

# 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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## *Changes in the Owner-Operator Climate Demand Motor Carriers' Attention*

Recent developments in the owner-operator climate continue to create potential potholes for the unwary motor carrier. On the one hand, a recent favorable case law decision is a welcome respite in California, a state in which the owner-operator model is under attack on many fronts. On the other hand, legislative efforts across the country create the need to closely monitor ongoing owner-operator operations in order to ensure they meet all of the new requirements.

### *A recent California decision favors the owner-operator model*

In *Narayan v. Eagle Freight Systems, Inc.*, a California trial court recently determined that Eagle Freight Systems' owner-operators were independent contractors and not employees for purposes of California's labor laws. Although the court applied Texas law, it observed that the outcome would have been the same using California law. This favorable decision may help mitigate a recent series of adverse decisions in other cases involving the owner-operator model in California. Suffice it to say, California remains very volatile on this issue.

### *Recent legislative efforts signal new statutory requirements*

Perhaps the most active area affecting the owner-operator model is the legislative arena. State and federal efforts are underway to regulate the use of owner-operators as independent contractors. New legislative initiatives, such as South Carolina's new owner-operator law effective July 1, are positive developments that create a general owner-operator exemption from employment for purposes of workers' compensation benefits. Other new state laws may make it more difficult to establish independent contractor status. For example, New Hampshire has passed an onerous eleven-factor test for establishing independent contractor status. Finally, a recent hearing before subcommittees of the U.S. House Education and Labor Committee regarding the misclassification of workers as independent contractors specifically addressed the classification of owner-operators in the trucking industry and creates the potential for federal legislation affecting the use of owner-operators.

Regardless of whether new judicial decisions or legislative initiatives are positive or negative, it is imperative to stay abreast of ever-changing developments in order to ensure compliance with the requirements of new laws and court interpretations of those laws.

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



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## *Consultant Reports Pose Risk of Discovery in Litigation*

Generally, reports prepared by consultants retained by motor carriers are not protected from discovery in the event of litigation unless prepared in anticipation of the litigation. Thus, for example, a written report prepared by a DOT consultant describing compliance problems or particular violations would likely be discoverable in a highway litigation case in which the carrier's DOT compliance efforts are at issue. One possible way to shield such reports from discovery is to have the motor carrier's attorney directly employ the consultant for the purpose of assisting in rendering legal advice to the carrier. The attorney's advice, including the consultant's report, would likely be protected under the attorney/client privilege under most state laws so long as the consultant's report is related to the issue about which the attorney was consulted by the motor carrier.

Because of the possible harm an unfavorable consultant report may have in the hands of opposing counsel, it is recommended that motor carriers consult with their attorneys before retaining consultants, especially those who will be commenting on the company's safety and compliance programs.

*Timothy W. Wiseman,  
Indianapolis*

## *Federal Court Overturns New Hours Of Service Regulations*

On July 24, 2007, the D.C. Circuit Court of Appeals vacated two key provisions of the FMCSA's new hours of service regulations. Specifically, the court found that the FMCSA had improperly issued regulations increasing from 10 to 11 the number of hours a

driver can operate a commercial motor vehicle. Similarly, the court vacated the new rule allowing drivers to "reset" their 70-hour clock after taking 34 consecutive hours off duty. This decision will become effective on September 14, 2007, unless the court issues a stay or federal legislation is implemented to delay or overturn the ruling. Additional legal challenges to the court's decision, from either the FMCSA or one or more industry associations, are expected.

*Timothy W. Wiseman,  
Indianapolis*

## *New North American Border-Crossing Requirements Anticipated*

Recently, the Departments of State and Homeland Security (DOS/DHS) released proposed rules that will implement new identification requirements for U.S. citizens and nonimmigrant aliens from Canada and Mexico who cross the border by land at all ports-of-entry from Mexico and Canada. The proposed rules, which will also apply to entry by sea, set forth a two-step implementation process: First, beginning January 31, 2008, both a government-issued photo identification and a birth certificate will be required; and second, by the summer of 2008, either a passport, a new proposed "passport card," or other approved document will be mandated. In light of well-publicized delays in the processing of U.S. passports, carriers with cross-border operations would be wise to keep abreast of these developments.

DOS/DHS also contemplate that commercial truck drivers will be exempt from the passport requirement if they obtain special identification under the Free and

Secure Trade (FAST) program. Although the application process for FAST is more rigorous than that required to secure a passport, the program's goal is to expedite customs and immigration processing for FAST-approved carriers at the borders. Information about FAST may be found at [www.cbp.gov](http://www.cbp.gov).

*Kathleen C. Jeffries  
Christopher C. McNatt, Jr.,  
Los Angeles*

## *Effective Communication is Key to Defending Whistle-Blower Claims*

The Surface Transportation Assistance Act (STAA) was enacted to prohibit a carrier from disciplining a driver because, among other things, the driver refuses to operate a vehicle due to a claimed safety concern. The law, which applies to both employees and independent contractors, is often relied upon by drivers who refuse a load based on a perceived hours of service violation. Importantly, however, the driver must show that operation of the vehicle would have actually violated a safety regulation at the time he refused to drive.

If the driver is successful in making a claim, he may be entitled to reinstatement, backpay and/or attorneys' fees. Because STAA claims often turn on how the dispatcher handled the driver's complaint, effective communication by dispatchers who are knowledgeable about safety and hours of service requirements, plus a record of that communication, are key to affording carriers a defense against claims when legitimate reasons for driver discipline exist.

*Donald V. Vogel  
Sara L. Pettinger,  
Chicago*

## *State-Specific Issues Are Critical to Planning of Expanded Operations*

Motor carriers hoping to sharpen their competitive edge by expanding operations to another state should consider a wide range of state-specific issues before initiating the expansion project, according to Indianapolis partner Andy Light.

In broad terms, the issues encompass the areas of corporate admissions, vehicle registration and permitting, tax issues, employment-related laws, insurance requirements, and a variety of regulatory requirements falling under the authority of state law jurisdiction. The state-specific owner-operator/independent contractor issues highlighted on the cover of this *Transportation Brief* are examples of many other challenges – and benefits – expansion of carrier operations may trigger.

For instance, a motor carrier opening a new distribution facility in Indiana, Wisconsin, and many other states should be prepared to take advantage of state law sales tax exemptions for certain purchases by “for-hire carriers,” but should be aware that no such exemption exists in other states. As another example, motor carriers considering an expansion into the state of Washington should understand that Washington requires the payment of overtime to Washington-based drivers for all hours worked over 40 in a workweek. In contrast, California recognizes the federal motor carrier exemption for drivers, but requires the payment of overtime to mechanics, loaders and helpers.

Careful planning of expansion projects through a coordinated, multi-pronged approach can reduce administrative drain on the motor carrier’s resources and increase the potential for cost savings and reduced liability. The Scopelitis firm’s range of experience covers all the bases that need to be touched in the expansion.

Norm Garvin, Jay Robinson, and Todd Metzger in Indianapolis and Bill Brejcha in Chicago have guided clients through corporate expansions, reorganizations, and admissions in states across the country. Light and his experienced team of attorneys and paralegals know the state-specific peculiarities of tax issues affecting trucking operations, including sales and use tax exemptions, property tax considerations, and fuel and income tax issues. Light has also worked extensively on equipment titling and IRP registration issues, while Greg Feary, Steve Pletcher, and Jeff Toole closely monitor insurance regulations on a state-by-state basis. Jim Hanson and David Robinson in Indianapolis and Don Vogel and Sari Pettinger in Chicago counsel motor carrier clients on overtime requirements, minimum wages, meal break regulations, and other work-related laws.

Finally, when state regulation changes – or when states adapt to federal changes in different ways – carriers with multi-state operations may be required to respond quickly. Light, Tim Wiseman, and other members of the Scopelitis regulatory team regularly evaluate the interplay between state and federal laws to provide up-to-the minute counsel to clients looking to further expand their operations.

## *On the Road*

Rich Clark will present “Background Checks on Non-driving Personnel” at the American Moving and Storage Association’s Safety Conference, September 10-11, in **Stone Mountain, Georgia**.

Dan Barney will provide an update on owner-operator legal issues at the Truckload Carriers Association’s Independent Contractor Division Annual Meeting, September 13-14, in **Chicago**.

Steve Pletcher will attend the National Association of Professional Employer Organizations’ Annual Conference, September 22-24, in **Chicago**

Norm Garvin and Todd Metzger will participate in the Indiana Motor Truck Association’s Annual Meeting, September 26-30, in **Bonita Springs, Florida**.

Don Vogel will attend the Canadian Transport Lawyers Association’s Conference, September 27-29, in **Montreal**.

Jim Hanson, Jerry Cooper, and David Robinson will attend the North American Transportation Employee Relations Association’s 21st Annual Conference, October 7-10, in **Las Vegas**.

Jim Golden will address the role of negotiation counsel as a litigation strategy at the 15th Annual Trucking Industry Defense Association Industry Seminar, October 12-13, in **Atlanta**. Tom Farrell, Mike Langford, Don Devitt, and Jim Ellman also will attend.

Steve Pletcher will attend the National Transportation & Logistics Association’s Fifth Annual Transportation Roundtable, October 16-18, in **San Antonio, Texas**.

Andy Light will speak on indemnity and insurance issues, and Greg Feary and Dan Barney will present an owner-operator update, at the American Trucking Associations’ Management Conference & Exhibition, October 20-23, in **Orlando**. Jerry Cooper and Jay Robinson also will attend.

Kim Mann, Don Vogel and Kathleen Jefferies will attend the Transportation Lawyers Association’s Transportation Law Institute on November 2, in **Washington, D.C.**



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## Dispatches



Under authority of a statute enacted last summer, the Indiana Department of Revenue has begun assessing **civil penalties on oversize/overweight vehicles** in addition to any citation issued and fine imposed by the state police. Craig Helmrieck counsels that the civil penalties can range from \$500 to \$5,000.

According to Norm Garvin, a new law requires Indiana **dump truck operators to display license plates** on the front of the vehicle starting July 1, 2007. Violation of the new law will result in fines up to \$500 plus court costs of \$110.50.

Mike Langford advises that more than 30 states have recently enacted laws providing that sympathy gestures made by a potential defendant toward an injured person or a decedent's family are not admissible at trial. Although some state laws only protect health care providers facing malpractice lawsuits, others make a motor carrier's **empathetic communications** non-admissible as well.

Rich Clark reports that effective July 1, 2007, Indiana and Michigan adopted new federal **household goods consumer protection regulations** for intrastate moves. These regulations impose additional requirements, such as requiring a written estimate, mandatory arbitration and distribution of pre-move information.