

THE TRANSPORTATION BRIEF®

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

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LABOR MEETS TRANSPORTATION IN SURFACE TRANSPORTATION REAUTHORIZATION BILLS

After a one-year extension last fall, Congress is making progress, albeit in fits and starts, towards passing a multiyear surface transportation reauthorization bill. Both versions of these massive bills not only authorize highway spending, but also contain numerous policy-related provisions aimed at trucking.

At the time of this writing, the full House has passed its version of policy-related provisions (H.R. 3684) and the Senate has passed its version, known as the bipartisan infrastructure bill. The Senate provisions will now have to go to the House to reconcile the differences between the two versions. While the future of the legislation and the final provisions are uncertain, now is a good time to look at what may be coming down the road.

Carriers utilizing lease-purchase agreements may be wary of provisions in both bills that direct the Secretary of Transportation, in conjunction with the Secretary of Labor, to establish a Truck Leasing Task Force to examine truck leasing agreements, including lease-purchase agreements, and whether their terms are “predatory” (House) or “inequitable” (Senate). The House version specifically directs an examination of the classification of drivers under lease-purchase agreements, while the Senate version places more emphasis on how the terms affect maintenance and safe operation of vehicles. Ultimately, the Task Force is to issue a report with its findings and include recommendations on best practices and changes to laws at the federal, state, or local levels to promote “fair leasing agreements” that allow drivers to “earn a living wage.” Because provisions are in both bills – although

not identical – some form is likely to become law.

Perpetuating the novel intersection of labor and transportation, the House version requires consideration of an applicant’s compliance with “applicable labor and employment laws and regulations, including wage and hour and workplace safety laws and regulations, relevant to the safe operation of a motor carrier” when granting or denying motor carrier authority. Another House provision would direct a rulemaking to establish limits on the amount of time a driver can be detained without the driver being compensated for such detention.

In a measure supported by some in the industry but opposed by many, the House version would increase the minimum liability insurance amounts from \$750,000 to \$2 million and provides for automatic inflation adjustments every five years thereafter. On the positive side, there is a Senate provision that directs the establishment of a pilot apprenticeship program under which drivers aged between 18 and 21 could engage in interstate operations.

The highway bill is critical to the trucking industry. Congressional deliberations throughout the remainder of the summer and fall hope to produce a necessary bill – whichever policy provisions make the final cut.

Gregory M. Feary,
Indianapolis

Prasad Sharma,
Washington, D.C.



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Please send contact updates to:
The Transportation Brief
tbrief@scopelitis.com www.scopelitis.com

BRIEFLY

Ninth Circuit Addresses Piece-rate Pay Plans

Plaintiffs' lawyers have long argued that under California law, drivers paid with a mileage-based compensation formula are not compensated for their non-driving activities, such as time spent conducting pre-trip and post-trip inspections, fueling, waiting at company terminals, waiting at customer locations, and completing paper work associated with a load. As a result, plaintiffs' lawyers contend that employers must compensate drivers for performing those tasks separately from the pay they receive from their mileage-based compensation formula.

Notwithstanding such arguments, in *Ayala v. U.S. Xpress, Inc.*, the Ninth Circuit recently ruled that a properly drafted piece-rate compensation pay plan that pays for delivered loads can cover both the time spent driving as well as the time spent performing non-driving activities associated with delivering the loads.

It is important to have a written compensation pay plan to address how drivers earn their activity-based pay.

James H. Hanson
Indianapolis,

E. Ashley Paynter,
Seattle

Collections During COVID and Beyond – Protecting Your Warehouse

During the height of the pandemic, businesses, including warehouses, were presented with a new world of challenges. One such challenge present before and during the pandemic is collections. Warehouse customers often seek to "offset" invoices owed against claim amounts, but claims can be complicated and

may not be resolved for months or years after the initial claim. In the meantime, warehouses may lose money because claims delay or freeze collections.

The good news is that warehouses can take certain actions to be better positioned to handle this age-old problem. One way to counter this assertion to offset money owed to the warehouse company is to eliminate it from the warehouse contract language and include a provision requiring payment in full regardless of any outstanding or unresolved claims. By including more favorable provisions in a warehouse's storage agreement or terms and conditions, warehouse companies may decrease assertions from customers requesting a right to offset money owed, thus allowing business to thrive.

Kevin M. Philips
Michael D. Reed,
Chicago

Questions Remain After Change in Export Air Cargo Rules

In the Spring 2021 edition of *The Transportation Brief*, we advised on an upcoming change to the rules governing cargo offered for international air transportation. The new rule, effective June 30, 2021, requires all cargo to be screened or handled pursuant to an "alternative framework." Due to delays by the Transportation Security Administration (TSA) in updating affected security programs, we have seen significant disruption in the supply chain as shippers, air forwarders, and all-cargo aircraft operators attempt to navigate new compliance obligations. Difficulties encountered by air forwarders include limits on screening capacity, unclear packaging guidance, late-

arriving amendments to their security programs, and murky rules for single-entity charters and cargo that is not capable of being screened using methods currently approved by the TSA. Despite recent indications of imminent relief on these issues, we continue to advise Indirect Air Carrier and Certified Cargo Screening Facility clients to work closely with screening vendors and air carriers to stay ahead of the curve.

Nathaniel G. Saylor,
Salt Lake City

Braden K. Core
Tyler P. Biddle,
Indianapolis

New Texas Law Paving the Way to Curbing Nuclear Verdicts

With "runaway" jury verdicts in trucking accident cases on the rise in recent years, a new law may give trucking companies some relief in one major venue. Effective September 1st, Texas law will provide defendants in these cases the right to a bifurcated trial. The first trial phase will be limited to a determination of liability for compensatory damages. Next, any liability for punitive damages will be determined in the second phase of the trial. Evidence of a defendant's failure to comply with a regulation (like the Federal Motor Carrier Safety Regulations) may only be presented during the second phase with some exceptions. Several Texas jury verdicts have exceeded \$100 million in recent years. The industry is hopeful and optimistic that this new law will combat the reptile theory, curb nuclear verdicts, and set an example for other jurisdictions.

Renea E. Hooper
Peter C. Morton,
Indianapolis

SPOTLIGHT

Spotlight on

Investigations and Audits

While the transportation industry is largely deregulated, a surprising number of federal, state, and local government agencies write and administer a long—and growing—list of rules affecting transportation providers. These agencies regularly inspect for noncompliance, and they have the power to assess civil penalties for violations, place assets “out of service,” or worse.

When the inspectors come calling, it is important to be prepared.

The Firm’s multi-disciplinary Investigations and Audits practice combines a deep knowledge of the regulations impacting transportation providers with experience helping clients navigate the complex web of agencies and enforcement regimes.

Scopelitis can defend your business in a wide range of investigations: Federal Motor Carrier Safety Administration compliance reviews and safety audits; Transportation Security Administration and Federal Aviation Administration inspections concerning air-cargo security and dangerous-goods compliance; Environmental Protection Agency investigations involving violations of California’s Truck and Bus Regulation and Drayage Truck Regulation; Department of Labor wage-and-hour audits; Occupational Safety and Health Administration inspections; Equal Employment Opportunity Commission investigations; and state unemployment audits.

In addition, the Firm regularly defends clients facing investigations beyond those conducted by government agencies, including “premium audits” conducted by insurers, “pension fund” audits for unionized workforces, and “contract audits” conducted by shippers (e.g., for compliance and most-favored-nation clauses).

The Firm’s multi-disciplinary Investigations and Audit practice assists Mergers and Acquisitions partners for due diligence projects. While we primarily employ these skill sets on buyer-side projects, our experience in these areas aids sellers in understanding their strengths and weaknesses as they prepare for sale.

The Firm’s Investigations and Audits team - Greg Feary, Braden Core, Lizzie Bolka, Nathaniel Saylor, Chris McNatt, Kelli Block, Jim Hanson, David Robinson, Jack Finklea, Steve Pletcher, and Becky Trenner - can guide you through the regulatory inspection and enforcement process.

MILEPOSTS

FOR THE RECORD

We are pleased to announce that Rebecca Brown has joined the Firm’s Los Angeles office, and Peter Wickard and Madeleine Vala have joined the Firm’s Indianapolis office. Ms. Brown’s practice is primarily devoted to the Class Action Defense and Complex Litigation practice group. Mr. Wickard’s practice will concentrate on Highway Accident Defense. Ms. Vala’s practice will focus on Transportation Regulations and Compliance.

ON THE ROAD

Greg Feary presented “The Changing Regulatory & Legal Environment on the IC Home Delivery Model” at the National Home Delivery Association’s Annual Forum, August 1 – 4, in **San Diego, California**.

Renea Hooper presented “Cross-Examination of Plaintiff’s Trucking Safety Expert: Neutralizing the False Narrative of Unsafe Operations” for the Strafford Live Webinar on August 4th.

Greg Feary presented on “The California Conundrum” at Randall-Reilly’s CCJ Symposium, August 11, in **Birmingham, Alabama**.

Eric Meyers will present “Introduction to Warehouse Law” and “Case Studies in Warehouse Law” at the WFLO Institute East, September 9, in **Atlanta, Georgia**.

Greg Feary will present “An Industry in Flux: How Employment and Labor Law are Changing Trucking” at the FTR Transportation Intelligence’s Transportation Conference, September 14, **Indianapolis, Indiana**.

Kevin Phillips will attend the Southeastern Warehouse Association’s Annual Meeting & Convention, September 16 – 18, in **Point Clear, Alabama**.

Kelli Block, David Robinson, and Steve Stanaszak will present “Steering Through the Transportation Assault - From Judicial Hellholes to Nuclear Verdicts & Everything in Between” at the Wisconsin Motor Carrier Association’s Annual Meeting, September 21 – 22, in **Lake Geneva, Wisconsin**.

Jim Hanson will present “Road Closed Ahead: Avoiding the Detours of Wage and Hour Class Action Lawsuits” at the North American Transportation Employee Relations Association’s Annual Conference, September 26 – 28, in **Austin, Texas**. Don Vogel, Emily Quillen, and Fritz Damm will also attend. Jim Hanson and Fritz Damm will participate on NATERA’s Board of Directors’ meetings.

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GARVIN LIGHT HANSON & FEARY

Jeffrey S. Toole, Editor
Allison O. Smith, Editor
10 West Market St., Suite 1500
Indianapolis, IN 46204

On the Road, continued from inside

Kevin Phillips will present “Introduction to Warehouse Law” and “Case Studies in Warehouse Law,” and Tyler Biddle will present “Risk Management: Transportation Exposures,” at the WFLO Institute West, September 26 - 29, in **Tempe, Arizona**.

Jay Robinson and Jannie Steck will present on “Company Structuring and Nuclear Verdicts” at the Truckload Carriers Association Dry Van Group’s Meeting, September 29 - 30th, in **Las Vegas, Nevada**.

Todd Metzger will attend the Indiana Motor Truck Association’s Annual Convention, October 7 – 9, in **French Lick, Indiana**.

Kevin Phillips and Eric Meyers will present “Warehouse Legal Claims and Issues” at the IARW-WFLO Convention, October 8, in **Austin, Texas**.

Michael McFarlane will present on the topic of pre-work and pre-employment evaluations and their impact on workers’ compensation coverage at the Trucking Industry Defense Association’s Annual Seminar, October 13 – 15, in **Philadelphia, Pennsylvania**.

DISPATCHES

David Robinson reports that on July 9, 2021, President Biden issued an Executive Order on Promoting Competition in the American Economy. One aspect of this Executive Order that will receive close attention is the encouragement of the Federal Trade Commission to exercise its *statutory rulemaking authority to curtail the use of non-compete provisions or other agreements that limit worker mobility*. In an area traditionally governed by state law, federal limitations on non-compete agreements could be a game-changer.

LOCATIONS

INDIANAPOLIS
10 W. Market St., Suite 1400
Indianapolis, IN 46204
Phone (317) 637-1777

DALLAS/FORT WORTH
777 Main Street, Suite 3450
Fort Worth, TX 76102
Phone (817) 869-1700

MILWAUKEE
330 East Kilbourn Ave., Suite 827
Milwaukee, WI 53202
Phone (414) 219-8500

WASHINGTON, D.C.
4601 North Fairfax Drive, Suite 720
Arlington, VA 22203
Phone (202) 551-9030

CHATTANOOGA
600 Republic Center
633 Chestnut Street
Chattanooga, TN 37450
Phone (423) 266-2769

DETROIT
100 West Big Beaver Road, Suite 200
Troy, MI 48084
Phone (313) 237-7400

SALT LAKE CITY
345 W 600 South, Suite 107
Heber City, Utah 84032
Phone (435) 315-3947

CHICAGO
30 W. Monroe Street, Suite 1600
Chicago, IL 60603
Phone (312) 255-7200

LOS ANGELES
2 N. Lake Avenue, Suite 560
Pasadena, CA 91101
Phone (626) 795-4700

SEATTLE
3214 W. McGraw St., Suite 301F
Seattle, WA 98199
Phone (206) 288-6192

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