

# Understanding the Clean Truck Litigation Part IV:

*4 years, million dollars, and tens  
of thousand of pages later... And  
the driver - IC - MC relationship*

Presented by  
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# THREE YEARS AND COUNTING:



"This is going to go on for years."

*Judge Harry Pregerson,  
Ninth Cir.*

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# A YEAR AGO ...

ENVIRONMENTAL NEWS FROM CALIFORNIA AND BEYOND

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## Port of L.A.'s 'clean truck' program prevails in court

August 27, 2010 | 1:06 pm

Environmental justice activists are gaining influence, taking on the San Pedro Bay ports over contamination of their neighborhoods along transportation corridors. Soot and nitrogen oxides from ships, trains and trucks are linked to asthma, cancer and heart disease. The ports pledge to cut pollution by 45% by 2012.

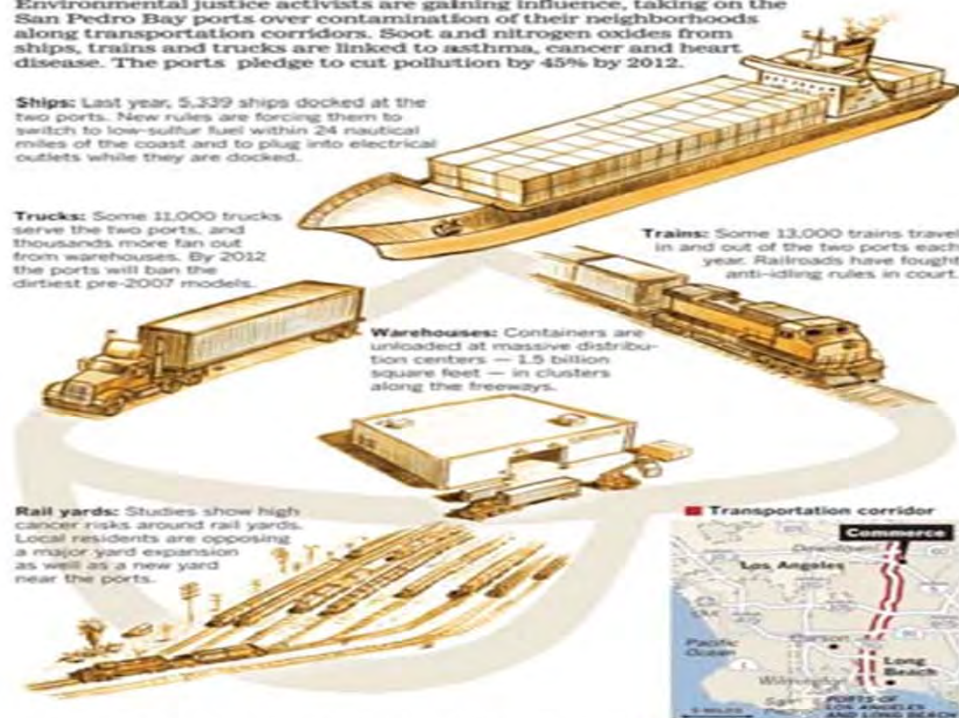
**Ships:** Last year, 5,339 ships docked at the two ports. New rules are forcing them to switch to low-sulfur fuel within 24 nautical miles of the coast and to plug into electrical outlets while they are docked.

**Trucks:** Some 11,000 trucks serve the two ports, and thousands more fan out from warehouses. By 2012 the ports will ban the dirtiest pre-2007 models.

**Warehouses:** Containers are unloaded at massive distribution centers — 1.5 billion square feet — in clusters along the freeways.

**Rail yards:** Studies show high cancer risks around rail yards. Local residents are opposing a major yard expansion as well as a new yard near the ports.

**Trains:** Some 13,000 trains travel in and out of the two ports each year. Railroads have fought anti-idling rules in court.



Sources: Ports of Los Angeles and Long Beach; South Coast Air Quality Management District; California Air Resources Board  
Graphics reporting by MARGOT ROBERTS

A federal judge has given the nation's busiest port complex authority to require shipping trucks to reduce air pollution. U.S. District Court Judge Christina Snyder ruled Thursday that the Port of Los Angeles' Clean Trucks Program can require trucks coming in and out of the port to meet diesel emissions standards. The American Trucking Assn. sued after the port put the rules in place in 2008, saying that while it supported the clean air goals, the port's regulations violated a federal law prohibiting states and localities from regulating interstate trucking. The port's rules also would have eliminated owner-operator drivers, making it impossible for independent operators to work the harbor.

Snyder said that even though some parts of the port's regulations were pre-empted by the federal government, the port should be able to regulate air pollution to stay competitive in the marketplace. Air pollution has "interfered with port growth and jeopardized the port's continued viability as a commercial enterprise," she wrote.

Both the Natural Resources Defense Council and the Coalition for Clean and Safe Ports cheered the ruling. NRDC attorney David Pettit, who argued for the program during the trial, said it was a victory of "national significance" because it allowed ports across the country to impose air quality rules.

-- Associated Press

@ Twitter: @latenvironment  
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More in: [Air Pollution](#), [Los Angeles area](#)

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# WHERE ARE WE NOW?

## Panel throws out part of Port of L.A.'s Clean Truck Program

U.S. 9th Circuit Court of Appeals eliminates provision that would have ended trucking companies' use of independent contractors to haul containers from the port. The program is aimed at reducing diesel emissions.



Comments

2



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53



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Hundreds of trucks line up to be checked at the Port of Los Angeles Clean Truck Center in 2009. (Bob Chamberlin / Los Angeles Times / February 19, 2009)

11/18/2011

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# WHERE ARE WE NOW?

## Cleaner air, and rules, at the Port of L.A.

*Diesel truck emissions there have dropped 80% in three years, proving that there's no need to phase out independent truckers in favor of unionized ones.*

**September 28, 2011**

For years, L.A. labor and environmental advocates have been claiming that it would be impossible to clean up the diesel pollution that sickens residents near the Port of Los Angeles without phasing out the independent truckers who have traditionally picked up cargo there and replacing them with unionized employees. There's just one problem: Three years after implementation of the port's Clean Truck Program, during which the labor provision was blocked in federal court, it's now clear that this isn't true.



Hundreds of trucks line up to be checked at the Port of Los Angeles Clean Truck... (Bob Chamberlin / Los Angeles Times)

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# WHERE WE ARE NOW?

## Court Strikes Down Port of LA Driver Mandate

Bill Mongelluzzo | Sep 26, 2011 8:18PM GMT

*The Journal of Commerce Online - News Story*

Ports/Terminals | Labor | United States



Deals blow to Teamsters' effort to use clean-truck program to unionize drivers

A federal court of appeals on Monday struck down a controversial employee-driver mandate in the Port of Los Angeles clean-truck program, dealing a severe blow to Teamsters' effort to use the environmental program to unionize harbor truck drivers.

The U.S. Court of Appeals for the 9th Circuit left in place other concession requirements in the Los Angeles clean-truck program that pertain to safety and truck maintenance. That makes it difficult for the port to determine whether it should pursue a costly appeal to the U.S. Supreme Court.

Striking down the Los Angeles employee-driver mandate was the major target of the American Trucking Associations when it filed its suit against the city and the port more than two years ago.

"It is a clear win on the employee mandate. We're certainly very pleased by the decision," said Curtis Whalen, executive director of ATA's intermodal conference.

As part of its clean-truck program, which is intended to reduce harmful diesel emissions by more than 80 percent, Los Angeles included a requirement that harbor trucking companies hire drivers as direct employees. The port's reasoning is that in order to sustain a clean-truck program over the years, the

# WHAT HAPPENS NEXT?

## ↳ The POLA:

↳ Following the October 6, 2011 meeting, Dr. Geraldine Kantz, Ex. Dir. of POLA told reporters that the port does not plan to appeal the ruling of the 9<sup>th</sup> Cir., but an appeal could be filed as late as 26<sup>th</sup> of December.

↳ IANA Intermodal Insights, November 2011

## ↳ The ATA:

↳ The ATA is expected to file a petition for certiorari to the Supreme Court before the 24<sup>th</sup> of December.

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# WHAT WILL THE SUPREME COURT DO?



- ⌘ The ATA will look to the dissent:
  - ⌘ Market – the wrong market
  - ⌘ Duplication with FMCSA, DOT and CHP

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# IN THE BEGINNING . . .

- ✎ In November 2006, the Ports voted to approve the San Pedro Bay Ports Clean Air Action Plan ("CAAP").
- ✎ The CAAP's general goal is to reduce pollution in the Ports and surrounding areas, thereby reducing the attendant health risks.
- ✎ One component of the CAAP is the Clean Truck Program ("CTP").

# THE CONCESSION AGREEMENT

## ✎ MAYOR VILLARAIGOSA LAUNCHES LANDMARK CLEAN TRUCK PROGRAM TO CLEAN LOS ANGELES' AIR

✎ Bans over 10% of port trucks or 2000 "dirty-diesel" trucks, removing over 350 tons of harmful port-related emissions from Los Angeles' air.

✎ When fully implemented in 2012, the Clean Truck Program takes over 16,000 dirty-diesel trucks off the road, slashing harmful truck emissions by 80 percent.



Office of the Mayor  
City of Los Angeles

**ANTONIO R. VILLARAIGOSA**

FOR IMMEDIATE RELEASE  
October 1, 2008

Contact: Janelle Erickson  
(213) 978-0741

### **MAYOR VILLARAIGOSA LAUNCHES LANDMARK CLEAN TRUCK PROGRAM TO CLEAN LOS ANGELES' AIR**

*The most ambitious air-pollution cleanup in the nation immediately bans over 10% of port trucks – or 2,000 dirty-diesel trucks removing over 350 tons of harmful port-related emissions from Los Angeles' air*

*When fully implemented in 2012, the Clean Truck Program takes over 16,000 dirty-diesel trucks off the road, slashing harmful truck emissions by 80 percent*

LOS ANGELES – Mayor Antonio Villaraigosa today launched the Clean Truck Program, the centerpiece of the most ambitious air-pollution cleanup initiative in the nation immediately banning over 10% of port trucks – or 2,000 dirty-diesel trucks from the Ports of Los Angeles and Long Beach and removing over 350 tons of harmful emissions from Los Angeles' air.

"Today we are launching the Clean Truck Program and immediately, we will take 2,000 of the dirtiest, diesel spewing trucks off the road and start reducing the choking pollution in LA and Long Beach," Villaraigosa said.

"People said the fight would be too hard, but we kept on truckin' because we knew that the people of our port communities needed relief. We can proudly say that our Clean Trucks Program will begin on schedule, as planned, with more than enough drivers, trucking companies and clean trucks to meet the Port's demand."

Considered the most significant environmental achievement of Mayor Villaraigosa's time in office, the Clean Truck Program immediately bans trucks built before 1989, the first year of diesel pollution control; and by 2012, bars any truck that doesn't meet the cleanest 2007 emission standards.

- MORE -

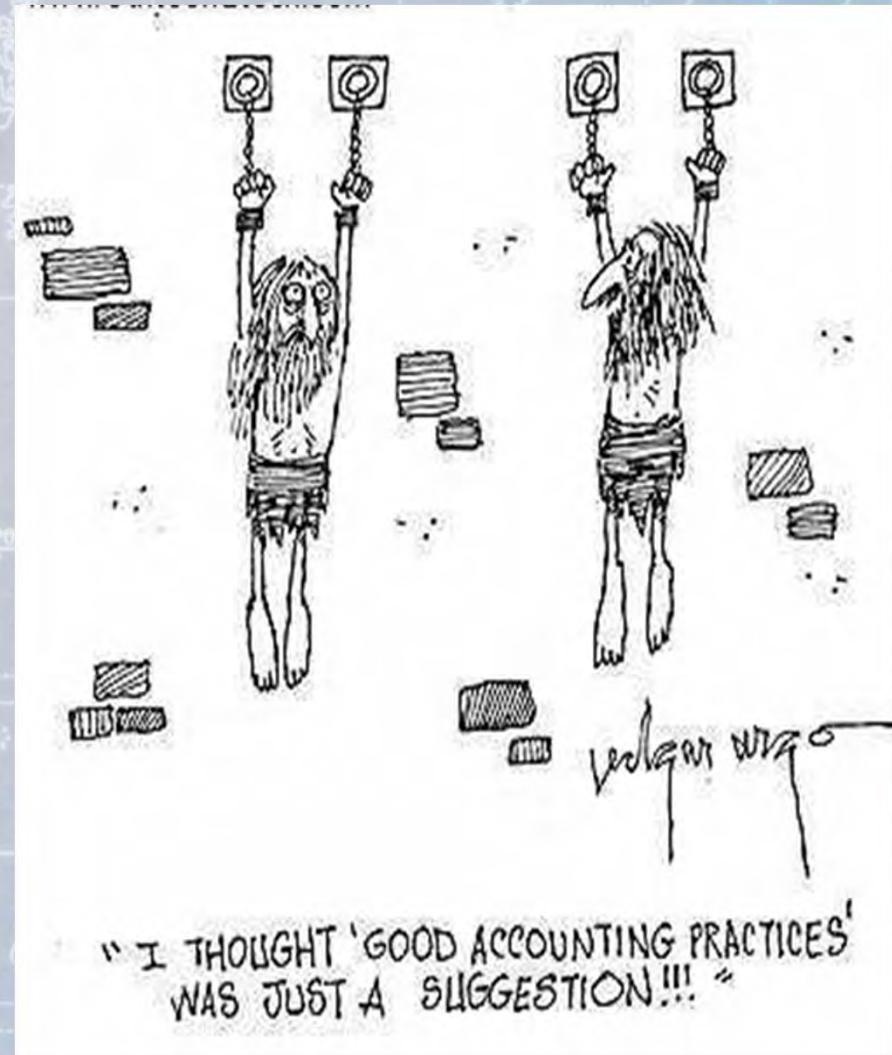
# MORE POLITICS – LABOR & THE GOVERNOR

- Teamsters also worked tirelessly to return Brown to the governor's mansion.
- Teamsters say: Brown “a lifelong public servant . . . “successfully fought to protect working families and consumers, including *port drivers fighting against trucking company abuses.*”  
- Teamster press release.

# THE CONCESSION AGREEMENT

↳ The Ports of Long Beach and Los Angeles have each adopted a CTP and a Concession Agreement (the "Agreements").

↳ The Agreements required motor carriers to comply with a number of provisions. Failure to comply would result in barring the motor carrier from entry. The ATA filed a legal challenge to the Agreements.



# TRIAL COURT: HISTORY, STATUS

- ✦ ATA filed action in federal court on July 28, 2008.
- ✦ Two days later, ATA filed a motion for a preliminary injunction in order to stop the implementation.
- ✦ Judge Snyder's September 9th order denied ATA's request for a preliminary injunction.
- ✦ On remand, the Court issued an order enjoining portions of the Agreements.
- ✦ Port of Long Beach settled. NRDC challenged the settlement.
- ✦ Trial is over. September 10, 2010. Court enters FINAL JUDGMENT in favor of the Port of Los Angeles, NRDC, Sierra Club and Coalition for Clean Air.
- ✦ ATA filed an appeal of trial court's FINAL ORDER.
- ✦ Ninth Circuit opinion issued on September 26, 2011.

# APPEAL: HISTORY, STATUS

- ✦ The ATA has appealed the District Court's order denying the injunction to the U.S. Court of Appeals for the Ninth Circuit.
- ✦ The Ninth Circuit agreed with the ATA and remanded the case back to the District Court.
- ✦ The District Court issued an order following the remand.
- ✦ The ATA filed a second appeal as to the order following remand. The Ninth Circuit denied the ATA's second appeal.
- ✦ The ATA has filed a third appeal, this is an appeal of the trial courts FINAL ORDER.

# THE TRIAL COURT'S FINAL ORDER

↳ The Court held:

↳ The FAAA Act applies.

↳ Certain provisions are Not subject to prices, routes and services in the FAAA Act:

↳ Maintenance provision;

↳ Placard provision;

↳ Financial capability;

↳ Subject to the "Safety" Exception:

↳ Maintenance provision;

↳ Placard provision;

↳ NOT subject to FAAA Act because the Port of Los Angeles is acting as a market participant:

↳ Employee mandate

↳ Parking

# PRICE, ROUTE, OR SERVICE

- ✦ Federal Aviation Administration Authorization Act
- ✦ Preemption is the general rule.
- ✦ 49 U.S.C. § 14501(c)(1): A State "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service or any motor carrier . . . with respect to the transportation of property."

# MARKET PARTICIPATION

- ⌚ If state action is **proprietary**, rather than regulatory, such action is **not** generally subject to statutory preemption.
- ⌚ The market participant test does not turn on whether the state or local government is a purchaser or seller of the goods and services at issue.
- ⌚ The Court rejected ATA's contention that the Port itself must participate directly in the drayage market.
- ⌚ **The Port's participation in the port services market is sufficient.**
- ⌚ Concession Agreement was a "business necessity," in order to eliminate evident obstacles to POLA growth.

# THE ATA INJUCTION – STAY

⌚ While the appeal is pending, the ATA asked the court to enjoin:

⌚ Employee mandate;

⌚ Off street parking fees;

⌚ Financial responsibility.

⌚ The court only enjoined:

⌚ Employee mandate.

# LONG BEACH SETTLEMENT



**"ATA has always strongly supported the environmental objectives of the Port and supports strict compliance with and adherence to all safety and security laws and regulations."**

**- ATA President and CEO Bill Graves**



**"The (CAAP) program that has been highly successful in reducing air pollution . . . The NRDC's real objection to our program has nothing to do with clean air. ... (it is a) Teamster ... campaign to unionize port truckers."**

**- Richard Steinke, Port of Long Beach**



**"The Port of Long Beach violated the public trust ... approved a worthless settlement ... they ran away from a fight."**

**- David Pettit, NRDC**

# WHAT ARE THE UNDERLYING INTERESTS?

- ↳ Increase the Ports' capacity
- ↳ Reduce emissions
- ↳ Improve health
- ↳ Politics
- ↳ Taxes – Revenue
- ↳ Costs of operation
- ↳ Labor

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# LITIGATION: KEY PLAYERS

- ✦ Port of Long Beach
- ✦ Port of Los Angeles
- ✦ ATA
- ✦ U.S. Government
- ✦ Interested Third Parties/*Amici Curiae*
  - a. Environmental Interests
  - b. Shippers
  - c. Labor

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# SAMPLING OF AMICI CURIAE

- ✎ National Retail Federation
- ✎ National Right to Work
- ✎ National Industrial Transp. League
- ✎ U.S. Government
- ✎ Sierra Club
- ✎ NRDC



**SIERRA CLUB**  
FOUNDED 1892



**NATIONAL RIGHT TO WORK COMMITTEE®**

*No one should be forced to pay tribute to a union in order to get or keep a job.*

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# NINTH CIRCUIT OPINION

➤ We **reject** ATA's arguments that (1) the concession agreements **per se** affect rates, routes, and services; (2) the market participant doctrine does not apply because the Port does not "procure" drayage services; and (3) that the Supreme Court's decision in *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954) precludes the application of the safety exception to this case.

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# NINTH CIRCUIT OPINION

✎ The Port directly participates in the market as a manager of Port facilities. In essence, the concession agreements are contracts under which the Port exchanges access to its property for a drayage carrier's compliance with certain conditions.

# NINTH CIRCUIT OPINION

➤ In this case, we are not faced with a situation where the Port is managing property “in its sovereign capacity,” or imposing restrictions unrelated to its business interests as a property manager. As the district court recognized, the Port of Los Angeles is a business entity, operating wholly separately from the city government.

# NINTH CIRCUIT OPINION

↻ We hold that when an independent State entity manages access to its facilities, and imposes conditions similar to those that would be imposed by a private landlord in the State's position, the State may claim the market participant doctrine. ... A private port owner could (and probably would) enter into concession-type agreements with licensed motor carriers in order to further its goals. *See Boston Harbor*, 507 U.S. at 231-32. We therefore conclude that the Port acted in its proprietary capacity as a market participant when it decided to enter into concession agreements.

# NINTH CIRCUIT OPINION

## ↻ Financial Capability Provision

↻ While this does not preclude the possibility that the financial capability provision will effect rates, routes or services, it makes that possibility “tenuous or remote.” Accordingly, we hold that the financial capability provision is not preempted by § 14501(c) of the FAAA Act.

## ↻ The Maintenance Provision

↻ We conclude that the maintenance provision was intended to respond to safety concerns.

↻ We hold that State provisions duplicating federal law may still be genuinely responsive to safety.

## ↻ Off-Street Parking Provision

↻ The off-street parking provision serves the Port’s business interest in promoting Port security as a market participant.

## ↻ Placard

↻ The placard provision is genuinely responsive to motor vehicle safety and helps the Port to gather information about the safety of drayage truck operations, both on and off Port property.

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# NINTH CIRCUIT OPINION

- ↪ The employee-driver provision is
  - ↪ **"tantamount to regulation"** and thus does not fall under the market participant exception.
- ↪ We conclude that, the employee driver provision seeks to impact third party behavior unrelated to the performance of the concessionaire's obligations to the Port.
- ↪ One of the Port's primary motives in adopting the employee driver provision was to increase stability in Port drayage by ensuring that drivers were paid higher wages.
- ↪ As a facilities provider, the Port has an interest in continued provision of drayage services, but it may not obtain that stability by unilaterally inserting itself into the contractual relationship between motor carriers and drivers.

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# THE DISSENT

- ✎ I must dissent from the majority opinion because:
- ✎ (1) The market participant exception to preemption does not apply. Drayage services (not port services) form the relevant market, and the Port of Los Angeles (the "Port") acts as a regulator of drayage services.
- ✎ (2) Even assuming the Port qualifies as a proprietor, the off-street parking provisions are preempted, because they affect parties unrelated to contractual obligations to the Port.
- ✎ (3) The placard provision is preempted and not saved by the market participant doctrine or the safety exception, because California cannot revoke access to channels of interstate commerce and identification requirements on motor carriers are expressly preempted under 49 U.S.C. § 14506(a).

# IS THE EMPLOYEE ISSUE REALLY DEAD?

## WANTED DEAD OR ALIVE

Murder of U.S. Nationals Outside the United States; Conspiracy to Murder U.S. Nationals Outside the United States; Attack on a Federal Facility Resulting in Death

**USAMA BIN LADEN**



**Aliases:**

Usama Bin Muhammad Bin Laden, Sheykh Usama Bin Laden, The Prince, The Emir, Abu Abdullah, Majid al Sheykh, Hajj, The Director

	DESCRIPTION	
<b>Date(s) of Birth Used:</b>	1957	<b>Hair:</b> Brown
<b>Place of Birth:</b>	Saudi Arabia	<b>Eyes:</b> Olive
<b>Height:</b>	5' 4" to 6' 4"	<b>Complexion:</b> Tan
<b>Weight:</b>	Approximately 160 pounds	<b>Sex:</b> Male
<b>Build:</b>	Thin	<b>Nationality:</b> Saudi Arabian
		<b>Language:</b> Arabic (probably Fusha)

**Scars and Marks:** None known  
**Remarks:** Bin Laden is left-handed and walks with a cane.

**CAUTION**

Usama Bin Laden is wanted in connection with the August 7, 1998, bombings of the United States Embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya. These attacks killed over 200 people. In addition, Bin Laden is a suspect in other terrorist attacks throughout the world.

**REWARD**

The Rewards for Justice Program, United States Department of State, is offering a reward of up to \$25 million for information leading directly to the apprehension or conviction of Usama Bin Laden. An additional \$2 million is being offered through a program developed and funded by the Airline Pilots Association and the Air Transport Association.

**SHOULD BE CONSIDERED ARMED AND DANGEROUS.**

If you have any information concerning this person, please contact your local FBI office or the nearest American Embassy or Consulate.

OR



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# WORKER MISCLASSIFICATION

↳ In 2007, US Gov. Acct. Office found that misclassification of workers as independent contractors cost the United States Government \$2.72 billion.

↳ California surge in misclassification increased 2005 -07 to 54 percent, reaching 15,751 workers in 2007.

↳ The state of California was able to recover a total of \$11.9 million in payroll tax assessments, \$18.5 million in labor code citations, and \$40.3 million in assessments on employment tax fraud cases.

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# NEW LAW IN CALIFORNIA

↳ SB 459 - On October 9, 2011, Governor Brown signed the bill into law, and it will take effect January 1, 2012.

↳ • "Unlawful ... to engage in the *willful misclassification* of an individual as an independent contractor and/or charging an individual who has been willfully misclassified a fee, or making any deductions from compensation for any purpose, where the employer would have been in violation of the law if the individual had not been misclassified."

↳ • "Knowingly *advises* an employer to treat an individual as an independent contractor to avoid employee status for that individual shall be jointly and severally liable with the employer if the individual is found not to be an independent contractor." (This does not include attorney authorized to practice law in California).

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# SB459 RECORDS & PENALTIES

- Requires ... retention of specified records related to all independent contractors retained, to make those records available upon request to the Department of Industrial Relations (DIR) or the Employment Development Department (EDD), and to provide each individual retained as an independent contractor with a written notice developed by the EDD that includes specified information.
- Establishes civil penalties, for any person found guilty of misclassification.
- First time offenders** shall be assessed a penalty of not less than \$5,000 and not more than \$15,000 for each violation.
- Persons found guilty of a **repeated pattern or practice** of these violations shall be assessed a civil penalty of not less than \$10,000 and not more than \$25,000 for each violation.

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# WHAT NEXT - IC or EMPLOYEE?

↳ NARAYAN v. EGL, INC.

↳ Labor Code benefits to employees requiring employers to pay/provide:

↳ overtime compensation;

↳ reimburse employees for necessary business expenses, and

↳ provide off-duty meal periods.

↳ Prohibit employers from making improper deductions from wages

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# WHAT ABOUT THE IC CONTRACT?

↳ The Labor Code:

↳ These provisions are part of a broad regulatory policy defining the obligations that " 'the law places on an employer **without** regard to the substance of **its contractual obligations** to its employee.'

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# WHAT ABOUT TEXAS?

↳ The court rejected the Texas choice of law clause, stating:

[A]ppellants claims arose under the Labor Code, a California regulatory scheme, and consequently, California law should apply to define the boundaries of liability under that scheme.

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# THE FACTORS

- ✦ Distinct occupation or business;
- ✦ Kind of occupation;
- ✦ Usually done under the direction of the principal or by a specialist without supervision;
- ✦ Skill required in the particular occupation;
- ✦ Who supplies the instrumentalities, tools, and the place of work for the person doing the work;
- ✦ Length of time for which the services are to be performed;
- ✦ Method of payment, whether by the time or by the job;
- ✦ Regular business of the principal, and
- ✦ What the parties believe.

# ADDITIONAL FACTORS:

- ↳ Opportunity for profit or loss depending on his managerial skill;
- ↳ Investment in equipment or materials required for his task, or his employment of
- ↳ helpers;
- ↳ Service rendered require a special skill;
- ↳ Degree of permanance of the working relationship, and
- ↳ Service rendered is an integral part of the alleged employer's business.

# WHICH FACTORS TO USE?

☞ “the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends on particular combinations.”

☞ “We must assess and weigh all of the incidents of the relationship with the understanding that no one factor is decisive, and that it is the rare case where the various factors will point with unanimity in one direction or the other.”

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# WHAT NOT TO DO -

## DO NOT:

Make a video referring to the driver - IC as:

- Essential part of the company;

- Playing a key role in the shipping process;

- The eyes of the dispatcher;

- A vital source of shipping leads for the MC;

- The companies largest "sales force;"

NEVER put in writing that the growth of the MC *depends* on the driver - IC.

# MORE OF WHAT NOT TO DO -

## DO NOT

Use a Driver Handbook that looks like an employee manual or Requires the driver -

IC to:

Use company forms;

Constantly communicate with MC dispatch;

Report at a time certain

Show up at a specified time or face disciplinary action;

Give advance notice of vacation time;

Accept load "batched" as "all or nothing."

# MORE OF WHAT NOT TO DO -

## DO NOT

Require the driver – IC to:

Wear company logo;

Shirts;

Boots;

Hats;

Paint the truck a particular color;

Display a company ID card.

Provide drivers with equipment like:

EGL branded boxes and tape;

The court went on and on...

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# WHAT TO DO?

↳ Conduct an internal – confidential audit of your worker classification.

Review:

↳ Documents v. Real World.

↳ Independent point of view

↳ Consider Occupational Accident Insurance for driver – IC

↳ One Beacon

↳ Zurich

↳ Great American

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# Occ. Accident Ins. driver – IC

- ↳ What is the driver – IC looking for?
  - ↳ \$ if injured;
  - ↳ Payment of medical bills;
  - ↳ Lost wages due to injury.
- ↳ Benefits better than workers comp?
- ↳ What are the sources of workers compensation disputes - litigation?
  - ↳ Driver – IC's loss of income;
  - ↳ Disappointment – Expectation; Desperation
  - ↳ Looking to the deep pocket.

# WHAT TO DO?

- Consider the broker – motor carrier model:
  - Broker authority under Title 49;
  - Each motor carrier has its own authority;
  - Brokers are NOT motor carriers:
    - Non-asset;
    - Separate un-related entity must own and lease trucks;
    - Concession agreement executed by motor carrier, not broker.

FOR ADDITIONAL INFORMATION

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