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The Transportation Brief℠

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

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Employee vs. Independent Contractor — Are Your Drivers Subject to Reclassification?

Recently, the scope of coverage for workers under federal social legislation has expanded. At the same time, a few state courts and administrative agencies (notably Pennsylvania, Arkansas and New Jersey) have extended application of more traditional employment laws to owner-operators based on findings that owner-operators are employees rather than independent contractors. Added to that are the Owner Operator Independent Driver Association's allegations in several recent lawsuits suggesting that owner-operators are entitled to employment benefits. These trends require motor carriers to closely evaluate their owner-operator relationships to avoid reclassification.

There are two basic tests, and many hybrids thereof, used to determine a trucker's classification. The prevalent "right of control" test focuses on an employer's ability to exercise control over the details of the worker's job duties. The "economic reality" test prompts courts to look at the investment in trucking equipment and who is responsible for various costs, fees, taxes and insurance. One hybrid test, known as the "relative nature of the work" test, asks whether the work done is an integral part of the employer's regular business and whether the worker is in a business or profession of his or her own.

Notably, because different tests are applied, a driver may be classified as an employee for purposes of one law yet treated as an independent contractor for purposes of another. However, the practical reality is that, once reclassification occurs in one area, the way is paved for the same to occur in others. Key factors on which all motor carriers must focus to avoid reclassification include:

- Ownership and maintenance of the trucking equipment by the owner-operator
- No forced dispatch rules
- Written independent contractor agreements allowing owner-operator control over the details of work such as route selection and rest break schedules, the hiring/firing of helpers, and the right to trip lease
- Owner-operator provided workers' compensation/work injury insurance for drivers

The issues surrounding driver classification are complex, but, because of the potential liability involved, a periodic audit of internal procedures and documentation relating to owner-operator agreements can save motor carriers substantial expense over the long haul.

Norman R. Garvin, Andrew K. Light, Gregory M. Feary, Indianapolis

Briefly...

Electronic Signature Act Takes Effect

On October 1, 2000, the Electronic Signatures in Global and National Commerce Act took effect. The Act validates electronic signatures so that contracts can be effectuated via the Internet and other electronic networks without the risk of being considered invalid or voidable due to a non-traditional signature. This law should help trucking companies deal with their drivers in many matters on a real-time basis.

In the near future, the Act will also allow documents requiring an original signature to be retained in an electronic format, including those documents required to be available for audit or inspection by government agencies such as driver logs and independent contractor agreements. The records retention portion of the Act has a tentative effective date of March 1, 2001.

Please contact the Firm for a copy of its advisory letter explaining the Act and some of its applications in greater detail.

Gregory M. Feary
Jay D. Robinson
W. Todd Metzger
Indianapolis

MEWA Rules Impact Trucking Industry

As reported previously, Department of Labor (DOL) rules effective May 1, 2000, require administrators of multiple employer welfare arrangements (MEWAs) to file new information reports (Form M-1). Failure to comply with reporting requirements may result in fines of up to $1,000 per day.

The trucking industry's dilemma results from participation by both employees and contract drivers in a trucking company health plan. The DOL may conclude that such a health plan is a MEWA because it covers employees of two or more employers. The Firm's discussions with the DOL indicate that the DOL is not likely to levy harsh penalties through the end of this initial reporting year if the company makes a good-faith effort to determine whether it is administering a MEWA.

The Firm is attempting to resolve this potential problem with the DOL, but, in the meantime, we urge carriers to contact counsel with questions and concerns.

Gregory M. Feary
Steven A. Pletcher
Indianapolis

Web Presence May Create Jurisdiction

Recent court cases have addressed whether a company's website creates a contact with a forum state significant enough to allow a court in that state to exercise jurisdiction over the company. Plaintiffs have successfully argued that an interactive website can expose a defendant to a lawsuit in a forum where the defendant has no other presence and that a website in conjunction with other contacts increases the likelihood that the exercise of jurisdiction over the defendant will be proper.

One significant factor considered by courts is whether the website is passive — merely providing information — or interactive — allowing the exchange of information. Clients with websites should be aware that a greater degree of interactivity increases the probability that their companies could be subject to the laws and courts of a state in which the website can be accessed.

Jay D. Robinson
W. Todd Metzger
Indianapolis

Mileposts

Carriers Should Review Pay Practices

A Department of Labor (DOL) audit of a motor carrier's pay practices is likely to reveal wage and hour law violations that can carry costly penalties, according to Indianapolis partner Jim Hanson. Violations may be avoided by a periodic review of the carrier's pay practices.

The Fair Labor Standards Act (FLSA) establishes record-keeping requirements and a minimum wage. It requires employers to pay employees overtime compensation for all hours worked over 40 hours in a workweek. The DOL can conduct audits of employers to enforce the FLSA, and an employer that violates the FLSA may be liable for unpaid wages. Additional amounts may be imposed for civil penalties, criminal penalties in cases of willful violations, and attorney fees.

The transportation industry has historically considered itself exempt from federal and state wage and hour laws because the FLSA creates an exemption from the payment of overtime for drivers, drivers' helpers, loaders, and mechanics. Despite the motor carrier exemption, most carriers will find that some of their employees are subject to wage and hour laws, according to Hanson.

For example, many carriers believe that salaried employees are exempt. Hanson warns, however, that the method by which an employee is paid does not determine whether the employee is entitled to overtime compensation. Thus, not all salaried employees fall within the FLSA's "white collar" exemptions.

Hanson, along with Laurie Baulig and Sylvia James of the Washington, D.C., office, regularly reviews motor carrier pay practices. Unfortunately, those reviews are often conducted as a result of DOL-initiated audits. Hanson advises that the better practice to avoid liability is for carriers to call for a wage and hour review before a DOL audit occurs.

On The Road

Bill Brejcha will speak on Illinois' commercial driver's license program and requirements at the City of Elmhurst's Safety Symposium on November 7, in **Elmhurst, Illinois.**

Jerry Cooper, Victor Shane, and Dennis Duffy will hold a seminar on the interaction of the physician-patient relationship and the Illinois Workers' Compensation Act for Gallagher Bassett Services, Inc., on November 9, in **Arlington Heights, Illinois.**

Jim Hanson and Jerry Cooper will attend the 14th Annual Conference of the North American Trucking Industrial Relations Association, November 12 - 15, in **St. Petersburg Beach, Florida.** Jim, who is program chair for the conference, will serve on a panel titled "Sexual Harassment: Knowing the Rules of the Road."

Greg Feary and Jeff Toole will make a presentation on "Hot Topics in Transportation Insurance" at the Transportation Lawyers Association, January 12, in **Chicago.**

For The Record

Congratulations to **Craig Helmreich, Jack Finklea,** and **Lisa Glenn** on their successful completion of the Indiana Bar Exam. They began their practices as Indianapolis associates after swearing-in ceremonies this Fall.

Jeff Toole and Julie Campbell celebrated their marriage on Saturday, October 21, 2000. Jeff will continue his Indianapolis practice in insurance and employee benefits law.

Indianapolis associate **Carla Stagnolia** spearheaded the Sixth Annual Food Drive sponsored by the Young Lawyers Division of the Indianapolis Bar Association.

Staff and attorneys participated again this year in the Central Indiana Chapter of the Alzheimer's Association Memory Walk on September 17. Scopelitis' walkers were led by **Paula Carson** and **Jennifer Canary** of the Indianapolis office. Firm Executive Director **John Thompson** co-chaired the 11th Annual Memory Walk, which raised more than $273,000 to assist families affected by Alzheimer's disease or related dementia.

With regret and best wishes, we note the departure of **Wendi Martinez,** office manager for the Washington, D.C., office. Wendi departs November 22, 2000, for a position in human resources management at TMA Resources, Inc., in McLean, Virginia.

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Dispatches

SCOPELITIS, GARVIN, LIGHT & HANSON

Scopelitis, Garvin, Light & Hanson's review of 100 **transportation contracts** was referenced in Mercer Management Consulting's "'Just in Time to Wait': An Examination of Best Practices for Streamlining Loading/Unloading Functions," a report prepared for the Truckload Carriers Association. The Firm's review found that most contracts did not materially address loading and unloading issues and those that did gave insufficient attention to such topics as detention charges, notice of late deliveries, fees for spotted trailers, and unloading charges. Andy Light advises carriers to address these issues in their contracts.

Tim Wiseman warns that beginning November 20, 2000, any motor carrier found to be "unfit" by the Federal Motor Carrier Safety Administration will be subject to a mandatory out-of-service order prohibiting the carrier from providing transportation services in interstate commerce. Importantly, this new regulation provides that an **"unsatisfactory" safety rating** will equate to being found unfit, triggering the out-of-service order. Carriers issued an unsatisfactory safety rating will have 60 days before the out-of-service order takes effect to improve their safety and compliance programs and seek an upgrade of their rating.

An Indiana court has ruled that a mobile home transporter was not liable for the negligent acts of an escort vehicle driver hired by the carrier's owner-operator. Although Indiana case law adheres to the **"logo liability"** rule that makes carriers strictly liable for the conduct of owner-operators, the court's decision did not extend that rule to the driver of the escort vehicle and, reports Angela Cash, may signal a weakening of the logo liability rule in Indiana.