

**EMPLOYMENT TAX GUIDELINES:  
CLASSIFYING CERTAIN VAN OPERATORS  
IN THE MOVING INDUSTRY**

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**I. PREAMBLE**

**A. OVERVIEW**

Market Segment Understanding Program

The Market Segment Understanding (MSU) Program is an innovative approach to resolving some longstanding disagreements with various industries on administrative or technical tax issues. An MSU identifies a particular area where the facts, law, or both are unclear, or noncompliance is widespread, within an identified market segment.

Employee/Independent Contractor Controversy

In order for examiners to make accurate and consistent determinations of employee/independent contractor status for any market segment, the Service must look closely at the market segment to understand how it operates. In this way, the facts that best demonstrate whether an individual is an employee or independent contractor can be identified. Identifying these facts permits the Service to use its resources more efficiently and assists taxpayers in the market segment in understanding the tax law and properly classifying their workers.

MSU

The purpose of this MSU is (1) to reduce disputes about the proper classification of a Van Operator in the moving industry, and (2) to provide a consistent and accurate approach to proper classification of Van Operators. As explained more fully in the definition of Van Operators, this MSU addresses only those drivers who work under a written agreement to provide services and equipment that includes a power unit (and may include other items). Where a business's operations go beyond the scope of the MSU, further investigation and analysis is required.

These audit guidelines, developed pursuant to the MSU Program, will assist taxpayers and the Service in determining the employment tax status of Van Operators working in a variety of settings.

The guidelines neither provide the industry special treatment or tax advantages, nor alter the legal standard of the "right to direct and control the performance of services." They are intended, however, to identify those facts that are clearly

more significant than others in determining the right to control in a specific market segment and to establish, wherever possible, objective standards for determining whether these facts are present.

In the event, however, a taxpayer in the market segment does not agree with an examiner's determination made in accordance with these guidelines, the examiner will need to collect and analyze all the facts. This will ensure that the examiner's file contains all the relevant data necessary to respond to the taxpayer's position.

The first step in any case involving whether a business has the employment tax obligations of an employer with respect to workers is determining whether the business meets the requirements of section 530 of the Revenue Act of 1978. If it does, the business will not have an employment tax liability with respect to the workers at issue. A discussion of section 530 is beyond the scope of these guidelines. Section 530 is discussed in the training materials entitled "Independent Contractor or Employee?" Training 3320-102 (Rev. 10-96) TPDS 84238I.

Regardless of the employment tax classification of a Van Operator, the person for whom the services are performed may be obligated to issue certain reporting forms. While these reporting requirements are analytically separate from the worker classification issue, an examiner should confirm that payments were properly reported for all workers, whether they are classified as employees or independent contractors.

If the Van Operator is an employee, the employer is required to report the wages on Form W-2. Further, employers are subject to certain requirements to withhold, deposit, report, and pay employment taxes. Withheld employee income tax and Social Security and Medicare taxes are reported on Form 941. Federal unemployment tax is reported on Form 940. For more information about employment taxes, see Publication 15 (Circular E), Employer's Tax Guide, and Publication 15-A, Employer's Supplemental Tax Guide, both available from the Service.

If the Van Operator is an independent contractor, the person for whom the services are performed may be required to report payments (if they equal or exceed \$600 in a year) on Form 1099.

## B. BACKGROUND

### 1. Structure of the Moving Industry

A basic understanding of the moving industry is a necessary foundation for determining whether Van Operators are employees or independent contractors. The moving industry consists of three distinct components, which are defined ordinarily by contractual arrangement. The three components are as follows:

Carrier - an independent household goods carrier or van line that operates as a common and/or contract carrier of household goods in intrastate and/or interstate commerce. Historically, such carriers have been granted intrastate authority from a state transportation agency or interstate authority from a federal agency.

Agent - a company under contract to a carrier to provide transportation service for the principal carrier in intrastate or interstate commerce.

Van Operator - the driver of a vehicle that transports household goods. As used in this document, the term Van Operator includes only a driver who operates under a written agreement with either an agent or a carrier (hereinafter "Company") specifying that the Van Operator will provide the Company with services and equipment. The equipment consists of a "power unit," the motorized vehicle used to pull the trailer that carries the household goods.<sup>1</sup> Other items, such as a trailer, may also be provided under the agreement, although it is common for the Company to provide the trailer, which is usually much less valuable than the power unit. The Van Operator may own or lease the power unit.

The written agreement between the Van Operator and the Company is sometimes designated as a "lease," since it pertains to the Company's use of the equipment. This "leasing" is necessary since federal law requires the Company to have exclusive possession, control, and use of the vehicles operated in its service in interstate moving. 49 C.F.R. § 376.12(c) (formerly 49 C.F.R. § 1057.12(c) (1996)).<sup>2</sup>

The Department of Transportation Federal Highway Administration (FHWA) Leasing Regulations set forth certain provisions required to be contained in a lease granting the use

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<sup>1</sup> For purposes of this document, "power unit" includes both a truck capable of carrying household goods and a truck tractor capable of pulling a trailer.

<sup>2</sup> The Government Printing Office makes the text of federal regulations available on line at <http://www.access.gpo.gov>.

of equipment to a Carrier. 49 C.F.R. Part 376 (formerly 49 C.F.R. Part 1057 (1996)). These regulations apply only to interstate moves under the FHWA's commercial jurisdiction, as defined by 49 U.S.C. § 13501 (Supp. I 1995) and delegated by the Secretary of Transportation in 49 C.F.R. 1.48(h)(3). They do not apply to intrastate moves or interstate moves within a single commercial zone. This FHWA-regulated lease of equipment from the Van Operator to the Company will be present in every case, because these guidelines apply only to those Van Operators who operate under such a lease. The FHWA-regulated lease, however, is not a focus of these guidelines. Unless otherwise specified, the term "lease" in these guidelines refers to the Van Operator's lease of equipment from the Company or a third party.

Before World War II, the moving industry consisted mainly of local moving companies employing salaried drivers. These companies profited from transporting household goods locally and intrastate. After the war, growth in the number of interstate moves required the moving companies to find return shipments once deliveries were made. Return shipments avoided the expenses of transporting an empty trailer and provided additional revenue. To keep their fleets profitable, moving companies banded together to arrange moves. The first affiliations were the forerunners of today's van lines. As the industry changed, so did the role of the drivers.

After World War II, an increased number of drivers purchased power units and held themselves out as independent owner-operators. Today, these owner-operators number some 35,000 in the moving industry.

Today's moving industry is far more complex than is generally understood. A customer who calls a moving company may believe he or she is dealing with one company. While some moving companies handle all aspects of a move, frequently a move involves a Carrier and one or more of its Agents. The Agent who receives the call estimates the cost to move and registers the move with the Carrier. The Carrier may arrange for a second Agent or Van Operator to pick up and deliver the shipment and a third Agent to handle unpacking. If warehousing and packing services are required, the Carrier may arrange for other Agents to provide these services. In addition to serving the general public, a Carrier may contract with large corporations, the military, or governmental agencies to move household goods.

The moving industry is seasonal; May through September is the busiest time of the year, and the winter months are the least active. Many Van Operators accept and deliver shipments during most of the year and may work 320 or more days a year.

## 2. Regulation of the Moving Industry

The moving industry is regulated primarily by the Federal Highway Administration (FHWA) and the Surface Transportation Board (STB), both agencies of the Department of Transportation (DOT),<sup>3</sup> as well as state and local governmental agencies. Nearly all of the states have adopted safety regulations governing intrastate moves that parallel federal regulations. The moving business is also increasingly affected by federal and state regulations governing environmental, employee rights, and workplace safety matters.

A Carrier must have an FHWA certificate of operating authority to transport household goods interstate. 49 C.F.R. Part 365 (formerly 49 C.F.R. Part 1160 (1996)). Regulations under FHWA authority address the following:

- Estimating rules;
- Weighing practices;
- Defining reasonable dispatch;
- Insurance for public liability and cargo;
- Annual performance reports;
- Packing and unpacking of household goods;
- Lease and interchange of vehicles;
- Shipping documentation (Order for Service, Bill of Lading); and
- Dispute settlement (arbitration) procedures.

49 C.F.R. Chapter III (formerly Chapter X).

Regulations under STB authority address the setting of tariffs and loss and damage claims. 49 C.F.R. Chapter X.

The Federal Motor Carrier Safety Regulations govern the following safety areas:

- Commercial driver's license standards;
- Minimum levels of financial responsibility for Carriers;
- Notification and reporting of accidents;
- Hours of service of drivers;
- Inspection, repair, and maintenance of vehicles;
- Qualification of drivers;

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<sup>3</sup> The Interstate Commerce Commission Termination Act of 1995 (ICCTA) abolished the Interstate Commerce Commission (ICC) effective January 1, 1996. Pub. L. No. 104-88, 109 Stat. 803 (1995). The ICCTA transferred certain functions and proceedings to the Surface Transportation Board and the Department of Transportation. The Secretary of Transportation delegated certain motor carrier functions to the FHWA. The DOT subsequently transferred and redesignated certain regulations, resulting in some renumbering. These changes are set forth in 61 Federal Register 54,706 (October 21, 1996) and 62 Federal Register 32,040 (June 12, 1997). They are not yet reflected in the Code of Federal Regulations. Department of Transportation regulations appear in title 49 of the Code of Federal Regulations. FHWA regulations appear in 49 C.F.R. Chapter III (Parts 301-399), and FHWA regulations that were previously the responsibility of the ICC will appear in Chapter III in the next edition of the C.F.R. STB regulations that were previously the responsibility of the ICC continue to appear in 49 C.F.R. Part X (Parts 1000-1199), with a change in the name of the agency in the heading from the ICC to the STB.

Parts and accessories necessary for the safe operation of a motor vehicle;  
Drug and alcohol testing; and  
Identification and handling of hazardous materials.

49 C.F.R. Parts 390-397 (1996).

The DOT has not taken a position regarding the employment status of Van Operators for employment tax purposes. DOT/FHWA regulations regarding the written requirements for leases of equipment and drivers by regulated carriers include a statement to that effect as follows:

Nothing in the[se] provisions [. . .] is intended to affect whether the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 11107<sup>4</sup> and attendant administrative requirements.

49 C.F.R. § 376.12(c)(4) (formerly 49 C.F.R. § 1057.12(c)(4) (1996)).

The DOT uses interstate operating authority as a method to require the Carriers to monitor and enforce federal regulations. Federal regulations require the Carriers to obtain vehicle inspection reports from the Van Operators, with the DOT reviewing the Carrier's compliance. The DOT recently took a new regulatory approach by providing state agencies funds to enforce the federal regulations. For example, the DOT gives funds to state agencies to inspect vehicles. Both the Carrier and the state agency have authority to stop the vehicle from operating and demand that necessary repairs be made. 49 C.F.R. Parts 350-388 (1996).

### 3. The Van Operator's Role in the Moving Industry

Before engaging a Van Operator, either as an employee or as an independent contractor, the Company must ensure that the Van Operator meets state and federal qualification requirements. Federal regulations require a written application for employment that includes information on such areas as prior work history and driving record. 49 C.F.R. 391.21 (1996). The federal requirements include possession of a valid commercial driver's license and medical certification of physical competency. 49 C.F.R. Part 391 (1996). Companies require differing amounts of training and experience. In some cases, a Company negotiates the individual terms of its FHWA-regulated lease agreement with the

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<sup>4</sup> The ICC Termination Act moved the text of 49 U.S.C. 11107 to 49 U.S.C. 14102. Pub. L. No. 104-88, 109 Stat. 890 (1995).



Van Operator, but usually Companies use a standard contract. FHWA-regulated lease agreements are not collectively bargained.<sup>5</sup>

Upon signing an FHWA-regulated lease with a Company, the Van Operator generally must paint the power unit according to Company specifications. The Carrier's identifying number, name, and place of business must be placed on the power unit. 49 C.F.R. Part 390 (formerly 49 C.F.R. Part 1058 (1996)). Once the Van Operator completes the qualification requirements and readies the power unit for service, the Company's dispatcher offers jobs to the Van Operator. The jobs may be for either interstate or intrastate moves. The Van Operator may contact the dispatcher regarding the status of a shipment or to receive notification of the locations and time frames for pickup and delivery.

Generally, the Van Operator performs the job personally but uses helpers for loading and sometimes driving. In most instances, at least one helper is needed to load the household goods. The Van Operator may go to a temporary employment agency, the Carrier's local Agent, a referral service, or any other contact point to find helpers. In some cases, the Van Operator has a helper who also qualifies to act as a driver and accompanies the Van Operator regularly.

After the Van Operator obtains the bill of lading for the job, the Van Operator reports to the job site. The Van Operator inventories the goods and obtains the customer's signature. In some cases, the Van Operator performs packing. The Van Operator loads the goods, pays the loading assistants and then weighs the load. If space remains in the trailer, the Van Operator may telephone the dispatcher to request another job. The Van Operator plans the route and drives the load to the delivery site in the time frame specified on the bill of lading. The Van Operator may pick up and/or deliver additional shipments before delivering the first shipment.

Upon reaching the vicinity of the delivery site, the Van Operator usually seeks helpers for unloading. The Van Operator then drives to the site and unloads the shipment, pays the helpers, and obtains the customer's signature verifying completed delivery. Finally, the Van Operator forwards the paperwork and any monies collected to the Company to verify completion of the job and entitlement to compensation.

The predominant practice for compensating Van Operators covered by this document, those drivers who provide services and lease power units and other equipment to the Company under an

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<sup>5</sup> Although a Van Operator may seek union membership on his or her own accord, a Van Operator's relationship with a Company is not governed by union rules or contracts.

FHWA-regulated lease, is payment based on a percentage of revenue collected on individual shipments. Drivers who do not lease equipment to the Company under an FHWA-regulated lease are compensated in a variety of ways, including fixed salaries. Van Operators may also be compensated separately for accessorial or other services performed or equipment provided, or they may be compensated on the basis of miles traveled.

## II. FACTS AFFECTING THE CLASSIFICATION ISSUE

### A. OVERVIEW

#### 1. The Common Law Standard

The classification of a worker as an employee or independent contractor determines whether the worker is subject to tax under the Federal Insurance Contributions Act (FICA) and income tax withholding. Classification also determines whether the business is subject to tax under the FICA and the Federal Unemployment Tax Act (FUTA). For FICA, FUTA, and income tax withholding purposes, the term "employee" includes any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. Internal Revenue Code sections 3121(d), 3306(i) and 3401(c).

Under the common law rules, the key question is whether a business has the right to direct and control a worker as to the details of when, where, and how work is to be performed. If so, the worker is an employee. If, instead, the business merely specifies the result to be achieved, the worker is an independent contractor.<sup>6</sup> Because the right to direct and control can be manifested in many ways, the Service has developed training materials that discuss facts that may suggest employee or independent contractor status.<sup>7</sup>

#### 2. Overview of Analysis

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<sup>6</sup> The common law test, as set forth in regulations, looks at whether a business has:

the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but as to how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods of accomplishing the result, he is not an employee.

Treas. Reg. § 31.3121(d)-1(c)(2).

<sup>7</sup> "Independent Contractor or Employee?" Training 3320-102 (Rev. 10-96) TPDS 84238I.

In order to determine whether a Van Operator is an employee or an independent contractor, an analysis of all the facts and circumstances is required. These guidelines provide the analysis for taxpayers and examiners to reach the proper conclusion.<sup>8</sup>

a. The critical fact--Potential for profit or loss.

The analysis begins with the critical fact--whether the Van Operator has the potential to realize a profit or loss. In determining whether this fact is present, four criteria are analyzed. The first is a threshold criterion--whether the Van Operator has a substantial investment in equipment. If the Van Operator does not have a substantial investment in equipment, then the Van Operator is classified as an employee. If the Van Operator has a substantial investment, then the three other criteria are analyzed. These criteria are as follows:

Whether the Van Operator pays the business and traveling expenses;  
Whether the Van Operator's compensation is based on a percentage of revenue or on miles driven; and  
Whether the Van Operator hires and pays assistants.

If none or only one of these three criteria indicates independent contractor status, then the Van Operator is classified as an employee. If two of these three criteria indicate independent contractor status, a rebuttable presumption of employee status results, and the analysis proceeds to the next step. If all three of these criteria indicate independent contractor status, a rebuttable presumption of independent contractor status results, and the analysis proceeds to the next step.

b. Significant facts.

The next step requires an analysis of the two "significant facts":

1. Whether the Van Operator is free to set the work schedule; and
2. Whether the Van Operator determines the manner of performing the details of daily activities.

If analysis of the critical fact resulted in a presumption of employee status, this will result in one of the following:

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<sup>8</sup> Determining the correct classification of Van Operators requires complete and thorough analysis of the facts relevant to the pertinent factors discussed in these guidelines. In addition, cases in which the Company classifies Van Operators as independent contractors for purposes of employment taxes but as employees for purposes of eligibility for tax-deferred retirement plans raise plan qualification issues and should be referred to the Employee Plans Division.

1. If the Van Operator neither is free to set the work schedule nor determines the manner of performing the work, the Van Operator is classified as an employee with no further analysis;
2. If the Van Operator both is free to set the work schedule and determines the manner of performing the work, the presumption of employee status is conclusively rebutted and the Van Operator is classified as an independent contractor without further analysis; or
3. If the Van Operator either is free to set the work schedule or determines the manner of performing the work, the analysis proceeds to the third step, "Other relevant facts."

If analysis of the critical fact resulted in a presumption of independent contractor status, this will result in one of the following:

1. If the Van Operator either is free to set the work schedule or determines the manner of performing the work, or both, the Van Operator is classified as an independent contractor with no further analysis; or
2. If the Van Operator neither is free to set the work schedule nor determines the manner of performing the work, the analysis will proceed to the third step, "Other relevant facts."

c. Other relevant facts.

In cases where the first two steps are not determinative, the analysis proceeds to the "other relevant facts." The goal of this analysis is to determine whether the Company's right to control work activities is so meaningful that it makes the Van Operator an employee. The "other relevant facts" are as follows:

1. Whether the Company requires the Van Operator to make oral or written reports;
2. Whether the Company requires the Van Operator to attend training;
3. Whether the Van Operator has a choice to accept or reject jobs;
4. Whether the Van Operator's services must be rendered personally;
5. Whether the Van Operator works for more than one firm at a time;
6. Whether the Company has the right to discharge the Van Operator at will; and

7. Whether the Van Operator has the right to terminate services without liability.

At this point, the analysis requires weighing the "other relevant facts" as well as the "critical" and "significant" facts to determine whether the Company has the right to control the Van Operator required to result in employee status under the common law.

This analysis is explained more fully below.

#### **B. THE CRITICAL FACT--POTENTIAL TO REALIZE PROFIT OR LOSS**

A Van Operator's potential to realize profit or loss is the critical fact in determining whether the Van Operator is an employee or an independent contractor.

Analysis of the four criteria listed below determines whether the Van Operator has assumed the risk of profit or loss. The analysis of the critical fact is explained below and is also presented in outline form in the chart attached as Appendix A. The first criterion--substantial investment in equipment--is the most important, and its absence establishes that the Van Operator has not assumed the risk of profit or loss. Thus, employee status is found in all cases where the first criterion is not present.

If the first criterion is present (that is, the Van Operator has a substantial investment in equipment), the analysis proceeds to the remaining three criteria. This analysis will result in one of the following outcomes:

1. If none or only one of these criteria indicates independent contractor status, the Van Operator has not assumed the risk of profit or loss. In this case, the Van Operator is classified as an employee. No further analysis is undertaken.

2. If two of these criteria indicate independent contractor status and one does not, a presumption of employee status results. The presumption is not conclusive, and the analysis proceeds to "Significant facts."

3. If each of the three criteria indicates independent contractor status, a presumption of independent contractor status results. The presumption is not conclusive, and the analysis proceeds to "Significant facts."

In weighing whether each criterion indicates independent contractor status, all the facts and circumstances will be analyzed and minor variances from the stated standard will not

affect the conclusion. The four criteria used in analyzing the critical fact are described below.

**Criterion No. 1. Substantial Investment in Equipment.**

A substantial investment in a power unit indicates a right to control by the Van Operator. A Van Operator typically obtains a power unit through an arrangement styled either as a purchase or as a lease.<sup>9</sup> Whether the Van Operator obtains the power unit from the Company, a party related to the Company, or a third party unrelated to the Company, the examiner must verify that the Van Operator has a substantial investment in the power unit. In all cases, the terms of the arrangement, the substance of the transaction as a whole, and the parties' intent and treatment of the arrangement must all lead to the conclusion that the Van Operator has a substantial investment in the power unit. Further, the analysis of whether a Van Operator has a substantial investment is limited solely to the determination of employment tax classification and does not address what constitutes a loan or lease for other tax purposes.

Where the Van Operator obtains the power unit from a third party unrelated to the Company, the examiner will likely be able to verify that the Van Operator has a substantial investment in the power unit by looking at the Van Operator's title, loan documents, or lease. For example, if a Van Operator finances the purchase of a power unit through a commercial bank, the Van Operator will have loan documents showing his or her responsibility for payments to the bank as well as a title to the power unit showing a lien in favor of the bank. Similarly, if a Van Operator leases a power unit from a commercial truck leasing entity (not related to the Company), the Van Operator will have a lease document showing his or her responsibility for payments to that entity. If the examiner is unable to confirm through these documents that the Van Operator has a substantial investment in the power unit, the examiner may need to look further.

Where the Van Operator obtains the power unit from the Company or a party related to the Company, the examiner must consider the elements in sections A and B below in determining whether the Van Operator has a substantial investment in the power unit.

The Company may have different motivations from those of an unrelated third party for leasing or financing the purchase of a power unit to a Van Operator performing services for it. While

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<sup>9</sup> The nonregulated private lease arrangement through which a Van Operator may obtain a power unit should not be confused with an FHWA-regulated lease that a Carrier is required to execute with the Van Operator to operate a vehicle under its interstate authority. The FHWA-regulated lease of the vehicle to the Company does not alter or diminish the Van Operator's investment in the equipment, since the Van Operator recoups his or her initial investment only by continuing to perform jobs to achieve a net profit.

an individual may not have the ability to negotiate a lower price for a new or used power unit, a Company may be able to purchase in quantity to secure discounted rates and credit terms which allow it to structure a program of sales to individuals at prices and credit terms the individuals can manage. The Company also may have enhanced ability to monitor risk factors and collect payments from the Van Operator. Thus, the terms of leasing or financing arrangements involving the Company or a party related to the Company sometimes differ from those commonly found in arrangements involving a third party unrelated to the Company. For this reason, a more in-depth analysis is required when the Company or a party related to the Company leases or finances the purchase of a power unit to a Van Operator performing services for the Company.

If the requirements in section A are met and the considerations described in section B are satisfied, the Van Operator has a substantial investment in the power unit.

A. Requirements.

1. Intent and Treatment. The parties must intend that the Van Operator have a substantial investment in the power unit and must treat the transaction consistently with that purpose.

2. Documentation. The parties must document the transaction appropriately (that is, a title in the Van Operator's name in the case of a purchase and a note or other evidence of indebtedness if the purchase is financed, or a lease agreement in the case of a lease). The transaction will be examined considering the terms in light of all the facts and circumstances, including the overall relationship between the parties.

3. Reasonable Valuation, Personal Liability for Payments, Reasonable Interest Rate, and Reasonable Amortization. The purchase price or the valuation used to determine payments, in the case of a lease, must reflect a reasonable valuation for the power unit. The Van Operator must be personally liable for payments if a purchase is financed or for lease payments in the case of a lease. If the purchase is financed, the amount of the payments must reflect a reasonable interest rate and reasonable amortization. In the case of a lease, the amount of the payments must reflect a reasonable interest rate.

a. Reasonable valuation. The amount of the purchase price or the valuation used to determine payments, in the case of a lease, must reflect a reasonable valuation for the power unit. A reasonable valuation is assumed if it is consistent with that derived from the N.A.D.A. Official Commercial Truck Guide, The

Truck Blue Book, or similar source, adjusted for condition, mileage, bulk discounts, or other factors relevant to the individual power unit.

b. Personal liability for payments. Except in cases where the Van Operator pays the entire purchase price in a single payment, the Van Operator must be personally liable to make fixed periodic payments consistent with the form of the transaction (for example, principal and interest if the purchase is financed, and lease payments if a lease). Payment may occur through deduction from the Van Operator's commission account.

In the case of a lease, it is important to note that these guidelines require fixed minimum payments.<sup>10</sup> If, however, there is a fixed minimum rental at fair rental value, the fact that a Van Operator may pay a higher rental based upon fees collected does not suggest the absence of a substantial investment.

c. Reasonable interest rate. In the case of a financed purchase and in the case of a lease, the amount of the payments must reflect a reasonable interest rate. An interest rate is reasonable if it is equivalent to rates charged by independent lenders or lessors providing financing for power units of similar type and quality or if it is at least equal to the applicable federal rate under section 1274(d) of the Internal Revenue Code.<sup>11</sup> In the case of a variable interest rate, the rate is reasonable if, on the effective date of the loan and on any date the interest rate changes, the rate at least equals the applicable federal rate then in effect under section 1274(d).

d. Reasonable amortization. If the purchase is financed, the amount of the payments must reflect a reasonable amortization. Amortization of principal is reasonable if the amortization schedule is (1) similar to that offered by other financial institutions to comparable borrowers for a power unit of similar type and quality, or (2) at least sufficient to amortize the indebtedness over the greater of five years or the useful life of the power unit, if the taxpayer can demonstrate a useful life greater than five years.

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<sup>10</sup> The Service has determined that where "lease payments" are a set percentage of the fees collected and, in order to insure that the "lessor" receives the proper amount, the "lessor" requires the "lessee" to submit financial reports showing the amounts received, this kind of receipt-sharing agreement diminishes the likelihood of a true lessor-lessee relationship. Rev. Rul. 71-572, 1971-2 C.B. 347.

<sup>11</sup> The Internal Revenue Service publishes a revenue ruling each month stating the applicable federal rates for the current month. The revenue rulings first appear in the Internal Revenue Bulletin and are subsequently collected in the bound Cumulative Bulletin. Thus, for example, the applicable federal rates for January 1998 appear in Table 1 of Rev. Rul. 98-4, 1998-2 I.R.B. 18 (January 12, 1998). The rates for January through June 1996 appear in Table 1 of Revenue Rulings 96-6, 96-14, 96-15, 96-19, 96-24, and 96-27, respectively, collected in 1996-1 C.B. 181-191.



The following example illustrates the requirement that the amount of the payment reflect a reasonable valuation of the power unit, a reasonable interest rate, and reasonable amortization.

Example: The Van Operator and the Company enter into an agreement under which the Van Operator obtains from the Company a power unit for a term of five years. The power unit has a value of \$50,000, according to the Truck Blue Book. The power unit is expected to have a residual value of \$10,000 after five years. At the time the Van Operator and the Company enter into the agreement, the applicable federal rate under section 1274(d) is 7 percent. The agreement calls for monthly payments by the Van Operator.

To calculate the minimum amount that would be considered a reasonable monthly payment under these circumstances, two factors are relevant: (1) the amount of interest the Company would receive on the \$50,000 value of the truck over five years (using the applicable federal rate on a declining monthly balance), and (2) the amount the Company would receive for the power unit's depreciation over five years. The first computation shows that total interest payments of \$10,617 would be required. The second computation shows that total payments for depreciation of \$40,000 would be required since only \$10,000 of the power unit's original \$50,000 value would remain after five years. The total, \$50,617, divided by 60 payments, yields a monthly payment of \$844. Thus, a substantial investment would be found only if the agreement required monthly payments of at least \$844.

4. Freedom to Select Entity. The Van Operator must be free to select the entity from which the Van Operator obtains the power unit.

5. Personal Responsibility. The Van Operator must be responsible for the vehicle, including maintenance, fuel, liability insurance, and risk of loss from damage or destruction. If the lessor performs standard maintenance, the cost of maintenance must be included in determining the Van Operator's periodic payments and must be clearly shown as a separate cost item in determining the payment amount.

6. Duration. In the case of a lease, the arrangement must generally have a duration of at least one year. Because the moving industry is seasonal, however, the entire business relationship between a Van Operator and a Company may last for a shorter period, for example, May through September. (See discussion under section I.B.1., "Structure of the Moving Industry.") In this case, the arrangement must have the same duration as the Van Operator's service or hauling agreement.

7. Default Provision. The agreement must provide for financial remedies against the Van Operator in the event of default. An event of default may include the Van Operator's termination of association with the Company. The Company must demonstrate that it acted in a commercially reasonable manner to enforce the obligation in the event of default.

B. Other considerations.

1. In general. The terms of the arrangement must not undercut or diminish the substantial nature of the Van Operator's investment. The arrangement must be considered in light of all the facts and circumstances, including the overall relationship between the parties.

The following example illustrates item B.1.:

Example: A Company decides to convert its employee drivers to independent contractors. It tells its drivers that from now on, they must lease a power unit from the Company for \$1,000 a month and the Company will lease it back from them at the same rate, plus an amount to reimburse the drivers for expenses such as fuel and oil changes, for which they will be responsible. Nothing else about the relationship between the parties will change. In this example, the overall relationship between the parties remains that of employer-employee; the Company controls the financial aspects of the drivers' work. The drivers do not have the opportunity for profit or loss.

2. Other Agreements. The examiner must review all ancillary contracts, including the FHWA-regulated lease, riders, and other side agreements and interview both the Company and Van Operator with respect to those agreements. A Company often uses multiple agreements, which may or may not be consistent. If the documents are consistent with the characterization of the transaction by the parties, this supports, but is not conclusive of, a finding that the arrangement should be respected. If the documents are inconsistent, further analysis is needed. Occasionally, the terms of a transaction are so altered by another agreement that the transaction is devoid of economic substance and should be disregarded. In sum, the examiner must look to the true substance of the transaction.

The following example illustrates item B.2.:

Example: A Van Operator leases a power unit from the Company for \$1,000 a month. The lease agreement states that the Company will perform all maintenance and that the portion of the lease payment attributable to maintenance is \$250. The Van Operator also has an FHWA-regulated lease agreement to provide

driving services and a power unit to the Company. The FHWA-regulated lease agreement provides that the Company will pay the Van Operator \$1,000 a month for the sublease of the power unit and \$8 an hour for hours worked. Under the FHWA-regulated lease, if the Van Operator stops driving for the Company, the power unit is returned to the Company, neither party is liable for its lease payments, and the Company pays the Van Operator the hourly rate for hours worked. In this example, the Van Operator does not have a substantial investment in the power unit or the risk of loss because the FHWA-regulated lease agreement relieves the Van Operator of liability to make the lease payments and guarantees the Van Operator \$8 an hour for hours worked.

## **Criterion No. 2. Business and Traveling Expenses.**

Payment by the Van Operator of a substantial majority of business and traveling expenses, in terms of total dollars, indicates right to control by the Van Operator. Expenses incurred in moving household goods include the repair, maintenance and inspection of equipment owned or leased by the Van Operator, cost of fuel and oil, food and lodging expenses while on the road, personal and vehicle insurance costs, tolls and ferry charges, traffic tickets and fines resulting from acts or omissions of the Van Operator, costs of washing the vehicle, costs of obtaining and maintaining a commercial driver's license, the cost of the base plate license, and other expenses incidental to owning or operating the power unit and trailer. Company advances that are repaid or debited against the Van Operator's account are considered paid by the Van Operator. A Van Operator leasing equipment under a full maintenance lease is considered as bearing the costs of operating the equipment. A full maintenance lease is a lease under which the lessor or owner retains all responsibility for maintenance or repairs for the vehicle with these costs included within the rental payment.

Significantly, federal law requires the Carrier to provide public liability and cargo insurance for shipments hauled under the Carrier's authorization. See 49 C.F.R. Part 387 (1996). The Van Operator is, nonetheless, considered to bear the cost of the insurance if the Van Operator is liable to the Carrier for the Van Operator's share of the insurance cost or claim and if the share reasonably approximates the Van Operator's percentage of the risk.

In some cases, the FHWA-regulated lease agreement provides for some of the Van Operator's income to go into an escrow account to ensure that the Van Operator will be able to pay the Company for the Van Operator's portion of expenses initially paid out by the Company (for example, claims for cargo damage). The escrow account is regulated by the FHWA regulations. 49 C.F.R.

§ 376.12(k) (formerly 49 C.F.R. § 1057.12(k) (1996)). Such escrow accounts do not alter the Van Operator's responsibility for paying all maintenance and operating expenses.

**Criterion No. 3. Manner of Compensation.**

If a Van Operator's principal compensation is based on a percentage of revenue collected on individual shipments or per mile compensation for miles driven, this indicates right to control by the Van Operator. Since the predominant practice in the industry is to compensate Van Operators in this manner, it is anticipated that this fact generally will be present, indicating independent contractor status.

In any case where the Van Operator receives a fixed salary or wage, however, this strongly indicates the Company's right to control. Other indications of the Company's right to control are paid vacations, sick leave, and health insurance (unless the Van Operator pays the cost of the insurance).

**Criterion No. 4. Assistants.**

If the Van Operator decides whether to hire helpers, selects them, and takes full responsibility for compensating them, without reimbursement, this indicates the Van Operator's right to control. Conversely, if the Company hires, supervises, and pays helpers to assist the Van Operator, this indicates the Company's right to control both the business aspects of the move and the details of performing the move. In some instances, the Van Operator elects to use temporary employment agencies to obtain helpers or to hire and pay helpers provided by the Company. Obtaining helpers by these means does not diminish the degree of the Van Operator's right to control. Similarly, obtaining only helpers who meet the general Carrier or customer standards does not diminish the degree of the Van Operator's right to control. Examples of general standards for helpers include requirements that they be neat and clean in appearance, wear an item of apparel with the company logo (for example, a T-shirt), treat customers with courtesy, and carry some form of identification.

The Van Operator generally is responsible only for loading, transporting, and unloading the goods. Accordingly, the preliminary packing that the Company often performs is generally considered a separate function. Thus, packers are not usually helpers of the Van Operator unless the Van Operator contracts to perform the packing.

**C. SIGNIFICANT FACTS**

If the critical fact is present (that is, the Van Operator has the potential to realize profit or loss), the analysis proceeds to the "significant facts" to determine properly the Van Operator's classification. While the critical fact indicates the degree of the Van Operator's right to control the business aspects of the work, the significant and other relevant facts listed below primarily show the degree to which the Van Operator has the right to control the daily work activities. The analysis of the significant facts is explained below and is also set forth in outline form in the chart attached as Appendix A.

Two significant facts are the most important indicators of this right to control--set hours of work and instructions. The conclusion to be drawn from the analysis of the two significant facts will differ depending on the presumption drawn from the analysis of the critical fact:

1. Where a presumption of independent contractor status resulted: (a) if one or both of the significant facts indicates independent contractor status, then the Van Operator will be classified as an independent contractor with no need for further analysis; or (b) if neither significant fact indicates independent contractor status, then the analysis will proceed to "Other relevant facts."

2. Where a presumption of employee status resulted: (a) if neither significant fact indicates independent contractor status, then the Van Operator will be classified as an employee with no need for further analysis; or (b) if both of the significant facts indicate independent contractor status, then the presumption of employee status is conclusively rebutted and the Van Operator is classified as an independent contractor without further analysis; or (c) if one significant fact indicates independent contractor status and the other does not, the analysis proceeds to "Other relevant facts."

The two "significant facts" are described below.

1. Set Hours of Work. If the Van Operator can freely select his or her own work schedule, such freedom indicates the right to control by the Van Operator. If, however, the Company mandates that the Van Operator work on a specified schedule, this indicates the right to significant control over the Van Operator.

As explained below under section II.C.2., "Instructions--Regulatory Requirements," the Van Operator's freedom to select his or her own work schedule will not be considered diminished because the Van Operator is required to comply with federal and state limits on driving hours. The Federal Motor Carrier Safety Regulations restrict the number of hours a Carrier may allow or

require a Van Operator to drive. 49 C.F.R. Part 395 (1996). The restrictions are, however, of a general nature. For example, under the regulations, a Carrier operating vehicles every day of the week cannot allow or require any Van Operator to drive after being on duty more than 70 hours in any eight consecutive days. Because these restrictions originate with the federal government rather than with the Company and are imposed on all drivers, they are not indicators of the right to control by the Company.

Furthermore, because customers demand some degree of certainty and timeliness in the pickup and delivery of their goods and because federal regulations require moving services to be executed with reasonable dispatch (49 C.F.R. Part 375, formerly 49 C.F.R. Part 1056 (1996)), it is common industry practice for the Company to give the Van Operator a certain period for pickup and delivery. A Company requirement that the Van Operator pick up and deliver shipments within reasonable time periods is not considered to infringe on the Van Operator's freedom to select his or her own work schedule.

2. Instructions. The crucial element in evaluating instructions by the Company to the Van Operator is the right of the Company to control the details of daily work performance. Daily work performance includes such activities as making customer contact, loading and unloading the trailer, selecting and driving the route, and maintaining the power unit. If the Company instructs the Van Operator on the manner of performing the details of daily activities, this indicates the Company has the right to control for purposes of this fact. If, however, the Van Operator determines the manner of performing the details of daily activities, right to control by the Van Operator is indicated. A number of specific types of instructions are considered below.

a. Regulatory Requirements. Almost every business must conduct at least part of its operations in conformity with the rules of governmental agencies or industry governing bodies. Therefore, in determining the significance of the instructions imposed by a business, it is important to weigh separately those instructions that are established by the business only to comply with the rules of governmental agencies or industry governing bodies. If a business requires workers to comply with rules established by a third party (for example, the Department of Transportation), then little weight should be given to the fact that the business enforces those rules with respect to the workers. However, if a business requires workers to comply with rules that are more stringent than the ones established by a third party, then more weight should be given to those instructions in determining whether the business has retained the right to control the workers.

As explained in the preamble, federal and state regulations make the Carrier responsible for the compliance of the Van Operators and vehicles (including power units) in the Carrier's service. The Carrier may be subject to fines and penalties if it uses a Van Operator or vehicle that does not comply with governmental regulations. Accordingly, the Carrier must require a Van Operator to follow all governmental regulations covering such areas as inspection, repair, and maintenance of the vehicle (49 C.F.R. Part 396 (1996)), driving of the vehicle (49 C.F.R. Part 392 (1996)), maximum driving and on-duty time (49 C.F.R. Part 395 (1996)), weighing procedures (49 C.F.R. § 375.7, formerly 49 C.F.R. § 1056.7 (1996)), and testing for alcohol and controlled substances (49 C.F.R. Parts 40 and 382 (1996)).

The significance of instructions to follow governmental regulations has been addressed by courts and by the Service. Harrison v. Greyvan Lines, Inc., 331 U.S. 704 (1947); United States v. Mutual Trucking Co., 141 F.2d 655 (6th Cir. 1944); Rev. Rul. 76-226, 1976-1 C.B. 322. In Greyvan Lines, Inc., the Supreme Court held that truck drivers dispatched by a moving company were independent contractors for employment tax purposes, where the drivers owned their own trucks and were responsible for management of their own business. Rev. Rul. 76-226, summarizing the court's conclusions in Mutual Trucking, states:

the fact alone that the trucking company was bound by the Interstate Commerce Act was not controlling as to its status as an employer or a non-employer. Rather, the lack of an employment relationship in that case was based on the absence of facts under the usual common law tests which would indicate such a relationship. Only if the trucking company in the Mutual case had, in implementing the governmental regulations there, utilized such methods as were indicative of an employer-employee relationship under the common law tests, would a finding that such a relationship existed be warranted.

1976-1 C.B. at 323. Rev. Rul. 76-226 then analyzed the facts of the ruling and concluded that certain described truck owner-operators were independent contractors rather than employees. A copy of the revenue ruling appears as Appendix B.

b. Customer Requirements. The Van Operator must be told the day or days the customer has requested pickup and delivery, the approximate size of the shipment and any special handling requirements. If the Company merely relays this information to the Van Operator, this does not indicate a right to control. If, however, the Company provides detailed instructions to the Van Operator as to how to comply with the customer's requirements, this indicates the Company's right to control the Van Operator.

For example, if a customer requested that a chandelier be treated with special care and the Company then instructed the Van Operator to crate the chandelier in a particular manner, the Company would be exercising control over the Van Operator rather than merely conveying a customer requirement.

c. Quality Standards. Companies commonly establish policies and procedures relating to minimum standards of quality service. When standards are general in scope and the details of meeting the standards are left to the discretion of the Van Operator, imposition of the standards does not indicate the right to control by the Company. Rather, it merely shows that the Company must establish service levels that are acceptable to the customer. Examples of general quality standards include the following:

- Courtesy, professionalism and/or acting in a business-like manner;
- On-time pickup;
- On-time delivery;
- Satisfaction with loss or damage and/or reducing claim costs; and
- Responsiveness to customer inquiries.

Conversely, if the Van Operator has little or no discretion in meeting the standards or the standards are specific in their terms, this indicates the right to control by the Company. Examples of specific quality standards include the following:

- Inventorying and loading furniture in a certain order or sequence; and
- Moving heavy appliances in a manner prescribed by the Company.

d. Safety Standards. As discussed above, state and federal regulations impose safety standards on Carriers. In some instances, the Company instructs the Van Operator to exceed state or federally required standards in the interest of enhanced safety. For example, the Company's standard for maintaining the power unit's brakes may exceed the federal standard, or the Company may require more frequent testing for controlled substances than is federally required. Imposing this type of additional or heightened safety standard does not significantly increase the Company's right to control so long as the Company does not instruct the Van Operator on the details of how to meet the standard. Thus, setting a high standard for safety is distinguishable from specifically instructing the Van Operator on how to meet the standard.



Examples of heightened standards would include minimum tire standards and periodic professional brake inspections. Examples of details of how to meet a standard include specifying the brand of tire to be purchased or the chain of service stations to do the inspections.

e. Suggestions. If a Van Operator occasionally requests information from the Company to assist in the performance of some detail of the work, the Company's response is not considered an instruction. For example, a Van Operator in unfamiliar territory may ask the dispatcher for advice on selecting an efficient route of travel, and the dispatcher may suggest a possible route. If the Van Operator may reject the suggested route, then the dispatcher is not considered to have given an instruction. On the other hand, where the Company initiates the communication and makes unsolicited suggestions about details of performance, the burden is on the Company to show that these "suggestions" are not "instructions."

The analysis of whether a suggestion is, in fact, in the nature of an instruction focuses on all relevant facts and circumstances, including whether the Company provides the Van Operator with clear written policy statements defining the areas over which the Company has full discretion, whether the Van Operator's service contract clearly defines the areas of discretion, and whether the Van Operator generally perceives himself or herself as having the power to reject suggestions.

f. Uniforms. Commonly, the Company instructs the Van Operator and helpers to wear a uniform imprinted with its name or insignia in the presence of the customer. Instructions on wearing uniforms or insignia generally originate with the Company's desire to assure the customer that the Van Operator and helpers are who they purport to be and may be trusted to enter the customer's home. Thus, the instruction ordinarily is intended to ensure customer security rather than to control the Van Operator. In view of the underlying purpose, an instruction to wear a uniform in the customer's presence is a neutral fact.

Examples. The following examples illustrate the analysis of instructions.

Example 1: The Company requires the Van Operator to comply with all governmental regulations and to obtain biannual professional brake inspections. The Van Operator can select the provider of the brake inspections. The Company requires the Van Operator to be courteous and professional in dealing with customers. The Company relays information to the Van Operator by recording customer requests regarding pickup and delivery dates and special handling requirements on the shipping order. The

Company requires the Van Operator to wear a shirt with a Company logo in the presence of customers. The Company does not instruct the Van Operator on the details of making customer contact, loading and unloading the trailer, selecting and driving the route, maintaining the power unit, or other daily work activities. Under these facts, the Van Operator is not required to comply with Company instructions about how the Van Operator is to work.

Example 2: All facts are the same as in Example 1, except the Company instructs the Van Operator how to place goods in the trailer in order to balance the weight while maximizing efficient use of space. Under these facts, the Company retains the right to require compliance with instructions.

#### **D. OTHER RELEVANT FACTS**

In cases in which analysis of the critical and significant facts is not determinative, it is necessary to analyze the other relevant facts. The goal of such analysis is to determine whether the Company's right to control work activities is so meaningful that the Van Operator is an employee. The key question is whether the Company has the right to control the methods and details of the Van Operator's performance. See the discussion of the employment tax regulations in Section II.A. The other relevant facts are as follows:

1. Oral or Written Reports. A requirement that the Van Operator make oral or written reports regarding day-to-day activities indicates the right to control by the Company. For example, if the Company requires the Van Operator to report regularly regarding the specific routes chosen, all expenses incurred, the manner of loading the trailer, or other matters demonstrating accountability for the specific details of performance, this indicates the Company's right to control. Such reports are distinguishable from oral telephone reports to the Company's dispatcher to apprise the Company of the Van Operator's location and availability for jobs. These oral reports are needed for scheduling purposes and do not indicate a right to control by the Company.

Federal and state law require certain types of reports. These primarily include reports of vehicle inspections and maintenance, accidents, convictions of certain traffic violations or crimes, and logs of driving time. In addition, state fuel tax laws require detailed reporting by the Carrier and Van Operator regarding routing information, when and where trucks enter and leave the state. Federal and state law require the Carrier to maintain these reports for jobs the Van Operator has performed in the Carrier's service. Federal law also regulates the completion

of the bill of lading, which might also be considered a report. 49 C.F.R. § 375.6 (formerly 49 C.F.R. § 1056.6 (1996)). Federal law requires the Carrier to file an annual report compiling statistics on such subjects as untimely pickups and deliveries and cargo claims, which requires the collection of certain information. 49 C.F.R. § 375.18 (formerly 49 C.F.R. § 1056.18 (1996)). Also, Companies require certain types of reports from the Van Operator to ensure compliance with customer requirements, to satisfy customer complaints or claims, or to ensure compliance with the type of general minimum quality standards previously described under section II.C.2, "Instructions."

Satisfaction of government requirements to provide reports and information is given little weight. See the discussion under section II.C.2. "Instructions--Regulatory Requirements." If the Company requires more numerous or more detailed reports than governmental regulations, customer requirements and general quality standards, this indicates the right to control by the Company.

2. Training. Training during the term of the contract can be an indicator of the right to control by the Company. Some training, however, is often necessary so that a Van Operator will be able to understand and fulfill contractual obligations and does not indicate control by the Company. The following five questions help weigh the significance of training provided by the Company.

- a. After entering into a contractual relationship with the Company, is a Van Operator's participation in training optional or mandatory?
- b. Does the training concentrate on administrative procedures and/or policies with regard to compliance with federal and state safety, operational and consumer protection regulations, general quality service standards and customer requirements, or does it concentrate on the mechanics of loading and unloading and/or driving techniques?
- c. How long is the training period?
- d. How frequently is training required?
- e. Who pays for the training, the Company or the Van Operator?

Some level of training may be necessary for a Van Operator at the beginning of a contractual relationship to familiarize the Van Operator with the Company's administrative procedures relating to governmental regulations, general quality service standards of the type described under section II.C.2, "Instructions," and customer requirements. Additional training may be offered occasionally to update Van Operators on changes or

to help them with compliance problems. Such training does not indicate significant right to control by the Company unless it is mandated on a recurring, periodic basis.

The answers to each of the preceding questions are weighed to determine the significance of the training. The following examples illustrate situations in which a particular course of training does not show a significant right to control by the Company.

Example 1: The Company mandates that all new Van Operators must attend a short classroom training session. The primary subjects of the class are compliance with governmental regulations, quality service standards of a general nature, customer requirements and related administrative matters. Follow-on training with respect to governmental and administrative compliance is offered on occasion to Van Operators who fail to meet the requirements or to update them regarding new governmental regulations, quality service standards of a general nature or customer requirements.

Example 2: The Company offers an optional, short training course, open to both new and experienced Van Operators. The course covers a variety of topics, including government regulations, quality service standards of a general nature, administrative matters, and efficient packing and loading techniques. The Van Operator pays his or her own expenses to attend the training.

Example 3: Individuals with little or no experience may be offered an opportunity to attend an initial qualification training course sponsored by a Company prior to entering into a contractual relationship. There is no commitment on the part of either the individual or the Company to enter into a contractual relationship after successful completion of the training, nor does the Company mandate attendance at its course as a prerequisite to initiating a contractual relationship. The individual is also free to enter into a contractual agreement with another Company after completion of the training. While the instruction is furnished by the Company at no cost to the Van Operator, individuals attending the course are responsible for all of their own expenses relating to transportation, food, lodging, and incidentals.

The type of training in the first two examples indicates only a minor level of right to control by the Company. Training courses of longer duration during the term of the contract, covering the specific details of the Van Operator's work, are more significant indicators of the right to control, particularly if such courses are mandatory.

The training course in the first example ensures that Van Operators in the Company's service know how to operate safely and consistently with the governmental regulations, general quality service standards, and Company administrative procedures. The Company is motivated to pay for training of this type because it must ensure the Van Operators' knowledge of the subject matter covered.

The training course in the second example offers the Van Operator the opportunity to improve his or her performance and, thus, to maximize profits for both the Van Operator and the Company. The training's optional nature indicates the Company is not enforcing the use of the particular packing and loading techniques taught. The Van Operator's assumption of the cost of attending the training indicates the Van Operator's responsibility, and corresponding right to control, the business aspects of the work.

The third example involves optional training that a Company makes available for individuals with little or no prior experience in order to become qualified to enter into a contractual relationship. Such training is necessarily of longer duration and more detailed in nature than that provided for a more experienced Van Operator who has initiated a contractual relationship with a new Company. Both sides incur risks. For the driver candidate, no contractual relationship exists, nor does the Company commit to one at the end of the course. The individual, nevertheless, must not only cover personal expenses to attend the training but may lose compensation from other employment or contractual relationships. For the Company, the candidate may terminate the training process at any time, and/or seek a position with another Company upon completion of the course. Under these circumstances there is not a significant indication of Company right to control.

The following example illustrates a situation in which a course of training shows a Company's significant right to control the Van Operator.

Example: The Company mandates that a new Van Operator must attend a three-day training session. The session includes training on efficient packing and loading techniques as a primary subject. Because the training is mandatory and because it relates to the method in which the work is to be completed, it clearly indicates the Company's right to control the Van Operator.

3. Choice to Accept or Reject Jobs. If a Van Operator may choose either to accept or reject jobs the Company offers, right to control by the Van Operator is indicated. Conversely, a

requirement that the Van Operator accept jobs assigned by the Company evidences right to control by the Company. In determining whether a Van Operator is empowered to accept or reject jobs, evidence that the Company's Van Operators do, in fact, occasionally reject jobs or make themselves unavailable for jobs is relevant.

4. Services Rendered Personally. If the Company requires the Van Operator to perform the services personally, with the aid of helpers for loading and unloading, this indicates the Company has the right to control the manner of performance. If the Van Operator may use substitutes or employees of his or her own choosing, right to control by the Van Operator is indicated. In cases in which the Van Operator uses an alternate driver, the Company must require the alternate to be fully qualified under the same standards applicable to the Van Operator or risk incurring liability. For example, the alternate driver must be tested and certified for controlled substances and other health requirements and must possess a valid commercial driver's license. The fact that an alternate driver must be qualified is not significant in analyzing this fact.

5. Working for More Than One Firm at a Time. It is unusual for a Van Operator to work for more than one Company at a time. Thus, the fact that a Van Operator does not work for more than one Company is normally of little relevance. If, however, a Van Operator under contract with one Company also may, during the term of the contract, use his or her vehicle to work for other firms or on his or her own account, this indicates right to control by the Van Operator. Where a Company prohibits a Van Operator from accepting jobs from other firms or individuals, right to control by the Company is indicated.

A Van Operator who works for another entity would necessarily be required to cover the Company's name and identification number, as well as licenses, permits, decals, and other regulatory documentation applicable to the operation of the vehicle in the Company's service. Furthermore, the Van Operator would be prohibited from using the Company's trailer or the Van Operator's trailer that bears the name and trademark of the Company. These requirements are not significant in analyzing this fact. Where a Company has similar contracts with a number of Van Operators and one or more of these Van Operators exercises the right to work for other firms or individuals, this right is presumed to exist for all of the Van Operators with similar contracts.

If a Van Operator has multiple power units available to lease and uses the power units in hauling independently or under individual FHWA-regulated leases to multiple Companies, this

indicates that the Van Operator has the right to control. If the Van Operator chooses to lease all units to a single Company and to drive one unit solely for that Company, this is of little relevance in classifying the Van Operator.

6. Right to Discharge. If the Company may end its relationship with the Van Operator at will, this indicates that the Company has the right to control. The ability to discharge the Van Operator, at will or without cause or notice, increases the Company's leverage to enforce instructions and its right to control details of the Van Operator's performance. Conversely, if the Company may end its relationship with the Van Operator only upon the Van Operator's failure to meet the terms of the contract, at the end of the contract term, or following the notice period given in the event of early termination, this indicates that the Van Operator has the right to control. However, because the significance of facts bearing on the right to discharge is often unclear and depends primarily on contract and labor law, this type of evidence should be used with great caution. For a discussion of the right to discharge, see "Independent Contractor or Employee?" Training 3320-102 (Rev. 10-96) TPDS 84238I.

7. Right to Terminate. If the Van Operator may end the relationship with the Company at any time without liability, this indicates the Van Operator has not assumed the risk of enterprise and thus the Company has the right to control. If the Van Operator can be held liable for failing to complete the duties assumed under the contract, this indicates assumption of the risk by the Van Operator and the Van Operator's right to control. Commonly, a Van Operator's contract does not require the Van Operator to accept jobs the Company offers. But once a job is accepted, the contract may require completion and subject the Van Operator to potential liability if the job is abandoned. Such a contract imposes risk on the Van Operator, who is not free to end the job to accept a more profitable one or because of unforeseen adverse conditions. However, because the significance of facts bearing on the right to terminate is often unclear and depends primarily on contract and labor law, this type of evidence should be used with great caution. For a discussion of the right to terminate, see "Independent Contractor or Employee?" Training 3320-102 (Rev. 10-96) TPDS 84238I.

#### **E. FACTS OF LITTLE RELEVANCE**

The five facts described below have little, if any, relevance in classifying the Van Operator.

1. Continuing Relationship. Courts have considered the existence of a permanent relationship between the worker and the

business as relevant evidence in determining whether there is an employer-employee relationship. If a business engages a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence of their intent to create an employment relationship. However, a relationship that is created with the expectation that it will be indefinite should not be confused with a long-term relationship. A long-term relationship may exist between a business and either an independent contractor or an employee.

The length of the relationship between the Van Operator and the Company varies and appears to have little bearing on the degree of the right to control by the Company or on the Van Operator's assumption of the risk of enterprise. Significantly, the traditional benefits that often flow from long-term employment do not exist for Van Operators. For example, continued service for the same Company will not generally lead to promotions, higher pay, increased vacation time, or increased future benefits under a retirement plan. Thus, the Van Operator is motivated to remain with a particular Company only as long as the Van Operator can continue to maximize profits. Correspondingly, the Company has less leverage to control the Van Operator than it would if a long-term relationship inherently benefited the Van Operator.

2. Making Service Available to General Public. Because of the nature of the moving industry, the Van Operator would not generally maximize profits by soliciting business from the general public as an independent operator. The primary reason is that DOT authority is needed for a Van Operator to transport household goods interstate. Accordingly, the Van Operator may move goods interstate only under the direction of a Carrier with DOT authority. A Van Operator could, nonetheless, independently solicit intrastate jobs if state law allows. Such jobs would be unlikely to maximize profits because of the difficulty an independent Van Operator would have in arranging return-trip loads.

3. Doing Work on Company's Premises. Obviously, it is not possible for Van Operators to spend significant time working on the Company's premises. The vast majority of their time is spent on the road or picking up and delivering goods. Even if the Company required the Van Operator to perform some work, such as recordkeeping, on Company premises, such work would be insignificant in the context of the Van Operator's overall duties.

4. Furnishing Tools and Materials. The Company commonly furnishes the Van Operator with dollies, ramps, padding, and



wrapping and tying materials, requiring the Van Operator to pay for any damages to this equipment. Logically, the Company provides the equipment since it is carried in the trailer, which also is usually provided by the Company. The Company's providing of equipment is not likely to lead to the right to control the Van Operator since none of the items have unique characteristics that would influence the Van Operator to perform in a particular manner. Moreover, the investment in the equipment, commonly worth about \$3,000 to \$5,000, is small compared to the Van Operator's investment in the power unit. Consequently, providing this equipment affects profitability of the enterprise very little.

5. Part of Regular Business Activity. In determining worker status, courts often consider whether the worker's services are a key aspect of the regular business activity of the principal. The facts discussed above are the important facts in determining whether the right to direct and control exists.