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Werner Truck Drivers Win Class Cert. In Nebraska Wage Suit

By **Max Kutner**

Law360 (November 19, 2020, 5:04 PM EST) -- A group of Nebraska truck drivers suing over worker classification issues that they say have left them making little to no money have won class certification, after a federal judge rejected objections to a magistrate judge's recommendations.

A Nebraska federal judge on Wednesday signed off on conditional certification of workers who drove trucks for Werner Enterprises, Inc., which they allege misclassified them as independent contractors and left them to make less than the legally required minimum wage.

"There is evidence that the putative class members were victims of a single decision, policy, or plan, and that a common policy or practice exists regarding the classification of owner-operator drivers as independent contractors," U.S. District Senior Judge Joseph F. Bataillon wrote in the order.

Werner had filed objections to the magistrate judge's October order, arguing that the judge should have found that the claims of the driver who brought suit were too individualized to support class certification and that there was no evidence that drivers in similar situations would want to join the suit.

Judge Bataillon recognized that the magistrate judge can only make recommendations but said he found the suggestions to be sound.

"The court has conducted a de novo review of the class certification issue and agrees with the magistrate judge that a collective action should be conditionally certified," Judge Bataillon said.

The district judge also affirmed the magistrate judge's decision to let the drivers file an amended complaint, which Werner had also challenged.

The class consists of all current and former drivers who transported Werner shipments between May 2015 and May 2019 using trucks they bought from Werner. Workers who drove Werner shipments between November 2016 and May 2019 with trucks they got from non-Werner entities can also join.

Christopher Midgett, a tractor-trailer driver, filed the lawsuit in May 2018. He alleged that Werner failed to pay him and other drivers minimum wage because the company misclassified them as independent contractors instead of employees, in violation of the Fair Labor Standards Act and Nebraska wage law.

Midgett had been a Werner employee since as early as 2012 and then learned of a Werner program in which he could purchase a used truck from the company, the lawsuit said.

He took part in the program in 2015, and in doing so, his classification changed from a W-2 employee to a 1099 independent contractor, according to the suit. But through the program, he could only use the truck for Werner purposes, the suit said.

"Werner used its scheme to pass on its overhead costs to its workers, to deprive plaintiff and numerous other drivers of their minimum wages and to offload its aging fleet of trucks onto its unsuspecting employees," the complaint said.

Werner and other drivers had to pay for insurance, workers' compensation, gas, truck repairs, and maintenance, the complaint said.

Because of those costs, drivers did not earn minimum wage, according to the complaint. In April 2016, after fuel, insurance and maintenance expenses, Midgett earned just \$78.74 total, or \$2.65 per hour, the suit said.

The following month, because he had to pay for a repair to his truck, Midgett made no profit and was \$18,612 in the red, according to the complaint.

Other drivers had comparable experiences because they received around the same pay and had similar expenses, the suit said.

Werner should have classified the drivers as employees, because the company controlled and monitored their work and prevented them from using their trucks for other purposes, so the drivers could work only for Werner, the suit alleged.

Independent contractors lack many legal protections and benefits that the law mandates for employees, including minimum wage, overtime pay, paid sick time, family leave and the right to unionize.

Werner has around 13,000 employees, 24,000 trailers and more than 8,000 trucks, according to its website.

Counsel for both parties were not immediately available to comment. A Werner spokesperson also was not immediately available.

Midgett is represented by Courtney M. Stout and Eric L. Dirks of Williams Dirks Law Firm, Jack D. McInnes of McInnes Law Firm and Steven H. Howard of Steve Howard Law Firm.

Werner is represented by Elizabeth A. Culhane, Joseph E. Jones and Sarah L. McGill of Fraser Stryker Law Firm.

The case is Midgett v. Werner Enterprises Inc., case number 8:18-cv-00238, in U.S. District Court for the District of Nebraska.

--Editing by Haylee Pearl.

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