2003)*
- Failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information. Loss of data due to unfamiliarity with recordkeeping policy by EE responsible for preserving was grossly negligent.
- What is a reasonable basis, or notice?
  - Credible threats of litigation - "You'll hear from my lawyer next!"; Plaintiff's duty arose when she retained counsel in connection with potential legal action even though she had not yet identified responsible parties.
  - Explicit communication – Letter, email, phone call, slide deck (a 2010 presentation by Apple to Samsung indicating that Apple believed Samsung to be infringing on some of its patents put Samsung on notice. Apple v. Samsung, 2012)
  - Preservation demand, Cease-and-desist letters, Regulatory Inquiry, Subpoena / Service of process, HR Complaint, Glassdoor Review
- Sanctions – penalties, instructions and dismissal… *OH MY!*
  - Sanctions for discovery abuse is broad and potentially devastating, including Civil and Criminal charges, charges of Perjury or tampering with evidence; Contempt Citations; Monetary Sanctions; Attorney's Fees; Court costs; preclusion of evidence or witnesses from use at trial; adverse inference instructions to the jury; Dismissal or entry of Default Judgment.
  - Can result in subsequent litigation against corporate officers and directors for breach of fiduciary duty claims.



Discovery Process sanctions can take a fully defensible case and turn it into a major risk situation.

AERIE Law & Consulting

Litigation Preparation "Takeaways"

- Audit your policies, procedures, handbook, and contracts for content and compliance; Audit your websites, social media, reviews, and press releases. Consider legal review/training.
- Gather a key team of probable deponents, and vet/train them in advance: safety director, corporate witness(es), IT spokesperson. (Cover the topic when interviewing new personnel.)
- Know your Real Time Data trove, have an escalation protocol, follow it.
- Have designated counsel or in-house personnel monitoring prior/contemporaneous lawsuits, prior depositions for consistency of corporate responses.
- Have a Document Retention and Destruction Policy and follow it. Have a Litigation Hold plan / protocol / software. Consult counsel when necessary.
- Witness preparation: Early and Often.

AERIE
Law & Consulting

IC MISCLASSIFICATION:
THE PATERNALIST / REVENUE GENERATING STATE

June 21, 2022

Just Trucking Along: New Jersey Federal Court Rules Truck Drivers Were Misclassified as Independent Contractors

LinkedIn Facebook

3 minute read · June 30, 2022 2:29 PM EDT

U.S. Supreme Court won't hear trucking industry challenge to Calif. employment law

By Daniel Wiessner

California Throws 70,000 Truckers in Gig-Work Legal Limbo, Risking Supply Chains

- Two-thirds of state's port truckers could be forced off road
- Operators have known for 2 1/2 years this may come: lawmaker

MOGA Logistics worker misclassification, wage violations $275K class settlement

By Top Class Actions
June 23, 2022

08/07/2024 - **USDC, No. District of Illinois, Eastern Div. ANDREY PROKHOROV, individually and on behalf of all others similarly situated**: Plaintiff's MSJ s granted. The Act applies to the class and the class members were Carrier's employees. -- Because class members performed some work in Illinois, there is no risk of extraterritorial reach, the Act applies.

O/O for Schneider described as employee as appeals court kicks case back to lower court

Appellate court reverses decision on independent contractor status

GET THE FACTS ON

MISCLASSIFICATION

UNDER THE FAIR LABOR STANDARDS ACT

Employee or Independent Contractor?

The Fair Labor Standards Act (FLSA) provides minimum wage and overtime pay protections to nearly all workers in the U.S. Some employers incorrectly treat workers who are employees under this federal law as independent contractors. We call that "misclassification." If you are misclassified as an independent contractor, your employer may try to deny you benefits and protections to which you are legally entitled.

Please refer to **Fact Sheet 13** for more information on the factors used to determine whether you're an employee or an independent contractor.

WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

1-866-4US-WAGE
dol.gov/whd

Receiving a 1099 does not make you an independent contractor under the FLSA.

Even if you are an independent contractor under another law (for example, tax law or state law), you may still be an employee under the FLSA.

Signing an independent contractor agreement does not make you an independent contractor under the FLSA.

Having an employee identification number (EIN) or paperwork stating that you are performing services as a Limited Liability Company (LLC) or other business entity does not make you an independent contractor under the FLSA.

Employers may not misclassify an employee for any reason, even if the employee agrees.

You are not an independent contractor under the FLSA merely because you work offsite or from home with some flexibility over work hours.

Whether you are paid by cash or by check, on the books or off, you may still be an employee under the FLSA.

"Common industry practice" is not an excuse to misclassify you under the FLSA.

Appeals Court Overturns Ruling for Schneider in Classification Case

The U.S. Court of Appeals for the 7th Circuit has reversed a U.S. district court ruling in favor of Schneider National in a worker classification case and sent it back to the lower court for further proceedings.

The district court had originally granted Schneider's motion to dismiss all claims, which were that the carrier,

(1) violated minimum wage requirements under the federal Fair Labor Standards Act and Wisconsin law;
(2) unjustly enriched itself under Wisconsin law; and
(3) violated federal Truth-in-Leasing regulations.

The appeals court ruled that the district court had erred by giving decisive effect to the terms of Schneiders contracts. "In many areas of the law, the district court's approach would be sound, but not under the Fair Labor Standards Act," the appeals court said. "As explained below, in determining whether a person is an employee under the Act, what matters is the economic reality of the working relationship, not necessarily the terms of a written contract." The appeals court concluded that the plaintiff's allegations about the economic reality of his working relationship state a viable claim under FLSA and the other laws relies upon.

For the opinion in the case, visit http://media.ca7.uscourts.gov/opinion.html and search for case No. 21-2122.

AERIE
Law & Consulting
Vision + Strategy = Power

-TIL – Truth in Leasing Class Action Litigation

- TIL Litigation arises out of the IC/OO contract and chargebacks/deductions process.
- Based in 49 CFR 376.11 & 376.12 and cases interpreting, & based on the concept that an IC/OO needs to have sufficient information regarding what to expect for charges before they sign on the dotted line, and the MC then must walk the talk…
- Detailed look at your settlements process, contracts, documentation, purchasing of fuel/insurance/equipment, etc.
- Types of Claims
  - MC is charging for items it didn't disclose.
  - MC can't "profit" from or take a cut of items to be charged back. (WRONG, but…)
  - MC can only charge what you paid (WRONG, but…)
  - MC can't use an ESCROW for maintenance (WRONG, but…)
  - MC must provide the back-up for formulaic calculations (YES, and…)
  - MC can't force an IC/OO to purchase equipment, products, or services (YES, but…)
  - MC's "affiliate" leasing company is an "extension" of the MC and therefore also subject to TIL rules. (WRONG, but…)
  - Etc.

Big money for Plaintiff lawyers, not so much for IC/OOs.

AERIE
Law & Consulting
Vision + Strategy = Power

Let's Talk about Risk, Bay-bee…

- How solid are your IC Agreements?
- Is your affiliate company armor strong?
- Do you use IC checklists/affidavits in your employment onboarding process?
- Do you audit files for completed W9s?
- Do you use a good IC Acknowledgement?
- Do you audit for LLC filings?
- How "close" are your MC / Leasing Cos?
- How well do Recruiting, Orientation, Ops, Settlements, keep EE/IC separate? "WE?"
- Do you have a standardized form response to use as a baseline illustrating your "IC argument" for any agency inquiry?
- And on, and on, and on…

Poll Question:

How many of you have had ICs make "employee" type claims: WC, request for insurance benefits, DOL/wage claims; FMLA; Unemployment; misclass, etc.?

AERIE Law & Consulting

Keeping the MC and the Equipment Lessor Separate

AERIE Law & Consulting

- An IC is such because s/he brings
  - Equipment, and
  - Driving Services
- Most states have statutes protecting the MC/IC relationship if the MC and EL are not the same company or owned by same apex.
  - If no such statute, or the latter is the rule – consider whether IC model is worth the risk.
- CRITICAL to understand applicable statutes and create your program to safeguard that protection!
  - Leasing is based on FMCSR 376.11 – 12
- Also CRITICAL to understand and operate LEASING separately from MC operations.

Use. The. Law.

Courts around the country have also routinely recognized that "*constraints imposed by customer demands and government regulations do not determine the employment relationship.*" *FedEx Home Delivery v. N.L.R.B.*, 563 F.3d 492, 501 (D.C. Cir. 2009) (emphasis added); *see also Sida of Hawaii, Inc. v. N.L.R.B.*, 512 F.2d 354, 359 (9th Cir. 1975) ("the fact that a putative employer incorporates into its regulations controls required by a government agency does not establish an employer-employee relationship"); *N. Am. Van Lines, Inc. v. N.L.R.B.*, 869 F.2d 596, 599 (D.C. Cir. 1989) ("employer efforts to ensure the worker's compliance with government regulations, even when those efforts restrict the manner and means of performance, do not weigh in favor of employee status"); *Wilkinson v. Palmetto State Transportation Co.*, 676 S.E.2d 700, 705 (S.C. 2009) (federal regulation "is not intended to affect" the independent contractor determination under state law); *Hernandez v. Triple Ell Transport, Inc.*, 175 P.3d 199, 205 (Idaho 2007) ("adherence to federal law" was not evidence of motor carrier's control over owner-operator); *Universal Am-Can, Ltd. v. Workers' Compensation Appeal Board*, 762 A.2d 328, 336 (Pa. 2000) ("obligations imposed by law upon a motor carrier … when leasing equipment from an owner-operator are not probative" of the independent contractor determination). As one court aptly explained, "[t]he employer cannot evade the law … and in requiring compliance with the law [the employer] is not controlling the driver. It is **the law** that controls the driver." *Universal Am-Can*, 762 A.2d at 335 (internal quotations omitted).

Additional examples of federal regulations governing the operations of commercial motor vehicles, whether by employed drivers or ***by independent contractors***, are listed below:

49 C.F.R. § 373.101, which sets forth requirements for for-hire, non-exempt motor carriers with respect to bills of lading;

49 C.F.R. § 373.103(a), which sets forth requirements for for-hire, non-exempt motor carriers with respect to expense bills relating to shipments of property;

49 C.F.R. § 376.11, which sets forth the general leasing requirements in the Federal Motor Carrier Safety Regulations;

49 C.F.R. § 376.12, which sets forth the written lease requirements in Federal Motor Carrier Safety Regulations;

49 C.F.R. § 376.22, which sets forth the exemption for private carrier leasing and

49 C.F.R. § 390, *et seq.*, which sets forth general applicability, definitions, general requirements and information as they pertain to persons subject to the Federal Motor Carrier Safety Regulations, including, among other things, that it shall be the duty of the motor carrier to require observance of any duty or prohibition imposed upon the driver by the Federal Motor Carrier Safety Regulations;

49 C.F.R. § 390.5, which sets forth the definition of among other things, "driver", "employee", "employer", "for-hire motor carrier", "lease", "lessee", "lessor", "motor carrier" and "operating authority", under the Federal Motor Carrier Safety Regulations.

Notably, as defined by statute within the Federal Motor Carrier Safety Regulations, for purposes of promoting safe operation of commercial motor carriers, the FMCSA does not differentiate between control of an employee driver and control of a contracted driver, because each must comply with commercial vehicle operational regulations set forth by the government. The statute provides:

> "Employee means any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle (*including an independent contractor while in the course of operating a commercial motor vehicle*), a mechanic, and a freight handler. Such term does not include an employee of the United States, any State, any political subdivision of a State, or any agency established under a compact between States and approved by the Congress of the United States who is acting within the course of such employment." (49 CFR § 390.5, *emphasis added.*)

49 CFR § 390.21, which sets forth the requirements for marking of self-propelled commercial motor vehicles and intermodal equipment;

49 CFR 391, *et seq.*, which sets forth, among other things, the rules establishing minimum qualifications for persons who drive commercial motor vehicles as, for, or on behalf of motor carriers, and minimum duties of motor carriers with respect to the qualifications of their drivers;

49 C.F.R. § 391.13, which states that "a motor carrier shall not require or permit a person to drive a commercial motor vehicle unless the person – (a) [c]an, by reason or experience, training, or both, determine whether the cargo he/she transports … has been properly located, distributed, and secured in or on the commercial motor vehicles he/she drives (b) [i]s familiar with the methods and procedures for securing cargo in or on the commercial motor vehicle he/she drives" in order to comply with the requirements of 49 U.S.C. §§ 392.9(a), relating to inspection of cargo and cargo securement devices and systems, and 383.111(a)(16), relating to required knowledge of all commercial motor vehicle operators and relationship of cargo to vehicle control;

AERIE
Law & Consulting
Vision + Strategy = Power

Rules for dealing with Agencies on IC issues

Rule 1: Have an ICA and a Lease. The right kinds that say the right things. Abide by it. Keep them separate. Walk-the-talk.

Rule 2: Have a plan. Know what the statutes say, use the regs, know your key talking points and deliver them concisely, consistently and repeatedly. This is not a subject upon which you should "WING IT."

Rule 3: Give good info. Err on the side of giving too much information (when its the right info - good info, i.e., not bad info) Operate on the presumption you are going to lose, and they do not know anything about these issues. Make a good record. Do it consistently, over and over again.

Rule 4: Be nice to them. Make sure the people in your organization interfacing with agency personnel are capable of being calm, speaking kindly, concisely and intelligently. Select a person in your organization who understands the complexities of the issues and communicates well.

Rule 5: Get help. From REAL transportation lawyers. It's better for your organization and the industry.

AERIE
Law & Consulting
Vision + Strategy = Power

QUESTIONS?

Let’s unravel them.

THANK YOU!

AERIE
Law & Consulting

Carrie Palmer, Esq.
ph. 843.277.4170
em. Info@AerieLC.com; Carrie@AerieLC.com

AERIE
Law & Consulting