What do the Two Ninth Circuit Decisions, *Ruiz* v. *Affinity Logistics I* and *Ruiz* v. *Affinity Logistics II*, Mean to the Logistics and Delivery Industry in California?

By Jim Bourbeau

Two recent decisions from the United States Court of Appeals for the Ninth Circuit, *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318 (9th Cir. 2012).) and *Ruiz v. Affinity Logistics Corp.*, 2014 U.S. App. LEXIS 11123 (9th Cir. June 16, 2014) (Hereinafter referred to as "*Ruiz I*" and "*Ruiz II*," respectively) have caused some stir in the logistics and delivery industry regarding the use of independent contractor drivers. In fact, *Ruiz II*, was already cited by the California Employment Development Department (EDD) in its appeal of a decision by an Administrative Law Judge of the California Unemployment Insurance Appeals Board, in which one of our clients prevailed in their use of independent contractors.

The genesis of the Ninth Circuit decisions, *Ruiz I* and *Ruiz II*, was a decision by the United States District Court for the Southern District of California dated March 22, 2010. Plaintiff, Fernando Ruiz, on behalf of himself and all others similarly situated, alleged that Affinity Logistics Corp. ("Affinity") misclassified the drivers it hired to perform home delivery services as independent contractors, contending that they should have been classified as employees. Because Affinity is a Georgia-based company, the Ninth Circuit applied a Georgia law stating a presumption for independent contractor status, if the contract designates the relationship between the parties to be one of principle and independent contractor. Applying that presumption, the District Court found Fernando Ruiz, as well as the rest of the plaintiff class, to be independent contractors. However, Ruiz resided in California and worked for Affinity in California. Ruiz appealed the District Court decision to the Ninth Circuit. There, the Ninth Circuit, in *Ruiz I*, on February 8, 2012, vacated and remanded the District Court decision finding Ruiz to be an independent contractor, ruling that under California's "choice of law" framework, California law should have been followed instead of the Georgia law presumption. On remand, the District Court, again, found the drivers to be independent contractors. Ruiz appealed again, and the result was this most recent decision, *Ruiz II*, on June 16, 2014.

So, what, if anything, do *Ruiz I* and *Ruiz II* mean to the logistics and delivery industry?

a. *Ruiz I*

First and foremost, *Ruiz I* would appear to substantially inhibit the viability of "choice of law" provisions of independent contractor contracts, if the state law in named in the choice of law provision at issue "directly conflicts with a fundamental California policy that seeks to protect its workers," and "California also has a materially greater interest than [the other state] in the outcome …"[1] A choice of law provision in a contract seeks to identify which state's law will control the interpretation and effect of that contract. Typically, such a provision will state something like the following: "All provisions of this agreement will be interpreted under and controlled by the laws of the State of California." The parties to a contract will choose the state which grants the most benefit or protection to the contractual relationship. Other factors considered are: (1) the place of contracting; (2) the place of negotiation of the contract; (3) the place of performance; (4) the location of the subject matter of the contract; and, (5) the domicile,

[1] *Ruiz v. Affinity Logistics*, 667 F.3d at 1324.

residence, nationality, place of incorporation, and place of business of the parties. Often, if the home-base of a logistics and delivery company is in a contractor-friendly state, that company will include a choice of law provision seeking to take advantage of less stringent controls over the use of contract drivers. Such was the case with Affinity. Under Georgia law, if a contract designates the relationship between the parties to be one of principal and independent contractor, this designation is presumed to be true "unless other evidence is introduced to show that the employer exercised control as to the time, manner and method of performing the work sufficient to establish an employer-employee relationship."[2]

The Ninth Circuit, in *Ruiz I* , ruled that California law controlled the contract, relying upon the seminal case, *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*,[3] as the basis for its decision, stating that the California Supreme Court recognized that *Borello*'s test "must be applied with *deference to the purposes of the protective legislation*" that the worker seeks to enforce, and that the employee-independent contractor issue cannot be decided absent consideration of the remedial statutory purpose of the California Worker's Compensation Act.[4] [5] This "policy" of deference for protective legislation as elucidated in *Borello* would likely apply a court's review of EDD's determinations of employee status for tax purposes as well, considering that the California Court of Appeals has held that *Borello* also applied to state employment taxes.[6]

The take-away is that choice of law provisions which affect California workers will be heavily scrutinized, if not outright negated, if California is found to have a materially greater interest in a contract dispute, and the other state's law is in conflict with California's policy to protect its workers. The above-stated threshold is not difficult to meet. A court will likely find a material interest if the work is taking place in California and the workers reside here, and will find it easy to prove that at a more contractor-friendly state law is in "conflict" with California law if it does not offer sufficient "worker protections." The Ninth Circuit made it clear that the status of independent contractors in California would be analyzed under California law. California courts will likely avoid any application of law that would contravene the fundamental California public policy in favor of ensuring worker protections. It is certain that the California governmental agencies which deal in worker classification issues will rely on *Ruiz I* wherever they can, if it means finding misclassification of workers.

b. *Ruiz II*

Ruiz II turns out to be "business as usual," in terms of the industry. However, that in and of itself can be quite instructive to the industry regarding the use of independent contractor drivers. If anything, *Ruiz II* simply reinforces that *Borello* is here to stay, and will be the guiding case in California. Underlying all the language in *Borello* regarding "control," "pervasive control," and "secondary factors," *Borello* is about the overarching California policy to "protect its workers." The take away here is that California is probably the most difficult state in which to utilize contract labor, and will continue to favor employment status when it comes to worker

[2] *Id.* at 1323, citing *Fortune v. Principal Fin. Grp., Inc.*, 219 Ga. App. 367, 465 S.E.2d 698, 700 (Ga. Ct. App. 1995).
[3] *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 [256 Cal.Rptr. 543, 769 P.2d 399].
[4] Cal. Lab. Code §§ 3600, 3700; Cal. Const. art. XIV, § 4.
[5] *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* , 48 Cal.3d at 355) (Emphasis added.).
[6] *Air Couriers Internat. v. Employment Development Dept.* (2007) 150 Cal.App.4th 923 [59 Cal.Rptr.3d 37].

classification issues. No surprises here, at all. However, a quick look at how the court in *Ruiz II* analyzed Affinity's treatment of the drivers under *Borello* is instructive as a primer on prohibited controls over independent contractors.

First of all, the key facts in *Ruiz II* are as follows:

- Fernando Ruiz previously worked as a driver for Penske Logistics Corporation, a furniture delivery company that had a contract with Sears. His job status was that of an "employee." When Sears terminated its contract with Penske in November 2003, Sears advised the drivers that Affinity Logistics Corporation, would take over Penske's contract.
- Affinity told Ruiz and the other drivers that if they wished to be hired by Affinity, they had to become independent contractors.
- Affinity told the drivers they needed a fictitious business name, a business license, and a commercial checking account. Affinity then advised the drivers on how to complete the necessary forms. Affinity went so far as to complete the forms for Ruiz, leaving only the spaces for his signature blank.
- Each driver was required to sign an Independent Truckman's Agreement ("ITA") and Equipment Lease Agreement ("ELA"). The ITA and the ELA included clauses stating that the parties were entering into an independent contractor relationship.
- The ITA was a one-year contract that automatically renewed from year-to-year. The contract could be terminated at any time by either party without cause upon giving the other party sixty-days' notice, or with cause upon breach of contract.
- A "Procedures Manual," prepared by Affinity, outlined the procedures drivers were required to follow regarding loading trucks, delivering goods, installing goods, interacting with customers, reporting to Affinity after deliveries, and addressing returns and refused merchandise, damaged goods, and checking in with Affinity after deliveries. The Procedures Manual included mandatory language such as "must," "will report," "must contact," "required," "not acceptable," "100 percent adherence," and "exactly as specified."
- Affinity did not require that drivers obtain special licenses. Nor did Affinity require that drivers have any specific work experience or training. Rather, drivers simply had to have a driver's license, sign the ITA and ELA, and pass a drug test and physical exam.
- Drivers had a fairly regular rate of pay since they worked five to seven shifts per week, and every route had approximately eight deliveries. Drivers had to request time off three to four weeks in advance, and Affinity had discretion to deny those requests. Affinity denied requests for time off when it decided the delivery schedule was too busy.
- Affinity encouraged, if not required, drivers to lease trucks from Affinity.
- Affinity handled upkeep of trucks and arranged for loaner trucks when trucks broke down, deducting these costs from drivers' pay.
- Affinity required drivers to stock their trucks with certain supplies, as outlined in the Procedures Manual.
- Affinity required that drivers use a specific type of mobile telephone. Affinity supplied the phones and deducted monthly costs for the phones from drivers' paychecks. Affinity also required each driver to have a "helper" or secondary driver

on the truck with them. Helpers had to submit to a background check and be approved by Affinity.

- While working for Affinity, at 6:00 or 6:30 a.m. everyday, drivers were required to report to the San Diego Market Delivery Operation ("MDO") warehouse where Affinity's offices were located.
- Affinity required drivers and helpers to attend a fifteen to thirty minute "stand-up" meeting at 7:15 a.m. The stand-up meeting was led by an Affinity supervisor. The Affinity supervisor would review the drivers' customer satisfaction survey scores from previous deliveries, discuss problems encountered in recent deliveries, and discuss any other issues Affinity thought would be beneficial to help drivers.
- Drivers were required to wear uniforms and abide by certain grooming requirements, as set forth in the "Delivery Team Apparel and Appearance" section of the Procedures Manual.
- Drivers had to keep their shoes "neat and clean." Affinity provided the uniforms, but charged drivers for them by deducting the costs from drivers' paychecks. Affinity also required that tattoos and piercings be covered or removed and that facial hair be "neatly groomed and properly shaved surrounding the beard." Affinity provided shaving kits to drivers with facial hair that did not meet Affinity's grooming requirements.
- After each morning stand-up meeting, Affinity required that its supervisor staff check the drivers' trucks to ensure that drivers had the required tools, that deliveries were loaded with the necessary padding and properly secured, and that no appliances were left on the dock. The supervisors also checked that the drivers were in their required uniform and properly groomed.
- Drivers made deliveries according to the route manifests Affinity provided to them daily. Drivers could not control the order of deliveries; they were instructed in the Procedures Manual to maintain "100 percent adherence" to the manifests created by Affinity. The assignment of routes was based on scores drivers received from Sears's customer surveys known as the Quality Measurement/Incentive Program. Drivers with higher scores selected their routes first, while drivers with lower scores were given the least desirable routes.
- Affinity required drivers to call an automated Sears customer service number after each delivery; this requirement is listed in the Procedures Manual as "a very important requirement." During these calls, drivers would report the stop number that was just completed, the arrival time, and departure time. Throughout the day, drivers also had to contact an Affinity supervisor after every two or three deliveries. When a driver did not call, Affinity would call the driver to find out the driver's location. If a driver was running late, Affinity would call Sears to inform them that Affinity had "a driver running late." Affinity supervisors also monitored the progress of each driver throughout the day on a "route monitoring screen," and would contact a driver if they noticed he or she was running late or off-course.
- Affinity also engaged in "follow-alongs," whereby an Affinity supervisor followed a driver for a few stops to ensure that the driver was wearing the uniform and using proper delivery techniques. Sometimes the Affinity supervisor would talk to a customer after a delivery to evaluate the driver's performance. Occasionally, for heavier loads, the Affinity supervisor would also assist the driver in a delivery.

- After drivers completed their daily delivery routes, they returned to the warehouse to park their trucks. At the end of the day, drivers were required to fill out a form (also known as a "cover sheet"), and return the route manifest to Affinity.
- Drivers left the trucks and the keys for the trucks at the MDO warehouse. Affinity admitted that it "strongly discouraged" drivers from taking the trucks home or otherwise removing trucks from the warehouse lot overnight or on weekends. Moreover, Affinity sometimes used the drivers' trucks for other jobs. Drivers were told to leave their keys at the MDO "just in case they need that truck to run another load with somebody else." Affinity did not compensate drivers for the use of their trucks for these other deliveries.

If one was to teach a course on "How Not to Utilize Independent Contractors in California," one could just use the above list of facts from *Ruiz II* as the text. Affinity controlled nearly every aspect of their drivers' activities. In California, the "primary factor" in finding employment status is the "right to control the manner and means" of the work. The court in *Ruiz II* could have stopped right here, finding that the "undisputed facts indicate that Affinity had the right to control the details of the drivers' work, and that Affinity retained all necessary control over the drivers' work."[7] No wonder they tried to get the case heard under Georgia law; it was the only way they were reasonably going to prevail in defending the Ruiz lawsuit. Given these facts, the Ninth Circuit did not even need to apply what are called the "secondary factors" of employment classification, as there was abundantly sufficient control present in the contractor relationship. However, in following California law, the Ninth Circuit was compelled to analyze the "secondary factors," in relation to the above facts, as well. The Ninth Circuit findings in that regard are as follows:

1. Distinct occupation or business: Affinity required drivers to create these businesses as a condition of employment. Affinity even helped drivers set up the businesses by filling out necessary paperwork. Moreover, in the real world, these businesses were in name only.
2. Work under principal's direction or by specialist without supervision: Affinity did not require special driving licenses or even any work experience; rather a driver simply had to have a driver's license, sign a work agreement, and pass a physical examination and drug test. These facts parallel *Estrada v. FedEx Ground Package System, Inc.*[8], where the court found that FedEx drivers "need no experience to get the job in the first place and [the] only required skill is the ability to drive." Moreover, as explained above, Affinity closely supervised the drivers' work through various methods.
3. Skill required: As described above, the drivers' work did not require substantial skill.
4. Provision of instrumentalities, tools, and place of work: The delivery truck was the main tool that Plaintiffs used to conduct their business; and, this main tool was provided by Affinity.
5. Method of payment: As in *Estrada*, the drivers were essentially paid by a regular rate of pay.[9]

[7] *Ruiz v. Affinity Logistics*, 2014 U.S. App. LEXIS 11123 at 18-19.
[8] *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1 [64 Cal.Rptr.3d 327].
[9] See also *Estrada* finding that the fact that drivers "are paid weekly, not by the job" weighs in favor of employee status. *Id.* at 335.

6. Parties' belief: Ruiz and Affinity understood their relationship to be an independent contractor arrangement. As the California Court of Appeal has noted, however, "the parties' label is not dispositive and will be ignored if their actual conduct establishes a different relationship."[10]
7. Right to terminate at will: The parties' mutual termination provision was consistent with either an employer-employee or independent contractor relationship.
8. Work part of principal's regular business: Affinity's drivers perform those very home delivery services that are the core of Affinity's regular business. Without drivers, Affinity could not be in the home delivery business.
9. Length of time for performance of services: There was no contemplated end to the service relationship when Affinity and the drivers signed their contracts, and drivers often stayed with Affinity for years.

Because Affinity had the right to control the details of the drivers' work, and because the totality of the secondary factors weigh in favor of the drivers, under California's *Borello* test, the Ninth Circuit found the drivers to be employees of Affinity rather than independent contractors.[11] What can California logistic and delivery businesses derive from *Ruiz II*?

First, while the use of independent contractor labor is not prohibited under California law, it certainly is restricted and should, therefore, be utilized with care. Further, if a business chooses to utilize contractor labor, I insist that it is a good idea to do so in conjunction with employee labor, making certain you carefully draw the distinctions between your treatment of the two classes. With the above in mind, the *Ruiz* decision can help guide a business in both its practice of the use of contractors, and whether or not such practice is even feasible in its operation. Let us approach the facts and decision one issue at a time:

- Affinity required the drivers to convert from employee to contractor status.

Chalk this up to some unfortunate lessons-learned by some logistics and delivery businesses over the past twenty or so years. Affinity's management told Ruiz and the other drivers that if they wished to be hired by Affinity, they had to become independent contractors. I have seen this done repeatedly by businesses seeking to convert employees to independent contractors, and it always is used by the IRS, the EDD, the DIR-DLSE, and the DOL-WHD[12] as evidence of control over the workers. Judges and auditors, for very good reason, are very skeptical regarding contractor status when a former employee testifies that they were offered a "take it or leave it" conversion to independent contractor status, especially when little or nothing changed in the nature of their work following such a conversion.

- Affinity required the drivers to acquire a fictitious business name, a business license, or a commercial checking account, and filled out related forms for the drivers.

[10] *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d at 403.
[11] *Ruiz v. Affinity Logistics*, 2014 U.S. App. LEXIS 11123 at 30-31.

[12] i.e. the U.S. Internal Revenue Service, the California Employment Development Department, the California Department of Industrial Relations – Department of Labor Standards Enforcement, and the U.S. Department of Labor's Wage and Hour Division. The WHD oversees the DOL's Misclassification Initiative.

As tempting as it may be to help your contractors, a business may not exhibit this level of involvement in the operational aspects of its contractors. Such involvement will inevitably be seen as an exertion of control over a worker. There are other, less intrusive, ways of ensuring the contractors you work with have bona fide documentation. If you choose to contract with drivers, seek knowledgeable guidance on how to do so.

- Each driver was required to sign an independent contractor agreement.

Often a written agreement is beneficial to both the business and to the contractor. However, there are times it may be better to just avoid ongoing written arrangements. If a business will be better off engaging its contractors in writing, make certain that the contract is drafted properly. The Affinity contract could be terminated "at will" and at any time by either party "without cause." As courts put it, "Strong evidence in support of an employment relationship is the right to discharge at will, without cause."[13] Interestingly, the power for Affinity to terminate the agreement without cause was actually weighed by the courts in *Ruiz II* as neutral, when it could have been used as "strong evidence" of employment status. I insist that it is usually unnecessary to have a terminate-at-will clause in order to protect the business. There are plenty of ways to draft termination for breach provisions into an agreement which work for many businesses: the goal being to allow a business the freedom to choose when it will utilize the services of a contractor, without having the appearance of power to terminate at will. Ideally, the provision for termination, should work to protect the interests of both the business and the contract driver.

- The Procedures Manual, prepared by Affinity, outlined procedures drivers were required to follow regarding loading trucks, delivering goods, installing goods, interacting with customers, reporting to Affinity after deliveries, and addressing returns and refused merchandise, damaged goods, and checking in with Affinity after deliveries. The Procedures Manual included mandatory language such as "must," "will report," "must contact," "required," "not acceptable," "100 percent adherence," and "exactly as specified."

I am fairly astounded that a business operating in California would demonstrate such overt and detailed control over its contract drivers. My guess is that Affinity was used to operating under more contractor-friendly conditions in Georgia and may not yet have been acquainted with California's strict policies regarding contract labor. My message for businesses in California is that, if you use contract labor, you must bear the risk that they underperform, make mistakes, and occasionally just plain frustrate you. Your option in the marketplace is that you avoid using them if they do so. You are essentially paying the contractor for the desired result, and may not direct the manner and means of their executing the task.

- Affinity did not require that drivers obtain special licenses. Nor did Affinity require that drivers have any specific work experience or training; rather, drivers simply had to have a driver's license, sign the ITA and ELA, and pass a drug test and physical exam.

If a special license is required by law in order to practice the profession, business should be aware of the licensure status of their contractors. In the case of the logistics and delivery

[13] *Empire Star Mines Co. v. California Employment Com.* (1946) 28 Cal.2d 33, 43 [168 P.2d 686, 692].

industry, contract drivers should possess a valid Motor Carrier Permit. According to the California DMV, a Motor Carrier Permit is required by any person or business entity that is paid to transport property in their motor vehicle regardless of vehicle size or weight. See also requirements for Commercial Vehicles,[14] double trailer, hazardous materials, tank vehicle, etc. In fact, a requirement for such licensure, where applicable, should be seen by the government as compliance with health and safety regulations, and as such, not evidence of "control" exerted over the contractor.

- Drivers had a fairly regular rate of pay since they worked five to seven shifts per week, and every route had approximately eight deliveries. Drivers had to request time off three to four weeks in advance, and Affinity had discretion to deny those requests. Affinity denied requests for time off when it decided the delivery schedule was too busy.

Regular rates of pay, regular shifts, regular routes, and essentially "regular" anything, tend to look like employment, which has a more continuous and "regular" nature than contract work.

- Affinity encouraged, if not required, drivers to lease trucks from Affinity, handled upkeep of the trucks and arranged for loaner trucks when trucks broke down, deducting these costs from drivers' pay. Affinity required drivers to stock their trucks with certain supplies, as outlined in the Procedures Manual.

Again, if a business maintains overt management and interaction over a truck fleet, as it did in this case, it will likely be seen by the government as evidence of control over the contractors. It can be advisable however, to offer fleet trucks for lease or sale, but a business should remain at arm's length in the process. In contrast, Affinity had its hands on every aspect of the contractors' work.

- Affinity required that drivers use a specific type of mobile telephone, supplied the phones, and deducted monthly costs for the phones from drivers' paychecks.

There are cases where the logistics and delivery company supplies the mobile radio/phones; however, this arrangement works best in conjunction with well-crafted language in the written agreement, articulating the business necessity for the standardized radio/phones. Further, the fact that Affinity was deducting the monthly costs for the phones from the drivers' "paychecks," certainly did not help their case. It is always a better idea to merely charge the contract drivers for leasing any devices, tools, etc. Avoid deductions from payments. Let the contractor figure out how they're going to pay their lease. This is an area where the logistics and delivery businesses must release control and accept some risk of consequences, should a contractor not fulfill their side of the agreement. If the relationship is truly that of contractor and logistics provider, the provider cannot manage the contractor's business, as Affinity did here.

- Affinity required each driver to have a "helper" or secondary driver on the truck with them. Helpers had to submit to a background check and be approved by Affinity.

[14] Commercial motor vehicles with a gross vehicle weight (GVW) or combined gross vehicle weight (CGW) of 10,001 lbs. or more.

There are simply very few things that you can require a contract driver to do, outside of getting the items delivered in a timely manner. You certainly cannot require a driver to use an approved assistant.

- While working for Affinity, at 6:00 or 6:30 a.m. everyday, drivers were required to report to the warehouse where Affinity's offices were located. Affinity required drivers and helpers to attend a fifteen to thirty minute "stand-up" meeting at 7:15 a.m. The stand-up meeting was led by an Affinity supervisor. The Affinity supervisor would review the drivers' customer satisfaction survey scores from previous deliveries, discuss problems encountered in recent deliveries, and discuss any other issues Affinity thought would be beneficial to help drivers. After each morning stand-up meeting, Affinity required that its supervisor staff check the drivers' trucks to ensure that drivers had the required tools, that deliveries were loaded with the necessary padding and properly secured, and that no appliances were left on the dock. The supervisors also checked that the drivers were in their required uniform and properly groomed.

Meeting attendance is a very tricky subject in respect to control over drivers. If it relates to the services to be delivered (i.e. bidding on routes, designation of delivery jobs, regulatory and safety issues, and the like), meetings attendance might pass muster in terms of control over drivers. However, it is obvious that Affinity required the drivers to attend what amount to quality control meetings. This is essentially an instructional "employee" meeting. The fact that the "supervisors" checked that the drivers were uniformed and properly groomed simply negates any argument that Affinity did not control the drivers.

- Drivers were required to wear uniforms and abide by certain grooming requirements, as set forth in the "Delivery Team Apparel and Appearance" section of the Procedures Manual. Drivers had to keep their shoes "neat and clean." Affinity provided the uniforms, but charged drivers for them by deducting the costs from drivers' paychecks. Affinity also required that tattoos and piercings be covered or removed and that facial hair be "neatly groomed and properly shaved surrounding the beard." Affinity provided shaving kits to drivers with facial hair that did not meet Affinity's grooming requirements.

Repeat after me: "I will not tell contract drivers how to shave or what they may pierce." Here again, the marketplace for labor services will "weed out" those contractors who don't work for your particular business model. If that includes a tiring grooming practices which your customers might find offensive, your alternative is to contract with drivers who have a reputation for neatness, etc.

Ruiz II goes on to describe various other substantial elements of control over the drivers, such as specified order of deliveries, supervisory "follow-alongs" and restrictions over what a driver could do with the leased vehicles. Suffice it to say, Affinity controlled nearly every aspect of the drivers at-work behavior.

After seeing abundant examples of, and different approaches to, logistic and delivery companies' use of contract drivers, I must admit that I have never seen such an overt example of obvious control over such drivers. Fairness to Affinity warrants acknowledging that the facts in the case

may have been exaggerated in the decision. I have seen enough cases where plaintiffs/claimants have convincingly "bolstered" the facts in their favor, creating control where it may not have truly existed. However, were that the case in *Ruiz II*, there still remains a profound level of control exerted by Affinity over Fernando Ruiz and the other plaintiff drivers. Such control may have worked under Georgia law, considering the presumption toward independent contractor status mentioned above in *Ruiz I*, but it will never work in California.

There are situations which demand the use of contract drivers such as labor availability, work overflow, specialty deliveries, and so on. There are, as well, ways to go about legitimately using contract drivers under California law. Recent history has shown the industry that the decision to use independent contractors must be restricted to a relationship whereby the logistics service provider merely hires a bona fide contractor driver to achieve the desired result, resisting all temptation to control the details of the services provided. The utilization of contract drivers might fit into your business model. However, I recommend wholeheartedly seeking advice regarding whether and how to go about doing so.