

The Transportation Brief®



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An Early Review of CSA 2010 Signals An Advance Warning

The Federal Motor Carrier Safety Administration (FMCSA) is field testing its Comprehensive Safety Analysis (CSA) 2010 Program in six states. Once implemented nationally (anticipated in mid-2010), CSA 2010 will effectively replace both SafeStat and the current safety rating methodology process. As such, CSA 2010 is one of the most important FMCSA initiatives in recent years. Early returns from those domiciled in the pilot states indicate that motor carriers operating under satisfactory safety ratings and acceptable SafeStat scores may have difficulty achieving an acceptable rating under the new program.

CSA 2010 contemplates seven measurement criteria for a three-pronged rating system

CSA 2010 measures carriers on seven Behavioral Area Safety Improvement Categories (BASICS): unsafe driving, fatigued driving (hours of service), driver fitness, controlled substance and alcohol, vehicle maintenance, crash history, and improper loading or cargo securement. The sources for the BASICS data are roadside inspections including all safety-based violations (not just out-of-service violations); State-reported crashes; and the federal motor carrier census from the previous 24-month period. The violations are weighted based on severity and the amount of time since the violation (within 12 month or 13-24 months) and then compared to the BASICS of other carriers within peer groups assigned by the FMCSA. The FMCSA then determines if intervention by the agency is necessary and assigns one of three Safety Fitness Determination (SFD) ratings for the carrier: Continue to Operate, Marginal, and Unfit. Importantly, an on-site compliance review is not required to issue or change an SFD rating.

Carriers should begin today preparing for CSA 2010

In today's marketplace, maintaining satisfactory safety ratings and acceptable SafeStat scores is an essential business tool to satisfy customer concerns and contractual requirements, minimize liability insurance premiums, and allow participation in certain governmental programs. Currently, carriers can focus their safety and compliance efforts by monitoring out-of-service violations and achieving readiness for an on-site compliance review. Under CSA 2010, however, carriers will also need to carefully review the other elements of BASICS that will be given substantial weight in the new SFD calculation. Carriers should begin to analyze their safety performance data now to avoid the possibility of triggering an FMCSA intervention and unfavorable SFD once CSA 2010 is implemented next year.

*Timothy W. Wiseman,
Indianapolis*





Briefly...

Prevailing Upon Owner-Operators to Form Business Entities May Be Counterproductive

Motor carriers have found the most highly-motivated, business-savvy owner-operators tend to establish and run their own transportation business entities, and some carriers have in turn decided to contract exclusively or almost exclusively with owner-operators who use the business entity model. At the same time, courts are often reluctant to find an owner-operator's business entity – and thus the owner-operator himself – to be “employed” by the motor carrier.

As recent case law indicates, however, evidence that a motor carrier “forces” an owner-operator to create a business entity as a necessary pre-condition to entering into a lease is frowned upon by courts and thus given less weight in deciding the work status of an owner-operator. Therefore, motor carriers should emphasize in communications with potential owner-operators that the motivation for instituting a preference for contracting with business entities is strictly a business decision that will

be placed within the entire context of the ultimate decision of whether the motor carrier and owner-operator (either individually or via a business entity) execute a lease.

*Gregory M. Feary
Andrew J. Butcher,
Indianapolis*

Port of Long Beach Litigation Update

The American Trucking Associations has favorably resolved its litigation with the Port of Long Beach, establishing a simplified registration system while preserving the environmental, security, and safety concerns of the port. Litigation continues with the Port of Los Angeles.

*Christopher C. McNatt,
Los Angeles*

Ohio Workers' Compensation Law Reduces Interstate Exposure

Recent changes to the Ohio workers' compensation act allow Ohio employers to separate payroll into Ohio and non-Ohio payroll. Subject to audit and workers'

compensation reciprocity laws of other states, the Ohio monopolistic fund will assess premium for employee services performed only in Ohio. Previously, many Ohio employers had separate workers' compensation coverage for work performed outside Ohio or may not have had any coverage outside the state. Consequently, employers were at risk of paying double premiums or paying for benefits and penalties associated with no coverage.

The new law, which was effective with the payroll-reporting period January 1 – June 30, 2009, is advantageous to trucking companies with operations based both inside and out of Ohio and limits a worker's recovery of benefits in multiple states. The law has various other requirements, including the submission of separate payroll records for reporting purposes and proof that the non-Ohio payroll/employees are covered under an “other states” workers' compensation policy.

*Gregory M. Feary
Shannon Cohen,
Indianapolis*

Updates

E-Verify Update

Effective September 8, 2009, qualifying federal contractors are required to use the electronic employment eligibility verification system (E-Verify) to confirm the work authorization of (1) all new employees hired to work in the United States during the term of the contracts and (2) existing employees assigned to work within the United States on the contracts. U.S. Customs and Immigration Services has stated that these obligations do not extend to independent contractors, but that they do extend to employees of subcontractors, which might have ramifications for motor carriers that utilize fleet operators.

*David D. Robinson,
Indianapolis*

Per Diem Rates Update

Effective October 1, the flat meals and incidental expense (M&IE) per diem rates that are part of the IRS special rules for the transportation industry were raised from \$52 to \$59 for travel inside the Continental United States (CONUS) and from \$58 to \$65 for travel outside CONUS. The high/low substantiation rates were raised from \$256 to \$258 for high-cost localities and from \$158 to \$163 for low-cost localities. The amount of the high/low rates treated as meals-only expense went from \$58 to \$65 for high-cost and from \$45 to \$52 for low-cost areas.

*Steven A. Pletcher,
Indianapolis*



Mileposts

Tough Economy Calls for Careful Review In Employment and Benefits Decisions

Today's tough economy calls for difficult decisions by company owners and executives looking to cut costs to match shrinking revenues. Among the most difficult decisions are those directly affecting the company's most valuable resource – its employees.

Attorneys in the Scopelitis firm's employment and benefits group have been fielding more questions recently from clients looking to trim costs through workforce and benefits cutbacks. Most situations, they caution, call for specific review with counsel to minimize potentially costly claims by affected employees. Much of their guidance has fallen along these lines:

Review employment contracts. If they are in place, employment contracts for those affected will provide guidance on a number of key issues: non-compete standards, severance requirements, notification, and other employer obligations related to the employment decision at hand.

Consider benefits and pension issues. Terminations, layoffs, and reductions in work hours will have implications dictated by the employer's benefits and pension offerings. Employers should review their group health and pension plans to ensure that the terms of the employment decision meet the plans' requirements.

Anticipate COBRA implications. The Consolidated Omnibus Budget Reconciliation Act (COBRA) is normally triggered by job loss, reduction in hours worked, and a number of other "qualifying events" that may arise through employment changes. Identifying the qualifying event is a key first step in preparing for the COBRA implications of the employment decision. The recent American Recovery and Reinvestment Act of 2009 provides new, significant COBRA issues to consider for terminations occurring from September 1, 2008, through December 31, 2009.

Consider notification requirements. Larger employers may be subject to Worker Adjustment and Retraining Notification (WARN) Act requirements, which require employers to provide 60 days' advance notice in qualifying mass-layoff situations. Many states have enacted their own WARN Act statutes that may provide different and/or additional requirements.

Base decisions on non-discriminatory criteria. A recent U.S. Supreme Court decision places a greater burden of proof on the employer under the Age Discrimination in Employment Act of 1967, and severance agreements for workers age 40 or older need to comply with the Older Workers Benefit Protection Act of 1990, which can create specific obligations for employers in group terminations. Also, employers who once may have been lax about granting leaves need to pay closer attention than ever before, when tight budgets are more likely to affect leave decisions and Family Medical Leave Act requirements.

Attorneys in the Scopelitis firm's employment and benefits group are available to respond to specific issues as they arise. The group includes Jim Hanson, Steve Pletcher, David Robinson and Jack Finklea in Indianapolis; Don Vogel and Sari Pettinger in Chicago; and Fritz Damm and Mike Tauscher in Detroit, among others.

For the Record

Congratulations to Andrew F. Marquis, who began his practice this fall as an associate in the Indianapolis office.

On the Road

Norm Garvin, Tim Wiseman, and Todd Metzger will participate in the Indiana Motor Truck Association's Annual Meeting, November 1-5, in Las Vegas.

Greg Feary will present "Owner-Operators What's on the Horizon: Recent Rulings on Independent Contractor Status" at the Society of Certified Insurance Counselors Tuckers II Seminar, on November 4, in Chicago.

Greg Feary will speak on owner-operator/independent contractor status at the Transportation Lawyers Association's Transportation Law Institute, November 6, in Arlington, Virginia. Don Vogel and Kathleen Jeffries will also attend.

Kathleen Jeffries, Fritz Damm, and Mike Tauscher will attend the Conference on Freight Counsel, January 10-11, in Austin, Texas.

Norm Garvin, Don Vogel, Kathleen Jefferies, Fritz Damm, and Mike Tauscher will attend the Transportation Lawyers Association's 2010 Regional Seminar, January 22, in Chicago.

Chris McNatt will attend the California Trucking Association's Annual Management Conference 2010, January 23-28, in Santa Barbara, California.



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Dispatches



◆ Andy Light reports that effective August 27, 2009, **Illinois joins 15 other states with anti-indemnification statutes specific to motor carrier agreements.** As a result, any agreement that indemnifies the indemnitee, e.g., a negligent shipper, for loss or damage resulting from the indemnitee's negligence or intentional acts is unenforceable in Illinois.

◆ Bill Brejcha reports that, as of this writing, no appeal has been filed in a much-publicized C.H. Robinson case in Illinois. C.H. Robinson, a **third-party logistics provider, was held liable** for millions of dollars in damages as a result of an accident involving a load it arranged. Updates on the status of this case will be published in future issues of *The Transportation Brief*.

◆ **Legislative and regulatory activity continues to target alleged misclassification of employees as independent contractors.** A Wisconsin task force recently recommended the removal of Wisconsin's favorable regulations governing independent contractors in trucking. Shannon Cohen advises motor carriers to stay alert for activity that may affect operations.

◆ According to Andy Light, **fees under the Unified Carrier Registration system would more than double** under a Federal Motor Carrier Safety Administration proposal published and commented on in September's Federal Register. The rulemaking was proposed as a way to make up for lost revenue resulting from a low compliance rate and other factors. Fortunately, trailers are no longer included in the vehicle computation.