

# 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

## *Union Organizing Efforts on the Rise*

Teamsters membership grew by 23,000 in 2007, ending years of decline. The Teamsters now claim nearly 1.45 million members (compared, however, to 2 million in 1980, before deregulation). The recent membership numbers reflect the Teamsters' success in organizing UPS Freight and certainly suggest increasing efforts to organize more of the trucking industry.

### *New legislation may eliminate NLRB secret ballot elections*

Within Congress, legislation has been introduced to make organizing easier for unions. Under the Employee Free Choice Act, which has passed in the House and is being considered by the Senate, an employee's right to a secret ballot election would be eliminated. Instead, the NLRB would be required to certify a union as the employee's bargaining representative if the union obtains signed authorization cards from a majority of an employer's employees. Unlike current law, no election would be necessary and employers would have no right to tell employees their position on union representation before the employees make a decision. The proposed legislation also requires employers to go straight to the bargaining table and, if the parties are unable to reach an agreement, to mediation and then arbitration of unsettled contract terms.

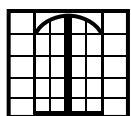
### *Review labor and employment policies in preparation for union organizing*

The best way to prepare for the Teamsters' new organizing efforts and for the proposed legislative changes is to determine your company's vulnerability to unionization by doing the following:

- Review your labor and employment policies now; don't wait until you first learn of the union's organizing activities.
- Evaluate those policies and correct them for issues that could cause employees to consider joining a union.

For the first time in many years, Teamsters membership is on the rise, and, in light of candidates' election year promises to make organizing efforts easier, the union may have already contacted your company's employees. Employers in the transportation industry should take an active role in ensuring that unionization does not come between the company and its employees.

*James H. Hanson, Indianapolis  
Donald J. Vogel, Chicago  
Fritz R. Damm, Detroit*



## *Indiana UM/UIM Coverage Exposure Multiplies Under Trio of Cases*

Three recent Indiana Supreme Court decisions increase insurers' UM/UIM exposure to Indiana losses by holding that required coverage for "bodily injury, sickness or disease" includes emotional distress arising from direct physical impact. Thus, according to the court, an emotional distress claim posed by an individual who also suffers a direct physical impact is a separate and distinct claim subject to its own per-person liability limit.

Because an insurer cannot provide less coverage than what Indiana's UM/UIM statute requires, the court also struck down a common policy provision that bodily injury to one person includes "all injury and damages to others resulting from this bodily injury." The provision was deemed unenforceable because it subjected a passenger plaintiff's emotional distress claim to the same liability limit applicable to damages for the injury to or death of the passenger's driver.

*Angela S. Cash  
Misti P. DeVore,  
Indianapolis*

## *Cargo Insurance Coverage Requires Close Scrutiny*

Generally, there is no regulation as to what a cargo insurance policy must cover, resulting in a significant lack of uniformity in policy forms. Therefore, policyholders must

carefully review both the coverage and the exclusions in their policies to ensure their operations are protected.

For instance, some policies only provide coverage for goods for which the insured is liable "as a carrier," which would generally not provide coverage to a property broker on a brokered load. Also, even if the policy initially provides coverage, specific types of commodities or causes of loss may be excluded. Common terms may include, but are not limited to, exclusions for reefer malfunction, items of extraordinary value, electronics, and losses resulting from unattended vehicles, theft and pilferage. In order to avoid uninsured losses, it is imperative that trucking companies recognize that cargo policies are seldom uniform and carefully consider whether the policy offered by an insurer will cover likely claims.

*Andrew K. Light  
Nathaniel G. Saylor,  
Indianapolis*

## *2008 UCR Issues Impact Equipment Leasing Companies*

States participating in the Unified Carrier Registration System (UCR) have notified motor carriers, brokers, and freight forwarders that 2008 UCR filings are due, with enforcement generally effective July 1. UCR fees for 2008 remain the same as 2007 fees. Due to UCR/USDOT limitations, equipment leasing companies without a USDOT number or having a "registrant only" number could not comply with the 2007 UCR filing

requirements. Those companies may now file 2007 and 2008 UCR applications, but must first obtain a USDOT number and then request the appropriate state agency (in Indiana, the Motor Carrier Services Division) to recognize the USDOT number in the UCR System after which the UCR applications may be filed.

*Andrew K. Light,  
Indianapolis*

## *FMLA Policies Should Be Updated*

On January 28, 2008, the Family and Medical Leave Act (FMLA) was amended to add additional circumstances under which employees may qualify for FMLA leave. The amendment permits qualifying family members to take up to 26 workweeks of leave to care for a "member of the Armed Forces . . . who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness." The amendment also permits an employee to take FMLA leave for "any qualifying exigency" arising out of a qualifying family member's active duty status in the Armed Forces. Employers are urged to immediately update their FMLA policies to reflect this change.

*David D. Robinson,  
Indianapolis*

## *Labor and Employment “Best Practices” Reduce Vulnerability to Union Activity*

In their cover article for this issue of *The Transportation Brief*, Jim Hanson, Don Vogel and Fritz Damm cite the quality of a company’s labor and employment practices as the best measure of its vulnerability to unionization. The Scopelitis labor and employment team provides counsel along these lines that is specific to management in the trucking industry.

Hanson is joined by David Robinson and Jack Finklea as members of the team in the Indianapolis office, while Vogel is joined by Sari Pettinger and Leonard Kofkin in Chicago. Fritz Damm and Mike Tauscher are recent additions with the opening of the firm’s Detroit office in January 2008.

The group cites the following three key areas of focus for employment “best practices:”

1. **Wage and benefits:** Staying competitive with respect to community and industry standards; crafting programs that reward productivity and tenure; and maintaining detailed, confidential wage data.
2. **Job security:** Treating employees equally and fairly; providing written work rules and personnel policies; regularly reviewing performance; and keeping accurate records of reviews and steps taken to follow up on specific issues.
3. **Job satisfaction:** Careful hiring and training of supervisors; communicating openly with employees; and providing prompt, fair systems for addressing employee concerns, grievances, and complaints.

Even under the best practices, management should anticipate unfair labor practice charges and recognize them as potential organizing efforts. Such charges should be addressed with the guidance of legal counsel.

Members of the firm’s labor and employment team have made a number of appearances before the NLRB on behalf of the firm’s trucking clients. They know the difference between “protected” and “unprotected” activities by employees and can provide counsel on appropriate ways to respond.

In responding to matters such as union solicitation, picketing, crossing picket lines, and “salting” – the union strategy of sending a representative to apply for a job for the express purpose of organizing the company – management’s first steps may be critical to the ultimate outcome. The Scopelitis labor and employment team has led many trucking clients through union organizing efforts, and it has run successful campaigns opposing unionization.

For trucking clients already organized by unions, the team has negotiated several collective bargaining agreements, assisted clients with the grievance and arbitration procedures associated with employee discipline and discharge cases, and assisted management as employees seek union decertification.

## *For the Record*

**Jim Golden** of the Scopelitis firm’s Chattanooga office has published *The Negotiation Counsel Model: Catastrophic Personal Injury Cases* in the Winter 2008 issue of the *Harvard Negotiation Law Review*. Visit [www.scopelitis.com](http://www.scopelitis.com) to view the article.

## *On the Road*

Angela Cash, Renea Hill, and Misti DeVore will attend the American Bar Association’s Women Drive Results In Transportation Law 2008 National Program, June 4, in **Dearborn, Michigan**.

Angela Cash will present “Accident Response and Effective Crisis Management” at the Specialized Carriers and Rigging Association’s 2008 Specialized Transportation Symposium, June 5-6, in **Cincinnati**.

Kathleen Jeffries and Fritz Damm will participate in the Conference of Freight Counsel, June 22-23, in **Denver**.

Don Vogel, Kathleen Jeffries, and Fritz Damm will attend the Transportation Lawyers Association’s Summer Executive Committee Meeting, June 25-27, in **Cleveland**.

Greg Feary and Dan Barney will present an Owner-Operator Legal Update at the American Trucking Associations’ Forum for General Counsels, August 10-13, in **Incline Village, Nevada**. Fritz Damm, Allison Smith, and Shannon Cohen also will attend.



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## Dispatches



Greg Feary reports that the **Illinois' Workers' Compensation Commission is reconsidering its web site commentary** both with regard to application of the Illinois Employee Classification Act to trucking in general and the interpretation that a recent Illinois Supreme Court decision implies that trucking companies must provide workers' compensation coverage to independent contractor truck drivers.

As of May 1, 2008, **CDL holders moving to the state of Illinois must pass the written and road tests** before they are issued an Illinois CDL. According to Bill Brejcha, other states are likely to pass similar measures.

Greg Feary reports that The Harbor Commissions of Long Beach and Los Angeles have approved differing **Clean Truck Programs**. The key difference is that the Los Angeles plan includes a phased-in employee-only mandate with an ultimate prohibition on utilization of owner-operators. The Ports' request to take concerted action in implementation and enforcement of their Clean Truck Programs is presently under Federal Maritime Commission scrutiny.

Chris McNatt warns that, while certain off-peak truck moves can still pass through the Ports of Los Angeles and Long Beach without incurring fees, the **projected per/FEU fee as of early 2009** may be as high as \$320. Although the fees are primarily targeted at cargo owners, an impact on carriers is likely as the cost of moving goods through the two primary West Coast ports increases.