

Independent Contractors in the Intermodal Industry

Overview

Motor carriers are crucial participants in the nation's international and domestic intermodal network. For decades, over 80 percent of intermodal trucking companies that transport freight have used owner-operator drivers or independent contractors. The independent contractor business model is indispensable to the intermodal industry, offering operational and financial flexibility to motor carriers, allowing them to adapt and respond to natural elasticity and volatility in the cargo transportation market.

The Owner-Operator Independent Drivers Association estimates there are approximately 350,000 to 400,000 owner-operator truck drivers in the U.S.¹ Unlike employee drivers, independent contractors personally invest in and operate their own company. These small business owners earn a Commercial Driver's License, invest in a truck tractor, and bear the associated operating costs attributable to registration, licensing, insurance, and fuel. They also invest a significant amount of time developing their knowledge of and complying with federal and state safety regulations. In many cases, independent contractors operate under their own U.S. Department of Transportation-approved operating authority and develop a wide customer base.

Benefits of the Independent Contractor Model

Owner-operators can determine the number of motor carriers they choose to work with and freely enter into multiple contractual arrangements, allowing the individual to make daily operating decisions based on their availability to perform drayage services. A recent study by the American Transportation Research Institute (ATRI) examined the various factors that impact a driver's decision to work as either an employee driver or as an independent contractor.² Unsurprisingly, the top motivating factors for independent drivers related to their ability to control their own work environment, such as: Independence/Ability to Set Hours; Schedule/Flexibility; and Choice of Routes/Length of Haul. These factors were ranked by over 90 percent of independent contractors as extremely important or important.

Each owner-operator makes a conscious choice to remain an independent contractor, but also has the ability to secure full-time employment in the trucking industry. Congress and the Administration are considering Federal legislative and regulatory proposals that would eliminate drivers' ability to choose the career path that best suits their personal circumstances by removing the freedom of individuals to operate as small business owners, a pursuit that so many find fulfilling. In fact, ATRI's study found that 73 percent of independent drivers expected significant decreases in their job satisfaction if they were to be reclassified as employees. Over 68 percent expected significant decreases in their annual income.³ Moreover, a client survey by American Truck Business Services found that only 17 percent of leased owner-operators would seek company driver opportunities if leasing were no longer an option.⁴

¹ Trucking Facts, Owner-Operator Independent Drivers Association. <https://www.ooida.com/wp-content/uploads/2021/03/Trucking-Facts.pdf>

² Owner-Operators / Independent Contractors in the Supply Chain, American Transportation Research Institute. <https://truckingresearch.org/wp-content/uploads/2021/12/ATRI-OO-IC-in-the-Supply-Chain-12-1-21.pdf>

³ Id.

⁴ Client survey, American Truck Business Services. <https://www.overdriveonline.com/overdrive-radio/podcast/15064950/owneroperators-are-not-company-drivers-for-a-reason>

Threats to the Independent Contractor Model

Legislation such as the Protecting the Right to Organize Act (proposed in Congress) and Assembly Bill 5 (enacted in California) establish restrictive standards, known as the ABC test, to determine a worker's classification status. This test would classify any worker performing a service as an employee rather than an independent contractor, unless: A) the worker is free from control and direction when providing a service; B) the service is performed outside the usual course of the employer's business; and C) the worker routinely engages in an independently established trade, occupation, or business of the same nature their services are performed. Given the nature of the work provided by independent drivers, the controversial "B" prong is nearly impossible to satisfy, essentially prohibiting the use of independent contractors within the trucking industry.

While regulatory agencies do not have the authority to establish the ABC test without congressional action, federal agencies have sought to implement similarly restrictive worker classification tests. In October 2022, the Department of Labor (DOL) released a notice of proposed rulemaking to rescind and replace a 2021 final rule, issued under the previous Administration, on the interpretation of independent contractors under the Fair Labor Standards Act (FLSA)⁵. The 2021 rule revised the "economic reality" test used to determine whether a worker is economically dependent on the potential employer by examining two core factors: (1) the nature and degree of the worker's control over the work; and (2) the worker's opportunity for profit or loss based on initiative and/or investment⁶. Due to the primary factors considered under the test, the final rule provided more flexibility for independent contractor classification.

The 2022 DOL proposal would eliminate the use of core factors and, instead, consider the totality of six factors in the economic reality test without predetermining the weight of each consideration. Moreover, while the 2021 rule determined that the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible, the new proposal would also consider these theoretical aspects in its assessment. This wide-ranging interpretation of the FLSA is expected to involuntarily classify more workers as employees, disrupting independent contractor opportunities across various industries, including trucking.

Further limiting independent contractor operations, the National Labor Relations Board issued a ruling in June 2023 modifying its standard for determining whether workers are employees or independent contractors under the National Labor Relations Act⁷. The decision overruled the standard established in 2019, which elevated consideration of a worker's "entrepreneurial opportunity" as a principle through which to evaluate all other factors. Instead, NLRB reinstated a more comprehensive Obama-era test adopted in 2014. Notably, the 2014 ruling was rejected by the US Court of Appeals for the District of Columbia. This standard uses a non-exhaustive list of factors that are each afforded equal weight in determining a worker's status, which is expected to expand the definition of an employee under the NLRA, further threatening the independent contractor business model.

⁵ Employee or Independent Contractor Classification Under the Fair Labor Standards Act, Notice of proposed rulemaking, Department of Labor, Wage and Hour Division, October 2022, [87 FR 62218](#).

⁶ Independent Contractor Status Under the Fair Labor Standards Act, Final rule, Department of Labor, Wage and Hour Division, January 2021, [86 FR 1168](#).

⁷ The Atlanta Opera, Inc. and Make-Up Artists and Hair Stylists Union, Local 798, IATSE. Case 10–RC–276292. National Labor Relations Board Decision on Review and Order: <https://www.nlrb.gov/news-outreach/news-story/board-modifies-independent-contractor-standard-under-national-labor>

Economic Impacts of Forced Reclassification

The implementation of the ABC test would require drastic, costly changes to business and operational models across the U.S. economy. Such changes stand to increase costs, reduce service efficiency and reliability, and exacerbate existing workforce shortages. When applied nationally, approximately 4.4 million independent contractors would be involuntarily classified as employees. Nearly 2.7 million of these reclassified workers would suffer “substantial, direct income losses.”⁸ The American Action Forum estimates that the national implementation of the ABC test could increase employment costs by approximately \$18 to \$61 billion and risk up to \$2.3 trillion in gross domestic product.⁹

While the national impacts are significant, the greatest effects will be felt by industries in which independent contractors represent a substantial share of their workforce, including the information, transportation, and construction industries. In 2017, the transportation and utilities industry alone engaged nearly one million independent contractors, which accounted for 7.8 percent of the industry’s workforce and 5.7 percent of all independent contractors.¹⁰

The reclassification of independent contractors as employee drivers would increase costs for motor carriers. As employers, they would be responsible for increased overhead, business insurance, benefits costs, and equipment maintenance, in addition to drivers’ compensation.¹¹ Consequently, motor carriers would pass these increased labor costs on to their customers, raising prices for the movement of goods, and ultimately, resulting in higher costs for consumers and businesses alike.

The trucking industry has faced significant workforce shortages for many years. In 2022, the shortage of qualified drivers was at a near-record high of 78,000.¹² According to projections by the U.S. Department of Transportation, U.S. freight volumes will grow by fifty percent between 2020 and 2050.¹³ Based on this increase in freight demand and current driver demographic trends, the shortage could reach 160,000 in 2031. Over the next decade, nearly 1.2 million new drivers will be needed to replace retiring drivers and drivers that leave the industry, as well as additional drivers necessary to meet growing freight needs. These already dire estimates are likely to increase with the implementation of policy changes that restrict independent drivers’ ability to operate. An analysis of hours worked by employee drivers vs. owner-operators in California, estimated that it would take roughly 26.6 percent more employee drivers to move the same cargo volumes as are currently being transported by independent contractors.

Conclusion

The independent contractor business model is critical to the health of the intermodal industry. By

⁸ Robert Shapiro and Luke Stuttgen, The Many Ways Americans Work and The Costs of Treating Independent Contractors As Employees. <https://progresschamber.org/wp-content/uploads/2022/04/The-Many-Ways-Americans-Work-Chamber-of-Progress-Shapiro-Sonecon.pdf>

⁹ Economic Costs of the PRO Act: Update. <https://www.americanactionforum.org/insight/economic-costs-of-the-pro-act-update>

¹⁰ Bureau of Labor Statistics (2021-A) and Bureau of Labor Statistics (2018-A)

¹¹ Review of Economic Conditions Potentially Effecting Harbor Drayage Firms From Change From IOO To Employee Drivers, John E. Husing, Ph.D., 2014 & 2017

¹² ATA Driver Shortage Update 2022, https://ata.msgfocus.com/files/amf_highroad_solution/project_2358/ATA_Driver_Shortage_Report_2022_Executive_Summary.October22.pdf

¹³ U.S. Department of Transportation, Bureau of Transportation Statistics, Federal Highway Administration, Office of Freight Management and Operations, Freight Analysis Framework, version 5.1.

maintaining flexibility and control over their schedules, opportunities, and business decisions, independent owner-operators are highly incentivized to provide safe, efficient, and cost-effective services that contribute to our nation's economic growth. Efforts to restrict or eliminate this business model will have an adverse effect upon the entire intermodal supply chain, injuring not only motor carriers, but also rail and ocean carriers, third-party logistics companies, and the customers they serve.