By Daniel R. Barney and Andrew J. Butcher

Risk is central to all trucking company owners. They live with it every day. But seldom has the degree of risk and the chances you’ll wind up in court defending your company been more daunting than now.

Motor carriers face an array of legal and regulatory challenges in 2013 that could increase their liability if not properly addressed. Here are some of our top issues:

**BROKERED FREIGHT**

The latest transportation legislation, the new “MAP-21”, spells an end to a motor carrier informally asking another to handle freight without registering as a broker or freight forwarder. Under the terms spelled out by Congress in its latest transportation bill, the Federal Motor Carrier Safety Administration (“FMCSA”) must require any company that brokers or forwards freight to register with the FMCSA and to secure a bond in the amount of $75,000. The requirement takes effect October 1, 2013.

MAP-21 also mandates that a trucking company brokering freight must employ somebody with at least three years of experience in brokerage or with knowledge of the discipline. The new rules will reach into the executive suite, imposing a $10,000-per-violation civil penalty on “officers, directors, and principles,” not just companies.

**NO EASE OF RE-ENTRY**

MAP-21 also empowers FMCSA to revoke the registration of an “imminent hazard” motor carrier and to reject “chameleon carriers,” meaning those owners or managers whose companies are shut down for safety violations but reopen later under a new name or with a new batch of owners.

**CSA SCORES**

FMCSA’s much-ballyhooed 2010 Compliance, Safety, Accountability (CSA) Program for tracking and sanctioning unsafe motor carriers has some serious deficiencies in data accuracy and reliability. The FMCSA acknowledges there are problems and has proposed some fixes.

However, the reality for motor carriers is that CSA is already fueling big highway-accident lawsuits. Publicly-available safety data has helped guide juries to award damages against motor carriers – and against property brokers for “negligent selection” of motor carriers. And these judgments are frequently going higher, into the tens of millions of dollars. Also, in order to avoid being drawn into these lawsuits, large shippers are writing CSA-related benchmarks into their contracts with carriers and brokers in whom minimum scores must be met or the contract terminates.

This means you shouldn’t delay taking whatever steps are necessary to keep your CSA scores above the minimum thresholds that the FMCSA deems to be ‘alert’ status. Otherwise, carriers could risk losing business. Savvy brokers are also establishing CSA protocols to guide their selection of motor carriers, including confirming their possession of operating authority, maintaining a ‘satisfactory’ safety rating, CSA scores above the alert threshold levels, and sufficient property and liability insurance coverage.

Management should carefully track the “Unsafe Driving” and “Hours of Service (HOS) Compliance” BASICS, which are purportedly better predictors of accidents than the other BASICS. CSA protocols, whether applied by brokers to carriers or by carriers to owner-operators, should be stringent enough to achieve real safety improvements. More importantly, the degree of commitment to safety is now more important than ever to convince juries, if sued, that the carrier or broker is totally devoted to safety, yet procedurally fair and not so harsh as to make goals impossible to meet.

**BANS ON TEXTING AND HANDHELD CELL PHONES**

FMCSA now prohibits commercial motor vehicle (CMV) drivers from using hand-held phones while driving. The 2012 regulation forbids a driver to hold a phone to talk or to initiate, answer, or end calls unless he/she can do so by touching a single button and can access the phone in the seated driving position with seatbelt fastened.

Conversely, trucking companies may not allow a CMV driver to use a hand-held phone and both drivers and motor carriers face civil penalties for violating the ban. As with the 2010 FMCSA “texting ban,” the handheld phone ban applies whenever a CMV driver is operating a commercial motor vehicle on a highway, including while stopped because of traffic, delays, or otherwise.
Both bans virtually invite plaintiffs’ counsel in highway-accident lawsuits to inquire about a truck driver’s phone-use, up to and including the time of the accident. Attorneys may also verify whether the motor carrier has policies forbidding texting and hand-held phone-use, what steps it took to train drivers on those policies, and what it has done to enforce them.

For those reasons, trucking company owners must ensure that, at a minimum, the company training and policy manuals incorporate specific information on the bans, and include the bans in driver-orientation and periodic driver safety meetings. Motor carriers should also consider having each driver sign a form – worded differently for company drivers than for independent contractors – certifying he/she is aware of the hand held cell phone and texting bans.

Finally, some carriers have considered prohibiting all phone use while driving, but if operational considerations are likely to preclude universal enforcement, such a prohibition could make things worse for the carrier in a future lawsuit.

FAILING TO NEGOTIATE

When faced with how to defend a severe highway accident lawsuit, consider ‘the art of compromise’ as an opportunity not a challenge. Negotiation is an alternative to the trucking company owner or manager’s usual approach to defending severe highway accident lawsuits – which is to deny, delay, and defend. This tactic can string out for years and at great expense to both sides.

The alternative, called “Negotiation Counsel,” focuses on major highway-accident lawsuits where the motor carrier’s fault is clear, but the amount of the damages – often in the millions or tens of millions of dollars – is not. A Negotiation Counsel is essentially an expert negotiator who works on a separate track from the motor carrier’s litigation defense counsel.

The Negotiation Counsel meets with claimants and their attorneys within days after an accident to demonstrate empathy and quiet strength and to do a “deep dive” to identify interests and obstacles to a settlement. Usually a mediation session is scheduled soon after. The goals are a faster resolution, lower transactional costs for both sides, and a major early-settlement discount for the motor carrier defendant.

Trucking companies can sometimes develop the capability in house. But what is essential is to have a negotiator who is an expert in communication, someone who is calm, experienced in trucking litigation, gifted at reading people and situations, familiar with state-of-the-art negotiating techniques, and tough when necessary. The results, though always varying with the specific facts and with no guarantees, can often be a true business-value proposition: major savings achieved through an early, fair, discounted settlement.

STATE EMPLOYMENT LAWS

Motor carriers are often the targets of employment class actions seeking tens of millions of dollars for alleged noncompliance with minimum wage, overtime, and state break laws. Some of these lawsuits have argued that situations in which an employee is paid on some activity, such as per-trip, per-stop, or cents-per-mile formulas, violates certain state laws that require employees be paid for each hour worked or for each discrete activity performed.

Other suits claim a motor carrier has improperly classified drivers as exempt from overtime pay. A number of class actions allege a carrier’s failure to provide meal and rest breaks at state-mandated intervals.

A clearly defined compensation policy explaining what a motor carrier’s activity-based pay system covers may limit exposure to minimum wage claims. Carriers can help themselves by tailoring their policies and driver handbooks to the wage and hour laws of each state through which their trucks pass.

INDEPENDENT CONTRACTOR STATUS

A motor carrier’s use of independent-contractor owner-operators is both a business opportunity and a risk of litigation. Legal challenges include workers compensation claims, employment class actions that start by reclassifying the carrier’s contractors as employees, state unemployment tax audits, and Internal Revenue Service assessments of employment taxes. If successful, these lawsuits and administrative agency actions can cost a motor carrier millions of dollars.

However, the risk has been reduced in Arkansas due to the Arkansas Trucking Association persuading the Arkansas Legislature to allow owner-operators access to workers compensation coverage under a motor carrier’s workers compensation policies while retaining their independent-contractor status.

The degree of control that the motor carrier maintains over its’ owner operator is a factor in defending challenges that the owner operator is actually an employee. Motor carriers should consider the following strategies to help show that they do not have a “right to control” the contractor and that the contractor does have entrepreneurial freedom:

1. in lease-purchase programs, offer vehicles for lease through an affiliated equipment-leasing company, use a capital lease not an operating lease, and allow a contractor-lessee to take the vehicle eventually to a third-party motor carrier with sound financials and safety-rating;
2. make it easy for contractors to trip lease to other carriers occasionally;
3. provide contractors an opportunity to have multiple trucks and employee-drivers and to hire substitute drivers;
4. give contractors choice among and within charge-back programs;
5. avoid time-based compensation and build in opportunities for contractors to increase or decrease their profits;
(6) If customers or government agencies are the true source of contractors’ instructions, make their origin clear in the independent contractor operating agreement (“ICOA”);

(7) don’t provide business coaching to contractors, but allow interested contractors to pay for outside coaches through charge-backs;

(8) avoid “employee” terminology in paperwork, websites, and customer communications; and

(9) subject your ICOA and leasing practices to periodic legal review.

**AFFORDABLE CARE ACT – COMPLEX CHOICES**

While the Obama Administration has announced that it will delay by one year, until 2015, the requirement that larger employers provide health care coverage to their workers or pay penalties, all other provisions remain in the landmark Patient Protection and Affordable Care Act’s ("ACA") remain in place.

Transportation industry employers should prepare now for the other provisions in the ACA. Individuals will have to maintain an ACA-defined minimum level of health coverage or incur a penalty collected by the IRS, while large employers – those with 50 or more full time, or part-time equivalent, workers – will have to offer employees an opportunity to enroll in “affordable” health coverage providing “minimum value” to the employee, or incur a penalty.

The individual mandate and ACA’s Affordable Insurance Exchanges may encourage owner-operators to look for affordable health care plans in order to avoid, as independent contractors, having to pay a penalty for lack of coverage. There is also a possibility the individual mandate will increase pressure on motor carriers to facilitate health insurance for owner-operators.

Motor carriers should familiarize themselves with this new dynamic that owner-operators will face in 2015, including whether it will help or hurt recruiting and retention. Motor carriers using owner-operators should consider moving now to conduct an operational review to remedy any vulnerability to reclassifying their owner-operators as employees rather than remaining independent contractors.

Damages in a successful worker-reclassification class action could include the owner-operators’ cost of having to purchase their own health care coverage, in addition to penalties under ACA for failing to provide health care coverage to the carrier’s “employee” drivers.

**ELECTRONIC LOGGING DEVICES**

As an early advocate of an Electronic Onboard Record ("EOBR") mandate, the Arkansas Trucking Association has long appreciated the safety-enhancement and customer-service benefits of EOBRs. The Trucking Alliance, spawned by the ATA leadership two years ago to lobby Congress, was instrumental in getting this EOBR mandate included in the transportation bill last year.

Now that Congress has finally agreed, the electronic logging devices (ELD) as they are now referred, will be fully implemented within the next two or three years. The ELD mandate becomes effective two years after the FMCSA promulgates, theoretically by 10/1/2013, a final rule on the subject. FMCSA has publicly acknowledged motor carriers’ right to install EOBRs in the meantime.

Some legal exposure may accompany a carrier’s use of EOBRs. The Owner-Operator Independent Drivers Association has sued FMCSA over the possibility that carriers would exploit EOBRs to harass drivers – by, for example, waking drivers resting in the sleeper berth or requiring drivers with available hours based on EOBR information to continue driving despite driver fatigue – or to invade driver privacy through EOBRs’ ability to GPS-track a driver’s off-duty whereabouts.

In response, FMCSA recently announced that it has completed a survey of more than 1,000 drivers and motor carriers for input on the potential for EOBR harassment of drivers.

For now, carriers using EOBRs should consider safeguards such as requiring EOBR use only for drivers who have demonstrated HOS-compliance problems; issuing a company policy, and training dispatchers and managers, on the limited proper use of EOBR data; restricting the frequency and detail of data-pings about the vehicle’s location; meeting the specifications of FMCSA’s current regulation on optional use of “Automatic On-board Recording Devices”; distributing for driver signature a privacy-related disclosure and consent form; and using a third-party clearinghouse to screen and channel all EOBR data for use only to satisfy specific regulatory or customer requirements.

Competitor Collaborations – Risk/Reward. The Federal Trade Commission and private lawsuits seeking treble-damages have increasingly been challenging competing companies’ agreements and joint ventures under the antitrust laws. Competitor collaborations offer motor carriers, among others, substantial lawful opportunities to get more efficient and profitable by, for example, sharing information on squeezing unnecessary expenses out of their operations. But coordination among competitors can also be a “slippery slope” to jury verdicts of unlawful price-fixing, dividing up of customers, concertedly refusing to deal with competitors, customers, or vendors except on anticompetitive terms, or engaging in other predatory conduct.

To avoid such jury verdicts and the prison terms, fines, and huge money damages they can bring, motor carriers should tread carefully and obtain antitrust advice in advance when contemplating collaborations with other motor carriers – including benchmarking surveys, questionnaires, or blogs.

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