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The Transportation Brief®

California Trucking Association Challenges State Misclassification Claims

On July 22, 2016 the California Trucking Association (CTA) filed suit against California's Labor Commissioner (the Commissioner) challenging her application of California state law as a basis to invalidate contracts between owner-operators and motor carriers. The CTA asserts that Congress deregulated interstate trucking in 1994 with the enactment of the Federal Aviation Administration Authorization Act (FAAAA) and preempted the use of any state law claims that would impact the manner in which motor carriers provide services.

The complaint, filed in the United States District Court for the Southern District of California, alleges that the Ninth Circuit has already found that the FAAAA prohibits California from mandating the use of employee drivers instead of owner-operators. The CTA contends that the FAAAA also preempts using California's *Borello* test as a basis to disrupt the contractual arrangements between owner-operators and motor carriers. The United States Supreme Court has interpreted the FAAAA's preemption provision broadly and held that "States may not seek to impose their own public policies or theories of competition or regulation on the operations of [a motor] carrier." *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 229 n.5 (1995). The CTA alleges that the Commissioner is doing just that when she applies California's public policies, as embodied in the *Borello* test, as a basis to find owner-operators to be employees. The complaint alleges although the Commissioner is using a common law test instead of an express statute or regulation is irrelevant. "What is important . . . is the effect of a state law, regulation or provision, not its form, and the [FAAAA's] deregulatory aim can be undermined just as surely by a state common-law rule as it can by a state statute or regulation." *Nw. Inc., v. Ginsberg*, 134 S. Ct. 1422, 1430 (2014).

The CTA is seeking an injunction to prohibit the Commissioner from continuing to use California's policy judgments regarding who should be considered an employee as a basis to disrupt the enforcement of the contractual arrangements between owner-operators and motor carriers. The case is captioned *CTA v. Julie Sui*, Case No. 16-CV-1866- CAB-MDD.

Adam C. Smedstad, Chicago

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Briefly...

7th Circuit Sides with NLRB on Class Arbitration Waivers Creating Circuit Split

The NLRB has held that arbitration agreements banning class or collective actions violates the NLRA. The 2nd, 5th, and 8th Circuits have rejected this position, finding it conflicts with the Supreme Court's recent holdings under the Federal Arbitration Act (FAA). In late May, the 7th Circuit sided with the NLRB in an opinion that creates a circuit split, thereby setting the stage for potential review by the Supreme Court. In the meantime, class and collective arbitration waivers will not be enforced in federal courts sitting in Illinois, Indiana, and Wisconsin (all of which are in the 7th Circuit). This is separate from the risk companies face in seeking to enforce arbitration agreements against "transportation workers," who are exempt from the FAA, leaving those agreements subject to varying state laws.

James H. Hanson
Braden K. Core,
Indianapolis

ELDs — To Charge or Not to Charge?

An appeal of last year's district court decision finding a motor carrier's practice of "passing through" a $15 per week charge to owner-operators for sat-com network usage remains pending at the 10th Circuit. The main allegation is the pass-through charge violates the No Forced-Purchase Provision of the Federal Leasing Regulations. Prior case law supports the conclusion a carrier may pass-through a network provider's charge for such usage to owner-operators without violating such Regulations. If the decision is not overturned, motor carriers that charge owner-operators for satellite or ELD/EOBR usage could face lawsuits. Some carriers have chosen to absorb such charges pending the outcome of the appeal, but even this approach warrants caution because it may be regarded as a factor in employee classification cases. The Firm is watching the case closely, because it might impact other third party vendor pass-through charges.

Gregory M. Feary
Kelli M. Block,
Indianapolis

New Salary Threshold for Exempt Workers

The U.S. Department of Labor has issued its long-awaited Final Rule updating its regulations regarding overtime pay. Effective December 1, 2016, employers must pay an annual salary of at least $47,476 ($913 per week) in order for a worker to qualify for exempt status under the so-called White Collar Exemptions (Executive, Administrative, and Professional). The Final Rule also establishes a schedule for the automatic updating of the salary threshold every three years, and it allows up to 10% of the salary amount to be satisfied by the payment of qualifying bonuses and commissions.

Employers are reminded that exempt workers must meet both a Salary Test and a Duties Test. The Final Rule does not alter the tests for determining whether a worker's job duties qualify for exempt status. As employers begin examining their salary levels in advance of the December 1, 2016 deadline, they should also take a fresh look at the duties being performed by workers who have been classified as exempt from overtime.

David D. Robinson,
Indianapolis

For the Record

We are pleased to announce that Bill Keeler, Megan Ross and Elizabeth Beck have joined the Firm. Bill is based in the Firm's Milwaukee office and joins the Litigation practice; Megan, in the L.A. office, joins the Class Action and Complex Litigation practice; and Elizabeth joins the Litigation practice working in the Dallas/Ft. Worth office.

A job well done to Scopelitis, Garvin, Light, Hanson & Feary for being named in Indiana's top workplace list for the 2nd year.

Congratulations to Kathleen Jeffries for ascending to the position of Chair of the Conference of Freight Counsel for a two-year term; and for her recognition at the Transportation Lawyers Association's Annual Conference with a Special Presidential Commendation for Leadership and Mentorship.

Mileposts

In his lead article for this issue of *The Transportation Brief*, Chicago partner Adam Smedstad discusses potential FAAAA preemption of state laws that effectively force motor carriers to use employee drivers rather than independent contractor owner-operators. The FAAAA preemption defense has become a critical tool to not only invalidate state laws that impact the manner in which motor carriers provide services but also to help defeat class or collective action lawsuits that are premised on those laws.

Led by Smedstad, Indianapolis partner Jim Hanson, and Los Angeles partner Chris McNatt, Scopelitis litigators have developed unparalleled experience defending class and collective actions in the transportation industry. In particular, the Firm continually defends claims by owner-operators, alleging they were misclassified under state law and therefore deprived of employment-type benefits. These claims use the intersection of state statutory or common law tests of employment and the dictates of the transportation industry to ignore the terms of the contracts signed by the owner-operators. Once successful, they seek to use the employment determination to recover the expenses they agreed to bear as well as penalties for "improper deductions" from their compensation.

With respect to company drivers, the firm regularly defends motor carriers against claims related to their method of payment. In California, for example, carriers that pay on a piece-rate basis must also pay for rest breaks and "non-productive" time. Again, claimants attempt to twist the elements common to the industry into claims of harm, alleging, for instance, that they were only paid when the wheels were moving or that they should have been paid for time they spent in the sleeper berth.

On the Road

Kevin Phillips will address the latest warehousing legal trends at the 2016 GCCA Assembly of Committees, July 31-August 3, in **Washington, D.C.**

Jim Hanson and Don Vogel will attend the 30th Annual NATERA Conference: *Changing Gears: Preparing for a Dramatically Changing Labor and Employment Environment for Transportation*, August 28-30, in **New Orleans**.

Greg Feary will present "Shares, Snags and Traps to the Independent Contract Model" at the TCA's Independent Contractor and Open Deck Meeting, September 8-9, in **Chicago**.

Greg Feary will present "Exploring Independent Contractor Challenges" and Tim Wiseman will present "DOT Regulatory Update" at the 2016 FTR Transportation Conference, September 13, in **Indianapolis**.

Craig Helmreich will present "Litigation Impacting Transportation Factoring Companies" at the International Factoring Association's meeting of Transportation Factors, September 15-16, in **Indianapolis**.

Kevin Phillips will attend the Southeast Warehouse Conference, September 15-17, in **St. Simons Island, Georgia**.

Nathaniel Saylor will present "Carrier Selection Considerations" at the Intermodal Association of North America's Intermodal EXPO 2016, September 18-20, in **Houston**.

Don Vogel will present "Department of Labor/NLRB Update" at the Illinois Trucking Association's Annual Meeting and Expo, September 20-22, in **Normal, Illinois**. Jerry Cooper will also attend.

Don Vogel and Fritz Damm will attend the Canadian Transport Lawyers (CTLA) Annual Conference, September 22-25, in **Toronto**.

Greg Feary will attend and Robert Henry will present "Preserving Independent Contractor Status While Complying with FAR (Service Contract Act) Requirements" at the 2016 ATA Management Conference & Exhibition's Government Freight Conference, October 3, in **Las Vegas**.

Don Vogel will present "Human Resources Law Basics" and Kevin Phillips will present "Warehouse Law" at the 2016 IWLA Essentials of Warehousing Course, October 4-7, in **Tempe, Arizona**.

Mike Langford and Jim Ellman will attend TIDA's 2016 Annual Seminar, October 12-14, in **Baltimore**.

Fritz Damm will attend as a Steering Committee Member of the Transportation Law Committee, DRI's Annual Meeting, October 20-22, in **Boston**.

John Hove will present "Understanding Global Anti-Corruption Laws" at TAG Alliances' Fall International Conference, October 24-26, in **Washington, D.C.** Shannon Cohen, Jake Fisher and Prasad Sharma will also attend.

John Hove will chair two panels on The Foreign Corrupt Practices Act and related international anti-corruption laws. One at the TAGLaw Fall International Conference October 24-26 in **Washington, D.C.** and the other at TLA's Transportation Law Institute November 4 in **Houston**.

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Dispatches

Compliance with the FDA Rule on Sanitary Transportation of Human and Animal Food is not required until at least April of 2017, but contracts are currently being negotiated in the supply chain that assign responsibilities under the rule. Craig Helmreich cautions that shippers, brokers, carriers, loaders and receivers of covered food need to pay close attention to contract changes proposed by supply chain participants, new contracts on shipments that may involve covered food, and to ensure form documents (contracts, bills of lading, tariff terms, terms and conditions, load confirmation receipts, etc.) protect the company based on the various roles it may fill in tendering or transporting food covered under the new rule.

Don Vogel reports that on June 22, 2016, the Chicago City Council passed an amendment to the Chicago Minimum Wage and Paid Sick Leave Ordinance, which will take effect on **July 1, 2017**. The Ordinance now provides that Covered Employees (those who perform at least two hours of work in any particular two-week period within the City limits who are not otherwise exempt) can accrue up to 40 hours of paid sick leave every 12 months. In advance of the effective date of the amendment, Employers should review their operations and policies to determine if the Ordinance applies to them and whether their existing policies may satisfy the requirements of the new law.

Braden Core reports that the new Defend Trade Secrets Act of 2016 affords additional protection to trade secrets, but for companies to take full advantage of the remedies available under that law, they must provide certain written notices, both to employees and independent contractors.

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