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The Transportation Brief®

The Transportation Brief

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Overtime Exemption Warrants Scrutiny by Trucking Employers

The Fair Labor Standards Act (FLSA) governs, among other things, the payment of overtime to employees. Because truck drivers and mechanics are generally exempt from receiving overtime, many motor carriers mistakenly believe that all salaried employees are also exempt. As a result, carriers run the risk of misclassifying non-exempt employees and subjecting themselves to liability for two (and in some cases three) years of unpaid overtime, liquidated damages, and attorney fees.

In recent years, an alarming number of carriers have been sued by plaintiff attorneys or investigated by the U.S. Department of Labor for failing to pay overtime to salaried personnel. One carrier was recently sued for failing to pay overtime to all of its "freight operations supervisors." To avoid a similar fate, carriers should understand the salary basis and duty tests of the most common "white collar exemptions" for bona fide executive or administrative employees.

Salaried employees must meet salary basis and duty tests

The salary basis test requires that salaried employees be paid $250 or more per week, and the amount of pay cannot depend on the quantity or quality of the employee's work. A common mistake that defeats this test is docking an employee's pay for partial day absences or for other reasons.

The duty test requires that exempt executive employees direct the work of two or more full-time employees and work in a management role. Exempt administrative employees must exercise discretion and independent judgment in the performance of office or non-manual work directly related to management policies or general business operations. Common mistakes include treating salaried employees as exempt when they do not supervise others or do perform routine clerical tasks.

Internal audits will expose mistakes now

Internal audits should be conducted by counsel to ensure compliance with the FLSA's wage and hour requirements before carriers are investigated or sued. Also, carriers should classify employees properly from the beginning and develop and periodically review written job descriptions for each position in the company based upon the FLSA standards. Taking such steps now can avoid costly penalties later.

James H. Hanson, Indianapolis
Sylvia F. James, Washington, D.C.

Briefly...

Recent Case Raises Interest in Arbitration Agreements

A recent U.S. Supreme Court decision clarified the right of employers to require arbitration of employment disputes. The decision dealt with the Federal Arbitration Act (FAA), which compels judicial enforcement of arbitration agreements in contracts "evidencing a transaction involving commerce."

Transportation employers are largely unaffected by the decision, because, as the Court confirmed, the FAA exempts "contracts of employment of transportation workers." Nevertheless, this well-publicized case has renewed interest in arbitration among many transportation employers. Because arbitration can be less costly and less time-consuming than litigation, it is a favorable option for many employers in resolving employment disputes.

Fortunately, transportation employers can often find legal support for arbitration agreements outside of the FAA, such as some state laws that specifically endorse the use of arbitration for employment disputes. Of course, careful drafting of an arbitration provision is critical to ensuring its enforcement if a future dispute does arise.

David D. Robinson
Indianapolis

U.S.-Mexico Border Opening May Be Delayed Beyond January 2002

The Bush Administration's proposal to fully implement NAFTA's trucking provisions by January 1, 2002 has hit a major roadblock, as both the House and Senate have passed measures that could significantly delay the opening of the U.S.-Mexican border. Responding to concerns about the safety of Mexican trucks, members of Congress from both political parties are supporting provisions in the 2002 DOT appropriations bill that would require DOT to conduct on-site compliance reviews of Mexican carriers and other safety measures before the carriers would be allowed to enter the U.S.

President Bush has threatened to veto any bill that would delay the opening of the border and prevent the U.S. from fully honoring its NAFTA commitments. The issue will likely not be resolved until the fall, after Congress returns from its traditional August recess.

Laurie T. Baulig
Washington, D.C.

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Carriers Must Have Company Tariffs

The ICC Termination Act of 1995 (the "Act") eliminated a common carrier's duty to file tariffs with the abolished Interstate Commerce Commission. The Act instead required all regulated-property motor carriers to provide the shipper upon request "a written or electronic copy of the rate, classification, rules, and practices, upon which any rate…is based."

Many carriers now prudently utilize written contracts to evidence the applicable rates and other aspects of their services, yet they fail to have a company rules and rates "tariff" (Company Tariff) to govern moves for which no written agreements exist. Absent a written contract, or at a minimum a rate confirmation sheet, the Company Tariff may well be the determining factor upon which a shipper dispute is resolved. Conversely, the failure to have a Company Tariff will significantly undermine the carrier's legal position.

To avoid shipper/carrier disputes about such issues as limitations of liability, accessorial charges, and billing procedures, the best practice is to enter into written contracts. However, all carriers still need to have a Company Tariff for moves not governed by written agreements.

Andrew K. Light
Indianapolis

Mileposts

"Practical Strategies" Workshop Offered by Scopelitis Employment Group

Attorneys from the Firm's Chicago, Indianapolis, and D.C. offices will assist human resources professionals in addressing common employment dilemmas in a day-long workshop set for Tuesday, September 25, at the Wyndham Drake Hotel in Oak Brook, Illinois.

Titled "Practical Strategies for Employers in the Transportation Industry," the workshop is geared towards the concerns of trucking and transportation company owners, general managers, human resources directors, risk managers, in-house counsel, and other employment professionals.

Workshop leaders—including Victor Shane (Chicago), Jim Hanson and David Robinson (Indianapolis), and Sylvia James (D.C.)—will provide step-by-step procedures and frameworks for decision-making to help employers address such thorny issues as wage and hour requirements, employee handbooks, drug-testing policies and unemployment claims.

Among the common employment questions addressed in the workshop will be the following: Are your salaried employees truly exempt? Does your harassment avoidance policy have what it takes? And, will today's problem employee become tomorrow's high-dollar plaintiff?

For more information, or to obtain a registration form, call Karla Cooper-Boggs at 317-637-1777, e-mail Karla at kcboggs@scopelitis.com, or visit our website at www.scopelitis.com.

On The Road

Greg Feary will speak on "Legal Developments Concerning Independent Contractors" at the Truckload Carrier Association's Independent Contractor Division Meeting in **Chicago** on September 21.

Steve Pletcher will speak on "Contracting with LLCs, Partnerships and S Corporations" at the National Association of Professional Employer Organizations' "Marketplace 2001," October 3-6, in **Nashville.**

Jim Hanson and Jerry Cooper will attend the 15th Annual Conference of the North American Trucking Employment Relations Association (NATERA), October 10-12, in **St. Petersburg Beach, Florida.** Jim, who serves as Vice Chairman of NATERA, will participate in a panel on security issues in the workplace.

Norm Garvin and Tim Wiseman will attend the Indiana Motor Truck Association's Convention, October 17-22, in **Palm Desert, California.**

Jim Hanson will serve as moderator of a panel on labor and employment issues at the 21st Annual Transportation Law Institute in **San Antonio,** October 21-23. The panel is titled "Hiring Ms. Right and Firing Mr. Wrong."

Greg Feary, Jay Robinson, Dan Barney, Laurie Baulig, and Jerry Cooper will attend the American Trucking Associations' Management Conference and Exhibition, October 28-31, in **Nashville.** Dan and Jay will lead an education session on "e-Legal Concerns: Buying, Selling, and Promoting via the Internet."

Norm Garvin will attend "Transportation of Tomorrow," a seminar sponsored by Deloitte & Touche, November 6, in **Chicago.**

For The Record

David D. Robinson joined the Firm on June 1, 2001, as of counsel in the Indianapolis office. Formerly a partner in the Indianapolis law firm Johnson Smith, LLP, David has substantial experience representing employers in a wide spectrum of labor and employment matters.

Greg Feary and **Jeff Toole** of the Indianapolis office led the Indiana Trucking Owners Roundtable discussion on insurance issues in transportation on July 25, 2001. They focused their discussion on captive insurance programs. The Trucking Owners Roundtable is co-sponsored by Scopelitis and Katz, Sapper, and Miller, an Indianapolis accounting firm.

Congratulations to **Lisa Glenn,** an associate in the Indianapolis office, on the Indiana Board of Accountancy's recent approval of her Certified Public Accountant's license.

Mike Langford, a partner in the Indianapolis office, was recently appointed Vice-Chairman of the Transportation Law subcommittee of the Defense Trial Counsel of Indiana.

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Dispatches

SCOPELITIS, GARVIN, LIGHT & HANSON

According to Bill Brejcha (Chicago), the Surface Transportation Board (STB) recently ruled that the issue of whether certain motor carriers were unlawfully operating as **household goods carriers** was to be resolved by the Federal Motor Carrier Safety Administration, not the STB. This decision clarifies the regulatory responsibilities of the agencies who succeeded the Interstate Commerce Commission (ICC) under the ICC Termination Act of 1995.

The Internal Revenue Service (IRS) will no longer automatically attack tax deductibility of premiums paid to a **captive insurer** based on the mere fact that premiums are being paid by the captive's corporate affiliates (the "economic family theory"). Rather, reports Greg Feary (Indianapolis), the IRS will evaluate each case on its individual facts.

Steve Pletcher (Indianapolis) advises that the U.S. Supreme Court will soon hear a case regarding **prospective Family and Medical Leave Act (FMLA) notice,** a problematic issue for many employers. Current regulations prohibit an employer from counting any leave taken against the employee's 12-week FMLA entitlement if the employer did not prospectively designate the leave as FMLA leave. Federal circuit courts have disagreed as to the validity of this rule, causing uncertainty and confusion. Steve will inform readers of the Court's decision in a future issue of *The Transportation Brief*.