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

The Transportation Brief®

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Which Regulations Apply to Carriers Utilizing Vehicles Weighing Less Than 10,001 lbs.?

The question is straightforward, but it is rarely met with a straightforward answer. It is an important question, especially for carriers with large fleets of smaller, lightweight vehicles (most typically, couriers). For them, the applicability—or non-applicability—of these regulations could cost or save thousands of dollars.

Interstate Operating Authority

A common misconception is that for-hire carriers operating vehicles with a gross vehicle weight rating (GVWR) under 10,001 lbs. (lightweight vehicles) are not required to obtain interstate operating authority. This is incorrect. Federal statutes require any "motor carrier" subject to the USDOT's jurisdiction to obtain operating authority. The USDOT's jurisdiction extends to any "person providing motor vehicle transportation for compensation" in interstate commerce regardless of the weight of the vehicle.

Federal Leasing Regulations

Another misconception is that carriers leasing lightweight vehicles from owner-operators are not subject to the somewhat onerous federal leasing regulations. This is also incorrect. In the regulations, the term "authorized carriers" means persons authorized to engage in the transportation of property as a motor carrier under the provisions of 49 U.S.C. §§ 13901 & 13902. For the reasons previously discussed, these statutory provisions do not exclude lightweight vehicles.

Federal Motor Carrier Safety Regulations

The FMCSRs apply only to vehicles with a GVWR or gross combination weight rating (GCWR) of 10,001 lbs. or more. There are some exceptions, including, for example, vehicles transporting placardable amounts of hazardous material. So as a general rule, the FMCSRs will not apply to lightweight vehicles, unless an exception applies.

Unified Carrier Registration

Interstate carriers that do not have USDOT numbers and operate vehicles weighing less than 10,001 lbs. GVWR are required to file annual UCR applications and pay a minimum flat fee of $76, whereas interstate carriers that do have USDOT numbers and operate vehicles weighing more than 10,000 lbs. GVWR pay UCR fees based on the number of power units indicated on their MCS-150. As a result, a fleet of lightweight vehicles pays less in UCR fees than a fleet of larger vehicles.

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Briefly...

FMCSA Faces Court Challenges to Increased Broker Bond and CSA Program

The industry is closely watching two lawsuits challenging recent actions taken by FMCSA. The first is a challenge by the Association of Independent Property Brokers and Agents (AIPBA) to FMCSA's decision to raise the bond requirement for property brokers from $10,000 to $75,000. FMCSA did not give stakeholders an opportunity to comment, claiming that Congress mandated the increase in MAP-21. AIPBA alleges FMCSA has misread MAP-21 and it was required to take comments. The second lawsuit, filed by the Alliance for Safe, Efficient, and Competitive Truck Transportation (ASECTT) and several of its members, attacks the CSA program. A ruling in the ASECTT litigation may be made as early as spring, while a ruling in the AIPBA litigation is not expected until later this year.

Braden K. Core,
Indianapolis

62c Employee Expense Reimbursement Programs

Courier companies that reimburse employee drivers for the business use of personal vehicles can take advantage of guidance found in IRS Revenue Ruling 2004-1. This guidance was developed at the urging of courier industry representatives after a number of unfavorable cases in which vehicle expense reimbursements were reclassified as wages subject to tax. The revenue ruling provides examples of what the IRS deems to be plans that are free from tax under Accountable Plan rules. The "62c" rule, so-called for the IRS Code upon which it is based, is not the model of clarity and in light of continued IRS focus on expense reimbursement programs, companies should ensure that reimbursement programs meet IRS Accountable Plan rules so that expense reimbursements are not reclassified as wages, resulting in the assessment of substantial employment taxes. To avoid such exposure, driver wage and vehicle expense reimbursements should be accounted for separately, and taxable wages should not be reduced based upon the amount of expenses incurred, even where the vehicle mileage expense has been properly accounted for.

Steven A. Pletcher,
Indianapolis

Broker and Freight Forwarder Authority Under MAP-21

Under MAP-21, companies that engage in both interstate brokerage and freight forwarding operations must hold separate authorities to do so. It is sometimes difficult to distinguish between the two, especially for companies that provide warehousing. The pertinent statutory definitions found at 49 U.S.C. §13102 offer some guidance. As a general matter, brokers typically arrange for the transportation of property by a motor carrier (usually truckload shipments) without actually handling or assuming responsibility for the freight, whereas freight forwarders take a more active role in handling the freight (e.g., assembling and consolidating) and also assume responsibility for the transportation from the place of receipt to the destination. Although separate authorities are required, companies providing both services need only obtain and file one surety bond or trust fund agreement in the amount of $75,000.

Andrew K. Light
Brandon K. Wiseman,
Indianapolis

M&A Due Diligence: Unclaimed Property Liability Considerations

M&A activity involving significant debt assumption experienced a marked increase from late 2013, forward. The increase in activity is encouraging; however, the race to close lucrative deals often leaves the acquiring company exposed to unexpected liability associated with past failures of the acquired company to report and remit "unclaimed" property. An example would be property the company held for a certain period of time without contact with the owner (e.g., settlement checks remaining outstanding for 3+ years). Lengthy statutes of limitation and laws allowing states to employ "estimation" techniques when records are not available may result in significant penalties and interest. States seeking to replenish depleted coffers have recently demonstrated an increased awareness of the uptick in M&A activity as an opportunity to corner M&A-related escrow accounts as sources of recovery for state unclaimed property funds. Acquiring companies should therefore remain wary of unclaimed property liability as an additional liability of any target company.

Jay Robinson, Jr.
Kelli M. Block,
Indianapolis

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Mileposts

Courier Industry Presents Unique Set of Legal Challenges

Knowledge of the various regulations specific to lightweight vehicles is one of many legal challenges faced by those engaged in the courier or last mile delivery segment of the transportation industry.

According to the Customized Logistics and Delivery Association (CLDA), couriers represent an $8.7 billion industry with over 7,000 companies providing just-in-time delivery of packages, medical supplies, bulk materials and documents. The Scopelitis firm is an associate member of CLDA and provides services to a number of its members. Scopelitis partners Greg Feary and Steve Pletcher are regular speakers at the association's meetings.

Independent contractors are a crucial component of many courier operations. Defending the independent contractor relationship can be challenging in any segment of transportation; however, it is particularly sensitive in the courier arena. Those challenging the business model for couriers may argue that the arrangement requires high levels of operational control, with strict delivery schedules and stringent company policies, often including uniforms. Because of such arguments, couriers are often on the defensive when they are sued for misclassification of their contractors.

Scopelitis regularly defends couriers against claims brought by drivers that they are in fact employees that have been misclassified as independent contractors. The firm's class action defense team – led by Jim Hanson, Bob Browning, Adam Smedstad, and Jack Finklea – has been involved in dozens of class and collective action cases in the broader motor-carrier realm over the past several years and has helped a number of courier businesses avoid and/or defend misclassification charges at both the state and federal levels.

High turnover among courier drivers, including independent contractors, requires stringent defense of unemployment claims. Led by Indianapolis partners Steve Pletcher and Becky Trenner, the Scopelitis firm routinely handles the defense of individual and state unemployment claims lodged against its courier clients. Pletcher and Trenner also assist couriers with IRS worker classification matters and, for those utilizing an employer-driver model, provide counsel on expense reimbursement arrangements as well as wage and hour issues.

Beyond a review of daily operations, courier businesses should periodically review driver contracts and shipper/customer agreements. Greg Feary leads a firmwide team of Scopelitis attorneys with detailed experience reviewing independent contractor programs aimed at preventing reclassification, while Andy Light, Nathaniel Saylor and others assist couriers with their shipper/customer agreements.

On the Road

Greg Feary will present on independent contractor issues, Craig Helmreich on defending freight charges, Don Vogel on motions to transfer, and Kathleen Jeffries on cargo claims FAQ at the Transportation Lawyers Association's Executive Committee Meeting and Annual Conference, April 30 - May 4, in **St. Petersburg, Florida**. Andy Light, Nathaniel Saylor and Fritz Damm will also attend.

Bob Henry, Jeff Jackson and Jim Spolyar will participate in the American Trucking Associations' Leadership Meeting, May 18-21, in **Scottsdale, Arizona.**

Jay Starrett will speak at the Trucking Boot Camp for Claims Professionals, May 2, in **Atlanta.**

Mike Langford will speak at the Trucking Boot Camp for Claims Professionals, May 22, in **Orlando**.

Mike Langford and Fritz Damm will attend the Defense Research Institute Trucking Law Seminar, June 19-20, in **Las Vegas**.

Kathleen Jeffries, Fritz Damm, and Mike Tauscher will participate in the Conference of Freight Counsel, June 21-23, in **Beaver Creek, Colorado**.

Kathleen Jeffries will attend the Transportation Lawyers Association's Summer Executive Committee Meeting, July 18-20, in **Columbus, Ohio**.

Greg Feary will present "Does Pursuing Safety Jeopardize Independent Contractor Status?" and Tim Wiseman will present "The Dangers of Carrier Selection" at the American Trucking Associations' Forum for Motor Carrier General Counsels, July 13-16, in **Marina del Rey, California**. Allison Smith and Shannon Cohen will also attend.

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Dispatches

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- Nathaniel Saylor reports that the **FDA has published anticipated timelines for implementing the requirements of the Drug Supply Chain Security Act**. According to that plan, the FDA intends to establish a system for third-party logistics provider reporting to the FDA by November 2014, and the FDA intends to develop licensing standards for third-party logistics providers by November 2015. Any entities transporting or arranging to transport pharmaceuticals subject to FDA jurisdiction should watch these developments closely.

- Chris Eckhart reminds motor carriers the **Fair Labor Standards Act's Section 13(b)(1) exemption does not apply to employees operating vehicles with a GVWR or GCWR of 10,000 lbs. or less**. Therefore, unless the Act is inapplicable for other reasons (e.g., the drivers are independent contractors), carriers must generally pay these employees time and a half for overtime.

Cover Story, continued …

IFTA Fuel Tax and State Highway Use Taxes

Interstate carriers operating lightweight vehicles are not subject to the International Fuel Tax Agreement, nor are these vehicles subject to state highway use tax requirements (*e.g.*, the New York Highway Use Tax that may be required of interstate carriers operating vehicles weighing 18,000 lbs. GVWR and greater).

International Registration Plan

Interstate carriers operating lightweight vehicles are not required to, but can, obtain IRP apportioned license plates for such equipment.

Andrew K. Light
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