

XPO Logistics Misclassification-Related Liability

Source: Justice for Port Drivers, Feb. 25, 2016

XPO Logistics (XPO) is a publicly traded company whose subsidiaries XPO Cartage (f/k/a Pacer Cartage) and XPO Port Services, Inc. d/b/a XPO Logistics (f/k/a Intermodal Container Service, dba Harbor Rail Transport) are together among the top trucking companies servicing the Ports of Los Angeles and Long Beach. XPO Logistics specializes in moving goods to and from the ports, while XPO Cartage primarily moves goods to nearby intermodal rail yards. There are approximately 280 alleged misclassified drivers working for both companies in their LA-area locations and 90 additional drivers in XPO Cartage's San Diego facility.

XPO and its subsidiaries are facing several legal and enforcement agency actions for alleged wage theft due to misclassification of their drivers as independent contractors. XPO's SEC filings indicate that they are accounting for the cost of the resulting liability they are facing. In their 2014 10K, XPO discloses that during the fourth quarter of 2014, the company established a reserve for the estimated probable loss with respect to certain lawsuits related to misclassification. The company estimates that given the recent adverse decisions, there is a possibility that a loss may be incurred in excess of the reserved amount. However, there is no mention in their filings of any plans to avoid future liability by reforming their business model and properly reclassifying their drivers as employees.

In Southern California alone, XPO faces a potential liability, due to driver misclassification, in an excess amount of \$200 million.¹

Since the illegal misclassification model appears to be a widespread practice in its Last Mile segment as well, with at least six major class actions across the country, we anticipate that XPO faces a higher potential liability nationwide.

Intermodal Drayage Classification Claims

Labor Commissioner Claims:

- In March 2014, the California Division of Labor Standards Enforcement (DLSE) San Diego office issued findings in the wage claims of seven individual Pacer Cartage, Inc. (currently known as XPO Cartage) drivers, all of whom it found to be employees who had been illegally misclassified as independent contractors. The DLSE awarded these drivers a combined \$2.1 million. Pacer appealed these seven awards to the California Superior Court, San Diego and in September 2015, the court upheld the DLSE's decision. XPO has appealed the court decision (fourth Appellate District, Div. 1, D069425) and the case remains pending.
- In 2015, the Long Beach DLSE office determined that Pacer Cartage, (currently known as XPO Cartage) had misclassified another five drivers, and awarded them a total of \$950,000 in unlawful deductions, reimbursable expenses, and penalties. Pacer has appealed the Labor Commissioner's decisions and the cases remains pending in court.

Private Litigation

- Class Actions:
 - Molina v. Pacer: XPO Cartage, then Pacer Cartage, is facing a class action lawsuit involving over 600 drivers and the estimated liability amounts to over \$5 million. Pacer and the class representative's attorney, Kabateck, have reached a tentative agreement to settle this litigation. However, the court approval and the acceptance of the settlement by a minimum percentage of members of the purported class remain pending. The settlement offer does not discuss the reclassification of employees. The drivers signed a petition and have sent it to the court to request that the judge rejects the proposed settlement.
 - Arevalo v. XPO Port Services, Inc., d/b/a XPO Logistics (f/k/a Intermodal Container Services, d/b/a Harbor Rail Transport): This is a class action lawsuit, involving 100 drivers, arises out of XPO Port Services' willful misclassification of employees, failure to pay wages, pay overtime, and provide meal and rest breaks to its employee drivers. Filed in August 2015, this lawsuit is in the beginning stages and no major event has taken place yet.
 - Lopez v. Pacer Cartage, Intermodal Container Services d/b/a Harbor Rail Transport, and now defunct PDS Transportation: In January 2016, Kabateck, the same firm that filed the class action against Pacer Cartage, filed a new class action lawsuit against all XPO's intermodal subsidiaries.
- Mass Actions: In 2014, a total of 202 drivers filed individual complaints in three separate "mass action" lawsuits against their respective companies—HRT, Pacer Cartage, and the now-defunct former XPO subsidiary PDS Trucking—for wage and hour violations arising due to misclassification as "independent contractors." All cases are still pending.

As the company faces further claims for illegal paycheck deductions related to employment misclassification, XPO could face financial liability in excess of \$200 million.ⁱⁱ

ⁱ From the 12 DLSE claims already adjudicated to XPO drivers, the total average amount granted per driver exceeds \$261,000 per driver. Between mass actions, class actions and DLSE claims, there about 800 drivers with pending claims against the different XPO's drayage subsidiaries in California.

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