Winter 2006 ❖ Vol. 13 No. 1

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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Attacks on the Trucking Industry's Use of Owner-Operators Pose Multi-Level Threat

Increasingly, motor carriers are confronted with a two-front legal assault on their use of owner-operators. On the first front is the well-publicized OOIDA campaign challenging carrier compliance with both the federal leasing regulations and the lease agreement's terms. On the second front, and despite the owner-operator's longstanding status as an independent contractor, the potential reclassification of owner-operators into "employees" in a labor and employment context is the subject of rejuvenated debate and litigation. Reclassification beyond the context of workers' compensation and/or unemployment tax laws has become a flashpoint for litigation.

What's at stake: Many of the motor carrier's business practices

The legal ramifications of reclassifying an owner-operator from an independent contractor to an employee can be far-reaching. Employees can join a union with which the motor carrier employer can be required to bargain. Federal laws require special programs to protect employees from discrimination based on race, color, religion, national origin, sex, age, and disability. Employees may participate in retirement and insurance benefit programs and may be entitled to vacations, sick leave, and other federal and state-mandated leaves of absence. Wage and hour laws may require the payment of overtime. Employers must withhold income and FICA taxes from compensation paid to employees and pay matching FICA and Medicare taxes, unemployment taxes, and, generally, workers' compensation insurance premiums too. And the new twist in reclassification cases concerns employee wage deductions that are often prohibited or severely restricted by state law, potentially requiring carriers to repay - with penalties and attorney fees - agreed-upon deductions from owner-operator settlements for truck operating expenses, occupational-accident insurance, cargo claims, etc.

Carriers should evaluate owner-operator relationships

Reclassification, which occurs on a case-by-case basis, is difficult to predict because there is no uniform legal test that transcends the many laws and social policies involved. Nevertheless, a number of factors favoring independent contractor status are common to each test, the most important of which focus on the owner-operator's management of his or her own separate and independent business. Carriers may reduce the chance of reclassification, through consultation with experienced counsel, by auditing their business relationships with owner-operators and making any changes necessary to establish practices that support an independent contractor determination.

James H. Hanson, Indianapolis

Briefly...

LTL Carriers Seeking Secure Trade Status Face Rigorous Security Requirements

C-TPAT, the Customs-Trade Partnership Against Terrorism, enables carriers involved in U.S/Canada trade and U.S./Mexico trade to seek qualification as secure trade participants, thus enabling the carriers to cross into the U.S. on an expedited basis. The primary objective of C-TPAT, which involves not only motor carriers, but also importers, ocean carriers, air carriers and a myriad of other international trade participants, is the validation and assurance of a secure supply chain. For less-than-truckload (LTL) carriers, proof of securing the supply chain has been and will continue to be the most onerous requirement for C-TPAT participation.

In its present format, C-TPAT requires LTL carriers performing pick-up and delivery operations that then proceed directly to the border to apply high security seals at each stop and to maintain a detailed record of the seals. While the trailer security requirements are somewhat less burdensome if the loads are taken to a consolidation point before crossing the border, carriers still must be able to confirm that each of their shippers is secure. Customs and Border Protection is working to clarify the carrier requirements, which may impact the trailer security requirements and enable more carriers to participate in C-TPAT.

Christopher C. McNatt, Jr.,
Los Angeles

Motor Carriers Should Beware of State Overtime Pay Requirements

Motor carriers often limit their analysis of overtime pay requirements to the *federal* "motor carrier" exemption, which exempts employers from paying overtime for drivers, driver helpers, loaders and mechanics if those workers are involved with interstate shipments. Carriers, however, sometimes overlook the fact that states are free to adopt and enforce their own more stringent requirements.

While the majority of states either expressly adopt the federal motor carrier exemption or something similar, Washington, Arkansas, and other states require overtime pay for drivers regardless of the federal exemption. Similarly, California provides a limited state exemption that essentially does not apply to drivers of vehicles with a GVWR of 10,000 pounds or less. In still other states, the law on exemptions is not settled.

Overtime pay requirements for drivers can be complex and potentially costly. Motor carriers should thoroughly analyze both federal and state exemptions in order to ensure overtime pay compliance.

James H. Hanson
A. Jack Finklea,
Indianapolis

Ohio Commercial Activity Tax Exemption May Reduce Liability

The Ohio Commercial Activity Tax is generally imposed on total gross receipts, without any deduction for costs attributable to Ohio business activities. A few limited exclusions apply. For example, if a written contract clearly establishes an agency relationship between a taxpayer and a payee, payments made by a taxpayer in its capacity as an agent may qualify for exclusion from gross receipts and thereby reduce the taxpayer's tax liability.

Motor carriers, brokers and logistics providers may qualify as agents in some circumstances, e.g., when a motor carrier pays an owner-operator or a broker makes payments to a for-hire motor carrier. Establishing an agency relationship with a payee may substantially reduce a taxpayer's Ohio Commercial Activity Tax liability.

Andrew K. Light
Ronald J. Morelock,
Indianapolis

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Mileposts

"Spring Cleaning" Calls for Review of Day-to-Day Practices

Spring cleaning at home means clean closets and a fresh start on a new year. For the motor carrier it means periodic, comprehensive review of operational programs in which the fit between practice and legal principles is critical.

When the review is conducted confidentially by legal counsel, the results are protected by attorney-client privilege and offer the company the time and guidance to make corrections without penalty. Following are key programs motor carriers should consider for legal review:

Leasing Programs: Attempts to reclassify owner-operators as employees and class-action claims of federal leasing violations call for heightened vigilance by motor carriers regarding their independent-contractor and vehicle leasing programs.

Corporate Restructuring: Motor carriers comprised of a number of distinct companies under common ownership need to ensure that the "separateness" of the various entities remains intact. A comprehensive audit focuses upon each entity's 1) legal status, 2) financial processes, 3) transactions with the other entities, 4) insurance structure and design, 5) profitability, and 6) independence.

Insurance Programs: An independent policy review is the best way to close gaps in coverage that occur with changes in operations. The review includes each policy's scope of coverage, exclusions, endorsements, and coordination with the company's other insurance coverage.

Accident Response: A comprehensive response plan gives motor carriers an advantage in highway accident litigation. Response plans include guidance for drivers on the scene and delineation of duties among insurers, adjusters, reconstructionists, and legal counsel. Changes in personnel, state requirements, and "best practices" in the industry call for periodic review of the plans and ongoing training.

Department of Transportation (DOT) Safety Compliance: An attorney-client-privileged mock DOT audit is one of the best ways to ensure compliance with the DOT safety regulations and to protect your valuable safety rating. The mock audits should also focus on OSHA rules, FLSA requirements and hazmat regulations to verify compliance with all regulatory requirements involved with the trucking industry.

Labor and Employment Practices: A Department of Labor audit of the typical motor carrier's pay practices may produce costly wage-and-hour violations. A review of these practices examines the company's practices in light of the Fair Labor Standards Act, which governs the exempt vs. non-exempt status of employees' overtime pay eligibility. Other labor and employment reviews focus on the employee handbook, drug and alcohol testing, harassment avoidance, and trade secret protection. Also, as discussed in this edition's cover article, a labor and employment review can identify factors that will assist motor carriers in maintaining the independent contractor status of their owner-operators.

For the Record

Christopher C. McNatt, Jr. joined the firm on December 1, 2005, as a partner in the Los Angeles office. He will concentrate his practice on international transportation and customs issues, including operational and regulatory compliance, contract review and formation, insurance, cargo liability, collections, and litigation.

Jerry Cooper has been named a Top Lawyer in Workers' Compensation Defense Law by Crain's Chicago Business.

On the Road

Dan Barney will attend the AirCargo Convention, March 12-13, in **Bal Harbor, Florida.**

Greg Feary and Dan Barney will attend the Truckload Carrier Association's Annual Convention, March 12-14, in **Orlando.** Dan will lead a Trucking in the Round Workshop on "Owner-Operator Litigation."

Dan Barney will also attend the Truck Renting and Leasing Association Annual Meeting, March 29-31, in **North San Diego.**

Rich Clark will speak on "Restructuring Your Business for Liability Protection" at the American Moving & Storage Association's Annual Convention, April 8, in **Ponte Verda Beach, Florida.**

Rich Clark also presents "From East to West: A Survey of Regulatory Issues for Interstate and Intrastate Courier Services" at the Messenger Courier Association of the Americas Annual Meeting, May 15-20, in **Orlando.**

Tim Wiseman will participate in a panel on "Outsourcing Employees in Today's Transportation Industry: Is She or Isn't She an Employee?" at the Transportation Lawyers Association Annual Conference and CTLA Mid-Year Meeting, May 16-20, in **Orlando.** Don Vogel and Kathleen Jeffries also will attend.

Steve Pletcher will present "An Update of Employee Case Law" at the National Association of Professional Employer Organizations' Legal & Legislative Conference, May 22-23, in **Washington, D.C.**

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Lynne D. Lidke, Editor
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Dispatches

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The federal SAFETEA Highway Bill provides that, as of February 10, 2006, no Mexican or Canadian commercial motor vehicle operator may transport hazardous material in the U.S. until the operator has undergone a background records check similar to those required for U.S. hazmat drivers. Bob Henry notes that the Director of the Transportation Security Administration may extend this deadline up to 6 months.

David Robinson reminds carriers relying on consumer report information in hiring or contracting with drivers that The Fair and Accurate Credit Transactions Act (FACTA) Disposal Rule went into effect on June 1, 2005. The rule requires that entities using consumer report information for a business purpose must take "reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal." Disposal measures may include shredding, burning, and pulverizing paper information and destroying or erasing electronic information.

Kathleen Jeffries reports that California companies with 50 or more employees or independent contractors have a continuing obligation to comply with the new California law requiring such organizations to train their managers in sexual harassment prevention and correction. January 1, 2006 was the deadline for completing at least two hours of such training for all companies with a presence in California. Training must be repeated every two years.