



TRANSTRENDS

THE TRANSLAW GROUP, INC.

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IF YOU WISH TO END YOUR SUBSCRIPTION TO TRANSTRENDS, SIMPLY SEND AN EMAIL REQUESTING A CANCELLATION TO JBURNS@TRANSREGS.COM



THE BURNS BOYS

We have to take a moment to dote on the two little princes! Tod II will be three on January 6, 2007 and Gage is six months old.

You can rightfully assure that these little guys were not willing participants in the photo session.

**Merry Christmas from The
Translaw Group, Inc.**

5 Ways to Mess with Santa

1. Instead of milk and cookies, leave him a sensible salad, and a note explaining that you think he could stand to trim a few pounds.
2. While he's in the house, have his sleigh given a level I by a friendly DOT inspector.
3. Leave him a note, explaining that you've gone away for the holidays. Ask if he would mind watering your plants and changing the litter box.
4. While he's in the house, find the sleigh and sit in it. As soon as he comes back and sees you, tell him that he shouldn't have missed that last payment, and take off.
5. Paint "hoof-prints" all over your face and clothes. While he's in the house, go out on the roof. When he comes back up, act like you've been "trampled." Threaten to seek legal redress.

ARE THEY INDEPENDENT CONTRACTORS OR EMPLOYEES?

Once again, fleets are under attack by the IRS and federal courts for their misuse of owner-operators and independent contractors. The line separating company employees and independent contractors is being blurred by transportation businesses who fail to differentiate between the two.

The National Labor Relations Board is cracking down on the guidelines which surround the use of independent contractors, stating that there must be legal differences between the two. Companies such as Allied Holdings, Artic Express, Bulkmatic, Burlington Motor Carriers, C.R. England, Heartland Express, Mayflower, Prime, Swift Transportation, United Van Lines, and FedEx Ground have all been investigated in courts regarding their misuse of independent contractors.

Trucking companies must fully understand the terms of owner-operators before hiring independent contractors. Some tests to determine whether a worker is an employee or owner-operator include: the amount of control over the work, qualifications of the supervisor, level of skills required, supplier of the vehicle, length of employment, method of payment, and or not whether both parties agree on the employment status.

The IRS uses a separate test to determine independent contractor status called the "20-factor" test. These factors include instruction, training, integration, service, hiring, payment, and the hours worked.

To be safe, fleets should provide the IRS a separate set of practices and manuals for owner-operators and require them to pay for their own health and insurance policies. Owner-operators should not be given employee related fringe benefits, free uniforms, or free equipment. If a company is using owner-operators, they should know all the rules or risk investigation by the government and the NLRB.

DRIVERS BUSTED FOR HAULING MARIJUANA

In the case United States v. Marquez, two drivers are found guilty for hauling a truck full of marijuana. Apparently, the drivers had no idea about the multiple pounds of pot in the truck which was hidden behind stacks of insulation.

The drivers would have most likely gotten away with their scheme had they kept accurate log book records or met inspection requirements. One would think a driver who was transporting enough marijuana to light up a small northern California town would not make himself so easy to be caught.

The plea of ignorance by the two drivers leads us to think that they must have been recreational users themselves to think that any jury would buy their case. It is reasonable to assume that anyone with common knowledge would notice the strong whiff of marijuana that would emerge from the trailer when opened (not that we have any personal experience).

Drivers should always know what their hauling at all times because no jury will believe your ignorance if there is any flaw in your records, inspections, or lading information.

DO YOU EMPLOYEE INDEPENDENT CONTRACTORS?

Some of the companies being audited by the IRS are finding the results to be disastrous, because many of the people working for them that they have been calling independent contractors are, according to the IRS, employees. Thus, these companies are faced with debts for taxes they should have withheld.

A general definition will help set the stage for this discussion on independent contractors. An independent contractor is a person who contracts with another to do something for him, but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.

Chapter 26 of the United-States Code, Employment Taxes, defines an employee in section 3121 (d)(2) as, "Any individual who, under the usual common-law rules applicable in determining the employer/employee relationship, has the status of an employee"

But what are the common-law rules regarding an employer/employee relationship? In general, this regards the relationship that exists between the employer and the employee, and that the employer has the overall control of the work.

The difference between being an employee or an independent contractor depends on who has the right to direct and control the method and manner in which work shall be done by the person doing the work. If the person doing the work has the right to control the work, then he is an independent contractor. If the person for whom the work is being done has the right to direct and control the work, then the person performing the work is an employee of the other.

The mere description of the relationship by the parties themselves as anything other than employer/employee is immaterial. Treas. Reg. Sec. 31.3401(c)-1. The status of the worker is determined by the whole picture, the total situation of the working relations, and it is up to the court to consider the whole picture to make its determination of the status of the worker as either an independent contractor or an employee.

Another definition for independent contractor is one who contracts to perform certain work for another according to his own means and methods, free from the control of an employer and all the

details connected with the performance of the work, except as to the product or the result. Kelly V. Eclipse Motor Line, 305 F. Supp. 191, 196 (D.C. Md. 1969).

Some of the issues that are examined in determining status of the worker include the following: 1) The investment by the person rendering the service in his own tools and equipment; 2) Cost incurred by the person rendering the service; 3) ability of the person to profit from his own managerial skills; 4) Whether the service requires specialized skills; 5) permanence of the relationship between the parties; 6) Whether the person works in the course of the recipient's business, rather than in an ancillary capacity.

The courts have reasoned that the employer/employee relationship exists where the person for whom the service is performed has the right to control and direct the individual who performs as to the details and means by which the result is accomplished and the end result. The employee is subject to the will and control of the employer, not only what shall be done but how it shall be done. It is not that the employer needs to exercise this right, just that he has the right to control and the right to discharge the employee.

Unless the employer/employee relationship exists, employer is under no duty to withhold federal income tax or to pay federal unemployment tax. Automated Typesetting, 527 F. Supp. at 519.

If you have any questions concerning the employee/independent contractor status of persons providing service to your company feel free to call the office for further information. When the tax man commeth, it hurts!

TRUCKING COMPANY OWNER AND WORKERS CHARGED WITH FUEL THEFT

The head of a Miami trucking company and six of his employees have been charged with stealing more than 8,000 gallons of diesel fuel and gasoline that was supposed to be delivered to customers.

According to a press release from the U.S. Attorney's office, Genesis Petroleum president Ricardo Mejia and the charged employees offloaded gas and diesel into tanks inside an unmarked shipping container, and then used the fuel for company vehicles and their private cars.

MACQUARIE PROFITS UP MORE THAN 50 PERCENT (ALL I WANT FOR CHRISTMAS IS A TOLL PLAZA)

Australia's most powerful bank, with subsidiaries that invest in some of the toll roads you may drive on every day in North America, issued a report this week showing record profits.

Compared with the same time period the year before, Macquarie Bank, the parent company to Macquarie Infrastructure Group, reported a 51-percent increase in profit for the second half of its current fiscal year, which ended Sept. 30, according to a statement published on the company's Web site.

And, during the first half of the current fiscal year – October 2005 through March 2006 – investors received a 39-percent increase in dividends and shares rose 62 cents Australian to \$57.73 (\$44.13 U.S.).

Macquarie Infrastructure Group is a principal investor in the Indiana Toll Road, Chicago Skyway, South Bay Expressway in San Diego, 407 Express Toll Route in Toronto, Canada, and the Dulles Greenway near Washington, DC.

And you think the Massachusetts Turnpike will become toll free. There is no better cash cow than a toll road and don't let anyone think differently, especially if you can get a 39% return!

Macquarie claims to be the biggest infrastructure investor in the world.

NJ LAWMAKER WANTS SHERIFFS' DEPUTIES TO INSPECT INTERSTATE TRUCKS

Just a few days after the U.S. Supreme Court confirmed that New Jersey can't keep out-of-state trucks off of secondary routes that are open to in-state drivers, a state lawmaker is renewing an effort to hamstring visiting vehicles.

Assemblyman Reed Gusciora is pushing a bill that was introduced earlier this year that would allow sheriffs' deputies to inspect interstate trucks – something that only state troopers can presently do.

Gusciora says his bill would simply increase the manpower available to clamp down on oversize and overweight trucks.

LUMPER PROBLEMS!

Have you been faced with unreasonable or unexpected charges for "lumper" services? Many large grocery warehouse operations, in particular, assess such charges routinely. The following information should be helpful to you in determining how you should handle the problem.

§ 14103. Loading and unloading motor vehicles

(a) Shipper Responsible for Assisting.— Whenever a shipper or receiver of property requires that any person who owns or operates a motor vehicle transporting property in interstate commerce (whether or not such transportation is subject to jurisdiction under subchapter I of chapter 135) be assisted in the loading or unloading of such vehicle, the shipper or receiver shall be responsible for providing such assistance or shall compensate the owner or operator for all costs associated with securing and compensating the person or persons providing such assistance.

(b) Coercion Prohibited.— It shall be unlawful to coerce or attempt to coerce any person providing transportation of property by motor vehicle for compensation in interstate commerce (whether or not such transportation is subject to jurisdiction under subchapter I of chapter 135) to load or unload any part of such property onto or from such vehicle or to employ or pay one or more persons to load or unload any part of such property onto or from such vehicle; except that this subsection shall not be construed as making unlawful any activity which is not unlawful under the National Labor Relations Act or the Act of March 23, 1932 ([47 Stat. 70](#); [29 U.S.C. 101](#) et seq.), commonly known as the Norris-LaGuardia Act.

§ 14905. Penalties for violations of rules relating to loading and unloading motor vehicles

(a) Civil Penalties.— Whoever knowingly authorizes, consents to, or permits a violation of subsection (a) or (b) of section [14103](#) or who knowingly violates subsection (a) of such section is liable to the United States for a civil penalty of not more than \$10,000 for each violation.

(b) Criminal Penalties.— Whoever knowingly violates section [14103 \(b\)](#) of this title shall be fined under title 18 or imprisoned not more than 2 years, or both.

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