

Trucking's Changing Workforce:

The Rise of Millennials and the War on Independent Contractors

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The Millennial Workforce and Unionization: What do Millennials Really Think of Labor Unions, and What Can We Do About It?

What do Millennials think of labor unions?



➤ Millennial Generation

- ✓ Born between 1981 and 1998
- ✓ From 18 to 35 years old



Millennial Workforce and Unionization



- Are Millennials more inclined to unionize as compared to prior generations?
 - ✓ 2015 Pew Research Center survey reveals 57% of Millennials are *in favor* (but **not** necessarily members) of unions



Generational Union Approval Ratings



➤ Generation X

- ✓ From 36 to 51 years old
- ✓ 42% in favor of unions



Generational Union Approval Ratings



➤ Baby Boomers

- ✓ From 52 to 70 years old
- ✓ 41% in favor of unions



Generational Union Approval Ratings



➤ Silent and Greatest Generation

- ✓ 72 years old and older
- ✓ 28% in favor of unions



Millennials and Labor Unions

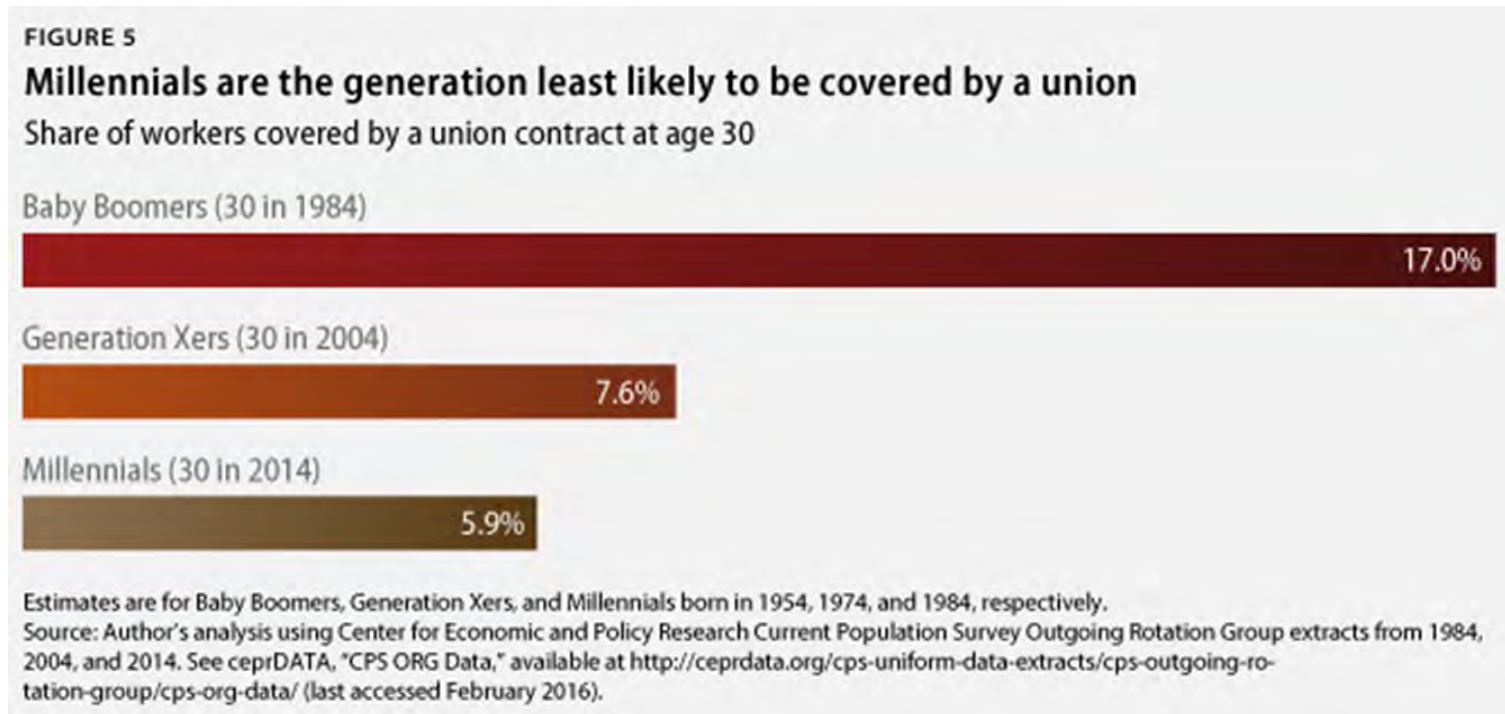


- According to the Pew survey, Millennial approval ratings of unions have increased **8%** since 2010
- But *why* do Millennials like labor unions?
- Are we sure they actually *do*?
- Can we neatly measure, categorize, and analyze Millennials?

Idea vs. Reality of Labor Unions



➤ Actual Millennial membership in unions is **low**



Idea vs. Reality of Labor Unions



- Are Millennials “all talk, no action” when it comes to unionizing?
- **Maybe for now**, but treat this impression with **caution!**



Idea vs. Reality of Labor Unions



- **First**, Millennials may not remain “Millennially minded” as they age
- **Second**, labor unions have caught on to Millennial approval of union ideals
 - Labor unions are making an effort to become more savvy in their communications with Millennials
 - **Virtual Labor Organizing** may be on the horizon

Who are “Millennials”?



- Largest living population in America
 - ✓ Estimated at over 75.4 MM
 - ❖ Compare to 74.9 MM Baby Boomers
- Largest population of unemployed men
- Most racially diverse of all living generations
 - ✓ 43% are non-white
- 71% of non-white Millennials favor big government with more services

Who are “Millennials”?



- 51% identify as “Independents” but tend to vote Democratic
- 19% identify as Democrats
- 24% identify as Republicans
- Majority voted for Obama in 2008 and 2012
- Staggeringly optimistic about America’s future

Who are “Millennials”?



- Represent the largest population *eligible* to vote
- **But**, Millennials are **not** the largest generation actually expected to cast a ballot
 - ✓ Only 50% of Millennials eligible to vote did so in 2008
 - ✓ 2008 turnout across four generations

» Generation X		61%
» Baby Boomer		69%
» Silent/Greatest		70%

Who are “Millennials”?



- The common denominator?
- The **Internet** and all other points of social media, connectivity, and transparency



Who are “Millennials”?



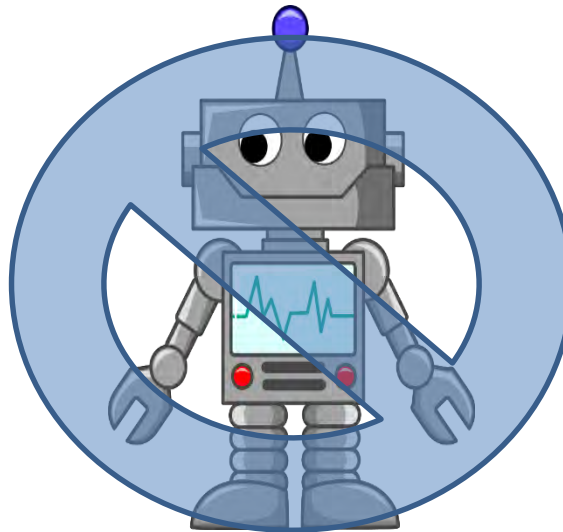
Access information from myriad sources



Who are “Millennials”?



- Changing parenting philosophy
- Not a generation of robots!



Who are “Millennials”?



- Financially challenged
 - ✓ Live with parents longer
 - ✓ Substantial student loan debt
 - ✓ 2007 Great Recession and economic downturn



Who are “Millennials”?



- Millennials get married later (if at all)
 - Married Millennials | 26%
 - Generation Xers Married “Young” | 36%
 - Baby Boomers Married “Young” | 48%
 - Silent/Greatest Married “Young” | 65%



Who are “Millennials”?



- Less trusting of other people
- “Crowd sharing”
 - ✓ Share feelings, perspective, opinions to large groups
 - ✓ Socially shared sense of responsibility
 - ❖ As compared to individual sense of responsibility

Who are “Millennials”?



- Generally well educated



- Less involved in organized religion
 - ✓ Lack of utility
 - ✓ Invasion of personal space

Millennials and the Workplace



- Seek flexibility and freedom
 - ✓ 62% prefer to work from home
- Participate in “Gig” or “Shared” Economy



Millennials and the Workplace



- 41% prefer to communicate electronically
- 75% believe access to technology makes them more effective at work
- 52% identify career progression as priority
- Value radical transparency
- Value personal time

Millennials and the Workplace



➤ Crave **collaboration**

- ✓ Millennials want to **participate** in the decision-making process

➤ Skeptical of entrenched power systems

- ✓ Turned off by companies with multi-level management hierarchy

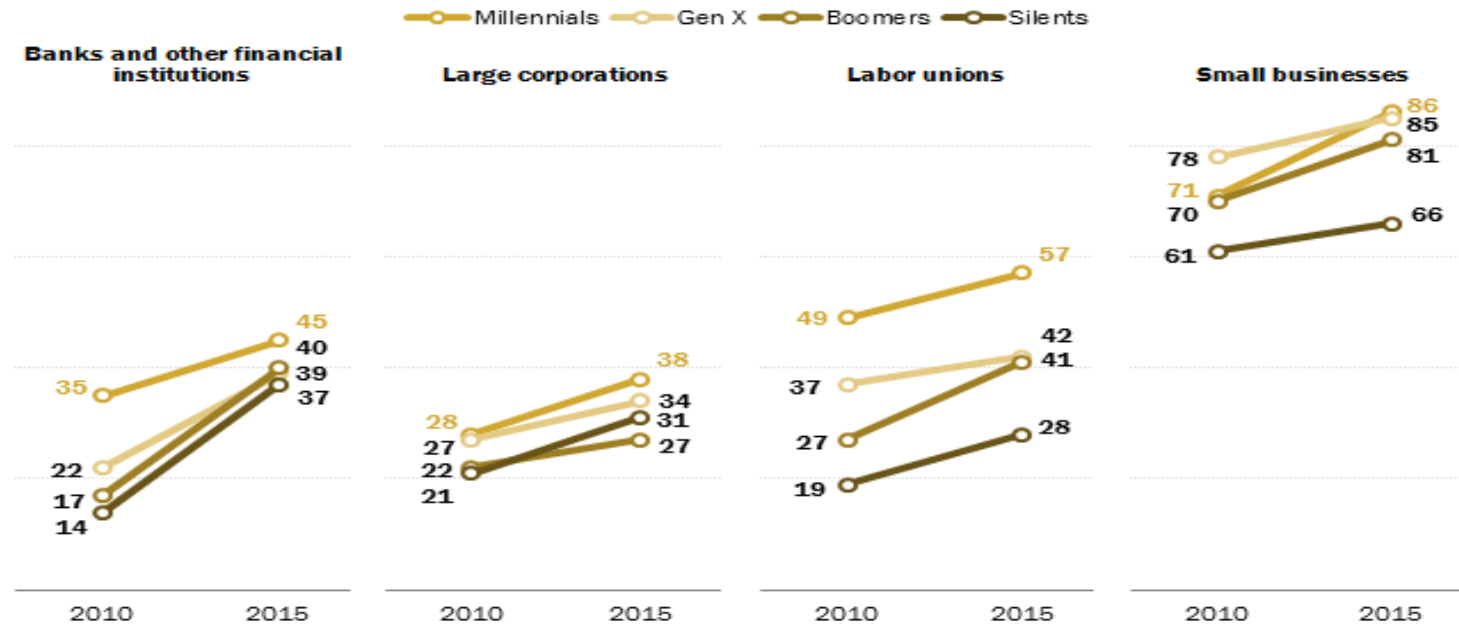


Millennials Prefer Institutional Solutions



Views of banks, large corporations, small businesses improve since 2010

% who say _____ have a positive effect on the way things are going in this country today ...



Source: Survey conducted Aug. 27-Oct. 4, 2015.

PEW RESEARCH CENTER

How worried should we be?



Age Range	Millennial Union Membership Today	Union Membership in 1982 (Baby Boomers)	Difference
16-24	4%	15%	11%
25-34	9%	28%	19%

How worried should we be?



General Increase in Union Approval Ratings Since 2010

Demographic	2010	2015	Increase
Millennials	49%	57%	8%
Generation X	37%	42%	5%
Baby Boomers	27%	41%	14%
Silent and Greatest	19%	28%	9%

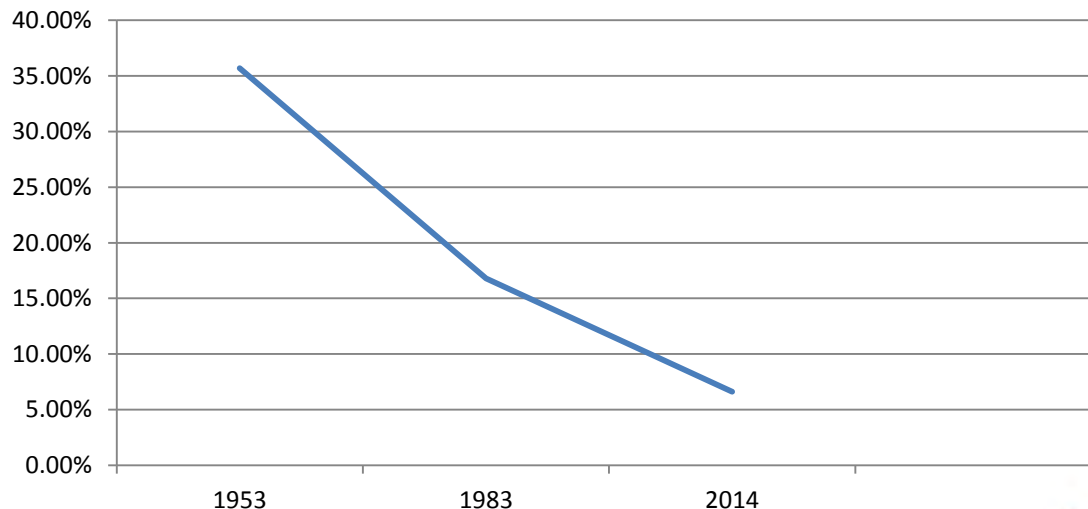
How worried should we be?



Private Sector Union Membership

- ✓ 1953: 35.7% of the workforce (high point)
- ✓ 2014: 6.6% (low point)

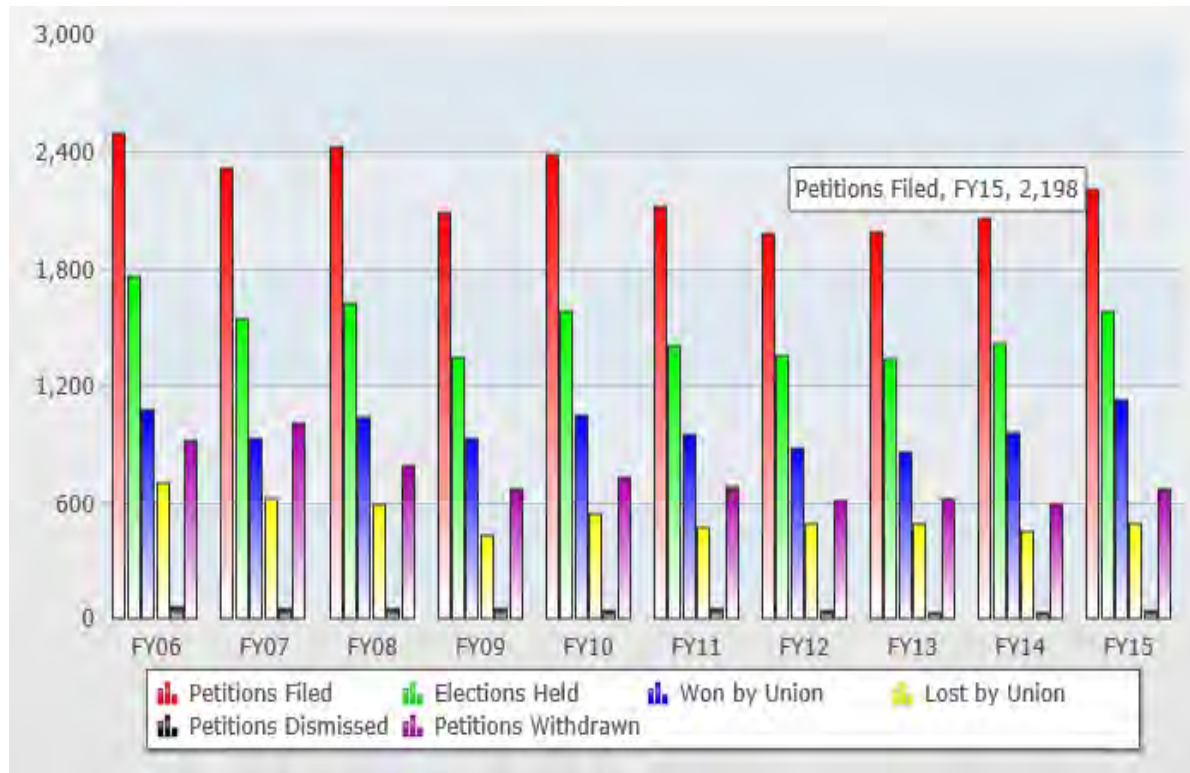
Union Membership



How worried should we be?



Election Statistics



Caution is Warranted



- Millennials identify with and approve of the fundamental values of unionization
 - ✓ Millennial tendencies may change as they move from the Gig workforce to a traditional career path
 - ✓ May be more likely to join a union when they have more wealth to protect

Caution is Warranted



➤ Teamster membership has not declined as dramatically as other unions

- ❖ 1980 | 1.8 Million Members
- ❖ 2014 | 1.3 Million Members



Caution is Warranted



- New “Quickie” or “Ambush” Election Rules
 - ✓ Effective April 14, 2015
 - ✓ Make it much easier to organize
 - ✓ Election timelines are decreased from max of 42 days to as little as 14 days
 - ❖ More likely about 21 days
 - ✓ Employers lose mandatory appeal rights for post-election issues
 - ✓ Election may be over before employer has opportunity to meaningfully begin its campaign

“Quickie” or “Ambush” Election Rules



- The new rules do not favor putative employers
 - ✓ Election petition filed and served same day
 - ✓ Company must post notice to employees within 2 days
 - ✓ Company must identify all eligibility issues in a position statement by noon on the 7th day
 - ✓ Must identify all bases for disputing the petition
 - ✓ Must identify the full names, work locations, shifts and job classifications of all individuals in the proposed unit
 - ✓ Failure to raise an issue waives the issue
 - ✓ A hearing to decide those issues occurs on the 8th day.
 - ✓ Pre-election challenges are limited to determining appropriateness of election – not unit eligibility.

Caution is Warranted



➤ Use of employer email systems

- ✓ NLRB recently found employees may use employer e-mail system for union organizing during non-work time

❖ *Purple Communications, Inc.*



Caution is Warranted



- Advances in scope of protected social media activity
 - ✓ In a Facebook conversation, employee stated was upset with his supervisor:
 - ❖ “Bob is such a NASTY M_____ F_____!!!!!! F___ his mother and his entire f_____ family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!”
 - ✓ Company found outburst violated work policies
 - ✓ NLRB nevertheless deemed outburst protected activity
 - ❖ *Pier Sixty, LLC*

Caution is Warranted



- Unions are actively targeting Millennials
 - ✓ Visiting campuses to explain unionization
 - ✓ Working to increase transparency within unions
 - ✓ Seizing on e-interactions through “Virtual Labor Organizing”

What should we do?



➤ Develop effective leaders



What should we do?



- Invest in high quality, efficient, and transparent communication system
 - ✓ Give well-developed leaders means to share information with workers
 - ✓ Give employees easy access to leaders

What should we do?



- The method of communication is key
 - ✓ Promote worker use of :
 - ❖ Web-based interactive training sessions
 - ❖ E-learning tech
 - ❖ Social media platforms
- Allow for collaboration
 - ✓ Do not change procedures without securing input from workers
 - ✓ Encourage and commit to “open door” culture

Remember



- Millennials have been trained to think for themselves and ask questions
- Millennials are strapped for cash in a way Baby Boomers and older Generation Xers may have never experienced
- Millennials have received more collegiate education than other generations
- Millennials aren't opposed to taking advice from their parents



The War on Independent Contractors: Update from the Front Lines and Best Practices to Fortify an IC Model

Update from the Front Lines



- U.S. DOL Wage & Hour/FLSA Advice Memorandums
 - ✓ Expansion of employer liability upstream
 - ❖ IC (July 2015), Joint Employer (January 2016)
- ACA Initiative
 - ✓ Offer of coverage/marketplace subsidy notice issue
- NLRB
 - ✓ Expansion of joint employment similar to DOL
 - ✓ Watch for increased misclassification related activity

Update from the Front Lines



➤ **U.S. DOL IC-Status Interpretation (July 15, 2015)**

- ✓ Advice memorandum from the Wage & Hour Division regarding IC-status under FLSA
- ✓ Takes expansive view of “suffer or permit to work” (definition of employ); focus on econ. dependence
- ✓ “In sum, most workers are employees under the FLSA’s broad definitions.”
- ✓ Elevates 1 factor (whether work is integral to employer’s business) over control (“the ‘control’ factor should not play oversized role in the analysis”)

Update from the Front Lines



- **U.S. DOL Joint-Employer Interpretation (Jan. 2016)**
 - ✓ Advice memorandum from the Wage & Hour Division regarding joint-employer status under FLSA.
 - ✓ Identifies the “core question” in joint-employment determinations as “whether the employee is economically dependent on the potential joint employer who, via an arrangement with the intermediary employer, is benefitting from the work.”
 - ✓ Candidly describes the U.S. DOL’s intention to shift FLSA liability upstream to **“larger and more established [businesses], with a greater ability to implement policy or systemic changes to ensure compliance.”**

Update from the Front Lines



- President Obama's U.S. DOL has made rooting out alleged misclassification a priority
- MOUs with 30 states, including Iowa, to share information and coordinate enforcement (AL, AK, AR, CA, CO, CT, FL, HI, ID, IL, IA, KY, LA, MD, MA, MN, MO, MT, NH, NM, NY, OR, RI, SD, TX, UT, VT, WA, WI, and WY)
- In FY 2015, federal WHD investigations led to recovery of \$74 million in back "wages"

Update from the Front Lines



- In FY 2014 and 2015, Congress passed a specific line item of \$10 million/yr. for activities to address “misclassification”; \$0 in FY 2016
- Program awards grants to increase the ability of state unemployment insurance tax programs to identify instances where employers improperly classify employees as independent contractors, including enhanced audit programs

Update from the Front Lines



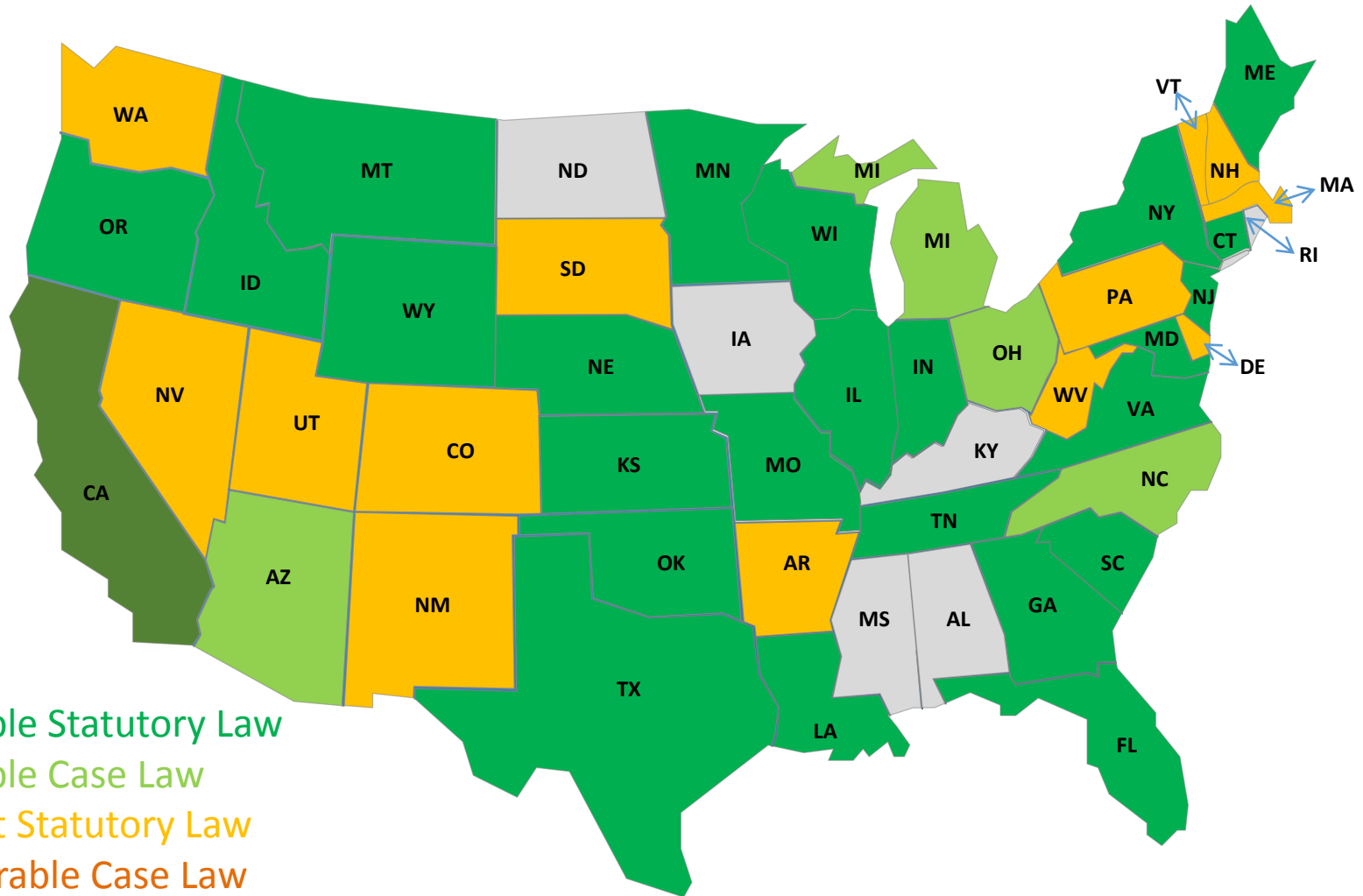
- **Affordable Care Act (ACA) Compliance: Potential IRS IC Reclassification**
 - ❖ Beginning in July 2016, the DHHS began issuing notices to companies when a putative employee (including an IC) applies for and receives a tax subsidy through the ACA Federally-Facilitated Marketplace indicating the worker was not offered ACA compliant healthcare by their putative employers
 - Companies have 90 days to respond to Notice
 - Forcefully and consistently respond that the IC applicant is not an employee and not eligible for company provided coverage
 - Ultimately, the IRS will follow-up and ACA tax penalties or a reclassification audit could ensure

Update from the Front Lines



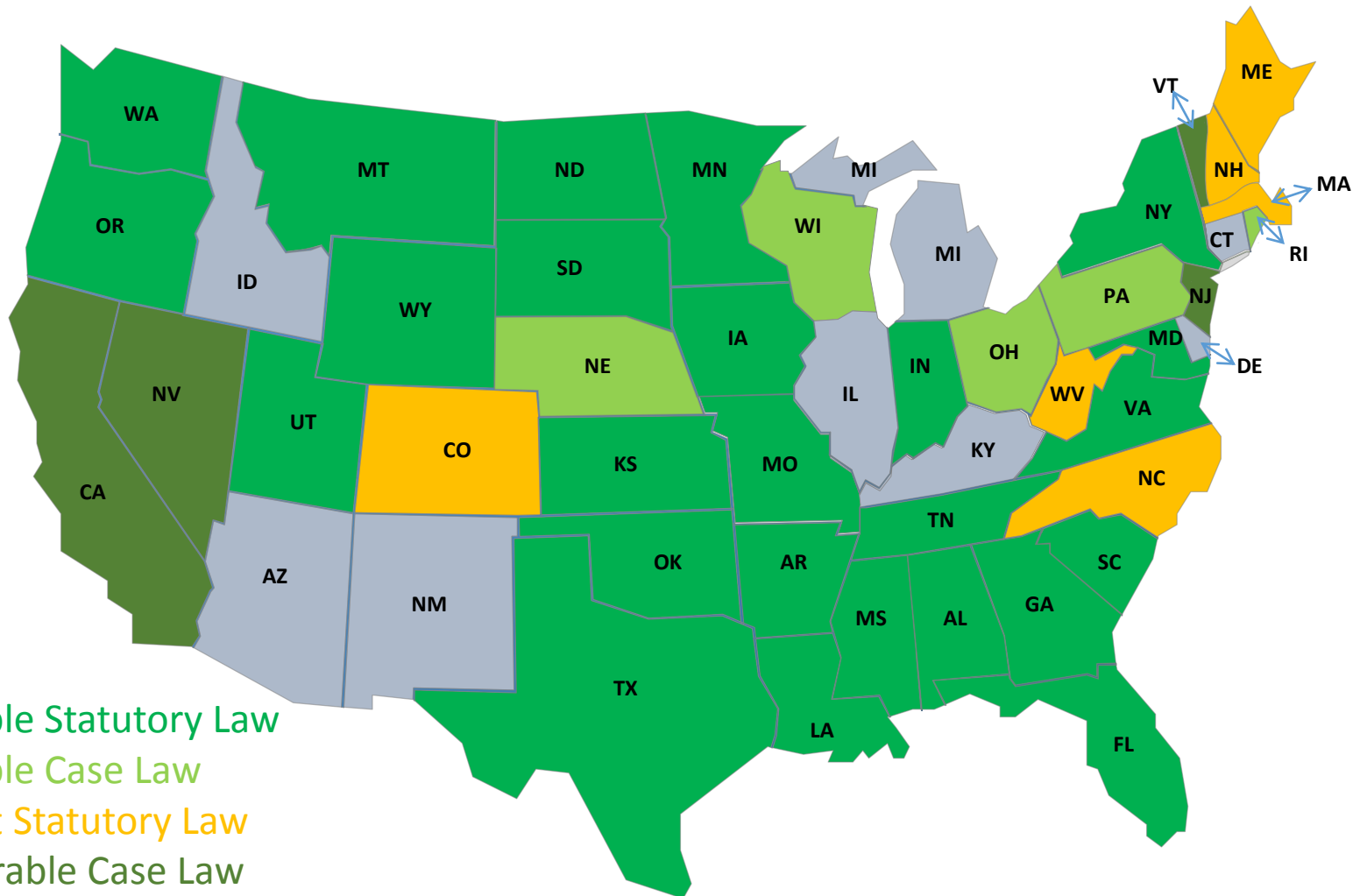
- Targeted administrative audits
 - ✓ Wage and hour
 - ✓ UET
- WC premium issues
 - ✓ SWIF/SCIF
 - ✓ Assigned risk pools and “could be liable”

Unemployment Compensation by State



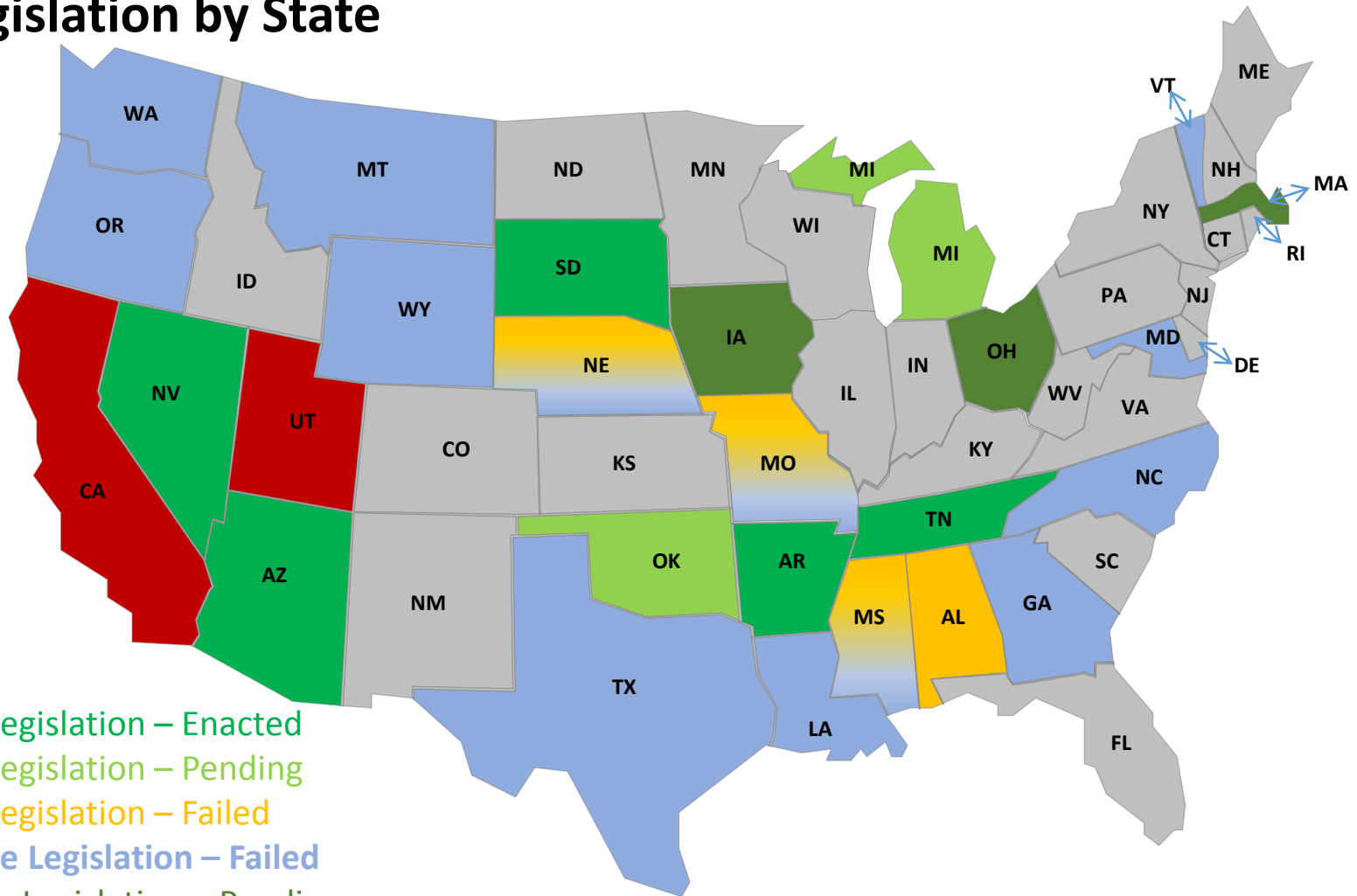
Favorable Statutory Law
Favorable Case Law
Difficult Statutory Law
Unfavorable Case Law
No Case Law

Workers' Compensation by State



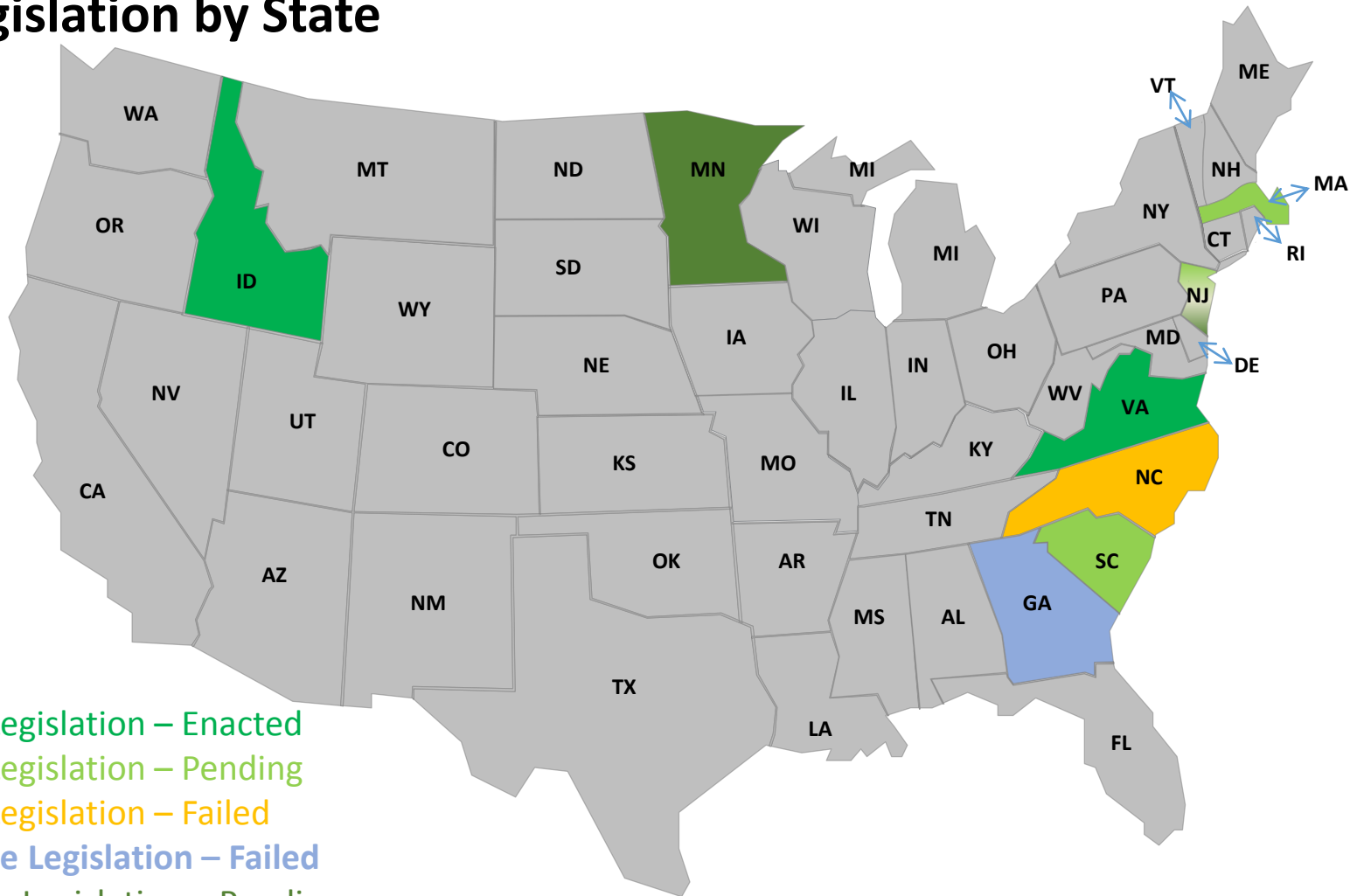
Favorable Statutory Law
 Favorable Case Law
 Difficult Statutory Law
 Unfavorable Case Law
 Conflicting Case Law

2015-2016 Proposed Generally Applicable IC Legislation by State



- Favorable Legislation – Enacted
- Favorable Legislation – Pending
- Favorable Legislation – Failed
- Unfavorable Legislation – Failed
- Unfavorable Legislation – Pending
- Unfavorable Legislation – Enacted
- No Relevant Legislative Activity

2015-2016 Proposed Trucking Specific IC Legislation by State



Favorable Legislation – Enacted
 Favorable Legislation – Pending
 Favorable Legislation – Failed
 Unfavorable Legislation – Failed
 Unfavorable Legislation – Pending
 Unfavorable Legislation – Enacted
 No Relevant Legislative Activity

Update from the Front Lines



- Class actions in CA, IL, MA and other states
 - ✓ Use of state-wage laws
 - ✓ Emerging F4A conflict
- UET battles and WC battles
 - ✓ Long standing arena for classification challenges
- Modern Business => Trad. Regs. and Case Law
 - ✓ Old practices may not fit new business models
 - ✓ Impact of sharing economy/market disrupters

Update from the Front Lines



- Favorable IC statutes in ID, NV, and VA
- 1st Cir. victories under the F4A
- State UET/WC victories
 - ✓ *In re Bogart* (NY UET Case, June 2016)
 - ✓ *CEVA Freight* (OR UET Case, July 2016)
- Industry litigation
 - ✓ *CTA v. CA Lab. Commissioner* – seeks ruling that agency interp. of IC test is preempted under F4A

Update from the Front Lines



- *CEVA Freight v. Oregon Employment Dep't*
 - ✓ Court reverses agency, finding **all** OR-based drivers **were ICs** under 4-part test for IC status
 - ✓ Holds that MC authority is not “license” or “tool” used by drivers, who only need CDLs (if that)
 - ✓ Quick to attribute “control” to gov’t or customers
- *Delta Logistics v. Oregon Employment Dep't*
 - ✓ **Overturns** agency’s **refusal** to apply exemption

Update from the Front Lines



- Issues created by legal volatility:
 - ✓ Safety compliance and best practices
 - ✓ Contractual changes
 - ✓ Insurance-risk issues
 - ✓ Sharing-economy issues

Best Practices to Fortify an IC Model



➤ Gain the IC Mindset

- ✓ ICs are **small business owners** who sell **capacity**—trucks and driving services
- ✓ The market for the capacity sold by ICs is comprised of **motor carriers, not shippers**
- ✓ This is a **B2B** relationship at its heart

Best Practices to Fortify an IC Model



- Because the IC is a vendor of **capacity**:
 - ✓ If a truck is offline, the IC must source another
 - ✓ If a driver is DQ'd, the IC must source another
- All aspects of the B2B relationship should fall under a **contractual promise** by the IC
- Every interaction with the IC is an **opportunity** to develop evidence that either **supports** or **undermines** IC status

Best Practices to Fortify an IC Model



Employment Jargon	Contractor Jargon
Employee	IC, Contractor, Owner-Operator
Employer	Company, Carrier
Wage, Salary, Paycheck	Compensation, Financial Obligation
Training	Orientation, Information-Sharing
Hire	Contract
Fire, Discharge, Separate	Terminate (K), DQ (driver)
Duties	Contractual Obligations
Supervisor	IC Liaison, Terminal Manager
Vacation, Holiday	Not In Service, Truck Unavailable

Best Practices to Fortify an IC Model



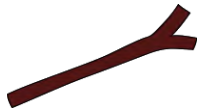
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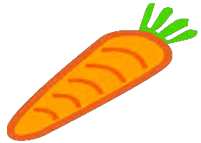
Best Practices to Fortify an IC Model



IC is a driver who becomes disqualified



Terminate the IC's contract
"for cause" and without notice



Offer the IC an opportunity to
source a replacement driver

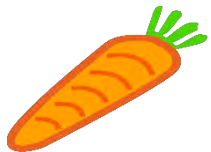
Best Practices to Fortify an IC Model



IC refuses reasonable load offers



Punish through offering only “bad” loads, or terminate the IC’s contract



Reoffer load to another IC (but serial refusals may breach duty of good faith and fair dealing in K)

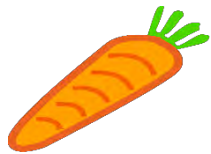
Best Practices to Fortify an IC Model



IC's performance is not up to carrier's standards



Discipline through notices, notes in file, "bad" load offers, or termination

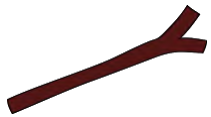


Create system of financial **incentives** for desired behavior (safe driving, clean inspections)

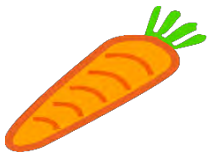
Best Practices to Fortify an IC Model



IC wants to use truck for other business



Refuse request, cite to “exclusivity” language required by FLRs



Accommodate the request as circumstances and the law allow

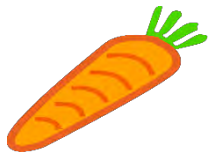
Best Practices to Fortify an IC Model



IC wants to source own products, services



Require IC to use carrier's programs (likely to violate the FLRs)



Allow IC to source products and services independently, but verify

Best Practices to Fortify an IC Model



➤ FLR Compliance Hot Spots

1. Service Fees for Telematics
2. Term and Termination
3. Charge-Backs (especially claims)
4. Specificity of Compensation
5. Freedom to Trip Lease/Exempt Haul

continued

Best Practices to Fortify an IC Model



➤ FLR Compliance Hot Spots

6. Source of Control (gov't, customers)
7. Settlement Period
8. Final Settlement and Return of Escrow
9. A True Choice re Facilitated Programs
10. Insurance Charges (especially profits)

Best Practices to Fortify an IC Model



- **Consider an IC Desk Audit**
 1. ICOA and Addendums
 2. Equipment Lease Agreement
 3. Onboarding Documents
 4. Driver and Policy Handbooks
 5. Online and Social Media Presence
 6. Advertising Materials
 7. Insurance Documents