

Regulatory Action and Litigation at XPO Logistics

XPO Logistics Cartage, LLC dba XPO Logistics, is a Delaware company that maintains California offices and operations in Commerce and San Diego, CA. XPO Logistics is a publicly traded, global company and one of the world's ten largest providers of transportation and logistics services. Its revenue is approximately \$15 billion. XPO Cartage Logistics Cartage, LLC primarily moves goods to and from rail yards to customers. There are approximately 163 misclassified drivers (current and former) who own or lease trucks and who have worked for XPO Logistics Cartage, LLC in its Commerce and San Diego locations from April 30, 2016, to the present.

XPO Logistics Cartage LLC (hereinafter called "XPO Cartage") is the successor company to XPO Cartage, Inc., which was formerly known as Pacer Cartage. XPO Port Services is also a subsidiary of XPO Logistics. XPO Cartage and XPO Port Services, Inc., d/b/a XPO Logistics, are together among the top trucking companies servicing the Ports of Los Angeles and Long Beach. XPO Port Services specializes in moving goods to and from the ports, while XPO Cartage primarily moves goods to nearby intermodal rail yards. These various XPO entities have faced multiple legal and enforcement agency actions for alleged wage theft due to misclassification of their drivers as independent contractors, as outlined below.

Agency investigations and determinations:

California Labor Commissioner

- On May 16, 2017, a federal judge upheld a 2015 decision issued by the Long Beach office of the California Division of Labor Standards Enforcement (DLSE) determining that XPO Cartage (then Pacer Cartage) had misclassified five drivers, ordering XPO to pay them almost \$1 million in unlawful deductions and reimbursable expenses, plus attorneys' fees and costs.¹ XPO appealed the federal judge's decision, and the case remains pending before the Ninth Circuit.
- On April 14, 2017, the DLSE's Long Beach office issued a decision in the wage claims of another four XPO Cartage drivers. The hearing officer determined that all four drivers were employees – not independent contractors – and ordered XPO to pay them over \$855,000 in damages. These cases included additional damages for "nonproductive" hours worked – such as time spent inspecting the truck or filling out paperwork – under new CA piece rate legislation (AB 1513). XPO appealed, and the appeal is now pending in California State Court after XPO unsuccessfully attempted to remove the case to federal court. XPO Cartage's appeal of the federal district court remand is pending before the Ninth Circuit.²

¹ *Jose A. Ramirez v. XPO Cartage Inc. f/k/a Pacer Cartage Inc.*, United States District Court, Central District of California, Case No. 2:15-cv-03830-WDK-AGR

² *Domingo Avalos v XPO Cartage Inc.*, United States Court of Appeals 9th Circuit, Case No. 2:17-cv-03906-RGK

- In March 2014, the DLSE San Diego office issued findings in the wage claims of seven individual Pacer Cartage, Inc. (now known as XPO Cartage) drivers, all of whom it found to be employees who had been illegally misclassified as independent contractors. The DLSE awarded these drivers a combined \$2.1 million. That ruling was subsequently upheld by the California Superior Court in September 2015 following XPO's appeal of the DLSE's initial decision. XPO appealed that decision to the Fourth Appellate District, which upheld the trial court on all issues except for recovery of lease payments.³ On October 2017, XPO filed a petition for review at the State Supreme Court where the petition for review was denied.⁴ The decision holding that the drivers were misclassified and are employees is now final.
- There are at least two pending port driver misclassification DLSE claims against XPO Cartage, both of which had their hearings on January 29, 2018. A decision is pending.

National Labor Relations Board

Region 21 of the National Labor Relations Board (NLRB) in Los Angeles issued complaints against both XPO Port Services, Inc., (d/b/a XPO Logistics) and XPO Cartage after investigations into unfair labor practice charges filed by drivers. In doing so, the Region made a merit determination that the drivers were employees.

An Administrative Law Judge has now heard the case against XPO Cartage. The last day of hearing was September 14, 2017, and drivers are currently waiting on the judge to issue a decision on the charges against XPO Cartage, including: whether the very act of misclassification in and of itself is a violation of the National Labor Relations Act (NLRA), whether the company violated the NLRA by interrogating employees regarding their union support, whether the company violated the NLRA by forbidding employees from discussing the union with their co-workers, and whether the company threatening workers was retaliation for engaging in union activity.

In XPO Port Services, the NLRB entered a settlement with the company that makes the outcome contingent on whether the Administrative Law Judge (ALJ) in the XPO Cartage case finds that the drivers are misclassified. If the ALJ does find that the drivers are misclassified, then XPO Port Services will provide full relief for all the charges against it, including providing back pay to an unlawfully suspended driver and posting a notice stating that it will stop violation labor laws. This notice also affirms that XPO Port Services will "rescind any portions of our agreements with our employee drivers that purport to classify them as independent contractors" and that they "will not misclassify [their] employee drivers as independent contractors."

³ Miranda et al. v. Pacer Cartage, Fourth Appellate District, Div. 1, Case No. D069425

⁴ Miranda et al. v Pacer Cartage, California State Supreme Court, Case No. S244793

Employment Development Department

- Upon investigations triggered by individual claims, the Employment Development Department (EDD) has determined that at least five XPO drivers (from both XPO Cartage and Port Services) are employees – not independent contractors – and therefore have a right to unemployment and state disability insurance.

Private Litigation

- In 2013, a class action against Pacer Cartage was filed on behalf of the Company's drivers statewide alleging misclassification and resulting wage and hour violations. In April 2016, 520 drivers were part of a court approved class action settlement for \$2,687,500.⁵ The settlement, however, failed to enjoin misclassification.
- In 2014, a total of 169 drivers filed individual complaints in three separate "mass action" lawsuits against their respective companies — HRT, Pacer Cartage, and the now-defunct former XPO subsidiary PDS Trucking — for wage and hour violations arising due to misclassification as "independent contractors." All cases are still pending.⁶

XPO Cartage's main customers: Amazon, Toyota, Procter & Gamble, Sony, Flor, and Decor.

XPO Port Services main customers: Firestone, Graco, Converse, and BMW.

Source: Bush Gottlieb, a Law Corporation, February 26, 2018.

⁵ *Molina v. Pacer Cartage, Inc.*, No. 13-cv-2344-LAB (JMA) (S.D. Cal.) (a/k/a *Mendoza v. Pacer Cartage*)

⁶ *Contreras v. Pacer*, Case No. BC567807; *Disus et al. v. Intermodal Container*, Case No. BC540538; *Lopez et al. v. PDS Trucking*, Case No. BC540537