

The Transportation Brief®



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Navigating Through Independent Contractor Audits

Much has been written and said regarding the turbulent legal environment surrounding the owner-operator independent contractor operating model used by motor carriers in all segments of the transportation industry. Given this reality, motor carriers should adopt a perspective on this operating model not unlike the proactive approach they have adopted in other areas of potential legal exposure including federal and state tax audits, and USDOT safety audits. Motor carriers should routinely examine contractual arrangements with their owner-operators and the operational interface between management and the owner-operator workforce. Doing so prepares the motor carrier for audits from governmental entities and, in some cases, workers' compensation insurance carriers. Moreover, such preparation may provide benefit in responding to or avoiding civil litigation.

A three-pronged internal self audit is highly recommended

The first prong is an analytical review of all documentation associated with a motor carrier's independent contractor program. Such documentation includes the principal agreement between the motor carrier and the owner-operator (the Independent Contractor Operating Agreement or Lease) it also should include handbooks, website information, and third-party printed materials associated with products and services that may be offered through or facilitated by a motor carrier, such as Qualcomm units, insurance, tires, uniforms and training programs.

The second prong of analysis involves determining how a motor carrier's frontline managers, dispatchers, safety personnel and contractor relation personnel are interacting with the owner-operator workforce. An approach that is minimally invasive and designed to obtain candid insight on the operational realities of such exchanges involves the use of questionnaires.

The third prong of the analysis requires careful review of the questionnaire responses and brief follow-up interviews with all or some of the respondents to ensure that an accurate picture of the operational realities is fully understood. Follow-up interviews with frontline managers can also be a helpful legal diagnostic step in determining where operational problems or inefficiencies exist.

Self-examination can reveal strengths to perpetuate and weaknesses to address

The results of the analytical audit process lead to executive team discussions and a fine tuning of the overall owner-operator program. It is important to note that a diligent and careful approach to the audit process that ensures attorney/client confidentiality is a key component to the process.

*Gregory M. Feary,
Indianapolis*

Briefly...

States Continue Attack on “Misclassification”

In the past year, state and federal legislatures continued to introduce legislation aimed at “misclassification” of employees as independent contractors. The legislation seeks, facially, to reduce the improper use of independent contractors in place of employees. While such statutes appear beneficial in the abstract, they can serve to chill business operations in industries that have historically (and correctly) used independent contractors with little impact on the truly abusive practices followed by the marginal employers in the cash economy.

Such legislation increasingly targets trucking. Just in the last year, legislation seeking to treat drivers as employees or targeting misclassification in the trucking industry was introduced in California, New Jersey, New York, Oklahoma, Pennsylvania, and Washington. Misclassification acts can be broad-reaching in their effect, and can create civil and criminal liability for company officers. Additionally, such acts often authorize class or representative actions alleging misclassification of employees as independent contractors. A failure to comply with the strict terms of the statute (or of related state law exemptions) can create heightened penalties.

Many of these initiatives were slowed or stopped only after the active participation of committed industry participants. It is, as yet, unclear what effect the November elections will have on these issues. Therefore, it is essential to stay abreast of developments in this

area and to be ready to contact your state or federal representative when such legislation threatens your business model.

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

Restructuring the Owner-Operator Model

Motor carriers operating owner-operator independent contractor business units, divisions or corporations should carefully examine the proper structure of such operations within the greater context of the motor carrier’s full transportation operations. The issue of independent contractor status can be quite complex within an interstate trucking operation. Owner-operators are often based in more than one state and operate regionally or nationally from their base state. Understanding the legal exposures within an owner-operator’s geographic range can lead to operational efficiencies in dealing with owner-operators and a stronger legal platform for such operations.

Motor carriers have faced class action lawsuits involving owner-operator independent contractors on a wide array of issues that predominantly involve state laws. The contractual requirements and operational best practices that may need to be implemented to deal with owner-operators based in one state may not be necessary, appropriate or effective with respect to the legal and operational requirements of another state. Consequently, motor carriers have explored and in many cases implemented

separate business entities on a per-state or per-region basis. In so doing, the motor carrier can more effectively address how best to work with its owner-operator workforce within the different legal environments created by state laws and regulations.

For example, Kansas, Mississippi and Utah incorporate occupational accident insurance into their laws deeming owner-operators to be independent contractors for the purpose of workers’ compensation. But, states within the same region like Colorado and California or even adjacent states may have laws that address such insurance from a different perspective. Some states employ the use of owner-operator statutes with multiple factors, while other states apply a common law test approach to determining independent contractor status. States such as Texas include an official governmental form that owner-operators execute dealing with “employment” responsibilities, while other states such as Georgia require specific language within the owner-operator agreement to address unemployment tax responsibilities. Moreover, when a purchase lease-back arrangement is involved, state laws can vary quite widely.

In sum, developing a structure that allows a motor carrier to operate within the parameters of the law of a state or region may provide not only operational efficiency, but also greater legal protection to the motor carrier.

*Gregory M. Feary
Jay D. Robinson,
Indianapolis*



Mileposts

Defending the Owner-Operator Model Calls for Vigilance on Several Fronts

Continued legislative attacks on the owner-operator model and an ongoing need for operational efficiency are two of many forces calling for review of contracts and procedures by motor carriers utilizing owner-operators. Add to those the second term of the Obama administration, the possibly adjusted impact of which may not be clear until it is too late to re-tool programs already in place, and the call for review becomes more urgent.

This issue of *The Transportation Brief* focuses upon the forces affecting the owner-operator model and provides considerations for opposing them on a number of fronts.

The three-pronged audit program described by Greg Feary in this issue's cover article frames the three main components of a comprehensive review of a motor carrier's owner-operator program:

1. Document review;
2. Analysis of the interaction by the motor carrier's key personnel with its owner-operator workforce; and
3. Follow-up interviews based on a review of questionnaire responses provided during the analysis.

When conducted properly, the executive discussions and fine-tuning of the owner-operator program fall under attorney/client confidentiality, which is a primary benefit of the audit process when conducted by attorneys.

As the second-term Obama administration kicks into gear, the Scopelitis firm will continue to monitor its effects on the owner-operator model. For the past several years the Firm's legislative counsel service has been monitoring state and federal legislation affecting the independent contractor status of drivers. The service is spearheaded by Feary and supported by attorney Shannon Cohen in the Indianapolis office. Although it is utilized primarily by the Firm's larger motor carrier clients, its benefits are evident in the work provided by the Firm's attorneys on behalf of carriers large and small.

The range of state-specific regulations that come to bear on a motor carrier operating across several states demands particular attention by carriers utilizing owner-operators. In their page two article "Restructuring the Owner-Operator Model," Feary and Jay Robinson urge carriers to consider business structures that provide operational efficiency as well as optimum protection of their owner-operator model. The Scopelitis firm's corporate restructuring team assists motor carriers in reviewing their business structure with an eye towards preserving their drivers' independent contractor status. Besides Feary and Robinson, the Scopelitis restructuring team also includes Andy Light and Todd Metzger.

For the Record

Congratulations to Allyson E. Feary, Ryan W. Wright and John-Thomas Young, who began their practices this fall as associates. Allyson is based in the Chicago office; Ryan and JT in Indianapolis.

On the Road

Becky Trenner is presenting an update on independent contractor issues at the Ohio Same-Day Transportation Association's meeting, November 14, in **Columbus**.

Fritz Damm will attend the Toronto Transportation Club's Annual Dinner, November 29, in **Toronto**.

Kathleen Jeffries, Fritz Damm, and Mike Tauscher will attend the Conference on Freight Counsel, January 12-14, in **Dallas**.

Norm Garvin, Bill Brejcha, Don Vogel, Greg Ostendorf, Bob Henry, Kathleen Jeffries, Fritz Damm and Mike Tauscher will attend the Transportation Lawyers Association's 2012 Regional Seminar, January 24-25, in **Chicago**.

Chris McNatt will attend the California Trucking Association's Annual Management Conference 2012, January 27-30, in **Westlake, California**.

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Dispatches

 SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY

◆ Brandon Wiseman reports that in Indiana, CDL holders must now provide a copy of their **current medical examination report and examiner's certificate to the Motor Carrier Services Division of the Indiana Department of Revenue**, instead of the Bureau of Motor Vehicles.

◆ According to Andy Marquis, a new law in **Indiana requires all motor vehicles transporting food to comply with Indiana Department of Health rules**. The law, effective March 16, 2012, authorizes law enforcement officers to inspect vehicles for proper temperature, signs of contamination, and risk of cross-contamination. Non-compliance may result in vehicle impoundment and food disposal.

◆ **The FMCSA recently amended its safety rating regulations to no longer allow for a 10-day stay of a safety rating's effective date**. According to Tim Wiseman, this change may make it more difficult for carriers to achieve an upgraded safety rating within the current regulatory time frames.

◆ Katie Feary-Gardner reports that **penalties for violating an out-of-service order have gotten stiffer in Indiana**; the driver will be disqualified at least 180 days for the first violation and up to five years for more than two violations.