

THE TRANSPORTATION BRIEF®

A quarterly newsletter of legal news for the clients and friends of Scopelitis, Garvin, Light, Hanson & Feary

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SPECIAL EDITION

INDUSTRY NEWS INSIGHTS

ELD Mandate Still On Track. Despite considerable attention to the Trump administration's directive on a regulatory freeze, the electronic logging device mandate was finalized as a rule in December 2015 and thus beyond an Executive Order's reach. Legal challenges to the rule by OOIDA have failed to date (an appeal to the Supreme Court remains an improbable possibility) and some in Congress have suggested repeal, but the initial compliance deadlines (December 18, 2017 for users of paper logs and December 16, 2019 for users of AOBDRs) remain in place.

– **Timothy W. Wiseman, Indianapolis, IN**

Safety Fitness Determination Rule Not Likely To Be Finalized Soon. FMCSA recently announced its intent to issue a supplemental notice of proposed rulemaking relating to its proposal in January 2016 to update its Safety Fitness Determination methodology in order to address the results of the ongoing review of CSA. FMCSA has not indicated a new schedule, but the opening of a new comment period in the future suggests the final rule is far from imminent.

– **Prasad Sharma, Washington, D.C.**

U.S.S.C. to clarify NLRA Waivers issue. The Supreme Court has agreed to resolve a circuit split regarding whether the National Labor Relations Act invalidates class- and collective-arbitration waivers in employment contracts, a position advanced by the National Labor Relations Board. A decision is not expected until early 2018. Regardless of the Court's holding, its impact on transportation companies will have to be carefully parsed in light of the exemption from the Federal Arbitration Act for "contracts of employment" with transportation workers.

– **Braden K. Core, Indianapolis, IN**

Joint Employment Scrutiny in Warehousing. Joint employment of workers in the warehouse and logistics industries will continue receiving increased scrutiny in 2017 following a 2016 Administrator's Interpretation from the DOL highlighting the potential that multiple businesses along the supply chain may employ one worker. Limiting exposure that can result from a joint employment finding requires both an examination of contractual terms between, for example, a warehouse business and the logistics company overseeing customer operations at the warehouse, and an assessment of the control each business may have over the warehouse workers employment conditions.

– **Andrew J. Butcher, Chicago, IL**

Significant Change in Jury Instructions. In a recent decision, the Wisconsin Supreme Court adopted a heightened standard of care for commercial truck drivers: "As the operator of a semi tractor-trailer, it was the defendant's duty to use that degree of care, skill, and judgment that a reasonable semi truck driver would exercise in the same or similar circumstances having due regard for the state of learning, education, experience, and knowledge possessed by semi truck drivers holding a commercial driver's license. A semi truck driver that fails to conform to the standard is negligent. The burden is on the plaintiff to prove the defendant was negligent."

– **Jay R. Starrett, Milwaukee, WI**



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BRIEFLY

Warehouse Claims – How to Respond, Defend, Settle

Upon receiving a claim from a customer, a warehouse should first notify its insurer. It is imperative to satisfy the policy's timely notice requirement should coverage be available. The warehouse should assess the claim, including the type of damages sought, and confirm the depositor has provided proper notice of claim by adequately identifying the goods or shipments involved. If the claim was not presented in a timely fashion, the terms of the contract or warehouse receipt may prohibit recovery. Next, the warehouse should determine if the contract provides for a limitation of damages. If the amount sought exceeds the damage limit, the warehouse may have a basis for enforcing this limit. Also, an assessment must be made of whether the claim seeks consequential damages (e.g., lost profits, investigative costs, chargebacks) that may not be recoverable under the contract. Finally, when agreeing to pay a claim, especially when the warehouse has used reasonable care in storing and handling the goods, it is critical to have the customer sign a release acknowledging the specifics of the claim and protecting the warehouse from subsequent estoppel arguments regarding waiver of the reasonable care standard.

Kevin M. Phillips
Eric J. Meyers,
Chicago

First Circuit Deals Blow to Hair Testing

On December 28, 2016, the United States Court of Appeals for the First Circuit dealt a setback to the Boston Police Department's hair testing program used to assess an individual's prior use of banned drugs. *Jones v. City of Boston*. The decision may impact the potential use of hair testing programs in the trucking industry in lieu of currently prescribed pre-employment urine testing.

This is the second time the case has been before the First Circuit. In its earlier opinion, the court held that hair testing had a statistically significant disparate impact on African-American police officers and remanded to the district court to determine whether 1) hair testing was job-related and consistent with business necessity and 2) whether the employer refused to adopt reasonable alternative means that had less of a disparate impact. In this decision, the court held that a jury could reasonably find that hair testing was job-related and consistent with business necessity (thus affirming the district court on that point), but the court also concluded that a jury could find the police department refused to extend an alternative with less disparate impact as required to avoid liability for discrimination. The opinion focused on the alternative approach of administering a urinalysis for officers who tested positive with the hair test.

Some carriers are utilizing hair testing in addition to DOT-mandated urine testing because hair testing has a longer detection window and screens out more users. However, carriers taking employment actions based on hair testing results alone should reconsider in light of the First Circuit decision.

Timothy W. Wiseman,
Indianapolis

Prasad Sharma,
Washington, D.C.

Ohio Commercial Activity Tax Audits on the Rise

Operating interstate motor vehicles in and through a jurisdiction where the carrier does not maintain an office, terminal or resident employee may create a state tax filing obligation. There is an increase in Ohio Commercial Activity Tax (CAT) audit activity involving interstate motor carriers with some presence in the state. For example, having owned or leased property in Ohio for more than 13 days during a calendar year, e.g. a truck, can establish CAT nexus. Once a nexus exists, a filing and payment obligation arises if a sufficient amount of the carrier's transportation revenue is sourced to Ohio under an apportioned mileage formula.

Andrew K. Light
Ronald J. Morelock,
Indianapolis

FOR THE RECORD

The Firm expands to 13 locations with the opening of a Salt Lake City office. The office is led by Scopelitis partner, Nathaniel Saylor.

We are pleased to announce that Christopher Heery has joined the Firm's Chicago office. Chris joins the Litigation and Appellate practice group and focuses on complex civil litigation matters and government enforcement.

Spotlight on Warehousing & Logistics Practice Area

Scopelitis attorneys are at the forefront of warehouse and logistics law. When litigation arises involving the storage and handling of any type of product or material, our attorneys draw from their extensive experience in all aspects of warehouse legal liability to help clients make strategic business decisions.

Attorney Kevin Phillips joined the Firm's warehousing and logistics practice in 2013. His legal practice focuses exclusively on warehouse legal liability, including property losses, general liability, regulatory compliance, enforcement of warehousemen liens, and review of storage contracts. He represents warehousemen, shippers, carriers, and freight forwarders in tort, contract, bailment, warranty, and statutory-based actions. He counsels clients with diverse operations that include warehousing and logistics.

Much of Kevin's time is spent working on third-party logistics matters, including the drafting of warehouse contracts and commercial litigation. During the remainder of 2017, Kevin anticipates two trends in the warehousing and logistics practice area:

1. More customers will request warehouse inspections before they store goods.
2. More customers will propose the use of their own contracts.

In terms of dealing with these requests, Kevin says the best approach is a proactive one.

"People use Scopelitis because we know the transportation industry. However, many times clients call us with an immediate, urgent need," Phillips said. "While we can certainly respond to those needs, we can help clients think most strategically when they engage us early on, even as early as the RFP phase."

Craig Helmreich, Eric Habig and Luke Robinson in the Firm's Indianapolis office; Nathaniel Saylor in Salt Lake City; and Eric Meyers and Caroline Pratt in Chicago round out the warehousing practice area. For more information or to contact a member of the team, please visit our website at www.scopelitis.com.

Robert Henry will attend the American Moving & Storage Association's 2017 Annual Education Conference & Expo, February 26 – March 1, in **Palm Springs, California**

Mike Langford will be a co-panelist, speaking on "Top 10 Legal and Regulatory Developments Affecting Trucking Litigation and Operations" at the ABA Transportation Mega-Conference, March 9-10, in **New Orleans**

Tom Schulte and Renee Hooper will present "What to do After a Catastrophic Injury Accident" at the Ohio Safety Congress & Expo, March 8-10, in **Columbus, Ohio**

Jake Fisher and John Hove will attend the TAG Law regional meetings, March 3-5, in **Nashville, Tennessee** and March 10-12, in **San Francisco**

Kevin Phillips and Eric Meyers will present "Contractual Solutions Based on Recent Court Decisions" at the International Warehouse Logistics Association's 2017 IWLA Convention & Expo, March 19-22, in **Indian Wells, California**

Kathleen Jeffries will present "Freight Claims – Questions and Answers" at the Transportation & Logistics Council Annual Conference, March 20-22, in **Henderson, Nevada**

Greg Feary will present "Escaping the Eruption of Class Action Suits" at the Truckload Carriers Association's 79th Annual Convention, March 27-29, in **Nashville, Tennessee**. John Green will also attend

Robert Henry will attend the American Moving & Storage Association's 2017 National Safety & Operations Conference, April 3-4, in **Louisville**

Nathaniel Saylor will serve as the moderator for the Transportation Intermediaries Association's legal panel at TIA's Capital Ideas Conference and Exhibition, April 6, in **Las Vegas**

Jim Golden will present "The Golden Rule, Doing Good While Doing Well" at Harvard Business School's classes on Managing, Organizing and Negotiating for Value, April 20, in **Cambridge, Massachusetts**

Kevin Phillips and Eric Meyers will attend the International Association of Refrigerated Warehouses' 2017 IARW-WFLO Convention, April 22-25, in **Dana Point, California**

Greg Feary will be a co-panelist on the "Reimagining the Evolving Risks in Transportation from Disrupting Technologies to Impacts on the Workforce" panel at RIMS' Annual Conference, April 23-26, in **Philadelphia**

Brandon Wiseman will present "FMCSA Regulatory Update" at the Indiana Motor Truck Association's Spring Transportation Summit, April 24, in **Indianapolis**

Don Vogel, Kathleen Jeffries and Fritz Damm will attend the Transportation Lawyers Association Annual Conference, April 26-30, in **Santa Fe, New Mexico**. Fritz Damm will also attend TLA's Executive Committee meeting as Voting Past President and Membership and Recruiting Committee Chairman.

DISPATCHES

Don Vogel reports that Cook County, Illinois has passed a similar ordinance to the Chicago Minimum Wage and Paid Sick Leave Ordinance, which will likewise take effect on July 1, 2017. Both Ordinances provide that Covered Employees (those who perform at least two hours of work in any particular two-week period within Cook County) can accrue up to 40 hours of paid sick leave every 12 months, 20 hours of which can be carried over to the following 12-month period. It is imperative that employers review their existing policies to assure compliance with the new laws.

According to Jeff Jackson, large commercial motor vehicles registered in Pennsylvania now must be inspected annually in that state, rather than semi-annually. This change, signed into law by Gov. Tom Wolf late last year, aligns Pennsylvania with FMCSA regulations and leaves only California, Delaware, Hawaii, Maryland and New Hampshire as states requiring inspections more often.

David Robinson reminds employers that January 22, 2017 was the start date for use of the updated "smart" version of the Form I-9 for all newly-hired employees. The new form is an interactive PDF and can be found at <https://www.uscis.gov/sites/default/files/files/form/i-9.pdf>.

Leasing dedicated warehouse space for a customer? Don Devitt cautions lessees to ensure the warehouse agreement and lease do not conflict and suggests paying particular attention to the length of each agreement and termination provisions to avoid carrying excess space.

Clients that have a sudden or expected vacancy on their legal team or that are experiencing extraordinary legal demands exceeding their internal resources may want to consider our Interim Internal Counsel Services. We can assign one of our experienced lawyers with internal experience to provide substantial or full time assistance for a limited period of time at a favorable rate.

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