

# The Transportation Brief®



*Indianapolis Office:*  
10 W. Market Street, Suite 1500  
Indianapolis, IN 46204  
Phone (317) 637-1777  
Fax (317) 687-2414

*Chicago Office:*  
30 W. Monroe Street, Suite 600  
Chicago, IL 60603  
Phone (312) 255-7200  
Fax (312) 422-1224

*Washington, D.C. Office:*  
1850 M Street, N.W., Suite 280  
Washington, DC 20036-5804  
Phone: (202) 783-9222  
Fax: (202) 783-9230

*Los Angeles Office:*  
2 N. Lake Avenue, Suite 460  
Pasadena, CA 91101  
Phone: (626) 795-4700  
Fax: (626) 795-4790

*Kansas City Office:*  
9393 West 110th Street  
51 Corporate Woods, Suite 500  
Overland Park, KS 66210  
Phone: (816) 279-9835  
Fax: (816) 676-1427

*Chattanooga Office:*  
600 Republic Centre  
633 Chestnut Street  
Chattanooga, TN 37450  
Phone: (423) 266-2769  
Fax: (423) 266-6784

*Detroit Office:*  
535 Griswold Street, Suite 1818  
Detroit, MI 48226  
Phone: (313) 237-7400  
Fax: (313) 963-7425

Please fax or e-mail address changes to:  
The Transportation Brief  
fax (317) 687-2414  
tbrief@scopelitis.com

## *Class Action Lawsuits Call for Quick and Organized Response*

In recent years, class action lawsuits have become an everyday concern in the trucking industry. Drivers have sued individually and in their representative capacities claiming they have been improperly classified as independent contractors, have been damaged because of federal and state statutory violations (e.g., leasing regulation or wage and hour violations), or have been improperly compensated under their contracts. Each case is unique; yet, some common rules of thumb apply.

### *A class action complaint does not mean the case will proceed as a class action*

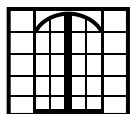
In all class actions, the plaintiffs must first prove that a class action is proper by convincing the court that there is a significant commonality between their claims and those of the other proposed class members. Assessing the factual and legal differences between the named plaintiffs' claims and the claims of those they seek to represent is a vital part of the early litigation process. Swift action to garner evidence and formulate arguments to defeat class certification greatly diminishes the potential damage exposure, the plaintiffs' settlement leverage, and the attorney fee demands.

### *Expect and prepare for a lengthy process*

Class action litigation requires a great deal of time and resources of the parties, the court, and the attorneys. If the class is certified, there is an increased amount of fact gathering and assessment which can prove to be very costly, particularly if discovery of electronically-stored information is involved. An organized action plan should be put in place soon after litigation ensues to address not only complex discovery issues, but also the legal issues in the case, which tend to be greater in number and more complex in class action litigation.

Fortunately, federal law affords trucking companies a greater opportunity to have their cases heard in the federal courts where judges are generally recognized as more receptive to and experienced in addressing class action-related legal arguments raised by the defendants. Nevertheless, the threat of class action litigation is a daunting one for the industry, and, if the threat becomes reality, prompt, decisive, and organized action is a necessity.

*James H. Hanson  
Robert L. Browning  
David D. Robinson,  
Indianapolis  
Adam C. Smedstad,  
Chicago*



# Briefly...

## *Lightweight Vehicles Subject to Operating Authority/Overtime Laws*

In the “on again, off again” world of the federal regulation of vehicles with a GVWR less than 10,001 pounds, interstate motor carriers, couriers and last-mile delivery operations using such lightweight vehicles again find themselves subject to interstate operating authority requirements. The operation of lightweight vehicles was deregulated by the August 2005 Safe Accountable Flexible Efficient Transportation Equity Act – a Legacy for Users; however, in a sign that this deregulation was inadvertent, a Technical Corrections Act effective June 2008 restored the earlier definition of motor carrier, again subjecting vehicles with GVWRs of less than 10,001 pounds to regulation by the FMCSA.

Accordingly, all interstate operators of lightweight vehicles should confirm that they have proper interstate operating authority. Note also that, even though lightweight vehicle operations are again subject to FMCSA regulation, the Technical Corrections Act specifically carved such operations out of the motor carrier exemption to overtime. Importantly, therefore, employee drivers of vehicles weighing less than 10,001 pounds remain subject to the overtime compensation requirements of the Federal Labor Standards Act.

*Steven A. Pletcher,  
Indianapolis*

## *New FMLA Regulations Address Intermittent Leave Issues*

On January 16, 2009, amended federal regulations implementing the Family and Medical Leave Act took effect. The amendments smooth the road for employers in several respects, such as granting new rights to deny perfect attendance bonuses to employees who have used FMLA leave and to require more in-depth return to duty medical certifications. The most anticipated reform, however, involves intermittent leave, and, although the reform is not expansive, it may offer some help to motor carrier employers.

The FMLA provides for unpaid, job-protected leave of up to twelve weeks each year, but intermittent leave can generally be taken in increments of one hour or even less. Under the new regulations,

however, if it is physically impossible to start work mid-way into a shift (such as in the cited examples of flight attendants and train conductors), the entire shift may be designated as FMLA leave. To the extent drivers can be compared to conductors and attendants, motor carriers may be able to avoid the problems associated with allowing time off one hour at a time.

The regulations also include several new posting and notice requirements and new leave rights for military personnel and their families. Motor carriers must therefore update their FMLA policies and practices as soon as possible in order to maintain legal compliance.

*A. Jack Finklea,  
Indianapolis*

## *Retention of Work Hour Records Is Important To FLSA Litigation*

The Fair Labor Standards Act (FLSA) requires employers to maintain -- for a three-year period -- payroll and other records, including the “hours worked each workday and total hours worked each workweek,” for each employee subject to the minimum wage and/or overtime provisions of the FLSA. Many states have similar requirements.

For many motor carriers, the only record of hours worked by driver employees is the drivers’ daily logs. The federal hours-of-service regulations, however, only require a motor carrier to maintain driver logs for six months. Many motor carriers that do not keep logs for more than six months have no record of hours worked for the three years required by the FLSA, and, as a result, problems can arise in employment litigation if the carrier is required to produce the FLSA-mandated work hours information.

Given recent litigation in California and other states, it is important that carriers maintain some record of hours worked by employees. If driver logs are not kept for at least three years (and, if operations occur in California, for four years), some other type of record should be maintained to ensure federal and state law and compliance to enable the employer to more readily defend itself in litigation.

*James H. Hanson,  
Indianapolis*

# Mileposts

## *Electronically Stored Information Creates New Challenges in Litigation Discovery*

Changes in court rules affecting discovery of electronically stored information (“ESI”) are cause for companies’ review of information technology (IT) practices that can be as broad and as difficult to manage as cyberspace itself.

Federal court rules were amended in December 2006 to focus on the role of ESI in litigation. State courts are following suit. The amended federal rules, along with the developing body of case law interpreting those rules, put companies on notice that they must have a firm grasp of the sources of ESI relevant to the claims and defenses in any matter that may someday lead to litigation.

ESI discovery can be pivotal in high-stakes cases such as the class action litigation profiled on the cover of this issue of *The Transportation Brief*, as well as in a wide range of other situations where litigation may arise: EEOC complaints, cease-and-desist demands, bankruptcy preference claims, contract disputes, and accidents causing serious injury or death.

An audit of company practices by IT staff and legal counsel in advance of such situations would be time well spent and would include a review or development of

- A company-wide document retention and destruction policy;
- An inventory of the company’s IT network and all IT devices used by its employees;
- Key employees’ responsibilities for managing ESI;
- Contracts with vendors or third parties obligated to store or otherwise maintain ESI; and
- A “litigation hold” plan, with protocol for retrieving and preserving ESI – and for suspending its destruction – once litigation is reasonably anticipated.

Senior associate Craig Helmreich in the Indianapolis office leads the Scopelitis firm’s efforts in assisting clients in ESI discovery matters, both in terms of proactive guidance and in the course of ongoing litigation. Partners Bob Browning, Angie Cash, and David Robinson in Indianapolis and Adam Smedstad in Chicago are involved as well, along with Jim Golden in Chattanooga and other members of the firm’s commercial and accident litigation teams.

## *For the Record*

**Greg Feary** has been re-elected to the Scopelitis firm’s Management Committee and will continue to serve as a managing partner with Indianapolis partners Lynne Lidke and Tim Wiseman.

## *On the Road*

**Rich Clark** and **Bob Henry** will attend the American Moving and Storage Association’s Annual Education Conference & Expo, February 8-11, in **Dallas**.

**Mike Langford** will attend the Trucking Industry Defense Association’s Advanced Seminar, February 11-12, in **Miami**.

**Fritz Damm** and **Mike Tauscher** will join the Michigan Trucking Association’s (MTA) Annual Safety Awards dinner, February 17, in **Lansing, Michigan**.

**Tim Wiseman** will join a panel discussing electronic on-board recorders in a webcast sponsored by the Truckload Carriers Association and FleetOwners magazine, February 24.

**Mike Langford** will serve on a panel on “Coordinating Nationwide Litigation for the Trucking Company—the Role of National Counsel” at the American Bar Association’s Transportation Megaconference IX, March 5-6, in **New Orleans**.

**Greg Feary** and **Dan Barney** will participate in the Truckload Carrier Association’s Annual Convention, March 8-9, in **Orlando**.

**Dan Barney** and **Chris McNatt** will attend the AirCargo 2009 Annual Convention, March 9-10, in **Las Vegas**.

**Dan Barney** will attend the Truck Renting and Leasing Association’s Annual Meeting, March 10-12, in **San Diego**.

**Jim Golden** will participate in meetings of the Council of Distinguished Advisors of the Straus Institute for Dispute Resolution on March 11-12, in **Malibu, California**.

**Greg Feary** will participate in the American Trucking Associations Distribution & LTL Carriers annual meeting, March 22-24, in **Tampa**. **Fritz Damm** also will attend.

**Kathleen Jeffries** will moderate a panel on transportation insurance at the Transportation Loss Prevention & Security Association joint conference with the Transportation & Logistics Council, March 22-25, in **St. Louis**. **Mike Tauscher** also will attend.



# The Transportation Brief®

## Dispatches



◆ Jim Hanson advises that the **ADA Amendments Act of 2008 (ADAAA)**, effective January 1, 2009, increases the protection provided to employees based on a broader definition of the types of physical and mental impairments now covered by the ADA. The determination of who is “an the individual with a disability” is now to be made without regard to the effects of corrective devices or medications, and an individual may be disabled even if the effects of the impairment are episodic, in remission, or latent.

◆ Recently, a number of the California Highway Patrol auditors in the Biennial Terminal Inspection (“BIT”) program have asked California carriers for vehicle maintenance and driver qualification records for the carriers’ independent contractor owner-operators. Rich Clark advises California carriers that use owner-operators to review their records and procedures to ensure that they have the **proper certification of their contractors’ compliance with BIT and Motor Carrier of Property permit requirements.**

◆ Effective February 20, 2009, qualifying federal contractors and subcontractors will be required to use an E-Verify system to verify that certain of their employees are qualified to work in the United States. David Robinson advises that contractors may enroll in the program and learn more about E-Verify requirements by visiting <http://www.dhs.gov/E-Verify>.

◆ Mike Tauscher cautions that, with the advent of Spring, **Frost Laws mandating reduced weight limits will go into effect in many Midwestern states.** Truckers, who are responsible for knowing when and where these laws are implemented, may access Michigan’s Frost laws at: <http://www.micountyroads.org/page.cfm/22/>

◆ Jerry Cooper reports that the **Illinois Department of Transportation has announced changes to IDOT Oversize/Overweight Truck Permit Rules.** Changes that particularly impact trucks servicing the highway construction industry include amendments to rules on Weekend Hours of Movement, Violations of Permits, Illinois State Police Escorts, Civilian Escort Vehicles, and Radioactive Material.