

Independent Contractors

Recent \$2.2 Million Award to Pacer Cartage Drivers Seen as Harbinger of Future Actions

The California labor commissioner's recent decision awarding \$2.2 million to seven truck drivers who alleged that Pacer Cartage Inc. misclassified them as independent contractors instead of as employees sets a precedent for future workers facing similar challenges, the attorney representing the plaintiffs told Bloomberg BNA April 3.

"We believe that these decisions, coupled with the lawsuits that we have recently filed and those we intend to file in coming weeks, will force the drayage industry to make long overdue changes in their business practices to comply with state and federal labor laws," said Alvin Gomez of the San Diego-based Gomez Law Group.

The California Department of Industrial Relations decided March 12 that the truck drivers were employees and each was due a separate amount; together they total more than \$2.2 million for wages and business expenses the drivers incurred in recent years (*Prieto v. Pacer Cartage, Inc.*, Cal. Labor Comm'r, No. 10-78468, 3/12/14).

"The evidence overall establishes that [Pacer] had 'necessary control' over the Plaintiffs' work," Dan Minchey, a hearing officer for the state Department of Industrial Relations' Division of Labor Standards Enforcement, wrote in the decision.

Issue Increasingly Prominent. The independent contractor issue has come under judicial scrutiny. In a February report, labor advocates said over the past three years a growing number of U.S. port truck drivers have filed misclassification complaints with state and federal enforcement agencies (34 DLR A-5, 2/20/14).

Pacer, a large drayage carrier that describes itself as having 6,500 contracted motor carriers, appealed the decision to the state superior court in San Diego March 21.

The company is a subsidiary of Pacer International Inc. XPO Logistics Inc. purchased Pacer in January and announced April 1 that it had closed the deal.

"We are aware of the rulings by the administrative hearing officer in the seven claims," a spokesman for XPO Logistics told Bloomberg BNA April 4. "These cases are ongoing and we have appealed the rulings to

California Superior Court. We intend to vigorously oppose these claims, which we believe are without merit."

Alleged Misclassification Began in 2009. The truck drivers filed initial claims with the California labor commissioner's office in April 2012, contending that Pacer misclassified them as independent contractors around 2009, and that this resulted in their incurring various out-of-pocket and other expenses, which were deducted from their weekly settlement checks.

Before 2009, the drivers owned their own trucks.

The change arose after the Port of Long Beach and the Port of Los Angeles adopted new environmental policies that also banned independent owner-operators from the facilities.

Because drivers no longer could pick up and/or deliver cargo to the ports, Pacer arranged through CTP Leasing Inc., a wholly owned subsidiary of Pacer International, to lease vehicles to its independent contractors.

According to the opinion, CTP Leasing entered into an initial lease agreement with Bank of America. CTP Leasing then subleased the trucks to Pacer's independent contractors.

A Pacer official testified that the lease created was a separate contract with a separate entity. He stated that the contractors would have equity in the trucks and at the end of the lease would have ownership in the vehicle.

Drivers Said Vehicles Only for Pacer's Use. The seven drivers decided to lease the vehicles and signed the lease agreement. Each lease contained a provision allowing the drivers to buy the truck at the end of the lease for \$45,047.00, or 45 percent of the acquisition cost of the truck.

The lease agreement also called for a two-year renewal option at the end of five years. If the independent contractor renewed the lease for another two years, he could then buy the vehicle at the end of the two-year renewal for \$18,019.00, or 18 percent of the acquisition cost of the truck.

According to the opinion, the lease agreement required that the monthly payments, which were about \$1,480, be deducted from the drivers' settlement checks. It also required payment into a security reserve and insurance coverage on the vehicles, both of which were deducted from the settlement checks.

But the drivers argued that Pacer only would allow them to use the leased vehicles to provide services for its company and not other carriers.

Pacer denied that the drivers only could use the leased vehicle to provide services for that company. Pacer officials said the drivers could use the vehicles for other motor carriers, but would have had to cover up Pacer's placard on them.

The drivers also alleged that Pacer required them to park the trucks at the company's San Diego property or on adjoining streets. They were not allowed to take the trucks home.

Pacer officials denied this allegation.

The drivers also alleged that they had no choice about which loads to accept and transport. If they refused a load, they said, Pacer would retaliate against them by sometimes not giving them work that day. The drivers also contended that they were threatened with having their keys taken away or being given loads that paid them less.

Pacer officials denied that any retaliatory action would be taken against the drivers if they refused a load.

Hearing Officer: Drivers More Convincing Than Pacer. Ultimately, Minchey, the hearing officer, found that the drivers' arguments were more convincing than those made by Pacer officials.

As a result, the drivers—six of whom no longer work for Pacer—were found to be entitled to wage deductions, reimbursable business expenses, interest and attorneys' fees. All but one of the drivers requested attorneys' fees.

"The deductions from the Plaintiffs' paychecks were for expenses incurred," Minchey wrote. "As employees,

those expenses, whether deducted from the Plaintiffs settlement checks or out of pocket, must be reimbursed to each of the Plaintiffs, according to the evidence presented at hearing."

David Arambula, an employee rights advocate at the Gomez Law Group, said April 2 in a statement: "[A]s a result of the progress being made against trucking companies like Pacer, drivers are now learning more about their employee rights and are appreciating the value and strength of uniting together with their fellow aggrieved workers to address workplace injustices collectively."

Gomez told Bloomberg BNA April 3, "The trucking industry is going to have to change and treat the individuals either as true independent contractors who can use their trucks for other business or as employees, and bear the cost of what it would be for any other employer."

He added that "these were seven test cases."

"We have 200 other cases we just filed lawsuits on in Los Angeles Superior Court," Gomez said. Those cases involve other Pacer drivers as well as drivers who work for the company's various subsidiaries.

"Based upon this case," he said, "we have all the information necessary to proceed and, hopefully, get a trial date within one year."

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