



Automobile Dealers Association of Indiana, Inc.

BULLETIN

Bulletin #1204 – August 1, 2012

Independent Contractor Status of Dealer Trade Drivers

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Between 2006 and 2007 our office secured favorable rulings for several Indiana dealers from Administrative Law Judges for the Indiana Department of Workforce Development (“IDWD”) relating to unemployment tax penalties concerning their treatment of dealer trade drivers as Independent contractors. Such treatment is commonplace in the industry. The Department argued that such individuals should be treated as employees for purposes of a dealer’s unemployment tax obligations. Given the strict language of the applicable Indiana statute, these determinations were questionable and since that time we have provided guidance as to possible alternative methods of maintaining the drivers’ independent contractor status. Regardless, until recently, to our knowledge, the Department has not attempted to assess penalties on this basis against Indiana dealerships.

Under Indiana law, for purposes of determining whether an individual is an independent contractor, the so-called “1-2-3 test” applies. I.C. §22-4-8-1(a) defines “employment” as a service, including service in interstate commerce performed for remuneration or under any contract of hire, written or oral, expressed or implied. Subsection (b) provides that “[s]ervices performed by an individual for remuneration shall be deemed to be employment...irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the board that:

- (1) The individual has been and will continue to be free from control and direction in connection with the performance of such service, both under the individual’s contract of service and in fact.
- (2) The service is performed outside the usual course of the business for which the service is performed.
- (3) The individual”
 - a. is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed; or
 - b. is a sales agent who receives remuneration solely upon a commission basis and who is the master of the individual’s own time and effort.

I.C. §22-4-8-1(b).

In obtaining the earlier favorable rulings we argued that the dealer trade drivers were not employees in that they are free from control or direction in carrying out the assigned task; the dealer itself is not in the delivery or auction business; and the drivers are independently and customarily engaged by other dealer to perform the same or similar services. In each of these cases the Administrative Law Judge determined that no substantial control or direction over the drivers was present in that the dealer would simply call the drivers on a designated list to determine availability to drive on a particular day and if so, provided a general time to report; if the driver was unavailable, the dealer would simply contact the next name on this list without penalty; the dealer’s business is buying/selling/servicing vehicles and thus the drivers’ functions fell outside the usual course of business; and the drivers were considered independent based on their performance of similar services for other dealers in the area.

Unfortunately, the Department's latest ruling casts significant doubt upon the independent contractor status of dealer trade drivers for purposes of a dealer's state unemployment tax obligations. On June 27, 2012, an IDWD Administrative Law Judge issued a determination against an Indiana dealer finding that dealer trade drivers were employees. In complete disregard of prior determinations and similar facts, the Judge found that the dealer exerted "some" control through its payment for fuel and providing transportation to various auctions. The Judge also focused on the addition of specific drivers' names to insurance documentations and coverage while driving dealership vehicles. In her ruling the Judge noted "[h]ad the drivers been independent contractors, the drivers would have paid for these expenses themselves." The most shocking pronouncement dealt with the apparent requirement that the drivers have an independently established business. The Department argued and the Judge agreed, that in order to satisfy this requirement the drivers would, in fact, have to establish a separate business and advertise their services to the general public (i.e., placing a magnetic sign on a personal vehicle). The fact that they may drive for multiple dealers in the same area was disregarded. Thus, the Judge found that the drivers' services were an "integral part" of the dealer's business and although the dealer could find other means of transporting vehicles, the use of the drivers was "the most economical and customer friendly" alternative.

Clearly this determination impacts a substantial number of Indiana dealers. Dealer trade drivers tend to be retired individuals who are simply looking for ways to spend their time. They have no interest in becoming employees of the dealership. In fact, pursuant to the test utilized by the IRS, arguably the drivers would be deemed independent contractors. However, the Department is not bound by the IRS standard and strictly applies the statutory test for such determinations. In any event, this determination essentially gives the green-light to the Department to target dealer practices in terms of dealer trade drivers and steps should be taken to review your operations to address this issue immediately. Of the available alternatives, it would appear that the establishment of the driver as independent entity would suffice for purposes of the statutory test. This could include incorporation or forming an LLC. In addition, there should be some form of invoicing for the service which would similarly establish the independence of the driver. There has also been discussion about designating one particular individual to act as a *de facto* dispatcher for the drivers. In the case discussed above, the group of drivers frequently socialized together and the dealership representative would contact one particular driver, indicate the number of drivers he needed on a particular day and the driver would make the necessary arrangements. Had the driver established a separate entity or business for providing driving services, this may have impacted the final determination. One method that is frequently utilized is having a specific written agreement that identifies the individual as an independent contractor. However the use of such agreements is not dispositive of the individual's status and any determination will be based on the satisfaction of statutory factors.

Dealers should also keep in mind that misclassification issues have been identified as a key enforcement initiative by the Indiana and U.S. Department of Labor which could lead to additional issues in terms of non-payment of minimum wage and overtime. In 2010, Indiana legislation went in effect which provides for information sharing amongst the Indiana DOL, Indiana Department of Revenue and IDWD concerning any suspected improper classification of an individual as an employee which could expose dealers to additional issues outside of the unemployment context. With that said, dealers need to be proactive in addressing any misclassification issues present in their dealerships as soon as possible.

For further information, please call ADAI retained attorneys, Jeff Halbert or Ron Smith at (317) 639-5454.