From the Executive Director

Anti-Trust, Contractors or Employees

By Dana Doran

Did I get your attention with these three subjects? I hope so.

Each spring, training is always a point of emphasis in this industry. It happens as an annual rite of passage in the spring, predominately because it's the only time of year for contractors when they have time to devote to it. However, each year when training occurs, it makes me think about the intent of training, who is providing the training and why they're doing it. Is it something that the contractors asked for, is it is something that they are vested in, is it something that will really help them or is it something that is mandated as a condition of work?

Heading into summer, there is a multitude of things to update the membership on: the high cost of lumber and the lack of positive impact on contractors, the Logger Relief Act, the Maine Legislature, markets, etc., but I would rather spend some time on one thought provoking area that I truly believe has become so engrained in the expectation of work here that it has largely been written off as a cost of doing business with no ability for change. Yet, in the grand scheme of

things, it's an unfunded mandate that must be looked at because it's bleeding contractors dry without recognition of the cost or the benefits in the end. Effectively, it's a death by a thousand cuts but no one has a band-aid and no one has time, attention or resources to in their own businesses to push back. It has become so top down that even state regulatory authorities have gotten in on the act of not only participating in it,but enforcing it without any consideration that there are implications related to anti-trust.

At this point in time, with depressed commodity pricing in some species, limited markets and increasing business costs (labor, fuel, parts, etc.), every dollar counts. As a result, there needs to be a recognition that training and credentials are important, but they are also costly and do have an impact on a contractor's bottom line, especially if it's not voluntary, and was not created or supported by the greater logging community.

Compounding this issue is the question of whether contractors are truly independent or whether they are being treated more like employees than contractors. This question also has legal implications

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that are far reaching which have been tried and tested by the US Supreme Court. The outcomes of which serve as guidance for the IRS and the US Department of Labor as it pertains to taxation and workers' compensation.

These are extremely complex and potentially litigious issues which can be set aside very easily. However, when looked at closely, there are significant issues which really stand out that every contractor should be aware of.

From my perspective, the treatment of contractors has become so ingrained and predictable that the majority don't question it anymore, regardless of if its contractors or those who hire contractors. Unfortunately, contractors comply with the mandates because their choice is to accept it or get out of the business. They're always told to stand in line as there's "another contractor" out there to take your job who will just accept the requirements if you don't. And on the other side, those who hire contractors think this is normal and don't consider the implications because it has been normalized over time.

With all that has happened over the last year, this might not be the case anymore as has been evidenced by this quarter's cover story. Very few are taking the leap into this business and having sawdust in your veins might not be good enough moving forward.

One of the big red flags related to the determination of independent contractor status and antitrust is related to training.

First, let's start with the determination of independent contractor status and the implications of things that contractors are forced to do and whether contractors are truly independent?

There's a reason that loggers and truckers in Maine are independent contractors. They want to be in business for themselves with the ability to control their own destiny and be profitable. The American dream, right?

This cuts both ways as we have seen in Maine over the last forty years. Landowners and land management companies also see the benefits of hiring independent contractors so they don't have the expense on their balance sheet. It is advantageous financially to hire independent contractors than to have loggers and truckers as employees.

However, the question remains, are independent contractors independent or are they being called independent for the benefit of those who oversee them? Are they really employees and not independent contractors? At this point, I don't think one of our members wants to be an employee, but in the end, are independent contractors just being taken advantage of and forced do certain things to save their clients' money?

The Supreme Court has considered many facts in deciding whether a "worker" is an independent contractor or an employee. The facts which make this determination fall into three main categories: B*ehavioral Control, Financial Control, and Relationship of the Parties*.

In the case of logging and trucking contractors, *Behavioral Control* is probably the biggest determiner of whether loggers and truckers are truly independent.

Are you a Contractor or an Employee?

"If the business provides the worker with training on how to do the job, this indicates that the business wants the job done in a particular way. This is strong evidence that the worker is an employee. Periodic or on-going training about procedures and methods is even stronger evidence of an employer-employee relationship. "

Internal Revenue Service

With *Behavioral Control*, the facts will determine whether there is a right to direct or control how the "worker" (logger/trucker) does the work. A "worker" is an employee when the business has the right to direct and control the "worker". The "employer", or client in a logger/trucker (worker) situation would be a mill, a landowner, or a land manager. The employer does not have to direct or control the way the work is done if the worker has the right to direct and control the work.

Training is one of the most significant *Behavioral Control* determiners of independent contractor status. Training implies that the "employer" needs to teach the independent contractor how to do the job. If the "employer" provides the "worker" with training or forces the "worker" to attend training as a stipulation in the contract, this indicates that the employer wants the work done in a certain way, and therefore suggests that they should be classified as an employee of the employer and not an independent contractor.

Since independent contractors bring their existing talents and skills to a job, forcing them to attend additional training violates the *Behavioral Control* test and effectively endangers the contractor classification. Contractors cannot be asked to attend additional training if it is not truly "voluntary" or unless incentives are offered to take the training.

One example of how independent contractor status could be violated would be if a landowner or land management company tells a contractor that it must attend its BMP training each year as a stipulation of being a contract holder. Effectively, it is telling the contractor how to do their job and then holding them accountable for it after the fact.

Some might say, "well, this is just how it is and I don't have a choice. It's easier said than done when you don't have many choices of who you work for". Both are valid points and it's hard to argue with because of the rural nature of Maine and limitations on employment. But, the other side of the coin is, are you as a contractor being asked to do things that you are not being paid for and are you losing money as a result? Additionally, are you losing your autonomy as a contractor?

If the answer to both is yes, I'm not being paid to attend additional training and I have lost my autonomy, then are you losing out on benefits of the value you add as an independent contractor. These are the same benefits that employees are typically entitled to, such as salary, benefits, retirement, paid vacation, paid holidays, compensated time, etc.? None of our members want to be employees, but have you been put in position that really benefits the "employer" in the end to reduce their cost, pass risk on to you and reduce your opportunity for independence and profitability? If you have, then perhaps your status as an independent contractor has been put at risk.

Simply put, if you are not seeking out training to improve your company on a voluntary basis or without the endorsement of your segment of the industry (i.e. workers' comp.), you may not be an independent contractor.

What you can do about it is unfortunately complicated and not easy. However, there is recourse and there are pathways to rectify the situation.

The second issue at hand for independent contractors is whether they are the victims of antitrust and price suppression because of anti-competitive behavior. If you thought the previous topic was complicated, this might be an even bigger pandora's box and one that doesn't just involve contractors in Maine, but colleagues across the country. In the case of independent contractors, one potentially glaring anti-trust issue is also related to training and the mandates that have been placed upon contractors as conditions of wood sales.

Isn't it amazing how one issue, training, can be related to two very all-encompassing issues? Training should be a positive, however, it has been used by those above contractors to not only control them, but also reduce the employers' costs and pass along blame.

For those not intimately aware of antitrust law, the history of antitrust in the United States goes back to the early 1900's and the passage of the Sherman Act. The Sherman Act was put in place to prevent large corporations from controlling the entire marketplace, i.e

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American Steel, Standard Oil, etc.. Recently, antitrust law has been applied to large corporations such as Microsoft so they couldn't control the world of technology from manufacturing to software.

The overriding goal of antitrust law is to promote open competition for the benefit of consumers. At a high level, antitrust laws prohibit price fixing, bid rigging, allocating customers or territories, group boycotts or other types of conspiratorial or monopolistic behavior that unfairly restricts free trade. Violations don't have to be formal agreements between high level executives and usually involve people who are responsible for sales, business planning and day to day business execution.

So, what does this have to do with training and logging/trucking contractors you might ask? Well, a lot, if a system has been created which is not voluntary, reduces competition in the marketplace and involves some type of similar business planning and oversight that adds mandates to contractors as conditions for wood sales.

It sounds simple and complicated all at the same time, but at its core, will require action by many across the country to ensure it doesn't continue to harm contractors. That said, our members need to be aware of it because when added to the plight outlined previously about requirements of work and the question of independent contractor status, the two add up to be a really big deal. They have created a dilemma which not only exacerbates the position of contractors in a downward trajectory, but it causes confusion that reduces time and attention which should be placed on more important business issues. This is a classic case of diversion which further cements contractors place at the bottom of the chain.

In 2018, I attended a session at the American Loggers Council's Spring Board of Directors meeting that was narrated by an attorney from the firm of Winston and Strawn, LLP, a Washington, DC law firm. The attorney's name was Neely Agin and she is an expert on the field of antitrust law in the United States.

As part of her presentation, Ms. Agin spent some time on standard setting and certification programs which really got me thinking about an issue that has been around for a long time, 27 years to be precise. To be direct, I am going to use the Sustainable Forestry Initiative (SFI) as an example that came to mind with respect to the mandate for logger training as a condition of work or as a condition of wood sales. For all our members who are familiar with these stipulations, you probably know where I am going with this.

In Ms. Agin's presentation, she discussed the parameters for groups that develop uniform standards or specifications that companies must follow. To determine antitrust with respect to these types of standards, the key factors that courts consider in such

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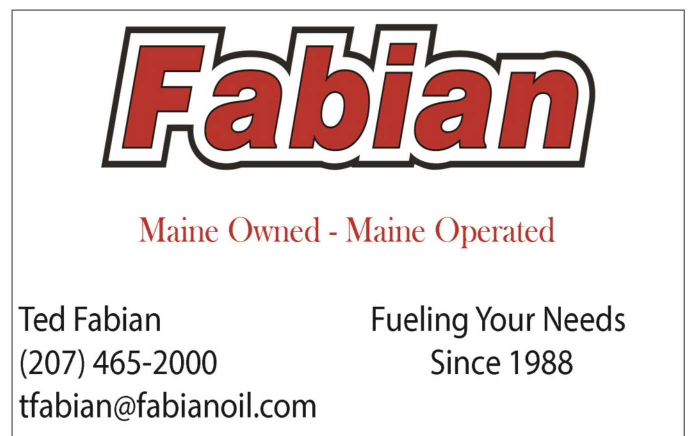

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cases include: degree of economic detriment caused to excluded or non-qualifying firms, the breadth of restrictions in relation to their need and the manner in which standards are used, i.e. whether designed to suppress or control competition.

From this perspective it sounds complicated as it pertains to how could logging or trucking contractors who are required to attend training as a condition of wood sales or work are impacted. However, it's not as far off as you think if you go back to the creation of the standard and how the practice has been implemented to this day.

When the SFI standard was created by the American Forest and Paper Association in 1994, whether it was intentional or not, it effectively created a structure that has the potential to boycott suppliers who did not comply with the training requirement. If the supplier did not comply, it was excluded from competition.

Secondly, because all mills and/or large landowners in a region hold a certificate, the standard is not considered voluntary because at that point there is nowhere else a supplier can work or sell wood, therefore the standard is effectively mandatory. And lastly, in its development, there was no participation from the community that is subject to the requirement, in this case, the logging community. As a result, because the logging community did not formally endorse the standard that it must comply with, it has created an unfunded mandate that was not agreed to, which could be viewed as a violation of antitrust law.

Fast forward to 2021, and because of SFI, there is a system in place which not only mandates training as a condition of wood sales without reimbursement of cost, but it also facilitates the enforcement of training as a condition of employment, not only by the "employer", but it has transcended beyond the employer to state regulatory authorities as well. Which is amazing to me when I've never seen SFI in Maine's statute.

This effectively creates a double whammy as it puts independent contractors in a position of deciding whether they can remain truly independent but also places the cost and burden on them without compensation or choice.

I know that these are big picture issues that I'm bringing to your attention, but I wanted to make sure you thought about them closely and consider what you are being asked to do and how it impacts your business. In the end, all of this has had a significant impact upon your business, has added cost and complexity, and effectively may be suppressing your ability to be profitable in the end.

Please educate those around you about the impacts this has and will continue to have on your business and let me know what the reaction is. I will do my part to educate those around us in other states on what this is doing to all contractors in the end and hopefully our national organization will consider looking into it in the very near future.

Stay safe, be well and I look forward to seeing all of you in person this summer.

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