

# the BIG RIG

Poverty, Pollution, and the Misclassification  
of Truck Drivers at America's Ports  
a survey and research report

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**CHANGE to WIN**

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# Foreword

## *“TOWARDS AN END TO SHARECROPPING ON WHEELS”*

By Wade Henderson

*President and CEO*

The Leadership Conference on Civil and Human Rights

Misclassification of employees as independent contractors continues to be one of the most potent tactics used to erode workers’ rights, as described in great detail in the collaborative groundbreaking report, *The Big Rig*. Across industries, millions of employees are misclassified by their employers as independent contractors, often as an excuse to cut costs and avoid paying taxes. Thus disguised, these employees become workers who fall outside the protection of most labor and employment laws that our civil rights and labor law communities have fought so hard to secure. And should these workers lose their jobs, they are ineligible for such critical benefits as unemployment insurance. Misclassification also gives irresponsible employers an unfair advantage over law-abiding competitors and drives down labor standards for all workers.

In the case of the port trucking industry, employee misclassification also places substantial financial responsibility for buying and maintaining expensive trucks on individual drivers – many of whom are people of color and make poverty level wages, keeping them and their families near or below the federal poverty line – rather than on trucking companies. The unsustainable leasing schemes require misclassified workers behind the wheel to bear the costs of truck ownership, operation, and maintenance. As many of these drivers realize and as articulated by several, they are “paying to work.” These workers suffer the worst of both worlds: They toil without the protections and benefits of employees, yet are without the control over their work that truly legitimate independent contractors enjoy. Devoid of traditional civil rights protections and lacking the protection of traditional labor laws, we see these misclassified workers as “sharecroppers on wheels.”

The troubling economic model and leasing schemes of port trucking, which promotes a cycle of poverty among workers, is compounded by the severe health and environmental impact the polluting rigs have on the drivers and the vulnerable port communities around them. In port-adjacent communities, the high level of diesel pollutants is many times the national average. The drivers and our nation’s coastal residents pay the price of this exposure with their health, which is yet another concern to the civil rights community.

As a society, we are called upon to defend the essential civil and human rights of these drivers, their families, and the adjacent communities. Companies have also used misclassification along with other weaknesses in American labor laws to prevent workers from forming unions. Misclassifying employees nullifies the protections that the U.S. and other advanced democracies have extended to all workers. If we ignore this situation in and around our nation’s ports, we tacitly accept the corrosive affects misclassification has on this and countless other industries where this unscrupulous employer practice is growing.

Make no mistake – this policy of misclassification must be eliminated. It is simply unacceptable.

Put in its broader context, the misclassification of port truck drivers is an example of a pernicious attack on our nation’s working families. It is a problem endemic to our entire economy, in which corporations have systematically found ways to take advantage of and mistreat their own employees, greatly contributing to the rising income inequality in America in which wealth is increasingly concentrated in the hands of the few. In fact, at the time of this writing, while the average worker

continues to struggle to pay rent or a mortgage, medical bills, and to keep food on the table, companies in the U.S. just posted their best quarter ever, earning profits at an annual rate of \$1.659 trillion. That is the highest figure recorded since the government began keeping track over six decades ago.

In the same 60-year period, The Leadership Conference on Civil and Human Rights has partnered with labor to pass and enforce key civil rights laws and to strengthen workers' rights. Our founders were the outstanding executive director of the NAACP – Roy Wilkins; a distinguished leader of the Jewish community – Arnold Aronson; and the legendary founder of the Brotherhood of Sleeping Car Porters and leader of the March on Washington – the great A. Philip Randolph. With visionary leaders like A. Philip Randolph, Walter Reuther, and Martin Luther King, Jr., the civil rights and labor movements came to understand that we share common interests, common values, and common goals. To The Leadership Conference, workers' rights have always been civil and human rights.

The Leadership Conference commends the National Employment Law Project, Change to Win, and Dr. David Bensman, the renowned professor of labor studies and employment relations at Rutgers University, for publishing this report and shedding light on the disturbing pattern of misclassification in the port truck driving industry, which tramples upon hard won workers' rights and civil rights gains. The robust policy recommendations must be implemented to help confront the consequences of misclassification at the federal, state, and local levels.

Our work with organized labor continues to focus on eliminating workplace discrimination, expanding opportunity, and enforcing laws and regulations designed to ensure fair pay, safe working conditions, and the right to organize.

The Big Rig makes an essential contribution to the labor and civil rights movement and serves as a call to action to address the industry-wide misclassification of port truck drivers. The Leadership Conference looks forward to joining with Change to Win and NELP to end employer misclassification of port truck drivers and misclassification in other industries.

# Acknowledgments

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This report was possible only because of the efforts of dozens of people spread across the country who offered up their time, wisdom and talent.

We are grateful to our colleagues at the National Employment Law Project, Change to Win, and Rutgers University for their support and guidance every step of the way. We also owe a considerable debt to the attorneys, organizers, and policy staff at Puget Sound Sage, the International Brotherhood of Teamsters, Leonard Carder LLP, and The Leadership Conference on Civil and Human Rights for lending their time and expertise on the core original research presented in this report, legal issues, and drafts of this report.

The analysis of port driver interviews and employment documents would not have happened without dedicated, meticulous research teams in each of the port sites. For their hard work testing the interview protocol and conducting interviews, special thanks go to staff at Partnership for Working Families organizations including Puget Sound Sage, East Bay Alliance for a Sustainable Economy, and LAANE. We also want to especially thank Molly Greenberg, a graduate student in Social Work from Monmouth University, Sara Cullinane at the New York University School of Law, as well as Professor Thomas Antkowiak and his students Bette Fleishman, Randy Gonzales, Brennan Emerson, and Jason Casebolt from the Seattle University School of Law International Human Rights Clinic for conducting interviews and their thoughtful comments on their experiences.

We are grateful to Jon Haveman, Kristen Monaco, David Jaffee, Port Jobs, CGR Management Consultants, Robert Harrison, Yael Bromberg, and Howard Greenwich for the insights into the port trucking industry contained in their published work, and for the surveys they conducted with port drivers, the results of which we aggregate here.

Lexer Quamie and Robert Chanin of The Leadership Conference on Civil and Human Rights patiently offered feedback from draft to completion. Annette Bernhardt of the National Employment Law Project provided invaluable assistance throughout the project, including guiding the aggregation of previously conducted driver surveys and help analyzing drivers' employment documents.

Above all, we want to thank Max Galvan for trusting us to share his story – and all the port drivers we interviewed in Seattle, Oakland, Los Angeles, Long Beach, New York, and New Jersey. In the face of an industry known to retaliate against those speaking out, these workers generously and courageously shared their time, sensitive personal information, and vast experience.

## A Note On Our Collaboration

This report grew out of our joint commitment to protecting the American Dream in the 21<sup>st</sup> century. The National Employment Law Project is an advocacy organization devoted to improving economic opportunities and security for working families. Change to Win, a federation of four labor unions with five million members, works to secure family wage jobs, affordable health care, a secure retirement, and dignity for all workers. Both organizations are dedicated to promoting policies that create good jobs, strengthen upward mobility, and expand and enforce workplace protections.

Rebecca Smith has been a worker advocate for over 30 years. Recently, she has helped modernize state unemployment insurance programs, applied international human rights laws to protect workers, and collaborated with immigrant worker organizing groups to enforce U.S. labor laws. Smith, an attorney with the National Employment Law Project, oversaw the misclassification analysis.

Paul Alexander Marvy is an attorney and researcher whose career has spanned the fields of public health, civil and criminal justice system reform work, and workers' rights. Over the last three years, he has collaborated with truck drivers, community groups, labor unions, and environmental advocates to encourage comprehensive reform of the port trucking industry in Washington State. Marvy, of Change to Win, coordinated the collaborative research and drafting, and led the aggregation analysis.

Dr. David Bensman is a Professor in Department of Labor Studies and Employment Relations at Rutgers University. He has published widely on American labor history and the impact of global economic integration on working people. He co-authored one of the driver surveys that we have drawn on in this work, *Report on Port Truckers' Survey at the New Jersey Ports*, and produced an important national review of the industry, published by Dēmos, *Port Trucking Down the Low Road: A Sad Story of Deregulation*. Dr. Bensman led the economic and historical examination of the industry's structure.



# Executive Summary

Max Galvan is a truck driver at Southern California's seaports. His company calls him an independent contractor. Because of that, he is paid by the load, not hourly, and is responsible for all the costs of the truck he drives, including leasing, fuel, taxes, maintenance, and repairs. But when asked about his relationship with the only company he has worked for over the last 13 years, Max replies: "What independence? They don't let us haul for anyone else. They'll fire you. Most companies make you sign a contract saying that you'll only work for them. I went along with it because that's just how things are done here at the ports."<sup>1</sup>

Fred Johring runs a port trucking company based in Los Angeles and heads an association that promotes the industry. When testifying recently before Congress, he characterized the relationship between trucking firms and drivers like Max quite differently: "We support the independent business owners who move the cargo of our customers. We create opportunities for full-time work that produces middle-class earnings, and we help them build their small businesses."<sup>2</sup>

Is Max really a small business? Or is he actually an employee?

Policymakers at all levels of government are now grappling with such questions because misclassification of employees as independent contractors drains public coffers of tax dollars, strips workers of important protections and benefits, and undercuts companies that play by the rules.

The debate over workers' employment classification has still further consequences in the port trucking industry because of where and how that industry operates. Last year, Max and about 110,000 other port truck drivers moved millions of cargo containers between the marine terminals, railheads and warehouses that sit in our country's port complexes and the major urban areas that surround them.<sup>3</sup>

Due to truck operational costs, Max reports net earnings between \$24 and \$40 for each haul, a tiny fraction of the \$70,000<sup>4</sup> worth of goods in the typical freight container. At the end of the year, he will net \$28,000 to \$30,000. At the industry average of 59 hours per week, Max's hourly pay works out to around \$10 an hour.

This level of wages means that Max and drivers like him cannot afford decent trucks or maintain the ones they have, trucks they are responsible for because they are treated as independent contractors. As a result, port trucking is full of old, poorly maintained diesel big rigs. Duct tape and bungee cords literally hold some together.

The U.S. Environmental Protection Agency and virtually all other industry observers agree on the consequences: port trucking is a major source of deadly diesel pollution. The EPA itself has granted over \$40 million to replace old, diesel-spewing port trucks. Tens of millions more for replacement programs have come from state and local agencies.

The employment classification of port drivers has become a core issue in determining how these programs should operate. An industry group, the *Coalition for Responsible Transportation*, is advocating for publicly-financed voluntary loan programs that will keep the independent contracting system in place. The *Coalition for Clean & Safe Ports* – an alliance of environmental, community, public health, civic, and labor organizations – advocates for mandatory policies which require use of employee drivers in order to make companies responsible for truck replacement and maintenance. This debate and its consequence have engaged several seemingly unlikely organizations in

discussions about employment classification – organizations like the Sierra Club, the American Lung Association of California, the League of Conservation Voters in New York, and the Church Council of Greater Seattle.

This swirling debate about the role of independent contracting in the environmental crisis affecting port-adjacent communities drew us to this topic, as did the pictures of working conditions depicted by prior industry observers. The central question – what is the classification status of drivers? – is ultimately an empirical one that can be answered by applying a set of facts to the proper legal standard.

In this first-of-its-kind analysis of workers' employment status, we used a multi-method research design consisting of three prongs: (a) an in-depth literature review covering the industry's structure and economics; (b) a re-analysis and aggregation of 10 surveys of 2,183 workers at seven major ports; and (c) an analysis of the work arrangements of a diverse group of drivers and the firms they work for, drawing on exhaustive, original interviews and collected employment documents such as contracts, leases and policy manuals. We analyze the data from these sources, especially the interviews and collected documents, according to the most stringent test of employment status in American law, used by the Internal Revenue Service.

### ***MAJOR RESEARCH FINDINGS***

Our in-depth interviews with drivers at major ports around the country and review of their employment documents reveal that drivers commonly lack the autonomy that is the hallmark of an independent businessperson under federal law. Port truck drivers are intimately tied to the core services and functions of the companies that hire them. Given the absence of oversight at the nation's ports, drivers in the port trucking industry are highly vulnerable to misclassification.<sup>5</sup>

**This analysis concludes that the typical port truck driver is misclassified as an independent contractor.**

- Port drivers are subject to strict behavioral controls. Trucking companies determine how, when, where, and in what sequence drivers work. They impose truck inspections, drug tests, and stringent reporting requirements. Drivers' behavior is regularly monitored, evaluated, and disciplined.
- Port drivers are financially dependent on trucking companies that unilaterally control the rates that drivers are paid. Drivers work for one trucking company at a time, do not offer services to the general public, and are entirely dependent on that company for work. Like other low-wage employees, drivers' only means for increasing their earnings is to work longer hours.
- Port drivers and their companies are tightly tied to each other. Drivers perform the essential (and most often sole) services of the trucking companies they work for. Drivers work for years for the same company; use company signs and permits; represent themselves to others as being from the company; and rarely offer their work independently of the company.

## **Classification of drivers as independent contractors drives the economics of the port trucking industry.**

- Based on surveys of 2,183 drivers in seven major ports, we estimate that 82 percent of the nation's 110,000 port truck drivers are treated as independent contractors. Industry analysts identify independent contracting as the industry's dominant business model which sets standards for all port drivers. Few other industries rely on anywhere near this proportion of independent contractors.
- Through independent contracting agreements, leases, and other employment arrangements, trucking companies make drivers responsible for all truck-related expenses including purchase, fuel, taxes, insurance, maintenance, and repair costs.
- Port truck drivers work long hours for poverty-level wages. Among surveyed drivers, the average work week was 59 hours. Average net earnings before FICA, income, and other taxes was \$28,783 per year for contractors and \$35,000 per year for employees. Minimum wage violations appear to be widespread.
- In driver surveys, independent contractors reported average net incomes 18 percent lower than employee drivers did. Independent contractors were two-and-a-half times less likely than employee drivers to have health insurance and almost three times less likely to have retirement benefits.

## **The misclassification of drivers in port trucking can be directly linked to safety violations and the environmental and public health crises at the nation's ports.**

- The literature on the industry describes how economic pressures encourage widespread evasion of safety regulations. Drivers commonly use dangerous and illegal equipment. Safety limits on working hours and vehicle weights are routinely ignored.
- Industry observers have concluded that low-wage independent contractors bear the industry's capital expenses by owning and operating the only equipment they can afford – the oldest diesel trucks on the road. The environmental and public health crises surrounding the nation's ports are a direct result of the industry's adoption of misclassification as a business model.

### ***POLICY RECOMMENDATIONS***

Eliminating misclassification in the port trucking industry and its consequences is best approached through coordinated use of overlapping policy tools that include state and federal agency enforcement, litigation, incentive funding, and local policy setting.

#### **Specifically, we recommend that:**

- U.S. ports adopt uniform rules requiring trucking companies to employ drivers and take ownership responsibility for trucks they operate. Such requirements would directly address driver misclassification and immediately establish the conditions for a revived, cleaner industry.

- Congress pass the Clean Ports Act of 2010 (H.R. 5967) to allow port authorities to address misclassification where it affects the environmental impacts, safety, or efficiency of port trucking operations. Port authorities sit in the best available position to enforce appropriate worker classification and thereby address the practice's negative environmental, safety, and operational consequences.
- The Department of Labor, the IRS, and state enforcement agencies implement comprehensive enforcement strategies of tax, employment, and safety laws in the port trucking industry. Concerted enforcement in the port trucking industry would help address violations that directly harm large numbers of port truck drivers and significantly contribute to ensuring the industry is free of now rampant misclassification.
- Federal, state, and local agency funding for diesel-truck emissions-reduction programs be made contingent on adoption of requirements that end driver misclassification. Taxpayer dollars should not continue to be pumped into programs that reinforce a system that violates labor laws and is destructive to the environment and the economy.

# Introduction

## “WHAT INDEPENDENCE?”

Max Galvan literally keeps our economy moving. For almost twenty years, he has hauled containers full of tennis shoes, televisions, mattresses, and webcams through the Ports of Los Angeles and Long Beach and their surrounding communities. But Max does not work for Nestle, Big Lots!, 99¢ Only Stores, or any of the other giant corporations whose cargo he hauls.

Nor is he recognized as an employee by the trucking company that has been his sole source of work for the past 13 years. That company classifies him instead as an independent contractor.

When asked about that designation, Max replies “What independence? They don’t let us haul for anyone else. They’ll fire you. Most companies make you sign a contract saying that you’ll only work for them. I went along with it because that’s just how things are done here at the ports.”

Max receives a “take-it-or-leave-it” rate for each container he hauls. “I’ve never negotiated the price of a single cargo load. Ever. It’s not something we port drivers can do. We don’t even know how much the retailer is paying for that load, so how can we negotiate? The company just tells us how much they are going to pay us, period.”

Max’s circumstances raise an important question: Is Max being properly treated as an independent business when he receives an IRS 1099 form each year? Or is he a disguised employee? And what of the tens of thousands of other hard-working drivers who are designated as independent contractors?

## THE SPREAD AND CONSEQUENCES OF INDEPENDENT CONTRACTOR MISCLASSIFICATION

*“The law should confer independent contractor status only on those for whom it is appropriate – entrepreneurs who bear the risk of loss, serve multiple clients, hold themselves out to the public as an independent business, and so forth. The law should not provide incentives for misclassification of employees as independent contractors, which costs federal and state treasuries large sums in uncollected social security, unemployment, personal income, and other taxes.”*

– “The Dunlop Commission”  
U.S. DEPT OF LABOR

Compare Max to the local plumber called in to fix a leaky toilet in the corporate bathroom or to a computer technician on retainer with several businesses to trouble-shoot their software glitches. These are true independent contractors. They have freedom to determine when, where and how they work. They determine whether they will negotiate, or unilaterally set, their prices.

Such genuine independent contractors form a small proportion of the American workforce. However, increasing numbers of companies are treating their employees as independent contractors; the U.S. Department of Labor recently found that up to 30 percent of businesses misclassify their employees as independent contractors.<sup>6</sup>

Misclassification can save businesses as much as 30 percent of their payroll costs.<sup>7</sup> Max’s mid-size employer pays zero payroll taxes for its contracted workforce, believed to total as many as 150 drivers. A competitor that relies on employees to do the same work would struggle to stay in business if continually undercut on labor costs.

Misclassification also denies workers a host of important benefits and protections. Max is ineligible for unemployment insurance if he loses his job. Without workers' compensation insurance, a job injury could leave him with huge medical bills and no way to earn a living. He lacks a guaranteed minimum wage, health care, and other employee benefits.

Unpaid income taxes, payroll taxes, unemployment insurance, and workers' compensation premiums mean that misclassification contributes significantly to the nation's tax gap, currently estimated by the Treasury Inspector General at \$345 billion.<sup>8</sup> A recent government estimate put the loss from just unpaid Social Security, Medicare, and Unemployment Insurance taxes due to misclassification at \$15 billion.<sup>9</sup> Similarly, as much as 20 percent of workers' compensation premiums in New York – \$500 million to \$1 billion – go unpaid each year due to misclassification.<sup>10</sup> Total tax loss in California due to misclassification has been estimated to be as high as \$7 billion.<sup>11</sup>

Such facts have left state Attorneys General, the Department of Labor, the Internal Revenue Service, and Members of Congress searching for ways to address the broad consequences of independent contractor misclassification. In port trucking, though, there are more local, specific consequences to misclassification. The nature of these local consequences has drawn organizations like the Natural Resources Defense Council, the Teachers' Association of Long Beach, and the Center for Environmental Health into policy discussions about Max's status as an "independent contractor."

### ***INDEPENDENT CONTRACTING AND THE ENVIRONMENTAL CRISIS IN PORT-ADJACENT COMMUNITIES***

In the port trucking industry, independent contractor drivers, or "owner-operators" as they are also known, bear the costs of truck ownership, operation, and maintenance. One estimate put those costs at 60 percent of drivers' gross incomes.<sup>12</sup>

While the median value of goods in a cargo container is \$70,000,<sup>13</sup> Max nets roughly \$24-\$40 for each container he hauls. After his typical 10-12 hours a day, five-day workweek, Max generally takes in \$550, although that number fluctuates. One week he brought home \$700. "But I've taken home only \$56, it all depends." Often what it depends on is how many loads his dispatcher assigns him.

Each week, he must divide this income between providing for his family and tending to his truck. He estimates that routine maintenance and repair cost him \$5,000 a year, a number that is consistent with academic studies.<sup>14</sup>

With such low take-home pay, drivers naturally buy older trucks that are the least expensive.<sup>15</sup> The average rig at port terminals burns diesel and is 10-15 years old, earning America's ports the reputation as "the place where old trucks go to die."<sup>16</sup>

When Max entered the profession in 1992, he scrimped to save a few thousand dollars to purchase a Wide Freightliner that was built in 1978. Three years later, he sold it to a fellow port driver to buy an International that was already 11 years old, and then drove that model for another seven years. He applied insurance money from an accident to buy his third vehicle in 2002, this time a 1994 Freightliner rig that he used until 2008.

In 2009, Max's company began deducting \$404 weekly payments for a truck they require him to lease from them, and he is also contractually required to handle the cost of vehicle maintenance.

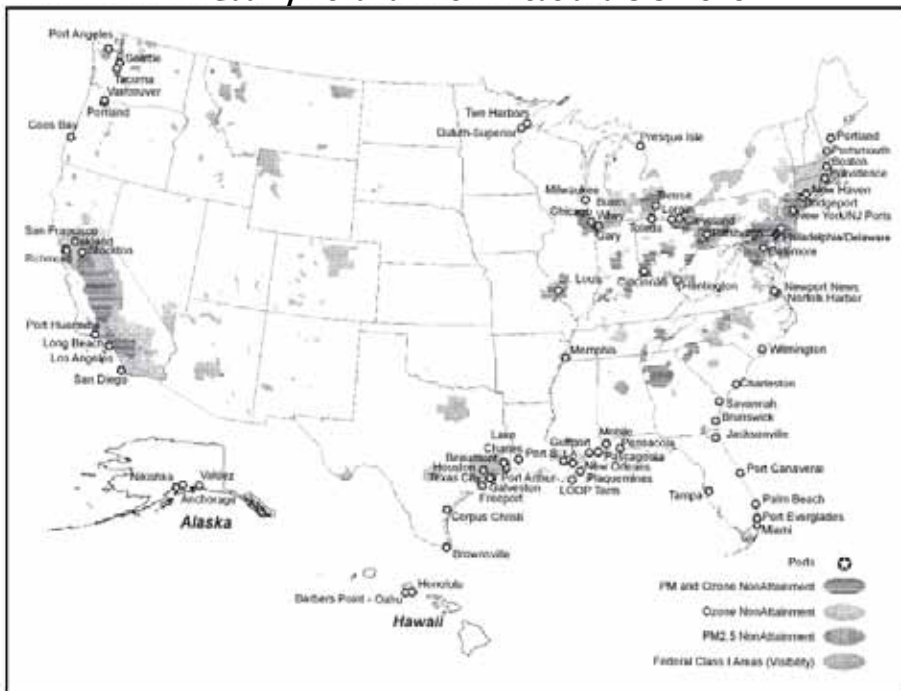
“I really don’t know how I’m going to continue doing it. The lease payment takes most of my check away already. And it worries me because these new EPA-compliant trucks aren’t like any other trucks; these need special oil and the filters and stuff. So far, all I’ve done is pay for oil changes but when I have to replace the tires it will cost over \$3,000. I don’t know what’s going to happen.”

**Where Old Trucks Go to Die: Max’s History of Truck Ownership**

Truck	Year Purchased	Age at Purchase	Year Disposed	Age at Disposal
1978 Freightliner	1992	14 years	1995	17 years
1984 International	1995	11 years	2002	18 years
1994 Freightliner	2002	8 years	2008	14 years

It is unsurprising then that the U.S. Environmental Protection Agency has recognized port trucking as a major source of diesel pollution,<sup>17</sup> as have the Natural Resources Defense Council<sup>18</sup> and virtually all other industry observers. The EPA estimates that some 87 million Americans now live and work in port regions that violate federal air quality standards. In these areas, diesel-soot-induced asthma, cancer, and respiratory illnesses rates are disproportionately high, leading to increased morbidity and premature death.<sup>19</sup>

**Air Quality Nonattainment Areas and U.S. Ports**



Source: Control of Emissions From New Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder; Proposed Rule (December 7, 2007). 72 Fed. Reg. 69522, page 69528.

There is now a broad consensus that diesel emissions from port trucking are a serious problem that must be addressed. The EPA has dispersed \$40 million in grants directed towards the emissions problems, and nine of the top 10 ports have also established diesel emissions reduction programs.

Coalitions of environmental, community, faith, public health, and labor groups have sprung up around the country seeking solutions. The shipping industry has set

up its own organization, the *Coalition for Responsible Transportation*, to advocate for its approach to the problem. These groups dramatically differ on how to address the industry’s environmental and community impacts and whether those policies must address drivers’ employment status.

Carl Pope, the Chairman of the Sierra Club, analyzes the problem this way: “Coast to coast, the industry forces the cost of truck operation and maintenance onto the workers behind the wheel, and as a result, old, diesel-spewing rigs fill U.S. transportation corridors because that’s all these low-wage earners can afford. Dire economic conditions led to the environmental crisis in the first place – we strongly suspect the culprit is not misbehavior by a few companies, but rampant misclassification in port trucking on the whole.”<sup>20</sup>

Curtis Whalen, an executive of the American Trucking Associations, the nation's largest trucking lobby, argues instead that the industry's environmental impacts can be addressed while maintaining the independent contractor system: "Requiring truckers to be employees has nothing to do with clean air." "Unfortunately," he later added, "I think the environmental and health community has been hoodwinked on this."<sup>21</sup>

### ***ARE PORT TRUCK DRIVERS TRUE INDEPENDENT CONTRACTORS?***

Working families, legitimate business operations, and the public pay a heavy price for misclassification in any industry. The link between port drivers' employment status and the industry's environmental impacts underscores the reasons to examine the question we started with: Are Max and other port truck drivers true independent contractors?

We use a three-pronged research method to develop the factual data necessary to address that question. Specifically, in the body of this report, we (a) review the substantial literature describing the industry's structure and economics; (b) aggregate and analyze 10 surveys of 2,183 workers at seven major ports; and (c) analyze work arrangements of a diverse group of drivers and the firms they work for, based on original, in-depth interviews and voluminous employment documents collected from them such as contracts, leases and policy manuals.

The literature review is presented first as it describes the port trucking system's development, scope, and operating models. Next, we present our re-analysis and aggregation of existing survey data and analysts' studies for their insight into drivers' wages, expenses, and work patterns.

The legal analysis immediately follows and it comprises the bulk of the report. It is principally based on the original data we gathered through in-depth interviews with drivers and a careful examination of the contracts, leases, and other documents that formally structure their work.

The report concludes by discussing recommendations to correct the misclassification that pervades the industry.

### ***POST SCRIPT***

When we talked with Max Galvan, the father of two revealed evident pride in the work he performs despite the conditions that have persistently kept the American Dream out of reach throughout his career. He spoke fondly of the other men and women who rise early to gather at his company's truck yard and referred to them as his co-workers, rather than as competitors. He believes the majority of them also clock 50-60 hours a week and knows several who are facing eviction and bankruptcy.

In the days immediately before this report went into production, Max's worst economic fears proved true. After nearly two decades on the job, Max recognized he was "paying to work" and handed over the keys of the truck he had been leasing through his company after pouring \$35,148 in weekly lease payments alone since April 2009. His new full-time job will be looking for another opportunity that will keep a roof over his head and food on the table for the family. Will it be in the same industry? He believes telling his story will result in near-certain blackballing, forcing him out of port trucking altogether. He has no retirement. At the time he stopped working, he said simply: "I'm a truck driver. A good one. This is all I know. But I give up. This is killing me."



# Sweatshops on Wheels: The Economics of Port Trucking

## *DEREGULATION AND THE RISE OF INDEPENDENT CONTRACTING*

Thirty years ago, the trucking industry changed profoundly. In the late 1970s, a federal agency oversaw freight rates and routing for the trucking industry. Unionized companies enjoyed substantial market power, earning reasonable profits while providing drivers with wages and benefits comparable to those of industrial workers. But many, including powerful cargo shipping interests, felt the price of this structure was too high.<sup>22</sup>

In response, the Carter Administration began to deregulate the industry. A bipartisan Congressional coalition supported by industry and consumer advocates followed suit, passing the Federal Motor Carrier Act in 1980. The Act abolished the old regulatory system to eliminate barriers to new competition. New companies, mostly small and without assets, entered the industry, driving down rates and wages. Established companies faltered. Unions disappeared.<sup>23</sup>

Within a few years, a new business model came to dominate the industry. Under that model, the overwhelming majority of port truck drivers became classified as independent contractors. At least formally, deregulation did not require this result. And it is unclear which, if any, of the proponents of deregulation foresaw this industry transformation or its long-term consequences. Nonetheless, deregulation provided an opportunity to cut costs by shifting liability to drivers, an opportunity which cargo shippers and trucking companies seized.

In this section, we survey the results of this transformation for port truck drivers. In particular, we review the current dynamics of the industry, the scope of independent contracting within it, and some of the consequences for drivers' wages and work routines. These details are the necessary background to the analysis of drivers' employment status that then follows.

## *SOURCES*

The contours of the port trucking industry, or "drayage" as it is known to insiders, have remained stable since the upheavals of the early 1980s even as the volume of containerized cargo moving through our ports has since risen more than five-fold. Tracing those contours, and especially their consequences for port drivers, requires a wealth of empirical data that has only recently become available.

Prior to 2004, there was little research on port trucking or its specific labor market. However, starting at that time, concerns about the environmental, operational, and community impacts of the port trucking system prompted multiple economic and operational analyses of the industry.<sup>24</sup> Among these are ten large surveys of port drivers.

These sources detail the workings of the industry and the place of drivers within it. The surveys, in particular, have never been drawn together. Their presentation here is the first nationwide overview of port drivers' working conditions.

These surveys, listed in Table 1, reached 2,183 drivers working at seven ports. Together, those ports accounted for 61 percent of the country's container traffic in 2009.<sup>25</sup>

**Table 1: Driver Surveys Source Data**

Author(s)	Port	Date of Study <sup>26</sup>	Study Title	Number Surveyed
<b>Monaco &amp; Grobar</b>	LA/Long Beach	2004	A Study of Drayage at the Ports of Los Angeles and Long Beach.	175
<b>CGR Management</b>	LA/Long Beach	2007	A Survey of Drayage Drivers Serving the San Pedro Bay Ports	209
<b>Monaco</b>	LA/Long Beach	2008	Incentivizing Truck Retrofitting in Port Drayage	197
<b>Port Jobs</b>	Seattle	2007	Big Rig, Short Haul: A Study of Port Truckers in Seattle	147
<b>Greenwich</b>	Oakland	2007	Taking the Low Road: How Independent Contracting at the Port of Oakland Endangers Public Health, Drivers & Economic Growth	202
<b>Harrison, et al.</b>	Houston	2007	The Impacts of Port, Rail, and Border Drayage Activity in Texas	598
<b>Harrison, et al.</b>	Houston	2008	Characteristics of Drayage Operations at the Port of Houston	105
<b>Haveman &amp; Monaco</b>	Oakland	2009	Comprehensive Truck Management Program: Economic Impact Analysis	238
<b>Jaffee &amp; Rowley</b>	Jacksonville	2009	Report on Port Truckers Survey at Jacksonville Port Authority	78
<b>Bensman &amp; Bromberg</b>	NY/NJ	2009	Report on Port Truckers Survey at New Jersey Ports	299

Table 2 presents a summary of the aggregated results<sup>27</sup> of these surveys. We discuss the detailed results of the surveys below.

<b>Table 2: Summary of Aggregated Survey Results</b>	
<b>Drivers classified as</b>	
Employees	17.8%
Independent Contractors	82.2%
Direct Contractors	69.8%
Sub-haulers <sup>28</sup>	12.4%
<b>Annual income, net of truck expenses</b>	
Median	
Contractors	\$28,783
Employees	\$35,000
Mean	
Contractors	\$33,081
Employees	\$38,000
<b>Hours per week (all drivers)</b>	
Median	59.0
Mean	55.7
<b>Hours per day (all drivers)</b>	
Mean	11.7
<b>Wages per hour (means)</b>	
Contractors	\$11.91
Employees	\$14.71
<b>Have health insurance</b>	
Contractors	25.1%
Employees	65.0%
<b>Have retirement plan</b>	
Contractors	7.3%
Employees	20.8%

Source: Authors' aggregate analysis of 2,183 surveys listed in Table 1.

## ***"FEROCIOUS COMPETITION": PORT TRUCKING AND THE GOODS MOVEMENT SYSTEM***

The employment arrangements of drayage drivers, including their status, wages and work hours, are a product of the fiercely competitive dynamics that shape the industry. Those dynamics are generated within the global goods-movement system of which port trucking is a small, but essential link.

Stuffed animals, pens, microwaves, Nikes, almost all of the goods made abroad come to this country in cargo containers. Our exports, like farm equipment, machine tools, and semiconductors, are packed in those same containers and shipped overseas. In 2009, almost 20 million of these containers moved through our nation's ports.<sup>29</sup>

### **The Top 25 U.S. Container Ports for International Maritime Cargo: 2008**



Bureau of Transportation Statistics, America's Container Ports 2009, pg 12 figure 8.

An estimated 5,000 trucking firms move these containers, principally over short distances between the marine terminals, warehouses and rail yards in and around major seaports.<sup>30</sup> The Transportation Security Administration estimates that 110,000 drivers work for these firms.<sup>31</sup>

The great majority of these trucking firms are small, with less than \$10 million in annual revenue. There are roughly 75 drayage firms with revenues above \$150 million, still small by general corporate comparisons but giants in this industry.<sup>32</sup> The two largest port trucking firms have about 2.5 percent of the total market each. Around 2,000 drivers work for each of them.<sup>33</sup>

The trucking firms' main customers are true behemoths and they act their size. Major cargo shipping companies like Wal-Mart, Target, and Home Depot demand rock bottom prices,<sup>34</sup> while continually imposing greater service requirements on port trucking firms.<sup>35</sup> The small size and large numbers of trucking companies leave them with "little bargaining power vis-à-vis the shipping lines and beneficial cargo owners;" as a consequence, they are condemned to "ferocious price competition."<sup>36</sup> Even the largest drayage firms have seen flat rates stretching back to at least the early 1990s and they admit that they have "begged for years for higher rates."<sup>37</sup>

One result of this intense competition is that trucking companies frequently go out of business.<sup>38</sup> With little in the way of fixed assets, there is little incentive to do anything but declare bankruptcy when shipping slows or the price of diesel rises. Conversely, when conditions improve, lack of business contacts is the only barrier to entering the industry.

In this context, drayage companies strive to reduce their principle expense – labor costs – however they can. Their core strategy for reducing those labor costs is independent contracting.<sup>39</sup>

### ***INDEPENDENT CONTRACTING IS THE DOMINANT MODEL OF EMPLOYMENT IN PORT TRUCKING***

The port trucking firms that triumphed following deregulation had one common feature: They hired their drivers as contractors and required them to own and operate their trucks. This business model provides companies with a contingent workforce paid by the load, rather than hourly. The companies have no responsibility for workers' compensation or unemployment insurance taxes. They obtain drivers' services without paying for health care or retirement plans.<sup>40</sup> And, as a leading Southern California company owner notes, the industry has shifted liability for most operational costs – truck purchases, fuel, insurance, taxes, maintenance – from themselves to the drivers.<sup>41</sup>

Today, the overwhelming majority of port truck drivers are treated as independent contractors. 82.2 percent of survey drivers identified themselves as independent contractors with 69.8 percent self-identifying as direct contractors and 12.4 percent self-identifying as sub-haulers, who drive trucks owned or leased by another contractor.<sup>42</sup> Only a small share, 17.4 percent, identified themselves as employees.

The overwhelming reliance on independent contracting as the principle method of organizing work stands out as one of the industry's most salient features, setting it apart from almost every other sector of the U.S. economy.

### ***PORT DRIVERS MAKE POVERTY LEVEL WAGES***

As the port trucking industry adopted the independent contractor model after deregulation, drivers' wages fell precipitously.<sup>43</sup> Wages fell 15-20 percent in the four years after the Motor Carrier Act passed, and by 30 percent from 1980 to 1995.<sup>44</sup> Commenting on changes in the industry, a Jacksonville port driver told researchers: "Containers used to be one of the best ways to work, but now it is the worst."<sup>45</sup>

As shown in Table 2, the median net income among surveyed drivers was \$28,783 per year for independent contractors and \$35,000 per year for employees. Comparatively, independent contractor drivers netted on average 18 percent less than employee drivers.

When annual net income is divided by drivers' work hours, the resulting hourly wages are also quite low: \$11.91 for contract drivers, \$14.71 for employees and \$12.10 for all port drivers. While these figures represent net earnings after truck expenses, they do not include tax burdens, a fact that widens the gap between independents and employees. Independent contractors must pay the employer's portion of Social Security, Medicare and similar taxes as well as their own.

Trucking company executives give similar wage estimates. The president of Southern Counties Express, a major operator at the Ports of Los Angeles and Long Beach, noted in 2006 that drivers earned \$11.34 per hour and an annual income of \$29,928.<sup>46</sup> Roadlink, a large national firm, recently put annual net income across the industry at \$24,550<sup>47</sup> noting that "at best," the pay rate for independent contractors at the ports "is 33 percent below standard" for comparable warehouse

and retail jobs.<sup>48</sup> And, in 2005, a Seattle trucking executive explained that he had trouble recruiting because while drivers may gross \$90,000 to \$100,000, “they’d be lucky to take home about \$25,000 to \$30,000 of that.”<sup>49</sup>

These admissions from port trucking executives stand in stark contrast to testimony that Fred Johring, who runs a port trucking company based in Los Angeles and heads an association that promotes the industry, gave before Congress in May 2010: “We support the independent business owners who move the cargo of our customers. We create opportunities for full-time work that produces middle-class earnings, and we help them build their small businesses.”<sup>50</sup>

Furthermore, the independent contracting model that keeps wages low not just for the owner-operators but for all port drivers. Because it is easy to replace employees with independents, who make up the bulk of the labor force, wages are held down across the industry. The median wage for heavy-duty truck drivers nationally is \$18.14 an hour.<sup>51</sup> The average employee port truck driver earns 20 percent less than that. Independent port drivers earn just 65 percent of the national average for truck drivers.

Such earnings are inadequate to raise a family, let alone move these workers into the middle class. The national median income for contract drivers falls below 133 percent of the federal poverty guidelines for a family of four – an important measure because the average port driver is married with children.<sup>52</sup> Under the Patient Protection and Affordable Care Act, an average driver, his spouse, and two children would all be eligible for Medicaid.<sup>53</sup>

Several researchers evaluated their survey results against other income benchmarks due to the belief that the federal poverty guidelines noted above are based on guidelines developed in the 1960s and do not adequately measure family need.<sup>54</sup> The researchers found that:

- In New Jersey, the average driver has two dependents, and the \$28,000 median annual income for contract drivers there falls 14 percent below what the Poverty Research Institute of Legal Services of New Jersey defines as the “true poverty threshold” for the state, or \$32,484 for a family of three.<sup>55</sup>
- In Jacksonville, drivers’ \$13.10 hourly rate clears the poverty threshold for a two-adult household, but “falls far below the \$27.44 hourly living wage for a household of two adults and two children.”<sup>56</sup>
- In Seattle, contract drivers’ median income of \$28,500 per year fell 23 percent below King County’s median wage for all workers.<sup>57</sup>
- In Oakland, 60 percent of the surveyed port drivers “earned wages less than the amount needed (\$12.02) to support a family of four above the poverty level in the Bay Area.” One-quarter of the drivers surveyed earn less than \$7.64, just barely above the state’s \$7.50 per hour minimum wage.<sup>58</sup>

### ***FEW DRIVERS HAVE HEALTH INSURANCE***

Port truck drivers are much less likely to have health insurance than other American workers while independent contractors have insurance rates that are significantly lower than employee drivers doing the same work.

As shown in Table 2, only 25 percent of independent drivers reported having health care coverage, be it through self-purchase, spousal employment, or public assistance.<sup>59</sup> In contrast, 65 percent of employee drivers reported being insured. Both figures are well below the 80 percent of working age adults in the general population who have coverage.<sup>60</sup>

The comparative dearth of coverage for independent contractors exacerbates the risks drivers face from the normal occupational hazards of their work. The Natural Resources Defense Council has, for instance, found that “although all drivers and longshoremen are heavily impacted by the negative health impacts of diesel pollution, independent port drivers are especially susceptible when compared with employee workers.”<sup>61</sup>

Researchers studying drivers at the Ports of New York and New Jersey found the result “a frightening picture of unmet need. Fully one-third of all drivers without health insurance ... were able to provide no health care at all for their families. When surveyed about where their families received care, they answered: ‘I can’t afford medical care.’ By choosing this answer, they were saying that they didn’t bring their families to any health facility at all. When their children get ear infections, they don’t get antibiotics. If they have trouble breathing, they don’t get examined for asthmatic conditions or pneumonia. If they get cut while playing, they don’t get tetanus vaccinations.”<sup>62</sup>

### ***LONG HOURS ARE ROUTINE IN THE INDUSTRY***

Port truck drivers routinely work long hours. Table 2 shows that surveyed port drivers worked an average of 59 hours a week. Drivers also averaged 11.7 hours per day. These results are actually slightly lower than the average 14-hour days<sup>63</sup> and 60-70 hour weeks<sup>64</sup> that trucking company executives have estimated that drivers work.

These averages do not, however, fully illustrate the periods of intense work drivers can face. One Los Angeles driver explained: “When it’s busy you will be working 14-16 hours per day with double log books so that you can make enough money for your truck. No one works only 40 hours per week. You’re working like a mule, sleeping in your truck.”<sup>65</sup>

Drivers are accustomed to these hours but remain particularly frustrated by the substantial amounts of unpaid waiting time that are part of it. Monaco and Grobar found that, on average, “waiting time accounted for between 50 and 66 percent of the total trip time.”<sup>66</sup>

Because independent drivers are paid by the load, trucking companies absorb no costs when drivers wait. Neither do terminal operators, rail yards or warehouse companies. Drivers wait for everyone else in the system. Effectively, they bear inefficiency costs for all the adjacent participants in the supply chain.<sup>67</sup> Drivers’ frustration with this arrangement has sparked numerous protests and work stoppages, including notable incidents in Savannah, Los Angeles, Long Beach, Miami, and Oakland.<sup>68</sup>

### ***MAJOR FINDINGS: INTEGRATED DRIVER SURVEY AND INDUSTRY LITERATURE REVIEW***

The picture emerging from our analysis of driver surveys done by prior researchers and industry reports is of an underground economy. Fierce competition, ever-increasing service requirements, a contingent workforce, poverty level wages, no health care coverage, rampant safety violations, ineffective or illusory enforcement – these are the rules of the industry.

Our review of the industry literature and 10 surveys of 2,183 drivers in seven major ports show that:

- Companies label 82 percent of the surveyed port truck drivers as independent contractors. Industry analysts identify independent contracting as the dominant business model which sets labor standards for the port trucking industry. Few other industries rely on anywhere near this proportion of independent contractors.
- Independent contracting is the principle means through which trucking firms make drivers responsible for all truck-related costs and liabilities including purchase, fuel, taxes, insurance, maintenance, and repair.
- Port truck drivers work long hours for poverty-level wages. The average work week amongst surveyed drivers was 59 hours. Average net earnings before FICA, income, and other taxes, was \$28,783 per year for contractors and \$35,000 per year for employees.
- Independent contractors reported average net incomes 18 percent lower than employee drivers across the surveys. Independent contractors were two-and-a-half times less likely than employee drivers to have health insurance and almost three times less likely to have retirement benefits.
- Economic pressures encourage widespread evasion of safety regulations. Drivers commonly use dangerous and illegal equipment. Safety limits on working hours and vehicle weight limits are routinely ignored.
- The port trucking industry is fiercely competitive. It comprises an estimated 5,000 small companies possessing few assets. These firms are under intense and constant pressure to lower their prices and increase their services. Industry dynamics create powerful incentives for port trucking companies to misclassify their workers.

### **Economic Pressures Encourage Widespread Evasion of Safety Regulations**

In an investigative report on industry safety, the *Los Angeles Times* detailed “a shadowy economy of risk-taking drivers and discount mechanics, body workers, welders and junkyards – legal and otherwise” who keep port trucks on the road. When a *llantero*, the Spanish name for those who regroove worn tires with a hot knife, pointed out a potentially deadly bulge in a client’s rubber tire, the driver shrugged and told the reporter, “it’s dangerous and irresponsible . . . But I don’t have money for new tires. I’m behind on my bills. As long as the California Highway Patrol doesn’t stop me, I’ll keep doing it.”<sup>69</sup>

The driver surveys also found widespread evasion of safety rules. Federal regulations limit drivers to 60 hours in any seven-day period and require at least 10 hours rest after a driver has been on duty for 14 hours or driven for 11 hours.<sup>70</sup> Monaco and Grobar’s survey of Southern California drivers found that 10 percent of drivers report working 72 or more hours in a typical week and that hours of service regulations are “typically violated by drivers.”<sup>71</sup> In New York and New Jersey, 14 percent of drivers reported working on average more than 14 hours per day.<sup>72</sup> In Oakland, 22 percent of drivers reported working thirteen or more hours per day. Some reported typical days as long as 16 hours.<sup>73</sup>

The rush to deliver loads also puts pressure on drivers to haul cargo on unsafe chassis, the separate frame and wheels that hold cargo containers. Monaco and Grobar found that half of all drivers had been offered an unsafe chassis in the previous month, and that 22 percent reported that they had “taken the chassis on the road.” Similarly, Bensman and Bromberg reported that 12 percent of drivers had taken an unsafe chassis on the road the last time they were offered one. “This would mean that 10,000 unsafe chassis leave the port making freight deliveries every year.”<sup>74</sup>

# Are Port Truck Drivers Independent Contractors or Misclassified Employees? The Analysis

The dynamics of the port trucking industry create a context in which misclassification can flourish – a suggestion industry observers have noted before. Fierce competition, ever-increasing service requirements, a contingent workforce, poverty level wages, lack of health care coverage, rampant safety violations, and ineffective enforcement all appear in other industries in which misclassification is rampant.

But, while suggestive, the driver surveys, industry reports, and other sources that formed the empirical basis of the preceding industry overview do not provide the kind of detailed facts about the interaction of particular drivers and their trucking companies that is necessary to make a legal determination of their employment status.

Because of that, we undertook the original research presented below. This consisted principally of the analysis of lengthy, detailed interviews conducted with 58 drivers at five major ports nationwide and hundreds of employment documents we collected from these drivers, including their independent contractor agreements, truck leases, pay stubs, insurance provisions, safety policies, drug and alcohol policies, meeting agendas, log books, and job applications. We analyzed this data according to the test of employment status set out by the Internal Revenue Service.

## *THE LEGAL FRAMEWORK FOR DETERMINING EMPLOYMENT STATUS*

The rules for classifying a worker as an independent contractor or an employee are laid out in state and federal statutes such as the Internal Revenue Code, the Fair Labor Standards Act, and state unemployment compensation laws. While there is some variety among these statutes, they apply essentially one of three different tests to determine a worker's employment status. Those three tests are:

- **The “Suffer or Permit to Work” Test:** The Fair Labor Standards Act, the Equal Pay Act, the Migrant and Seasonal Agricultural Worker Protection Act, and the Federal Family and Medical Leave Act cover workers whom an employer “suffers or permits” to work for it.<sup>75</sup> Of the three tests, the “suffer or permit” test has the broadest definition of an employee. Under it, a worker is an employee if the business has allowed the work to be performed in its business for its benefit, even though another party has hired, paid, or supervised the worker.
- **The “ABC” Test:** This test is used to determine coverage under most state unemployment insurance and some workers' compensation statutes. It establishes a presumption of employee status unless it can be shown that (a) the worker has been, and will continue to be, free from control by the employer over the performance of the work; (b) the service performed by the worker is outside the usual course of services performed by the putative employer; and (c) the worker is engaged in an independently established trade, occupation, profession, or business.
- **The “Right to Control” Test:** This test determines employee status under laws such as the Internal Revenue Code, Federal Insurance Contributions Act, Federal Unemployment Tax Act, *Employee Retirement Income Security Act*, the National Labor Relations Act, and the Americans with Disabilities Act. The version of this test currently used by the IRS draws on facts in three areas to determine whether the business controls the worker enough to form an employer/employee relationship. Those three areas are behavioral controls, financial controls, and the type of relationship between the business and the worker.<sup>76</sup>



Our analysis follows the Right to Control test as articulated by the IRS. We follow this measure because it is the strictest definition of employee status in American law. If port drivers are employees under this test, they would also be employees under the statutes that use the broader Suffer or Permit or ABC tests.

In applying the IRS' Right to Control test, courts and agencies have held that no single fact is decisive. Instead, courts and agencies examine the totality of the relationship between a business and a worker when determining employee status. We follow that approach here.

Lastly, it is important to note that judicial or agency legal determinations of the type this analysis mirrors are subject to several variables that we account for in our final determination but cannot reproduce in this research setting. Specifically, in a legal setting, determinations can be swayed by the quality of legal representation, the performance of witnesses, biases of the fact-finder, the availability of evidence, which factor of a multiple-pronged test a judge assigns the most weight, and multiple other factors. Ideally, such factors would not enter into final decisions. But they often do. Qualifications we make about the likelihood of drivers being found to be misclassified under legal tests of employment status reflect in part the inherent indeterminacy that such factors introduce into legal proceedings.

## **RESEARCH METHODOLOGY**

The IRS test of employment status requires analysis of virtually all facets of a worker's relationship with a business. In the language of attorneys, such determinations are fact-intensive.

We therefore developed a research methodology consisting of in-depth legal analysis of the work arrangements of a group of drivers who represent typical, modal work arrangements in major U.S. ports in small, medium, and large companies. The goal of the legal analysis was to assess the likely status of these drivers, drawing on (a) exhaustive interviews resulting in 33 measures of work arrangements and employee status, and (b) a comprehensive review of the drivers' employment documents.

Our interview questionnaire focused on key areas identified in the IRS test, and in agency and court decisions interpreting that test. After several drafts, pre-testing and consultations with outside legal experts, the final protocol had 67 primary and 82 follow-up questions.<sup>77</sup> The interviews lasted up to two hours each. We also asked the interviewed drivers to provide us with all the documents they had received from their companies. We gathered hundreds of documents this way, including many of the contracts, policies, and routine paperwork that structure drivers' working relationships with their companies.

The interviews were conducted following a semi-structured protocol that consisted of a series of largely open-ended questions asked of each respondent. The questions were designed to elicit dense, narrative responses addressing the critical dimensions of a classification analysis.<sup>78</sup>

Starting in February of 2010, we assembled and trained interview teams to survey drivers from the Ports of Seattle, Oakland, Los Angeles, Long Beach, and New York and New Jersey. The composition and contributions of the teams are noted in the acknowledgments page. Because prior researchers have suggested that employment practices may differ between small, medium, and large companies, we identified firms in each category at each locale for which we wanted to draw interviews, making sure to include at least three of the largest firms at each locale. Interviews began in March 2010 and were completed by May.

Except when a driver declined, the interviews were taped to enable the authors to recheck interview responses in case there was some confusion in the notes. Following standard human subjects protocol for interviews of this nature, drivers were guaranteed anonymity.

In the end, we completed 58 interviews. We discarded four interviews because they were incomplete or done in a group setting that compromised the results. Of the completed interviews, 24 were conducted in Seattle, 10 in Oakland, 10 in Los Angeles and Long Beach and 10 in New York and New Jersey. Fifty-three of the 54 drivers were called independent contractors by the trucking firms. One was treated as an employee. Forty-two owned their trucks and leased them back to a trucking company. Five had entered lease-to-own agreements with the trucking companies. One hauled loads for another driver, an arrangement known as “sub-hauling.” Two independent contractors that haul at the Ports of Los Angeles and Long Beach drove trucks owned by their companies.

After completing the interviews and document collection, we put the interview responses and documents into a database, summarizing the drivers’ answers to our questions under headings corresponding to the IRS legal test. So constructed, the database allowed us to assess the companies’ relationship with their drivers along the three dimensions of the IRS test, which we analyzed using 17 indicators gleaned from the IRS rule. These indicators are listed in Tables 5, 8, and 11.

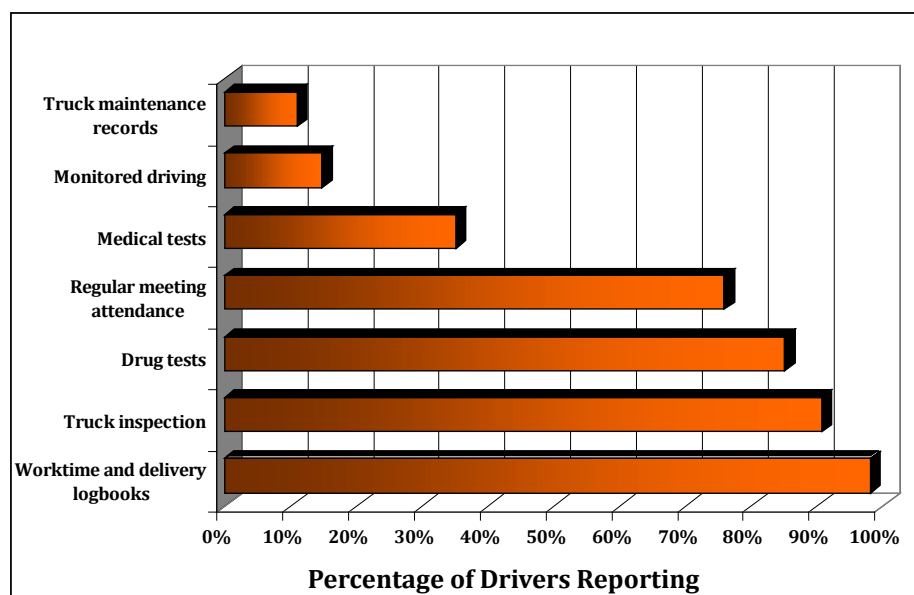
## RESEARCH RESULTS

### “Behavioral Control”: The First Dimension of the IRS Test of Employment Status

The first dimension of the IRS test of employment status, “behavioral control,” looks at whether the business has the right to control aspects of the worker’s job. The more a business has the right to exercise control, the more likely it is that a worker is an employee. This examination looks at how much and in what ways the business gives instructions about the work; provides training; establishes a work sequence; disciplines workers; tells the workers when to work; determines what tools to use; and requires that the work be personally performed. We detail our findings in each of these areas below.

**Behavioral Control – Company instructs driver about work:** Most of the drivers we interviewed referred to a number of different kinds of instructions that they received from the trucking companies, in a number of different circumstances.

CHART 1: Types of oversight drivers reported in interviews



Source: Authors’ analysis of 2010 port truck driver interviews

Forty-one of the 54 drivers indicated that they are required to attend safety or other periodic meetings, with most reporting that these meetings took place once every one to three months. All drivers are drug-tested periodically. One-third of them indicated that they had been required to undergo medical exams. An indication of the extent to which at least some companies provide instruction to their drivers is the two meeting agendas that workers provided to us. These include detailed sets of instructions about how truckers should do their work.

### Agenda from Regular Company Meeting With Drivers

- DRIVERS MEETING 8/1/2008
1. Drivers must call when arriving at the customer. No exceptions. If you do not you may be considered late.
  2. Driver must call dispatch when free time has expired to advise dispatch you are going into driver detention. When you do call please give the dispatcher some details. What's going on?
  3. Driver must call when you are finished and leaving.
  4. If you have driver detention on loads you are either delivering or picking up you must have a signed POD with the same in and out times you gave the dispatcher. If you do not you risk not getting paid.
  5. If you have accessorial of any kind you must turn in your paperwork within 2 days of the date it happened. If you do not you risk not getting paid.
  6. If you are going to be late on a delivery or pickup you must notify dispatch that you are as soon as possible. Please remember if you are late and it is your fault you are late you risk not being paid for driver detention or the load being refused and being rescheduled and not being paid for the dry run.
  7. If you are delivering a load after normal business hours and have driver detention you must call the office as soon as you are done and leave the information on the company's voicemail. If you do not you risk not getting paid.
  8. When you are going to pick an empty up for loading please make sure you are calling dispatch and giving them the empty number as soon as you get it. If you do not you risk no billing issues at the railroad.
  9. Make sure you are doing a thorough inspection of equipment before going to the customer. If the customer refuses to load your empty you will not be paid for the run.
  10. Please make sure your paperwork is in order and you are turning in everything with dispatch numbers on ALL documents.
  11. We need ALL drivers to be turning in daily logs, filled out correctly, with your paperwork.
  12. Please make sure we are getting copies of new tonnage.
  13. If you get a fix ticket from DOT you must give to Brian ASAP. You must also show proof of repairs so we can sign off on the ticket and get it to the DOT within 15 days.
  14. DO NOT drop empty containers in the yard and leave them. It is your responsibility to make sure you are turning in your empties before the free time expires. If you do not you risk paying for the termination and per diem charges.
  15. Please make sure you have map books in your truck so you can look up on your own how to get somewhere. The phones get very busy in the office and we need to, if we, can cut down on the number of phone calls we get.
  16. When you call with problems and the dispatcher tells you he will get it fixed, PLEASE be patient and give the dispatcher some time to work on the

- issue. Again the phones get very busy and we want to avoid drivers calling every 5 minutes for the same problem.
17. Please do not enter the office where the dispatchers are working without permission.
  18. Please do not litter the yard with garbage and do not put your personal trash in the company dumpster. If we catch you, you risk paying the dump fee.
  19. Please give as much heads up as you can when you are not going to be available for work.
  20. When doing multi stop pickups or deliveries you must have container sealed before leaving each stop, recorded, and seal broken by employee at next stop.
  21. Please keep the yard tight when parking empties or loads.
- PAPERWORK NEEDED TO GET PAID FOR WHAT YOU'VE DONE
1. Chassis move - Chassis interchange
  2. Drop empty container at customer - Container interchange and signed POD for drop
  3. Drop loaded container at customer - Container interchange and signed POD for drop
  4. Pick up empty container and terminate - Container interchange
  5. Pick up loaded container and terminate - Bill of lading and container interchange
  6. Stay with unload - Container interchange of load and empty and signed POD. Forklift loads require serial numbers on POD.
  7. Stay with load - Container interchange of load and empty and signed POD and bill of lading
- If you are going to expect to get paid for what you do, you must provide proof of what you do. If you do not you risk not getting paid.
- ACCESSORIALS
- You must show proof for what you expect to get paid for. If you expect to get paid for driver detention you MUST turn in a POD with in and out times that we can supply to our customer. This means for everything: wait time at the customer. Wait time at the rail yard, wait time at the border. We realize that you may not be able to get a signature at places like the rail yard and border but we still need something to give our customer. If you do not you risk not getting paid. If special circumstance please bring manifest into office and have dispatcher sign off on it.

At least two companies had given drivers detailed performance manuals. One 17-page procedures manual included 3 pages of operational safety procedures and 6 pages of a fleet safety maintenance policy with 4 different service schedule checklists for trucks. Attached to it was an 11-page drug and alcohol policy. At another company, the application form for drivers wishing to work with the company was 16 pages long.

### Excerpt from Policy Manual Given to Contractors and Employees

- DRESS CODE:
- Drivers are required to wear appropriate attire for the job i.e. safety shoes / boots, jeans and work shirts. Cut off pants, tennis shoes and tank tops are not acceptable dress code. The company reserves the right to suggest what appropriate attire is.
- EMPLOYEE CONFLICT RESOLUTION:
1. In the event of conflict between two or more employees (that can not be worked out between the Employee) the Safety Director will meet with the employees. The first meeting will be met on one with the Safety Director.
  2. The second meeting will be held with all parties involved. If the Safety Director is not available he/she will select the appropriate official to be the mediator.
- COMPANY DRIVERS:
- Company Drivers are paid a percentage of the load.
- OWNER OPERATORS:
- Owner Operators are paid a percentage of the load.
- TIME OFF:
1. When time off during the workweek is required the driver will notify the dispatcher a minimum of 3 day's before the date needed off.
  2. When 3 day's cannot be given, documentation will be provided to [REDACTED] to show good cause justifying the time off.
  3. If documentation cannot be provided, the driver will be placed on the bottom of the seniority list for 3-days.
- SAFETY PROGRAM:
1. [REDACTED] has a goal of an accident free company. Safety aids such as posters, auto-concussion, payroll flyers and videos are used. Videos will be available for viewing in the office or at the driver's home.
  2. When safety violations are due to blatant disregard to safety rules in place by [REDACTED] and/or the [REDACTED], the safety director has the power to terminate the driver.

**TABLE 3: Company inspection of drivers' trucks**

Drivers subject to regular truck inspections	47 of 54
Frequency of Inspections	
Unspecified	11
1 – 3 months	27
4 - 11 months	4
Yearly	5

Source: Authors' analysis of 2010 port truck driver interviews

In addition, every driver submits a variety of reports to their employer. Daily reports included logbooks, delivery logs (usually returned daily), wait time reports, transfer cards, interchange cards and manifests. Periodic reports included truck repair reports and truck inspection reports. Twenty-seven drivers – about half of our interview sample – indicated that they are required to have their truck inspected every 90 days or more frequently.

**Behavioral Control – Company trains workers:**

No driver indicated that he was put on the job without having received initial training from the trucking company. One driver explained that this training included details such as how to negotiate the terminals, get a load, speak on the phone, fill out paperwork, and use chassis. Though the level of detail and training varied, 18 drivers indicated that they had an orientation. Three drivers said that they received on-the-job training in the form of a ride-along with another driver for the company. One driver said that his training course lasted a full week. One driver said he had had one month of training, working with a friend.

**Behavioral Control – Company sets work sequence:**

All drivers indicated that they are dispatched by the company in some manner. For some of these, a daily in-person check-in with the trucking company is required before work. For others, a schedule is given out the night before work. For still others, a check-in by radio or cell phone is performed. Whatever the means, all drivers do their work in roughly the same sequence, established not by themselves, but by the trucking companies. Each day, they line up at a terminal or rail yard, or at their company’s own yard, awaiting dispatch. They pick up their first load, drive it to its destination, check in, drive back to the terminal or rail yard, check in again, wait in line, and pick up the next load. The companies tell the workers when and where to pick up a load and where to take it. One driver described his work this way, “You call-in in the morning and you have to check in throughout the day. You write down your dispatches for the day. After you drop the container, you call-in at each place. You go to different terminals each day – you go where they need you.”

**Behavioral Control – Company determines when and where the work is done:**

Through their dispatch system, trucking companies dole out loads to drivers. Loads are given out one-by-one with the company dispatcher telling the driver where to pick up a load and where to take it. While the number of loads and the time each takes to complete are variable because of conditions in traffic or at the terminals, drivers have little to no control over what loads they get or when they get them. Drivers report being disciplined or even fired for refusing loads.

**Coversheet Indicating Forms Required From Driver Applicants**

*You call-in in the morning and you have to check in throughout the day. You write down your dispatches for the day. After you drop the container you call-in at each place. You got to different terminals each day – you go where they need you.*

Further indication of the degree of company control over workload is the fact that 30 drivers indicated that they are obligated to call in if they are going to miss work. Many drivers also spend significant, regular time at company dispatch offices. About half of the drivers go to a company office every day. Many of them pick up their checks at a company office, use company parking, and have lockers there. Half of them call the company office on a daily basis.

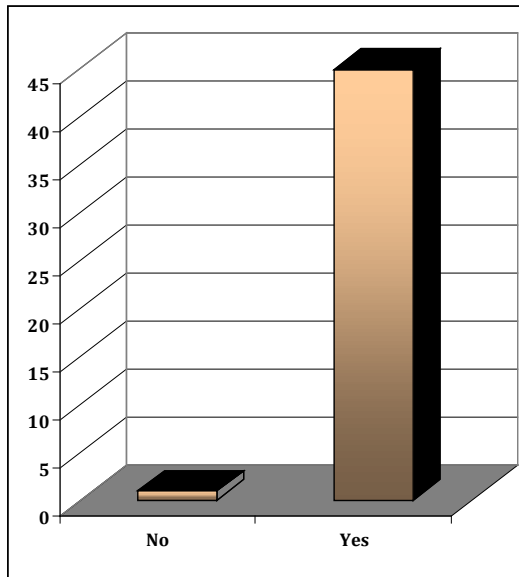
**Behavioral Control – Company furnishes supplies and equipment:** Drivers often rely on the companies to provide certain types of tools for their jobs. Unlike for traditional employees, these items are provided for a price.

Commonly provided tools and services that drivers receive from the companies include cell phones, radios, and parking. A smaller number receive road service, fuel cards, or are required to pay workers' compensation premiums through the company. Three trucking firms in New York and New Jersey and five in Los Angeles and Long Beach provide road service for their drivers, with costs deducted from drivers' paychecks. In Long Beach, this service corresponds with leased trucks.

Federal regulations prohibit companies from requiring drivers to purchase or rent any products, equipment, or services as a condition of employment.<sup>79</sup> Standard industry practice appears to ignore these regulations.

**Behavioral Control – Company requires services to be performed personally:** By contract or by the nature of the trucking business, services performed by port truck drivers are rendered by a qualified individual, carrying the appropriate insurance, having undergone the necessary training and tests, with an appropriate safety and driving record. While most of the 20 contracts we reviewed indicated that the drivers could hire employees, and while theoretically the companies could be contracting with a Lessor who owns a fleet of trucks and can guarantee that its employees met these qualifications, the reality is otherwise. We did not interview a single driver who had an employee. We did not interview a single driver who had more than one truck to let, although the surveys suggest a small number of

**CHART 2: Interview Question: Are you required to check in with your company each day?**



Source: Authors' analysis of 2010 port truck driver interviews

**Sample Charges to Interviewed Drivers**

- Insurance (15% of gross/week)
- Truck parking (\$150/month)
- Truck wash (\$10/week)
- Oil change (\$375)
- Radio (\$13/week)
- Diesel fuel (varies/gallon)
- Company fuel card (\$3.50 per use)
- Company truck inspections (\$50)
- Neon vest (\$10)
- Administration fee (\$10/week)
- Truck-board computer (\$12/year)
- Repair fees (varies/repair)
- Truck registration fees (\$550/year)

**TABLE 4: Drivers reporting equipment or services that their company provided for a charge**

Equipment or Service	Number of drivers
Workers' compensation	5
Fuel	6
Parking	19
Radio	23
Insurance	52

Source: Authors' analysis of 2010 port truck driver interviews

drivers haul loads in trucks owned by other drivers. Thirteen of the contracts prohibited assignment of the contract to another person. Drivers believe that the contracts are for them to personally perform. In any event, none of them has any larger business organization to offer beyond his personal labor.

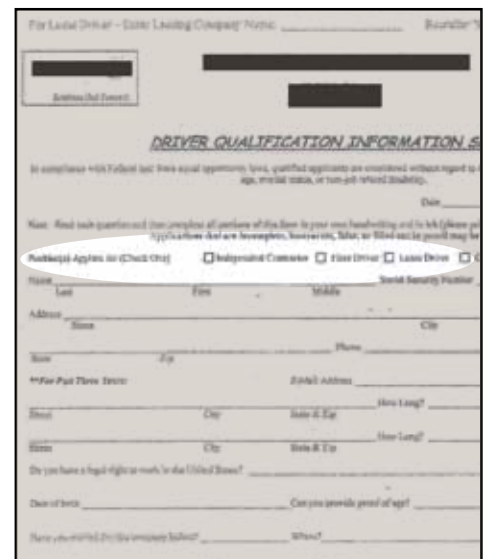
**Behavioral Control – Company evaluation and dismissal of workers:** Some drivers described a performance-monitoring system at their companies and many were evaluated through instructions and tests. Fifty-one of the 54 drivers believe that they can be fired at any time. Examples drivers gave as potential cause for firing included refusing a load, cutting in line, or receiving a traffic violation.

Some drivers reported the use of an “escrow” system, which can be viewed as a further means of behavioral control. Some companies require that their drivers deposit escrow funds when they begin work. Among our interviewed drivers the amount ranged from \$600 to \$2,500. In a variation of this practice, a handful of companies require long (16-week) pre-payment of insurance premiums. Drivers reported that some companies do not return escrow payments when drivers leave<sup>80</sup> although federal regulations closely prescribe how companies may collect, account for, and return escrow funds.<sup>81</sup>

**Behavioral Control – Summary:** Trucking companies exert a high degree of control over the work activities of the truck drivers. Port truck drivers work at times set by the business activities of the companies, under a sequence set by company dispatchers. Drivers’ behavior is monitored and evaluated. All drivers can be fired. One indication of the degree to which trucking companies control their drivers is shown in the detailed application forms of two companies. The application forms for employee drivers and independent contractors were identical.

Two facets of this examination indicated behavioral control by the workers themselves. Drivers’ contracts permit the use of “helpers.” In addition, the workers can control, to some degree, the hours that they worked. However, we found that all but one driver works full time, and a surprising number, 16, indicated they work a daily schedule with set hours.

**Coversheet for Job Application**



**TABLE 5: Frequency of Behavioral Control Factors Indicating an Employee/ Employer Relationship under IRS Test among Interviewed Drivers**

Behavioral Control Factor	Frequency
Company instructs driver about work	Always
Company trains driver	Always
Company sets work sequence	Always
Company determines when and where the work is done	Always
Company furnishes supplies and equipment	Usually
Company requires driver to perform service personally	Sometimes
Company evaluates drivers	Always
Company can fire drivers	Always

Source: Authors analysis of 2010 port truck driver interviews

**“FINANCIAL CONTROL”: THE SECOND DIMENSION OF THE IRS TEST OF EMPLOYMENT STATUS**

*“You can’t ask the company about the rate. If you ask, you in trouble.... They don’t give you jobs. That’s your punishment.”*

The second dimension of this test, “financial control,” looks at how much a business controls the economic aspects of a worker’s job. Facets of this examination include the degree of a workers’ financial investment in his or her work; the worker’s opportunity for profit and loss; how the worker is paid; whether the worker has unreimbursed expenses; and whether the worker provides services to multiple businesses. This aspect of the IRS test measures whether a worker has a “truly separate business.”

**Financial Control – Opportunity for profit or loss:** Port truck drivers have no opportunity for entrepreneurial profit in their work. As a practical matter, port truck drivers have little to no control over how much they work or how much they are paid.

Companies pay drivers by the load, a payment structure that in other industries is called a “piece rate.” For instance, several drivers in our interviews reported receiving \$40 each time they moved containers from a port terminal to a rail yard. Trucking companies unilaterally establish these load rates. One contract made this explicit, stating that the “rates are based solely on what the company may determine.” A second said that rates could be changed at any time on seven-day notice. Eighty-six percent of the drivers noted that the companies control the rates they are paid, and 80 percent said that there is no room for negotiation of rates. Three drivers volunteered that their company had unilaterally lowered rates and five contracts indicated that rates could be lowered at the sole option of the company. As a practical matter, one driver said “You can’t ask the company about the rate. If you ask, you in trouble.... They don’t give you jobs. That’s your punishment.”

*One driver half-jokingly told us that the only way that he could make more money would be to bribe the dispatcher. The dispatch system creates ample opportunities for this to happen and drivers from each of the surveyed regions reported dispatchers taking bribes. Loads vary significantly in their value to drivers. Some loads allow drivers to make more money than others because of how much the route pays or where the load must be delivered. Dispatchers control which drivers get which loads, a responsibility which enables them to take bribes in exchange for preferred loads.*

The trucking companies also control which loads each driver gets through their dispatch systems. Two-thirds (14) of the contracts we reviewed were explicit about this, stating that the companies did not undertake to provide a particular number of loads.

When asked, none of the interviewed drivers could conceive of any way that they could expand their routes or hours. We also asked each of the drivers what they could do to make more money. Most could not answer

**TABLE 6: Reported ownership of interviewed drivers’ trucks**

Ownership	Number
Driver-owned, leased back to company	42
Driver-leased	5
Company-owned	2

Source: Authors analysis of 2010 port truck driver interviews

the question. A few said they could drive faster or work more hours.<sup>82</sup> One said he could make more money if the port worked more efficiently.

**Financial Control – Investment in business:** Many port truck drivers own or lease their trucks, a fact that indicates some investment in their business. The fact of truck ownership alone is not, however, sufficient to establish a driver as a true independent contractor under the IRS test of employment status. In several cases, courts have found that merely owning a truck or other vehicle does not constitute a sufficient capital investment to be “in business.”<sup>83</sup>

While drivers had invested large sums of money in their trucks relative to their incomes, most did not have significant investment compared to other entities at the port. For those who own trucks that they lease to trucking companies, most had bought the oldest, least expensive truck they could find, with little resale value.

Forty-two of our interviewees owned their own trucks. Thirty-seven of these trucks are more than 10 years old. Of those who gave us an estimate of the worth of their truck, 25 percent own trucks worth less than \$5,000.<sup>84</sup> Another 25 percent own trucks worth between \$5,000-\$10,000, with 30 percent estimating the worth of the truck as between \$15,000-\$25,000. No driver owns a truck worth more than this unless it is either leased or purchased with a subsidized loan.

Five of the drivers we interviewed were leasing new “green” trucks. Three had leased their truck directly from the company they were driving for, and two, both from Southern California, were driving company-provided trucks. Of the 10 workers interviewed from the Ports of Los Angeles and Long Beach, only two

## New Clean Truck Leases Reinforce Company Control of Drivers

With the advent of clean truck programs at the Ports of Los Angeles and Long Beach requiring the use of expensive new trucks, complex leasing arrangements have become common among drivers working there. These leases are also sometimes found in Oakland and other ports. We have reviewed several of these new leases, which were provided by interview subjects as well as other drivers.

Under these contracts, drivers typically make weekly lease payments to the company they work for through paycheck deductions. In related but distinct arrangements, trucking companies co-sign or finance drivers’ lease-to-purchase agreements with banks and collect lease payments. In theory, drivers pay principle and interest on the truck until the conclusion of the lease period. At that point, the driver owns the truck.

However, companies have several mechanisms through which they can repossess the trucks. Drivers are particularly vulnerable to repossession under these kinds of lease arrangements when cargo volumes drop or diesel prices rise, or when companies decide to reduce the volume of loads given to a particular driver for their own reasons – circumstances that occur regularly in the industry.<sup>85</sup>

The leases also contain large balloon payments at the end of their terms. Here is how one interviewed driver explained his situation: “After 5 years, if I want to keep the truck, I’ll have to pay \$15,000 or \$16,000 for the truck.” Industry reports detailed above describe how drivers have limited take-home pay and frequently live paycheck to paycheck.<sup>86</sup> In this context, a \$15,000 lump-sum payment is simply beyond the reach of most drivers.<sup>87</sup>

During testimony before Congress, Joe Rajkovic, Director of Regulatory Affairs for the Owner-Operator Independent Driver Association noted that the federal government has not enforced regulations meant to protect drivers from such leasing schemes. He then described the new clean truck agreements as part of an “explosion in the sham lease purchase agreements” and a key failure in the drayage market: “We do agree this is a rent-to-own scheme, and it is sharecropping or involuntary servitude, and it really makes the payday loan industry look ethical in comparison.”<sup>88</sup>

In addition to the basic fairness issues, these leases have important ramifications for drivers’ employment classification. In particular, trucking companies exercise control of drivers’ most essential tool, their truck. That control gives them leverage over drivers’ behavior in all other aspects of their work.



owned their own truck. For those who are fortunate enough to drive new emissions-compliant trucks, they are so undercapitalized that they depend on the companies and public funds to purchase the trucks and keep them in business.

If, at the end of any given week, Lessee has failed to deliver at least fifteen (15) containers that week, Lessor may give notice to Lessee of the insufficient deliveries and Lessee must make up the difference on the following week. If the difference is not made up on the following week... this Lease will automatically terminate on the Sunday of the second week, without further notice, and Lessee shall immediately surrender the Leased Equipment to Lessor... Los Angeles Company Vehicle Lease Agreement

**Financial Control – Reimbursement of expenses:** No driver receives reimbursement for business or travel expenses, generally an indicator of employee status. However, in this context, lack of reimbursement serves to reinforce that drivers are not in independent businesses that sell to a number of customers, but instead subject to financial control of the company for which they drive.

Insurance coverage in the industry provides a good example of this. Every interviewed driver but one depends on the company to provide insurance, the costs of which are deducted from drivers' paychecks. Some also deduct for liability insurance for the drivers and their bobtails,<sup>89</sup> for workers' compensation, and for occupational accident insurance.

Although federal regulations and some contracts prohibit required purchases, some drivers are under the impression that they are required to purchase insurance from the company. Others said that as a practical matter, insurance is only available through the company. One driver stated that unless a driver has his own Department of Transportation authority and business license, he cannot purchase insurance and must obtain it through the company. Another said, "You cannot have your own insurance to work for my company. It's part of the deal... You work for us. You need insurance. You use our insurance."

*"You cannot have your own insurance to work for my company. It's part of the deal... You work for us. You need insurance. You use our insurance."*

Drivers' insurance cards routinely list the company as the insured party. Several drivers expressed confusion about what exactly the company-provided insurance covers and how a claim was to be made. Some drivers volunteered that they do not even know the name or contact information for the company that covers them. Some noted that claims always had to be made through the company, even though the worker pays the premiums. And one driver said that when he filed a claim, the insurance company didn't know who he was; he had to go get company officials to talk with the insurer.

## Danger Zone

Fines: Federal and state laws tightly regulate certain truck operations. Drivers can, for instance, only operate their trucks for limited numbers of hours before taking a rest.<sup>90</sup> Trucks and their hauled goods generally cannot exceed 80,000 lbs.<sup>91</sup> Port trucking companies sometimes require that their drivers violate these laws, forcing them to work longer than legal limits and haul overweight loads.

A Southern California driver told us the following story to explain why drivers take over-hour and overweight loads: "This guy [at my company] was tired and he wanted to go home and the dispatcher told him he had a load that needed to be turned into the harbor. He lives in Fontana, which is far... he told him, I've been working too many hours and I want to go home. So he went home. He was fired the next day because they said he denied the work and he doesn't want to work. So that was it."

**Financial Control – Payments in regular amounts at set intervals:** All drivers are paid at set intervals. For 47 of the 54 drivers, pay comes on a weekly basis, usually on Fridays. Thirteen of the 20 contracts that we examined included clauses that payment would be made 15 days after an invoice was received, a method of payment usually associated with contract work. However, in nine of these cases, drivers told us actual payment is by the week.

The payment amounts were variable and depended on the number and value of loads a driver got in a given week.

**Financial Control – Services offered on the market:** No driver offered services on the market or to the general public.

**TABLE 7: Indicia of driver ability to offer services independently of company**

Indicia	Number of Drivers
<b>Signage on drivers truck</b>	
Company sign only	36
Driver sign	3
<b>Driver has DOT operating authority</b>	
No	28
Yes, company required it	9
Yes	15
<b>Driver has own business license</b>	
No	25
Yes, company required it	12
Yes	10

Source: Authors analysis of 2010 port truck driver interviews

About half of the drivers possessed business licenses and their own U.S. Department of Transportation number. But of these, over half (nine of 15 who had a DOT number, 12 of 22 who had a license) indicated they only did so because the trucking company required them to. Only three had their own placard on their truck. None have their own business card. Only one of the 54 drivers had incorporated his business. He explained that he did so in order to have the corporation lease his truck.

Of the drivers who answered our question about how they represent themselves at the ports, all identified themselves by the company for which they drive. Each driver's truck has the company's DOT number and the company's sign on its door. Each fills out paperwork in the name of the company. A few have business cards in the name of the company. Nearly all have insurance in the name of the company. They do not operate a business separate from the trucking companies for which they drive.

**Financial Control - Summary:** Port trucking companies exert a degree of financial control over their contractors that is inconsistent with a view of the drivers as independent business people. Like other wage earners, drivers cannot profit from their work in any way but by working harder and longer. By contract or practicalities, they are restricted to one employer at a time, and do not offer services to the general public. They receive a regular paycheck (if in irregular amounts).

Two factors indicating independent contract status were present. The companies do not reimburse expenses for the drivers. Nor do they guarantee a particular income. These factors, while formally used to indicate independent contractor status, serve in this context to pass on financial instability and costs to the drivers, further binding them to the company.

**TABLE 8: Frequency of Financial Control Factors Indicating an Employee/Employer Relationship under IRS Test**

Financial Control Factors	Frequency
Driver has no opportunity for profit or loss	Always
Driver has no significant investment	Usually
Driver is reimbursed for expenses	Never
Driver receives a regular wage amount for a regular period of time	Always regular periods, variable amounts
Driver does not offer services on the market	Always

Source: Authors analysis of 2010 port truck driver interviews

### ***“TYPE OF RELATIONSHIP”: THE THIRD DIMENSION OF THE IRS TEST OF EMPLOYMENT STATUS***

The third and final dimension of the IRS test of employment status, “type of relationship,” assesses how closely the worker is integrated into the business and the permanency of the relationship between the worker and the business. Facets of this examination include whether the performed work is central to the business operation; whether the worker has an ongoing or exclusive relationship with the business; the presence of a written contract and its relationship to how the parties work together; and whether the business provides benefits.

***Type of Relationship - Services are a core activity of the company:*** The IRS indicates that if a worker provides services that are a core part of the company’s regular business activity, it is more likely that the worker should be considered an employee.<sup>92</sup> For example, a line chef working in a restaurant is more likely to be an employee than a tax preparer providing services to the same restaurant.

Port trucking companies have no other job but to convey cargo. The job that port drivers perform is not just integral to the companies’ business – it *is* their business. We found notable a clause in one of the trucking company’s contracts, which described the purpose for the contract: “WHEREAS, Carrier owns no vehicle(s), and WHEREAS, Carrier is engaged in the business of interstate transportation of property as a common carrier...”

***Type of Relationship - Ongoing relationship with the company:*** Most drivers we interviewed had a continuing relationship with the company for which they haul. Of our 54 interviewees, 34 had worked for the same company for over three years, 12 had worked for one to three years, and only seven had worked for their company less than a year. Over half (11) of the contracts had no end date or renewed automatically. Of the 47 interviewees who answered a question about contract length, all indicated that their contract either had no end date, or it was automatically renewed upon completion.

**TABLE 9: Length of time at current company**

Length of Time	Number of Drivers
Less than one year	7
One to three years	12
More than three years	34

Source: Authors analysis of 2010 port truck driver interviews

As a matter of regulation, leases must provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease, though the exclusive possession clause may be applied only to the time the equipment is operated by, or for, the authorized carrier lessee. Eleven of the contracts we reviewed, and 13 drivers, said that the carrier has exclusive possession for the duration of the contract.

Thirteen contracts were not assignable, meaning that the driver could not pass the contract on to another to perform. These contractual provisions operate to prevent workers from freeing either themselves or their trucks to do work for any other company. Also, 45 drivers said they were not allowed to work for any other company as a matter of practice although some had contracts which allowed outside work with company consent. Only four drivers did any work for another company – one drove a taxi during off hours, and the other three did occasional hauling work.

*“I work only for them. My insurance is for them. I am working for them. They hired me, I cannot drive. I don’t have the paperwork, but the agreement. I didn’t read the agreement very seriously, but I know I work for them.”*

In addition, drivers noted that they have neither the time nor the required DOT number or insurance to work for more than one company. The overall sentiment was this one, expressed by one of the Seattle interviewees: “I work only for them. My insurance is for them. I am working for them. They hired me, I cannot drive. I don’t have the paperwork, but the agreement. I didn’t read the agreement very seriously, but I know I work for them.”

**TABLE 10: Limits on drivers’ ability to work for another company**

Limits on working for another company	Number of drivers
Contract language explicitly prohibits	13
Practical limitations prohibit work	32
Driver has a second job	4

Source: Authors analysis of 2010 port truck driver interviews

**Type of Relationship - Written contracts:** Every contract that we reviewed stated that the parties were establishing a contractual, and not employer-employee, relationship. Most of these documents – all drafted by the trucking companies without input from the drivers – have lengthy recitals to that effect. In one case, an addendum gave a long list of “observations” to the driver in question carefully stating that these were “not rules.” Though it was a contract between a trucking company and an individual driver, it carefully referred to the driver as a “company,” as in, “your company desires to do business with our company.”

Nonetheless, the fact that a business calls a worker an “independent contractor” or that the worker signs an independent contractor agreement does not make it legally true. Case law is nearly unanimous that the parties’ label is not dispositive and will be ignored if their actual conduct establishes a different relationship.<sup>93</sup> So too, the IRS advises that it need not follow a contract stating that the worker is an independent contractor: “How the parties work together determines whether the worker is an employee or an independent contractor.”<sup>94</sup>

**Type of Relationship - Employee benefits:** None of the drivers we interviewed were provided with any traditional workplace benefits, such as pensions, health insurance, or vacation, or holiday time.

We believe that this factor should be given little weight, since few employers in low-wage industries provide such benefits. Perhaps more tellingly, the lack of benefits passes business risk to the individual drivers and exacerbates their dependence on the trucking companies.

**Type of Relationship - Summary:** Port truck drivers’ work is fully integrated into that of the trucking companies. In fact, it is almost always the sole work of the trucking companies. The drivers we interviewed generally had longstanding relationships with one company. Their work was always and only the work of this company.

With respect to this dimension, two factors are never present for port drayage drivers. First, like many industries today, trucking companies do not provide employee benefits to the drivers. Second, companies always provided workers with contracts that specified that they are independent contractors. Since the IRS and many courts caution that the nature of the relationship is more important than the parties’ characterization of it, we do not view the contracts as substantial evidence of the parties’ relationship.

**TABLE 11: Frequency of Relationship Factors Indicating an Employee/Employer Relationship under IRS Test**

Relationship Factors	Frequency
Services are a core activity of the business	Always
Continuing relationship with employer, works for one employer at a time	Usually
Employer provides benefits	Never
Contract language and its relationship to how the parties work together	Variable

Source: Authors analysis of 2010 port truck driver interviews

**CONCLUSION: THE TYPICAL PORT TRUCK DRIVER IS A MISCLASSIFIED EMPLOYEE**

In this analysis of driver interviews and employment documents, we have found significant evidence of the stringent behavioral controls, financial dependence, and lasting identification that characterize employer-employee relationships. Specifically, the interviews and documents reveal that:

Port drivers are subject to strict behavioral controls. They are subject to truck inspections, drug tests, review of safety records, and monitoring of the speed at which they drive. Their days follow a set path of report, inspect, line up, dispatch, load, drive, unload, check in, and then line up again. The drivers work at times set by the business activities of the companies, under a sequence set by company dispatchers. Drivers’ behavior is monitored and evaluated and all drivers can be fired.

Port drivers are financially dependent on the companies they work for. Like other piece rate workers, their only opportunity for profit is to work harder and longer. Drivers work only for one trucking company at a time, do not offer services to the general public, and are entirely dependent on that company for work. While many drive trucks they own or lease – and all must pay their company for business expenses like fuel and insurance rather than receive reimbursements – each of these circumstances passes business risk from the companies to the individual drivers, and so exacerbates their dependence on the trucking companies.

Port drivers are closely identified with the companies they haul for. Drivers work for years for the same employer, represent themselves to others as being from the company, use company placards and permits, and rarely offer their work independently of the company. Their work is fully integrated into that of the trucking companies and is almost always the sole work of the trucking companies.

Viewed in light of the strict IRS test of employment status, these findings strongly suggest that the majority of the drivers we studied were misclassified. The broad scope of industry-wide misclassification is even clearer when less stringent standards of employment status such as those found in federal minimum wage laws and state unemployment insurance statutes are taken into account. While there will be some exceptions within the industry, we conclude that the typical independent contractor port truck driver we interviewed is a misclassified employee.

# Recommendations

Misclassification drains public coffers through uncollected payroll, Social Security, workers' compensation, and other taxes; puts law-abiding businesses at a competitive disadvantage; and leaves workers vulnerable without basic protections. In the port trucking industry, further consequences arise because low-wage independent contractors bear the industry's capital expenses, and do so by purchasing and maintaining the oldest diesel trucks on the road. The environmental and public health crises surrounding the nation's ports are a direct result of industry's adoption of independent contractor misclassification as a business model.

Misclassification in the port trucking industry must be remedied.

Private and public litigation has often been a powerful tool to expose and correct misclassification of workers as independent contractors. But individual efforts to enforce labor, safety, and tax laws in the port trucking industry only provide limited relief.

This is the case for two reasons: First, port trucking is dominated by numerous companies that compete fiercely with one another. Their lack of assets makes it simple to form new trucking companies and fold existing ones, both of which happen frequently. In this environment, penalties stemming from agency enforcement actions or private litigation which are substantial enough to encourage a particular company to stop misclassifying its drivers may instead result in the company closing and reopening under a new name. Second, as has been the case in other contexts, companies that are found guilty of misclassification simply change their contracts in some small way and then claim that workers are thereby properly classified as independent contractors, exposing workers to endless litigation. Moreover, like many low-wage workers, port drivers cannot often afford to hire an attorney to pursue wage-and-hour claims or other causes of action that stem from misclassification. Few private attorneys are willing to work on contingency since trucking firms have few assets that would allow them to recoup their expenses.

Recently introduced legislation would strengthen some federal agencies' ability to enforce proper classification of workers. The Employee Misclassification Prevention Act (H.R. 5107, S. 3254) would require companies to keep accurate records of their employees and contractors, notify all their workers of their employment rights, and impose a penalty on companies for misclassifying workers. The Taxpayer Responsibility, Accountability, and Consistency Act of 2009 (H.R.3408, S.2882) would amend what is known as the "safe harbor" rule – a rule that effectively allows a company relief from misclassification provisions if the company can show that its violation is a standard industry practice.

These approaches are laudable and well worth pursuing. They can provide real relief for individual drivers and address problems of misclassification that go far beyond the port trucking industry. However, to truly solve the fundamental problems we have identified, a unified approach that combines sound industry-wide policy with strategic enforcement is necessary.

## **RECOMMENDATION 1: Policymakers should adopt uniform rules requiring port trucking companies to employ the drivers and own the trucks that they operate.**

Several economic studies have concluded that port trucking's independent-contracting business model, in which trucking companies shift capital costs and business risk onto their workforce, must be abandoned in order to address the industry's environmental, efficiency, and workforce problems.<sup>95</sup> After reviewing literature on the industry and conducting our independent research, we have

reached the same conclusion. In particular, we have found that driver misclassification is an integral part of the dominant business model and conclude that it will only be comprehensively addressed with a fundamental restructuring of the industry.

The most effective way to do this is to establish uniform rules that require port trucking companies to employ their drivers and own the trucks the drivers operate. Economic studies conducted on behalf of port authorities and local governments, community and environmental organizations have similarly concluded that adopting uniform requirements of vehicle ownership and driver employment is the most effective way to establish a competitive harbor trucking market that does not unsustainably push the cost of pollution reduction onto the public or individual workers.<sup>96</sup> Such requirements would directly address misclassification with a single stroke and establish the conditions for a revived, cleaner industry.

**RECOMMENDATION 2: Congress should pass the Clean Ports Act of 2010 to allow port authorities to tackle misclassification as it pertains to environmental impacts, safety, or efficiency of port trucking operations.**

Port authorities are in the best position to implement and enforce the uniform standards recommended above. Since port trucking firms must access public ports – passing through tightly controlled gates to conduct their work – ports sit at an ideal place to apply operational, safety, and environmental standards to these firms.

In 2008, the Port of Los Angeles adopted a program to put such standards into operation. Since it began, the Clean Truck Program has reduced average drayage truck emissions by approximately 80 percent; banned more than 10,000 older model, heavier polluting trucks; provided nearly \$70 million in port subsidies; and leveraged \$600 million in private investment in clean diesel and natural gas fuel trucks.<sup>97</sup> The result is that 94 percent of port cargo gate moves are being made by clean trucks (as of September 2010).<sup>98</sup> And Southern California is the preeminent market for alternative fuel truck technology.

However, an injunction obtained by the American Trucking Associations has blocked key portions of this program for over two years. Other ports have significantly scaled back or delayed their own clean truck programs due to the threat of similar litigation. While the district court recently ruled that the Los Angeles program was not preempted, the industry group has filed an appeal and an injunction against the program remains in place at the time of this writing, jeopardizing its achievements.<sup>99</sup>

The American Trucking Associations' challenge to the Port of Los Angeles program relied on federal preemption standards that it claims prohibit local authorities from establishing any rules which could affect the "price, route, or service" of a trucking firm.<sup>100</sup> Reflecting on this position, a friend of the court brief filed by the U.S. Department of Transportation under the Bush Administration took the position that ports do not currently have the authority to address environmental, safety, or congestion concerns related to port trucking.<sup>101</sup>

The Clean Ports Act of 2010 (H.R. 5967) would solve this problem. The Act clarifies to federal preemption law, specifically allowing ports to establish rules for port trucks that would improve environmental pollution, traffic congestion, highway safety, or operational efficiency. As we have shown, employment status and misclassification specifically are intimately related to improvements in all these areas. The Clean Ports Act would make these necessary improvements possible, in conjunction with targeted public and private enforcement actions.



**RECOMMENDATION 3: The U.S. Department of Labor, the IRS, and state enforcement agencies should take substantial, coordinated action to end the practice of misclassification in the port trucking industry.**

Independent contractor misclassification is a key issue in areas under the enforcement authority of the U.S. Department of Labor and multiple state agencies. The Department of Labor has itself identified correcting independent contractor abuses as a priority. It has the authority to address violations of federal minimum wage, family leave, unemployment insurance, OSHA and ERISA laws. It can hold multiple employers accountable for lax labor standards; it can seize goods produced in substandard or illegal working conditions; and it can require trucking companies to end the practice of misclassification through injunctive relief in cases of minimum wage, or other, violations. State agencies charged with enforcing tax, labor and safety laws have similar authority to correct misclassification as it relates to their specific enforcement powers.

The Department of Labor and state agencies have been important partners in addressing independent contractor misclassification. Concerted enforcement in the port trucking industry would help address violations that directly harm large numbers of port truck drivers and significantly contribute to ensuring the industry is free of now-rampant misclassification.

**RECOMMENDATION 4: Federal, state and local agencies should make incentive funds for diesel emissions reduction and other port activities contingent on adoption of requirements that end driver misclassification.**

Several federal agencies – including the Environmental Protection Agency, the Department of Transportation and the Department of Energy – provide funding to reduce diesel emissions from port trucks or to otherwise improve port operations. At the state level, the California Air Resources Board and Washington State’s Puget Sound Clean Air Agency are among those that do the same.

The independent contractor business model jeopardizes the success of all these programs. The Sierra Club, for example, issued a joint environmental and labor study that found that individual port truck drivers are financially unable to properly maintain new, clean trucks that they have leased through public subsidy programs.<sup>102</sup> The drivers still earn so little that they are effectively forced to choose between food on the table and truck maintenance. Over time, that lack of maintenance will inevitably compromise the diesel emissions reductions gains made by putting these cleaner trucks into service.

The large ongoing public subsidies that have been required to upgrade a fleet owned by independent contractors are likewise unsustainable. But such subsidies will be necessary until the costs of operation, including particularly the costs of truck ownership and maintenance, are internalized in the industry. The only way to do that is to require the trucking companies to own the trucks.

Federal and state programs can transform port trucking into a cleaner, family-wage industry by providing emissions reductions funding and other operations grants directly to port authorities contingent on the ports adopting effective clean truck programs. Those programs would include: 1) bans on older truck models that require port fleets to meet current EPA emissions standards; 2) establishment of direct contractual relationships with trucking companies that requires the companies to a) hold title to all trucks they operate; b) pay for truck maintenance; and c) directly employ their drivers. An interagency taskforce would be the most effective way to enforce these provisions.

# Endnotes

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compared to the size of the ports in which the other surveys were conducted; and 6) Averaged the data across the surveys with the assigned weights.

Because we are aggregating results from ten separate surveys, each with their own sampling strategies, we cannot be sure that the findings described below are statistically representative of all drayage drivers nationally. Strictly speaking, we are describing the experiences of the 2,183 workers who responded to the surveys.

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