

CR 84-202

RULES CERTIFICATE

STATE OF WISCONSIN)
) SS
DEPT. OF INDUSTRY,)
LABOR & HUMAN RELATIONS)

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APR 24 1985

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Revisor of Statutes
Bureau

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

I, Howard S. Bellman, Secretary of the Department of Industry, Labor and Human Relations, and custodian of the official records of said department, do hereby certify that the annexed rule(s) relating to Ch. ILHR 105 - The Relationship of Carriers and Contract Operators were duly approved and adopted by this department on April 24, 1985.
(Subject) (Date)

I further certify that said copy has been compared by me with the original on file in this department and that the same is a true copy thereof, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the department at 7:30 am in the city of Madison, this 24th day of April A.D. 1985.

Howard S. Bellman
Secretary

ORDER OF ADOPTION

Pursuant to authority vested in the Department of Industry, Labor and Human Relations by section(s) 101.02(1), 108.02(12) and 108.14(2), Stats., the Department of Industry, Labor and Human Relations hereby creates; amends; repeals and recreates; and repeals and adopts rules of Wisconsin Administrative Code chapter(s):

Ind. ILHR 105 The Relationship of Carriers and Contract Operators
(Number) (Title)

The attached rules shall take effect on the first day of the month following
publication in the Wisconsin Administrative Register, pursuant to section
227.026, Stats.

Adopted at Madison, Wisconsin, this 24th
day of April, A.D., 1985.

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS

Howard S. Bellman
Secretary



RULES in FINAL DRAFT FORM

Rule: Ch. ILHR 105

Relating to: The Relationship of Carriers and Contract Operators

CLEARINGHOUSE RULE NO. 84-202

ANALYSIS OF RULES
PREPARED BY

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS

Section 108.02(12), Stats., defines "employee" as any individual who performs services for an employing unit, unless he or she performs those services in an independently established business free from the employing unit's direction or control. Chapter ILHR 105 establishes standards for determining whether a contract operator performing services for a carrier is an employe or an independent contractor. In applying this rule, the department will not use specifications of the shipper nor legal requirements as evidence.

The contract operator will be found to be free from the carrier's direction or control if all of the following factors are present in the relationship:

- (a) The contract operator owns the truck or leases it from some person other than the carrier;
- (b) The contract operator is responsible for the maintenance of the truck;
- (c) The contract operator bears the principal burden of the truck operating costs;
- (d) The contract operator supplies the drivers;
- (e) The contract operator determines the details and means of performance;
- (f) The contract operator may refuse to make a haul when requested by the carrier;
- (g) The contract operator may terminate the lease at any time; and

(h) The contract operator is compensated on a division of the gross revenue or by a fee based on distance of the haul, weight of the goods or number of deliveries.

If even one of these factors is missing, the department will consider additional factors to determine whether direction or control exists. If the department finds, after an examination of all relevant factors, that the carrier maintains direction or control, the department will treat the contract operator as an employe of the carrier.

However, if the contract operator is free from direction or control, then the department will further determine whether:

(a) The contract operator owns the truck or leases it from some person other than the carrier;

(b) The contract operator is free to hire another person as a driver for the carrier; and

(c) The contract operator is free to reject hauling a load offered by the carrier.

The contract operator is in an independently established business if all three factors are present. Since the contract operator is also free from direction or control, he or she will be deemed to be an independent contractor, not an employe of the carrier.

If all three factors are not present, then the department will consider additional factors to determine whether the contract operator has an independently established business. The contract operator will be deemed to be an employe if he or she is found not to be engaged in an independently established business after an examination of all relevant factors.

Statutory Authority. Pursuant to the authority vested in the department of industry, labor and human relations by ss. 101.02(1), 108.02(12) and 108.14(2), Stats., the department of industry, labor and human relations hereby creates rules interpreting s. 108.02(12) in regard to carriers and contract operators, as follows:

SECTION 1. Chapter ILHR 105 is created to read:

THE RELATIONSHIP OF CARRIERS AND
CONTRACT OPERATORS

ILHR 105.001 DEFINITIONS. In this chapter:

(1) "Carrier" means a person engaged in the hauling of passengers or freight by motor vehicle and includes a person engaged as a "common motor carrier", under s. 194.01(1), Stats., as a "contract motor carrier", under s. 194.01(2), Stats., or as a "private motor carrier", under s. 194.01(11), Stats.

(2) "Contract operator" means an individual who contracts to lease a motor vehicle to a carrier for use in the carrier's business.

(3) "Department" means the department of industry, labor and human relations.

(4) "Motor vehicle" has the meaning designated in s. 194.01(7), Stats.

(5) "Shipper" means a customer of the carrier who arranges or contracts for the transportation of goods.

ILHR 105.01 PURPOSE. The purpose of this chapter is to establish standards for determining whether a contract operator performs services in an independently established business free from the carrier's direction or control so as not to be deemed an "employee" of a carrier under s. 108.02(12), Stats.

ILHR 105.02 REQUIREMENTS OF SHIPPER OR LAW; DEPARTMENT POLICY.

In determining whether the carrier exercises direction or control and whether the contract operator is engaged in an independently established business, the department may not use as evidence any factor to the extent that it is specified by the shipper or required by state or federal laws or regulations. The department believes it is unreasonable to consider mandates of law or specifications of shippers as evidence because they have not been imposed on the relationship between the contract operator and the carrier by those parties of their own volition.

ILHR 105.03 CONTRACT OPERATORS; DIRECTION AND CONTROL. (1) The department shall examine the factors enumerated in this section to determine, both under contract and in fact, whether the contract operator is free from a carrier's direction or control, while the contract operator performs services for the carrier. The department shall determine whether:

(a) The contract operator owns the motor vehicle or holds the vehicle under a bona fide lease arrangement with any person other than the carrier;

(b) The contract operator is responsible for the maintenance of the motor vehicle;

(c) The contract operator bears the principal burden of the motor vehicle operating costs including such items as fuel, repairs, supplies, insurance and personal expenses while on the road;

(d) The contract operator supplies, or is responsible for supplying, the necessary personal services to operate the motor vehicle;

(e) The contract operator determines the details and means of performance, namely, the type of equipment, assignment of driver, loading,

routes and number of stops to be made during the haul, as well as starting, completion and elapsed times;

(f) The contract operator may refuse to make a haul when requested by the carrier;

(g) The contract operator may terminate the lease at any time after reasonable notice; and

(h) The contract operator is compensated on a division of the gross revenue or by a fee based upon the distance of the haul, the weight of the goods, the number of deliveries, or any combination of these factors.

(2) If the department determines that all of the factors under sub.(1)(a) to (h) are present in the relationship between the contract operator and the carrier, the contract operator shall be deemed to be free from the carrier's direction and control in the performance of services under s. 108.02(12)(b)1, Stats. If one or more of the factors under sub. (1)(a) to (h) are not present in the relationship between the contract operator and the carrier, the department shall consider additional factors of the relationship, both under contract and in fact, including whether:

(a) The contract operator may negotiate with the carrier to determine the method, frequency and regularity of payments made to the contract operator;

(b) The contract operator has the authority to discharge any driver whom he or she employs;

(c) The carrier requires decals, lettering, signs, emblems or other markings on the contract operator's motor vehicle for the purpose of advertising the carrier's name or business;

(d) The carrier requires the contract operator to submit reports;

(e) The carrier requires the contract operator to obey any work rules or policies; and

(f) The carrier requires any deductions from payments owing to the contract operator for federal or state income taxes or taxes under the federal insurance contributions act.

(3) If the contract operator is found to be under the carrier's direction or control under subs. (1) and (2), the contract operator shall be deemed to be an employe of the carrier under s. 108.02(12)(b)1.

ILHR 105.04 CONTRACT OPERATORS; INDEPENDENTLY ESTABLISHED BUSINESS; CUSTOMARILY ENGAGED. (1) If the department determines that a contract operator is free from a carrier's direction or control in the performance of services under s. ILHR 105.03, the department shall examine the following factors to determine whether a contract operator who performs services for a carrier is performing these services in an independently established business in which the contract operator is customarily engaged. The department shall determine whether:

(a) The contract operator owns the motor vehicle or holds the vehicle under a bona fide lease arrangement with any person other than the carrier;

(b) The contract operator is free to hire another person as a driver in the performance of services for the carrier; and

(c) The contract operator is free to reject hauling a load offered by the carrier.

(2) If the department determines that all of the factors under sub. (1)(a) to (c) are present in the relationship between the contract operator

and the carrier, the contract operator shall be deemed to be performing services in an independently established business in which the contract operator is customarily engaged under s. 108.02(12)(b)2, Stats. If one or more of the factors under sub. (1)(a) to (c) are not present in the relationship between the contract operator and the carrier, the department shall consider additional factors including whether:

(a) The contract operator's business may provide a means of livelihood that is separate and apart from the livelihood gained from services performed for a particular carrier;

(b) The business would continue if the relationship with the carrier were terminated; and

(c) The contract operator has an ownership interest in a business that the contract operator alone may sell or give away without restriction from the carrier.

(3) If the contract operator is found to be free from the carrier's direction or control but not engaged in an independently established business under subs. (1) and (2), the contract operator shall be deemed to be an employe of the carrier under s. 108.02(12)(b)1 and 2. If the contract operator is found to be free from the carrier's direction or control and engaged in an independently established business, the contract operator shall be deemed to be an independent contractor and not an employe of the carrier under s. 108.02(12)(b)1 and 2.

SECTION 2. EFFECTIVE DATE. Pursuant to s. 227.026(1)(intro.), Stats., this rule shall take effect on the first day of the month following the date of publication in the Wisconsin administrative register.

The Wisconsin Department of Industry, Labor and Human Relations

April 24, 1985

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Gary Poulson
Assistant Revisor of Statutes
for Administrative Rules
411 West, State Capitol
Madison, Wisconsin

Douglas LaFollette
Secretary of State
Room 271, GEF-1
201 East Washington Avenue
Madison, Wisconsin

Dear Messrs. Poulson and LaFollette:

TRANSMITTAL OF RULE ADOPTION

CLEARINGHOUSE RULE NO. 84-202

RULE NO. Ch. ILHR 105

RELATING TO: The Relationship of Carriers and Contract Operators

Pursuant to section 227.023, Stats., agencies are required to file a certified copy of every rule adopted by the agency in the offices of the Secretary of State and the Revisor of Statutes.

At this time, the following material is being submitted to you.

1. Order of Adoption.
2. Rules Certificate Form.
3. Rules in Final Draft Form.

Pursuant to section 227.016 (6), Stats., a summary of the final regulatory flexibility analysis is also included.

Respectfully submitted,



Howard S. Bellman
Secretary

cc: Agency Contact Person