

The Transportation Brief®



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Industry Continues to Measure Potential Impact of the Obama Administration

Although the pressing nature of the country's economy means some new legislative and regulatory initiatives may be delayed, significant changes are likely. Many potential initiatives would impact employers in all industries – transportation included.

New legislation will look to change union elections

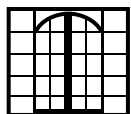
The Employee Free Choice Act (EFCA) a/k/a “card check” was introduced on March 10. EFCA as now written likely will not pass the Senate. Nevertheless, maintaining a watchful eye on future developments is crucial because organizing reforms are clear priorities of Labor and will likely be further pursued.

Past initiatives are also likely to resurface

As a Senator, President Obama supported two bills that would have affected the industry. The Independent Contractor Proper Classification Act of 2007 purported to seriously restrict use of the IRS Code's safe harbor provisions by authorizing worker-requested IRS review of employment status and eliminating the “industry practice” for the safe harbor. It also authorized targeted investigations of industries perceived to engage in misclassification. In a similar vein, the Employee Misclassification Prevention Act made worker misclassification a stand-alone violation of the Fair Labor Standards Act without the need to show an independent injury resulting therefrom, mandated recordkeeping for employees and independent contractors, and also authorized targeted investigations. These initiatives, along with potential employer-burdening proposals from the Middle Class Task Force, may reappear in the future.

Finally, the impact of the probable 60-member majority in the Senate is yet to be assessed. Although Senator Specter is now caucusing with the Democrats, his votes on substantive issues may not differ significantly from his prior positions. As always, Senator Specter, along with other moderate Senators, will play a large role in shaping the legislative landscape in the coming session.

*Gregory M. Feary
Shannon M. Cohen,
Indianapolis*





Briefly...

Jury Issues \$22.75 Million Personal Injury Verdict Against Broker

On March 20, an Illinois jury returned a verdict of \$22.75 million against transportation broker C.H. Robinson in personal injury litigation over a 2004 crash on Interstate 55. The jury expressly found that the truck driver in the crash was Robinson's agent.

Plaintiffs offered direct evidence that Robinson owned the cargo on the truck and cited damaging public representations from Robinson's SEC reports and internet website suggesting that Robinson assumed responsibility for the truck's operation. Plaintiffs also offered proof that Robinson directly tendered the load to the owner-operator driver, advanced her \$700 for fuel, and used a load confirmation sheet that identified 10 "mandatory" rules for the driver and 3 separate "fines" for her noncompliance with Robinson's rules.

Such practices – and the verdict they produced – confirm that brokers face unwarranted exposure if they do not vigilantly separate their activities from those of the carriers they hire.

*William D. Brejcha,
Chicago*

New Enforcement Efforts Create Exposure In Medicare Set Aside Cases

The Centers for Medicare & Medicaid Services (CMS) is stepping up enforcement of settlement reporting and Medicare set aside (MSA) requirements. An MSA, which is a fund created to protect Medicare's interests in the settlement of worker's compensation, liability, and no-fault claims, poses real risk for entities responding to the claims.

The Medicare, Medicaid, and SCHIP Extension Act of 2007 (SCHIP) takes effect on July 1, 2009 and requires worker's compensation, liability, and no-fault claims handlers to report all cases to CMS when the injured claimant is a Medicare recipient. SCHIP also requires insurers and qualified self-insured employers to register with CMS between May 1, 2009 and June 30, 2009.

Because the penalty associated with SCHIP violations is a stunning \$1,000 per claim per day, with no limit, cautious attention to compliance is required.

*Carla R. Hounshel
James T. Spolyar,
Indianapolis*

Unclaimed Property Audits on the Rise

Although many motor carriers are generally familiar with federal statutes and regulations that govern their obligations with respect to certain unclaimed property, many are not aware that all fifty states also have unclaimed property laws that may apply. Given that the state law of the property owner's residence generally applies to unclaimed property, the breadth of laws with which carriers must be familiar is daunting.

Lengthy statutes of limitations and the tendency of states to employ aggressive audit methodologies may result in significant penalties and interest for violations committed by unsuspecting carriers. Furthermore, in the current economic environment, state audits of unclaimed property appear to have increased. As such, it is important for carriers to develop procedures to identify ways to minimize potential unclaimed property liability.

*Jay D. Robinson
Kelli M. Block,
Indianapolis*

Scopelitis Firm's Legislative Counsel Service Tracks Key Industry Developments

The combination of a new administration with a turbulent economy will continue to fuel legislation affecting transportation, placing a greater premium than ever before on the need for legislative vigilance among motor carriers.

A number of the Scopelitis firm's transportation clients have engaged the firm's legislative counsel services to monitor and analyze state and federal legislative developments. Doing so allows the client to gain a very specific understanding of the legislation's impact on its unique operational business platform. It also allows a client to proactively engage in both the legislative process and long-term business planning.

An ongoing target of the firm's legislative counsel services has been federal and state legislation affecting the independent contractor status of drivers. A number of additional topics, however, may also bear watching as the next legislative session approaches:

- Fuel surcharge pass-through legislation;
- State implementation of Unified Carrier Registration (UCR) requirements, with significant cost implications for larger carriers; and
- A wide range of labor and employment issues, including whistleblower laws, immigration reform, and the Employee Free Choice Act, or "Card Check," discussed in this issue of *The Transportation Brief*.

Under the service, the firm provides client-customized reports as frequently as twice a week during the peak legislative season – typically January through June.

Indianapolis partner Greg Feary heads up the firm's legislative counsel services. Feary is assisted by senior associate Shannon Cohen, whose practice focuses in government affairs and independent contractor issues.

On the Road

Jeff Toole will conduct a presentation on Risk Management and Craig Helmreich and Greg Ostendorf will present "Surviving a Key Customer or Supplier Bankruptcy" at the National Accounting and Finance Council's 2009 Management Conference & Exhibition, June 21-23, in **Lake Tahoe**.

Kathleen Jeffries, Fritz Damm, and Mike Tauscher will participate in the Conference of Freight Counsel, June 28-29, in **Philadelphia**.

Don Vogel, Kathleen Jeffries, and Fritz Damm will attend the Transportation Lawyers Association's Summer Executive Committee Meeting, July 18, in **San Francisco**.

Greg Feary and Dan Barney will present "Defending Owner-Operator Independence" at the American Trucking Associations' Forum for Motor Carrier General Counsels, July 26-29, in **Vancouver, British Columbia, Canada**. Allison Smith also will attend.

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Dispatches



Effective June 1, **Alabama law requires all drivers hauling metal coil into or out of the state to be certified in proper load securement**, and violations can produce fines from \$5,000 to \$10,000. Mike Tauscher advises that many state trucking associations are providing their members online assistance for driver training, testing, and certification.

Rich Clark reports that the FMCSA will be taking a more aggressive stance toward motor carriers that violate safety regulations. **The FMCSA will now be using a “two strikes” policy**, assessing the maximum fine against motor carriers after only two safety violations have been incurred.

According to Chris McNatt, **the American Trucking Associations has sought appellate review of a district court order on its preliminary injunction challenge to many of the principal elements of the Ports of Long Beach and Los Angeles Concession Plans**. In the meantime, many elements of the Concession Plans not genuinely responsive to safety concerns are now enjoined.

Steve Pletcher reminds all interstate carriers that **vehicles with a GVWR of less than 10,001 pounds require interstate operating authority**. Although the Federal Motor Carrier Safety Regulations may not apply to drivers of such lightweight vehicles, other regulations such as the federal leasing regulations do apply.