

The Transportation Brief®



The Transportation Brief

A quarterly newsletter of legal news for the clients and friends of Scopelitis, Garvin, Light & Hanson.

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Owner-Operator Lease Agreements: The Litigation Continues

Motor carriers should take note of several recent court decisions on the issue of motor carrier compliance with the federal leasing regulations. The cases analyze the impact of 49 C.F.R. 376.12(c)(1), which states that an owner-operator lease agreement must provide that the carrier shall have “exclusive possession, control, and use” of the equipment and that the carrier shall assume “complete responsibility” for the equipment’s operation (the “(c)(1) language”).

The (c)(1) language can result in a finding of employee status

Courts in Illinois, Indiana and Arkansas recently held that the inclusion of the (c)(1) language in a motor carrier’s lease agreement is an indication of an employment relationship between the owner-operator and the carrier. The Indiana court held that the (c)(1) language is sufficient on its own to indicate employee status, while the Arkansas and Illinois courts found that several factors must be considered, including the lease terms.

The Pennsylvania Supreme Court issued a ruling favorable to motor carriers, placing the leasing regulations in the proper context. The court found that, because the carrier cannot negotiate aspects of a lease that are governed by the leasing regulations, the mandatory lease terms may not be considered in resolving whether an owner-operator is an independent contractor or an employee.

Carriers must still comply with the leasing regulations

A Missouri federal court recently reminded carriers that, despite the employment relationship issue, compliance with the leasing regulations is still required. In that case, the Owner-Operator Independent Drivers Association alleged that a carrier’s lease violated the leasing regulations. The court agreed, issuing a preliminary injunction that effectively shut the carrier down with no evidence that the leasing violation caused harm to the owner-operator.

Thus, motor carrier lease agreements continue to take on an even greater role in defining the relationship between motor carriers and owner-operators. Misapplication of the regulations should dwindle given informed decisions like that of the Pennsylvania Supreme Court.

*Gregory M. Feary, Andrew K. Light, Norman R. Garvin, Indianapolis
Daniel R. Barney, Washington, D.C.*

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Briefly...

Ergonomics Program Standard Takes Effect

OSHA's final ergonomics program standard became effective on January 16, 2001, for most employers, including trucking companies. The first compliance deadline is October 15, 2001, when employers must provide to employees specific information about musculoskeletal disorders (MSDs) and a summary of the ergonomics standard. Business groups have challenged the standard in court, but covered employers should be prepared to meet the initial deadline.

Notably, the standard's so-called work restriction protection provision will, in some cases, provide more generous benefits than workers' compensation and could produce gaps in insurance coverage. The Firm can assist in determining whether gaps in insurance coverage exist and how such gaps may be filled.

*Laurie T. Baulig
Washington, D.C.*

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NAFTA Cross-Border Transportation May Soon Begin

A recent decision by an arbitration panel convened under the North America Free Trade Agreement (NAFTA) may pave the way for cross-border transportation into Mexico as early as the spring. The panel found that a U.S. moratorium on NAFTA's access rights provisions was based on political considerations and violated the original agreement. Although the U.S. requested that the panel reconsider its decision, the original findings were upheld.

U.S. carriers interested in making Mexico deliveries may want to begin securing necessary authorities through the Mexican Ministry of Transportation. Trucks and trailers entering Mexico will also likely be required to obtain a Mexican license plate or trip permit because Mexico is not a member of the International Registration Plan. The Firm can assist clients in obtaining the necessary operating authority in Mexico so that timely cross-border operations can begin when the current moratorium is lifted.

*Timothy W. Wiseman
Indianapolis*

Blanket Qualification Standards Must Be Tested

A federal judge recently ruled that UPS's uniform policy of refusing to hire drivers with monocular vision to drive UPS delivery trucks weighing less than 10,000 pounds, regardless of their individual safety records, violates the Americans with Disabilities Act. The court held that, while the ability to drive safely is an essential job function for a truck driver, UPS's vision protocol "swept too broadly and was not significantly correlated with the ability to drive safely."

Any blanket safety-based qualification standard not sanctioned by DOT's safety regulations must be "carefully tailored" and tested through "professionally acceptable methods" to ensure that a "significant correlation" exists between the standard and the performance of the job function and that no practical and less discriminatory alternatives exist.

*James H. Hanson
Indianapolis*

*Sylvia F. James
Washington, D.C.*



Mileposts

Trucking Owners Briefed on e-Commerce, Electronic Signatures

Indianapolis partner Jay Robinson led a discussion on "e-Commerce in the Trucking Industry" at the Indiana Trucking Owners' Roundtable, February 6, in Indianapolis.

The second in a series co-sponsored by Scopelitis, Garvin, Light & Hanson and accounting firm Katz, Sapper & Miller, the Roundtable is an opportunity for chief executives from Indiana's top trucking companies to discuss current challenges and opportunities for their businesses.

In facilitating discussion, Jay drew on his experience in counseling trucking clients on legal issues involved in Internet startups. Topics included trademark concerns, multi-state jurisdictional issues, limitations of liability, security, and insurance.

Jay also discussed the Electronic Signatures Act, which may become effective as soon as March 2001. Although it presents new legal issues for the industry, the Act may help trucking companies deal with their drivers and customers on a real-time basis.

Jay encouraged trucking owners who market or conduct business through the Internet to review their practices in light of unfolding legal developments related to e-commerce. Such an audit, as well as guidance from the Firm's e-commerce practice group for trucking owners on their response to the Electronic Signatures Act, may be obtained by contacting Karla Cooper-Boggs, Director of Practice Development, in the Indianapolis office.

On The Road

Andy Light will speak on cargo liability insurance issues and Dan Barney will speak on indirect air carrier liability at the Air & Expedited Motor Carriers Association and the Airforwarders Association's Air Freight Management Conference and Exposition in **San Francisco**, March 4-7.

Tom Farrell will speak on "Defending Life Care Plans" at the American Bar Association's (ABA) Transportation Megaconference V, March 15-16, in **New Orleans**.

Bill Brejcha will participate in a panel discussion at the Transportation Consumer Protection Council's Annual Conference, March 28, in **Las Vegas**.

Dan Barney will speak in a panel on "Current Issues in Transportation Antitrust," at the ABA's Antitrust Section Spring Meeting, March 28, in **Washington, D.C.**

Norm Garvin, Andy Light, Greg Feary, and Dan Barney will attend the Truckload Carrier's Association Annual Conference, April 8-11, in **San Antonio**. Andy will speak on customer insolvency and collection issues.

Norm Garvin, Andy Light, and Jim Hanson will attend the Transportation Lawyers Association's Annual Conference, May 8-12, in **Tucson**. Jim will speak on "Labor and Employment Updates."

Greg Feary will lead a technology roundtable discussion on "Internet Law and Risk Management," and Dan Barney will speak on "Antitrust and Other Legal Concerns in e-Transportation and e-Commerce" at the American Trucking Associations National Accounting and Finance Council's 2001 Conference, May 22, in **Asheville, North Carolina**.

Mike Langford will speak at the National Private Truck Council's Annual Education/Management Conference, May 20-23, in **Nashville**. Mike's topic is "Avoiding Claims for Negligent Hiring and Driver Retention."

For The Record

Indianapolis partner **Steve Pletcher** was appointed to the Firm's Management Committee, effective January 1, 2001. Steve joins managing partners **Lynne Lidke** and **Greg Feary** on the Committee.

Andy Light was recently appointed to the Executive Committee of the Transportation Lawyers Association.

Steve Pletcher, Greg Feary, Tim Wiseman and **Karla Cooper-Boggs** continue their work on the American Bar Association's forthcoming book on *The Alternative Workforce*. Steve serves on the senior editorial staff for the project.



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Dispatches



SCOPELITIS, GARVIN, LIGHT & HANSON

Bill Brejcha reports that the U.S. Court of Appeals, Seventh Circuit, recently considered a case in which an employee claimed that his demotion in violation of **employee handbook rules** was a breach of contract. The handbook included express disclaimers that it “is not a contract of employment and does not affect your rights as an employee,” and the court held that such language was fully enforceable. The court also held that, while governing Indiana law was uncertain in this area, the express language of the handbook would defeat the employee’s claim even if Indiana had recognized claims that violation of a published employment policy could be a breach of contract.

A new California “Deadbeat Dads” law regarding **independent contractor reporting** requires some motor carriers to report specific information about their independent contractors to the California Employment Development Department. According to Dan Barney, if a business is headquartered in California, all independent contractors for which it is required to file a federal Form 1099-MISC, regardless of where the contractors live or work, must be reported. If the business is headquartered outside California but has California locations, the business must report on each independent contractor that receives a Form 1099-MISC from a California location. Failure to timely report the information may result in a fine of \$24 per violation and may be viewed as another factor indicative of an employment relationship for purposes of workers’ compensation insurance, unemployment insurance and other employment benefit determinations.

The Transportation Brief® is intended as a report to our clients and friends on legal developments affecting the transportation industry. The published material does not constitute an exhaustive legal study and should not be regarded or relied upon as individual legal advice or opinion. Scopelitis, Garvin, Light & Hanson would be pleased to provide more specific information or individual advice on matters of interest to our readers.

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