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The Transportation Brief®

The Transportation Brief

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

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Improper Wage Deductions Can Make Employers An Easy Target

Employees terminated from employment, whether voluntarily or involuntarily, often leave owing their employer money. A common response by the employer is to deduct from the employee's final wages whatever sums are owed. However, state law may prevent or limit such deductions and can impose serious penalties when improper deductions are made either during or after the employment relationship ends.

Wage deduction laws vary from state to state

In Indiana, a wage deduction is considered an assignment of wages and is allowable only when (1) there is a written agreement signed personally by the employee and the employer; (2) the agreement is revocable by the employee **at any time** upon written notice to the employer; (3) an executed copy of the agreement is delivered to the employer within ten days after execution; and (4) the assignment is for a limited purpose, the most common being for merchandise sold or loans made to the employee.

Illinois takes a different approach. Unless required by law or court order, made for the benefit of the employee (e.g., group insurance premiums), or conducted pursuant to Illinois' strict wage assignment laws, wage deductions are permitted only if made with the express written consent of the employee, given freely at the time the deduction occurs. Thus, although employers often obtain the employee's written consent at the time of hiring, later deductions during the employment or after termination are invalid if another consent is not signed each time a deduction is made.

Penalties can be severe

Under Indiana law, deductions that violate the law result in forced repayment of the deduction, a penalty of up to twice the amount of the deduction, and an award of attorneys' fees. In Illinois, damages may also include a penalty of up to twice the amount of the deduction plus personal liability for corporate officers and an award of attorneys' fees.

Employees, both current and departing, may harbor ill will against their employer, and an improper wage deduction may make an employer an easy "target" for a lawsuit. Assuring compliance with the wage deduction laws of your state can prevent unnecessary claims.

Donald J. Vogel
Sara L. Pettinger,
Chicago

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Briefly...

Make Owner-Operator Leases Precise To Avoid Litigation

A recent Louisiana case illustrates the importance of drafting owner-operator compensation provisions clearly. The challenged lease allotted owner-operators a specified percentage of "gross linehaul revenue," but did not define that term and was silent as to accessorial-charge revenue. Noting that the federal leasing regulations require leases to specify which party is responsible for "accessorial" services and that the carrier had ignored that mandate, the court declared that "gross linehaul revenue" included all accessorial-charge revenue not expressly excluded and awarded damages to the owner-operators.

Other carriers are fighting lawsuits challenging allegedly undisclosed "off-the-top" reductions in percentage-of-revenue compensation in Florida, Illinois, Montana, and Ohio. Another carrier is battling in Arizona over whether mileage pay should be based on actual miles or mileage-guide miles. All of these carriers will hopefully win their cases by pointing to supportive additional disclosures or courses of dealing. For those not yet sued, the best deterrent is extra precision and detail in drafting both compensation and charge-back provisions in leases.

Daniel R. Barney, Washington, DC

Preference Claim Update

The past six months have produced a flurry of preference claims by bankrupt shippers to recover payments made to motor carriers during the 90 days preceding the shippers' bankruptcy filings. Although preference claims seem especially unjust in many circumstances, good defenses often exist.

Payments received on terms consistent with past practices are frequently subject to the "ordinary course of business defense." Also, under the "new value defense," carriers can often offset payments received during the 90-day preference period against additional services rendered thereafter. In order to preserve such defenses, carriers should maintain an accounts receivable history on bankrupt shippers for at least two years after any bankruptcy filing. In addition, posing an aggressive defense upon the first indication that a claim is coming can produce a favorable informal resolution before litigation occurs.

Jay D. Robinson, Jr., Indianapolis

Motor Carrier Self-Insurance Applications are on the Rise

The trend in the transportation industry is for motor carriers to explore the possibility of receiving self-insurance authority from the Federal Motor Carrier Safety Administration (FMCSA). The FMCSA closely scrutinizes self-insurance applications and has placed burdensome conditions on certain motor carriers. For example, the FMCSA has begun to impose higher collateral amounts and usually establishes the collateral amount by using a comparison of the applicant's tangible net worth to loss reserves.

Motor carriers should also consider intrastate self-insurance authority, although the process for obtaining such authority varies between states. Regardless of the self-insurance authority being sought, careful preparation of the application and use of experienced professionals may increase the chance of success and may shorten the time for processing the application.

Gregory M. Feary
Jeffrey S. Toole, Indianapolis

Courts Take Aim At Workers' Compensation Premium Chargebacks

In December, a California court ruled that the chargeback of premiums to an owner-operator is illegal when the owner-operator signs a form "electing" workers' compensation coverage. More recently, a Missouri appeals court found that owner-operators did not qualify for a statutory workers' compensation exemption because they were not equipment "owners." The case was thus remanded to the trial court to assess the owner-operators' employment status under Missouri common law and then determine the legality of the chargeback practice. Watch for updates on this important topic in future *Transportation Brief* issues.

Gregory M. Feary, Indianapolis

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Mileposts

SGL&H Labor & Employment Team Offers Depth, Breadth in Transportation Law

The recent addition of senior labor and employment attorneys Don Vogel and Sari Pettinger in the Chicago office expands the range of services provided by SGL&H for transportation employers. They join the Indianapolis labor and employment group that includes partners Jim Hanson and David Robinson and associate Jack Finklea.

The Indianapolis group is led by Hanson, who has been an advocate for management for more than 20 years and is a director and past president of the National Transportation Employee Relations Association. Robinson similarly has 13 years of experience in counseling employers on a wide range of topics, with particular focus on employment discrimination and harassment issues. Finklea rounds out the group with a diverse practice that addresses labor and employment problems at all levels, including the appellate courts.

Collectively, the labor and employment group helps transportation employers develop a proactive approach to employment matters and implement practical tools to prevent problems before they arise. Their tasks often include

- Responding to union organizing campaigns
- Preparing employee handbooks and policy manuals
- Conducting audits of wage-hour and other employment practices
- Negotiating union contracts or non-union employment agreements
- Developing strategies for multiemployer pension plan withdrawals
- Leading harassment training programs
- Guiding employers through alcohol, drug, and job-related testing

Sometimes even the best planning, however, cannot prevent litigation. When disputes do arise, the SGL&H team offers management defense against discrimination and wrongful discharge claims, unfair labor practice charges, pension plan withdrawal liability cases, grievance and arbitration claims, and virtually any other employment-related lawsuit.

Vogel and Pettinger, co-authors of the cover article in this issue of *The Transportation Brief*, are welcome additions to the SGL&H labor and employment team. They joined the Chicago office in March 2004 along with long-time transportation attorney Leonard Kofkin.

For The Record

John S. Magiera joined the firm March 1, 2004, as of counsel in the Chicago office. Magiera's practice focuses upon workers' compensation defense. He earned his law degree at Lewis University College of Law in 1978.

James D. Ellman joined the firm May 10, 2004, also as of counsel in the Chicago office. Ellman's practice focuses upon accident defense litigation. He is a 1991 graduate of the Illinois Institute of Technology Chicago–Kent College of Law.

On The Road

Andy Light, Tim Wiseman, Bill Brejcha, Dan Barney, Leonard Kofkin, Don Vogel and Kim Mann will attend the Transportation Lawyers Association's (TLA) Annual Conference, June 1-5, in **Palm Beach, Florida.** Dan will present an update on owner-operator litigation at the Commercial and Business Litigation Committee meeting.

Don Vogel also will attend the TLA Executive Committee's Summer Retreat, July 24, in **Denver.** Don is Secretary-Treasurer of the TLA.

Norm Garvin will attend the Association for Transportation Law, Logistics and Policy's annual meeting, June 26-30, in **Moran, Wyoming.**

Andy Light, Greg Feary, and Jay Robinson will attend the American Trucking Associations' (ATA) National Accounting and Finance Council's annual meeting, June 27-29, in **Dallas.** Andy and Jay will speak on restructuring. Greg will present legal updates at the Insurance and Risk Management Committee meeting.

Norm Garvin, Greg Feary, and Dan Barney will attend the ATA's General Counsel Forum, July 26-28, in **Vail, Colorado.** Greg and Dan will moderate panels, respectively, on insurance alternatives and owner-operator class actions.

Don Vogel will speak on the rights of employees and independent contractors at the National Court Reporters Association's Annual **Chicago** Conference on July 30.

Norm Garvin will attend the National Tank Truck Carriers' Summer Board of Directors meeting, August 4-6, in **Asheville, North Carolina.**

Jim Hanson will speak on "Fundamental Issues in Indiana Human Resources Law" at the National Business Institute, August 23, in **Indianapolis.**

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Dispatches

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The Federal Motor Carrier Safety Administration (FMCSA), effective April 5, 2004, passed its long-awaited changes to the Consumer Protection Regulations for interstate household goods moves. Rich Clark cautions movers to be aware of some significant changes. For example, the mover now relinquishes the shipment when the customer tenders 110% of the estimated cost, even if the shipper requests, and the mover provides, significant additional services not included in the estimate. The balance of the charges must be deferred for 30 days following delivery.

Effective October 30, 2004, under a new FMCSA regulation, former employers must provide additional specific information on former drivers to prospective employers within 30 days of the request. According to Tim Wiseman, the new information includes the former driver's accident history as well as drug and alcohol test results.

Rich Clark reports that the FMCSA recently announced new requirements for operators of double and triple trucks, also known as longer combination vehicles (LCVs). The rule prohibits drivers from operating an LCV trailer until they have a doubles/triples endorsement on their CDL for 6 months and requires doubles or triples training following the 6-month period. The rule becomes effective June 1, 2004