

HIRING DRIVERS:

Contract vs. Payroll

Fleet operators looking to use non-employee drivers are well advised to draft a contract with clear lines of responsibilities and allow the contractor to remain in control – with specific issues arising as a result of the coronavirus pandemic. **BY GREGORY VAN TIGHEN**

>> Signing independent contract drivers is an option to nimbly respond to rapidly changing circumstances. With independent contractors, businesses can minimize their exposure to accident liability and avoid employee-related costs such as payroll taxes, unemployment insurance, and employee benefits.

This takes added urgency particularly for those companies gearing up for the upturn in business following an abatement of the coronavirus pandemic. As business slowly returns, businesses might consider hiring back furloughed employees as independent contractors — they know how to do the jobs and they know the customers.

“Bringing back furloughed employees as independent contractors could be done, but not without risk,” says Michelle Higgins, associate editor with J.J. Keller, a firm that advises companies on creating safe and compliant workplaces. “It has to be done very carefully.”

Whether from furlough or as new connections, owners, frontline managers, and C-level executives must be trained in how to coordinate independent contractors. “You must also have a plan,” Higgins adds.

Specific to bringing back furloughed employees, issues such as discrimination — from age and race to gender — can be amplified. “If you furlough 50 people, and you bring back 25 and they’re all under the age of 40, for example, that can very quickly turn into an age discrimination lawsuit,” Higgins says.

Mark Schedler, senior editor with J.J. Keller, also recommends having clear business goals and a specific rationale based on business needs when hiring back furloughed employees as independent contractors.



Those goals should be clearly communicated to everyone, Schedler advises. “Otherwise (the drivers will) fill in the blanks for you — it won’t be pretty, and they’ll do it on social media.”

Schedler says businesses need to be mindful of scrutiny for favoritism. “If you’re bringing back contractors before employees, then employees will voice their concerns and vice-versa,” he says.

CONTRACT FIRST

To clearly define roles in any independent contractor relationship, Jonathan Mazer, a partner with New York City-based boutique law firm Schlam, Stone & Dolan, says a well drafted contract is essential. Mazer’s firm handles independent contractor status of drivers for fleet-based businesses and structures contracts with independent contract drivers.

“Well-written agreements establish clear lines of responsibilities when it comes to indemnification, insurance, compliance with law, hiring procedures and practices and safety regulations,” Mazer says.

For one client, a properly executed contract prevented the company from getting tied up in years of litigation when an independent driver contractor struck and injured a teacher in training working her way

through school with no health insurance. The \$100,000 limit on the driver’s insurance policy “barely touched” the resulting damages, Mazer says. So, the future teacher’s attorney targeted his firm’s client.

Mazer says the contract’s language was written to establish well-defined roles for the driver and the company and was clear about the company’s lack of control over the driver. It established clear lines of respon-

sibilities when it came to indemnification, insurance, regulatory compliance, and hiring procedures and practices.

“They were well-positioned in terms of their agreement and practices,” Mazer says. “The case was dismissed prior to trial and the company paid nothing to the plaintiff.” A seven-figure verdict was later entered against the driver.

CALIFORNIA SCRUTINY

Businesses that operate in multiple states should realize regulations governing independent contractor status can vary greatly among the states, with California being among the most restrictive, Mazer says.

California scrutinizes the status of workers more closely following the State Supreme Court’s decision in April of 2018 in *Dynamex Operations West Inc. vs. Superior Court*, which was later codified in the Golden State in a law known as Assembly Bill 5.

Under this decision, and the later statute, the court established that in determining if companies correctly classified workers as independent contractors, courts should look at whether they or their hiring agencies can establish that:

- A. The contracted workers are free from the control and direction of the companies initiating the contacts in connection to job performance;
- B. The work the contracted workers perform under those contracts is outside of the usual course of the companies’ business;
- C. The workers are customarily engaged in an independently established trade, occupation or business, which is similar in nature to the work performed under the contracts.



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This three-part test is commonly known as the ABC test.

The B part of the test could be a particularly difficult bar to overcome. Companies looking to hire independent contract drivers to handle short-term increases in business in California may find it exceedingly difficult to prove those workers as independent contractors when they have other drivers they regularly employ doing the same work unless, at a minimum, they are treated differently from the employed drivers Mazer says.

Companies may try to restructure their business so they can dodge this issue. Or the businesses may try to argue that they are simply offering independent drivers business referrals for a fee. Still courts may find such arrangements unconvincing, Mazer says.

Mazer says independent contractor agreements should be consistent with the legal precedents established for independent contractors in the states in which fleets operate. Recent changes in legal precedent may require businesses to have far less control and less interest in who carries out the work and how they perform their duties.

CONTRACTORS IN CONTROL

Businesses must take steps to separate control of the employee from that of the contractor: They can't discipline contractors. Contractors set their own schedules and decide which

DOS AND DON'TS OF HIRING AND MANAGING INDEPENDENT CONTRACT DRIVERS

Our experts say that hiring independent contract drivers the wrong way could actually make it more difficult for companies to defend themselves should a negligence lawsuit, workers' compensation, or unemployment claim be brought.

Here's a few DOs and DON'Ts they recommend:

- ◆ DO think about the reasons for bringing back people, whether it's as independent contractors or as employees. Communicate those reasons clearly to all parties;
- ◆ DO consider that the U.S. Department of Labor is currently working on new federal regulations that will further define independent contractor status under the authority of the Fair Labor Standards Act;
- ◆ DO have one or two people in your company assigned to manage relationships with independent contractors — making sure that they are treated as independent contractors and not as employees. These people should use terms like business advisors to clearly define their roles;
- ◆ DO audits on the company's independent contractor relationships as part of any regular review of the company's HR policies;
- ◆ DO have a written driver agreement with your drivers, if the drivers are independent contractors;
- ◆ DO specify in the driver agreement that the company does not control the drivers in the conduct of their work;
- ◆ DO offer the drivers individual jobs, with the option to accept or reject those jobs, and pay the drivers a commission for jobs actually completed;
- ◆ DO confirm during the hiring process the driver has a suitable vehicle with the required insurance and is appropriately licensed for the type of work for which the driver is being contracted.
- ◆ DON'T control the daily operations of the drivers, or retain the right to such control, even if it is not exercised;
- ◆ DON'T direct the route the drivers take to get to and from the job site or to complete the job;
- ◆ DON'T require the drivers to wear a uniform or mark their vehicles with your company name;
- ◆ DON'T set the drivers' hours or pay them by an hourly rate;
- ◆ DON'T own the vehicles the drivers use;
- ◆ DON'T pay for insurance, storage or maintenance of the vehicles the drivers use.

jobs to take. With contractors, businesses can't use employee handbooks to establish rules or expectations except as to incidental matters such as procedures to drop off proof of the completion of a job, for instance.

"Ideally contractors should own, insure, and operate their own vehicles or rent or lease their own equipment independently," Mazer says. "They should decide which jobs to accept or reject and they should determine their own schedules."

This control could arise in another coronavirus-related issue. Mazer advises leaving decisions such as whether to wear personal protective equipment such as facemasks up to the contractor driver even if direct-hire drivers are required to comply.

In some cases, the right to control, and not just the actual control businesses exercise over drivers, may be enough for courts to determine their status as employees rather than independent contractors, Mazer says.

In other words, independent contractors must be free to exercise that control at any time in order to establish their independence — and it should be delineated in the contract.

Businesses should also realize that in

court cases involving accidents, the criteria a court uses to evaluate that status may be different than the criteria it uses in cases involving worker's compensation claims or unemployment claims, Mazer explains.

No matter what the forum, the crucial issue is the extent of the control over the driver. If the driver is involved in a collision, an injured plaintiff may sue both the driver and the company he works with as a contractor, claiming the company should also be liable for the driver's negligence.

"If a driver agreement is clear about lack of control over the driver, and the pretrial testimony shows the agreement was honored in practice, those facts could play well in terms of getting the company dismissed as a defendant before a jury trial, in a court case involving driver negligence," Mazer says.

The agreement may also require the driver to reimburse the company for the cost of the suit. "Businesses should consider that while agreements and best practices cannot prevent lawsuits, if they are well written, they can be critical to presenting adequate defenses should lawsuits ever be brought," Mazer says. **BF**