Autumn 2014 ❖ Vol. 21 No. 4

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

The Transportation Brief®

Indianapolis
10 W. Market St., Suite 1500
Indianapolis, IN 46204
Phone (317) 637-1777

Chicago
30 W. Monroe Street, Suite 600
Chicago, IL 60603
Phone (312) 255-7200

Washington, D.C.
1850 M Street, N.W., Suite 280
Washington, DC 20036-5804
Phone: (202) 783-9222

Los Angeles
2 N. Lake Avenue, Suite 460
Pasadena, CA 91101
Phone: (626) 795-4700

Chattanooga
633 Chestnut Street
Chattanooga, TN 37450
Phone: (423) 266-2769

Detroit
535 Griswold Street, Suite 1818
Detroit, MI 48226
Phone: (313) 237-7400

Spokane
503 W. Riverside Ave., Suite 583
Spokane, WA 99201
Phone: (509) 747-1800

Dallas/Fort Worth
801 Cherry Street, Suite 1075
Fort Worth, TX 76102
Phone: (817) 869-1700

Milwaukee
330 East Kilbourn Ave., Suite 827
Milwaukee, WI 53202
Phone: (414) 219-8500

Mt. Ephraim
851 Green Avenue
Mt. Ephraim, NJ 08059
Phone: (856) 203-6611

Philadelphia
1650 Market Street
Suite 3600
Philadelphia, PA 19103
Phone: (215) 240-1444

Right of Control Versus Exercise of Control

In *Ayala v. Antelope Valley Newspaper*, the California Supreme Court held that the relevant inquiry to class certification in an independent-contractor misclassification matter turns on whether evidence of the putative employer's "*right* of control" in the relevant contracts was uniform across the class and not whether the putative employer *actually exercised* its right of control. Oddly, the court noted in dicta that a termination without cause provision in the contracts may represent a uniform "*legal right* to control the activities of the agent" rather than merely the legal right to terminate the contract. The case was remanded for consideration of whether the means/right of control is "susceptible to classwide proof" or whether variations of the right "would defy classwide proof." How a right to terminate a contract is possibly uniformly used as leverage to extract specific conduct on a contractor by contractor basis remains an open issue in this unusual approach to class certification.

Relying on *Ayala*, a federal court in California held a termination without cause provision to be "a substantial indicator of an at-will employment relationship." The court in *Taylor v. Shippers Transport Express* noted that whether a "right of control exists may be measured by asking whether or not, if instructions were given, they would have to be obeyed on pain of at-will discharge for disobedience." The court found the right to terminate supported employment status. How the court would distinguish this "pain of at-will discharge" from any business owner's specter of the pain of losing a customer when the customer is dissatisfied remains an open question. The court's failure to enunciate whether the termination provision was actually used to extract detailed specific conduct of the owner-operators suggests that the provision's mere existence is evidence of control by the motor carrier, despite the lack of any facts of the exercise of control.

Gregory M. Feary
Jeffrey S. Toole,
Indianapolis

SCOPELITIS
GARVIN LIGHT HANSON & FEARY

Please fax or e-mail address changes to:
The Transportation Brief
fax (317) 687-2414
tbrief@scopelitis.com

www.scopelitis.com

Briefly...

Favorable Preemption Ruling Provides Potential Defense to Misclassification Lawsuits

On September 30, 2011, the First Circuit Court of Appeals remanded the case of *Massachusetts Delivery Association v Coakley* with instructions that the district court must reassess whether Massachusetts's ABC independent contractor test, Mass. Gen. Laws ch. 149, § 148B (148B), has an impermissible effect on motor carrier "price, routes and services" in violation of the Federal Aviation Administration Authorization Act of 1994 (FAAAA). This decision may prove useful to transportation companies facing misclassification lawsuits involving laws similar to 148B. A number of states utilize ABC tests similar to 148B, requiring proof that a person provides services "outside the usual course of business of the employer" to be classified as an independent contractor. Given the First Circuit's rejection of the argument that FAAAA preemption does not extend to "generally applicable" state labor laws like 148B and instruction that the district court on remand must "sufficiently credit the broad language and legislative history of the FAAAA's express preemption provision," transportation companies should consider whether similar preemption arguments are viable in misclassification lawsuits involving application of an ABC test.

Andrew J. Butcher, Washington, D.C.

State Unemployment Agencies Awarded Federal Funds to Combat Worker Misclassification

The U.S. Department of Labor, Employment and Training Administration recently announced its award of $10.2 million in grants and high performance bonuses to 19 states funding unemployment insurance ("UI") worker misclassification initiatives such as audits, assessments and employer education. The transportation industry has seen recent aggressive owner-operator reclassification efforts by several state UI agencies that received the awards, including California, Massachusetts, New Jersey, New York, Oregon and Texas.

Transportation providers utilizing independent contractors should expect a continued aggressive effort by these states and others to identify employees allegedly misclassified as independent contractors, resulting in the employer's failure to report wages and pay unemployment tax. Such misclassification detection often results when an independent contractor files a claim for UI benefits initiating a targeted audit. State UI agencies also routinely engage in broader audits aimed at detecting worker misclassification. A thorough, independent contractor favorable response to such state UI claims and agency inquiries is an important first step in attempting to avoid a costly unemployment tax assessment for several years in arrears.

Rebecca S. Trenner, Indianapolis

Two Checks? Proceed with Caution…

Two-check systems — paying a driver a W-2 wage check for driving services and a second, 1099 check for the lease of his equipment — have been in use for many years, historically in the oil and gas industry. Some motor carriers have regarded the system as a means of providing employee benefits and workers' compensation insurance to independent contractors. Others now view two-check systems as a potential answer to state and federal independent contractor reclassification attacks.

The IRS has recognized two-check systems, but guidance demonstrates that setting up a valid program can be difficult and counter-intuitive to an independent contractor relationship. According to the IRS, in order for a two-check system to be valid, it must meet either an "accountable plan" test or be a "lease of equipment that has significance independent of the employment relationship" with the vehicle's owner. The accountable plan approach is similar to a personal vehicle business use expense reimbursement, but without an IRS mileage rate. Instead, actual vehicle expenses must be tracked. The "significance independent of the employment relationship" option means that the lease of equipment from the owner-driver must be an arms-length transaction and the same as if the motor carrier leased the equipment from a dealer. For example, if the owner-driver is terminated, the lease of his vehicle should continue. Both of these programs contain traps for the unwary, and any motor carrier considering a two-check system should proceed with caution because an IRS invalidation can result in substantial employment tax liability.

Steven A. Pletcher, Indianapolis

SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY

Mileposts

Self-Audits Offer Protection Against Reclassification

This issue of *The Transportation Brief* explores the evolving legal landscape of employment classification in the transportation industry. It is, in a sense, a cautionary tale that calls for vigilance in light of recent, highly-publicized court decisions finding owner-operators to be employees, as well as continued legislative attacks on the owner-operator model.

Recent decisions discussed in this issue, highlight the importance of being proactive in addressing this area of potential legal exposure that the trucking industry sometimes overlooks. Reclassification decisions, whether in the context of private lawsuits or governmental audits, can be far-reaching, and motor carriers should take care to guard against them at all costs.

One way to do so is to engage in a self-audit. Headed by Indianapolis Managing Partner Greg Feary, the Firm's independent contractor audit program involves a three-pronged analysis of a motor carrier's independent contractor operations. The program is designed to provide a diligent and careful approach to the audit process that preserves attorney/client confidentiality, which is a key benefit of the program.

The audit's first prong is an analytical and comprehensive review of all documents associated with the carrier's independent contractor program, which includes the principal agreement between the motor carrier and the owner-operator, typically referred to as the Independent Contractor Operating Agreement. The review might also include any number of ancillary documents, such as driver handbooks, website information, and third-party materials distributed to independent contractors.

The second prong involves an assessment of how the motor carrier's frontline operations personnel — its managers, dispatchers, safety directors, and others — interact with the owner-operators. This assessment is minimally invasive and is designed to obtain candid insight on the operational realities of the carrier's interaction with its owner-operators.

The third prong involves review and consideration of the responses received from the carrier's operations personnel and follow-up interviews with respondents to ensure an accurate portrayal of the carrier's operational realities.

The audit culminates in executive team discussions and a fine-tuning of the carrier's independent contractor program to ensure the greatest chance of success in the event the carrier is forced to defend its operational model in court or before a government agency.

On the Road

Mike Langford was a guest commentator on *Tech Talk* radio show, discussing the legal ramifications that can arise from trucking maintenance issues on Sirius Radio, RoadDog station (station 146), on November 4. He will speak on legal issues arising from motor carrier accidents on the same show, December 7.

Kathleen Jeffries and Fritz Damm attended the Transportation Lawyers Association's Transportation Law Institute and the Executive Committee Meeting, November 6-7, in **St. Louis**.

Annette Sandberg provided a DOT regulatory update at the Commercial Carrier Journal Fall Symposium, November 7, in **Scottsdale, Arizona**.

Jim Hanson presented "Wage and Hour Updates — New Challenges for Motor Carriers" at the North American Transportation Employee Relations Association, November 9-11, in **Atlanta**. Don Vogel and Fritz Damm also attended.

Fritz Damm will attend the Toronto Transportation Club's Annual Dinner, November 29, in **Toronto**.

Mike Langford will speak on the topic of "Economic Damages: Wage and Loss Earning Capacity from a Defense Perspective" at the Indiana Continuing Legal Education Foundation Seminar, December 11, in **Indianapolis**.

Kathleen Jeffries and Fritz Damm will attend the Conference on Freight Counsel, January 10-12, in **Captiva Island, Florida**.

Bill Brejcha, Don Vogel, Greg Ostendorf, Bob Henry, Kathleen Jeffries, and Fritz Damm will attend the Transportation Lawyers Association's 2014 Regional Seminar, January 15-16, in **Chicago**.

Chris McNatt will attend the California Trucking Association's Annual Membership Conference 2015, January 16-19, in **Monterey, California**.

For the Record

Greg Feary was reappointed to the ATA's Insurance Task Force.

Michael B. Langford was reelected to his second three-year term on the Board of Directors for the Trucking Insurance Defense Association (TIDA).

Congratulations to **Elizabeth M. Bolka** and **Alaina C. Hobbs**, who began their law practices this fall as associates in the Indianapolis office.

SCOPELITIS
GARVIN LIGHT HANSON & FEARY

Jeffrey S. Toole, Editor
Allison O. Smith, Editor
10 West Market St., Suite 1500
Indianapolis, IN 46204

Dispatches

Jim Hanson reports that on September 8, 2014, the Ninth Circuit Court of Appeals denied a petition for rehearing en banc and issued an amended order and decision **reversing the district court's decision in *Dilts v. Penske Logistics, LLC.*** The district court had found that California's meal and rest break rules were preempted by the FAAAA's prohibition on state and local laws that directly or indirectly impact a motor carrier's prices, routes, and services. Penske has until December 8, 2014 to file a Petition for a Writ of Certiorari with the U.S. Supreme Court.