

THE TRANSPORTATION BRIEF®

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

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AB 5 – PRACTICAL SOLUTIONS TO A THORNY PROBLEM

California Assembly Bill 5 (AB 5) has been well publicized including a Scopelitis webinar, a Firm-authored Law360 opinion editorial, and a number of trade publication articles quoting the authors of this cover article. Companies and owner-operator businesses both search for practical solutions to the problem. California resident and/or working owner-operators are faced with the immediate dilemma of reshaping their small businesses, losing business revenue, and possibly losing their entire businesses. Transportation companies operating under an asset-light model face an immediate need for equipment to continue to provide the transportation services that are the backbone of their logistics businesses.

Owner-operators may not want to tackle the maze of regulatory, safety, and insurance obligations that come with operating as a motor carrier. However, transitioning to work as an employee while being reimbursed for expenses related to the equipment may be seen by many owner-operators as ending or limiting their entrepreneurial aspirations and may not provide a sustainable model for recovering their investment in equipment. Additionally, motor carriers operating within multi-faceted transportation enterprises are not in a position to provide a

comprehensive solution. They can only make changes acceptable to their businesses, their professional drivers, and their customers.

Two solutions appear to be developing as the best options for tackling the practical realities of equipment and professional services that these companies face. First is the settlement carrier model, where the equipment owner takes on the responsibility of operating as an authorized motor carrier. The second is the two-check system under which the professional driver becomes an employee and is paid separately for the use of the equipment in an unrelated transaction. (The latter is not new to the industry). The environment created by AB 5 may have ultimately created a circumstance in which the two-check system may be worthy of further discussion for owner-operator businesses. In the short term, these may be the most feasible options to meet the prickly and possibly ever growing challenges of AB 5 and the similar laws that may precipitate in Washington, New Jersey, and other states.

Gregory M. Feary
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Bankruptcy Filings on the Rise

The Firm's transportation bankruptcy practice group has noticed an uptick in bankruptcies impacting transportation service providers. Although there are always random bankruptcies creating collection issues or asserting preference claims against transportation service providers, the Firm has seen an increase in shipper and intermediary bankruptcies in the past six months. This is similar to a trend that was identified in advance of the last economic downturn. If the current trend continues, bankruptcy exposure avoidance will be a topic of concern for transportation service providers. Minimizing exposure in bankruptcy requires quick action – i.e., requiring prepayment at the first sign of shipper/intermediary instability; filing immediately in jurisdictions that recognize critical vendor status; drafting pre-petition strict payment terms in contracts for customers in jurisdictions not having critical vendor status laws. Careful planning and awareness of the issues is the best way to minimize exposure when your customers or trade partners file for bankruptcy.

Craig J. Helmreich
Gregory A. Ostendorf,
Indianapolis

Dash Cam Video Retention Policy

Safety and claims departments are experiencing positive developments from installing dash cam video recorders in their trucks. As the use of dash cam videos becomes more common, it is critical that motor carriers implement a written video evidence retention policy before inevitable litigation occurs. A written policy provides consistency

of approach and an explanation as to why certain video may or may not have been preserved. Video retention policies should include the following:

- Types of incidents that trigger preservation (single-vehicle accident, property damage only, near-miss accidents, etc.)
- Length of footage to be preserved
- The period of time for keeping footage
- When and how to produce video footage to law enforcement and claimants' counsel

Michael B. Langford,
Indianapolis

FMCSA Proposes Revisions to Hours of Service Rules

In mid-August, FMCSA released its highly-anticipated hours-of-service Notice of Proposed Rulemaking with the stated goal of enhancing safety by giving commercial drivers more flexibility. The proposal has five main components:

- Modifying the existing 30-minute rest break requirement, such that a break would only be required after a driver accumulates 8 hours of drive time, and allowing the break to be satisfied by "on-duty, not driving" time in addition to "off-duty" time.
- Allowing drivers to pause their 14-hour driving window with one off-duty break of between 30 minutes and 3 hours.
- Modifying the adverse driving condition exception by extending the maximum window during which driving is permitted by two hours.
- Lengthening the maximum on-duty period and air-mile radius for the CDL short-haul exemption to 14 hours and 150 air-miles, respectively.
- Broadening the split-sleeper-berth exception to allow drivers

to split their required 10-hour off-duty period into two periods of 7 hours and 3 hours (either off-duty or sleeper berth), and counting neither period against the driver's 14-hour driving window.

The proposal has already garnered thousands of public comments, which FMCSA must review over the coming months before deciding how to proceed. In all likelihood, the proposal will not take final form until sometime in 2020, unless it is further delayed by litigation.

Brandon K. Wiseman,
Indianapolis

PHMSA Updating Rules on the Transportation of Lithium Batteries

The Pipeline and Hazardous Materials Safety Administration (PHMSA) is amending the Hazardous Materials Regulations in an effort to maintain alignment with international standards. Among other proposed changes, PHMSA plans to require manufacturers and "subsequent distributors" of lithium batteries to make available a Lithium Battery Test Summary (LBTS). The LBTS requirement is scheduled to go into effect January 1, 2020, but commenters have requested the agency to delay implementation until 2022, citing difficulties in meeting the 2020 deadline. Transportation providers are closely watching this rulemaking process to understand who may qualify as a "subsequent distributor" and how quickly the LBTS must be made available to those who request a copy in the final version of the rule.

Braden K. Core
Elizabeth M. Bolka,
Indianapolis

spotlight

Spotlight on

Independent Contractor Legislative Counsel

As California AB 5 made clear, state-level changes to independent contractor (IC) status can significantly change the business operations of a motor carrier in any given state and can have a domino effect on operations even beyond the borders of that state.

The Firm's IC legislative counsel practice - led by Greg Feary, Shannon Cohen, and Prasad Sharma - regularly assists clients, state associations, industry associations, and coalitions with monitoring recent legislative activity that could impact IC status; evaluating the potential impact of such legislation; providing technical drafting revisions and talking points to support favorable legislation; and to oppose or mitigate unfavorable legislation.

IC legislation is introduced in multiple states every legislative session and may impact the test used to determine whether all workers are ICs or may be limited to the IC status of owner-operator drivers. No matter which type of IC legislation is under consideration, legislators and their staff often benefit from receiving real-world perspectives from transportation industry leaders. These interactions provide lawmakers with a more complete understanding of how such legislation may impact the transportation industry in their district and beyond, and what aspects of the transportation industry may operate differently than a typical business utilizing ICs. Policymakers further benefit from seeing specific language that can address the industry's needs, including talking points that summarize the issues for other legislators and stakeholders.

FOR THE RECORD

Congratulations to the Scopelitis Firm for being recognized by U.S. News & World Report. Scopelitis was named to the publication's "Best Law Firms" list for the sixth consecutive year. Firms included in the list are recognized for professional excellence with persistently impressive ratings from clients and peers.

The American College of Transportation Attorneys (ACTA) announced that it elected Scopelitis, Gavin, Light, Hanson & Feary Partner Michael B. Langford as chairman effective August 16, 2019.

ON THE ROAD

Anette Sandberg presented "ELDs and other Regulatory Updates for Motor Carriers" at the Washington Trucking Association's Safety Policy Committee Meeting, October 24, in Yakima, Washington.

Kathleen Jeffries and Fritz Damm will attend the Transportation Lawyers Association's Transportation Law Institute, November 7-8. Kathleen will also attend the Transportation Lawyers Association's Executive Committee Meeting as Voting Past President and Fritz Damm will attend as Past President and Chair of the Membership and Recruiting Committee, November 9, in Minneapolis, Minnesota.

Kevin Phillips will present "What Warehouses Need to be Ready for With Cyber Attacks" at the International Warehouse Logistics Association's Legal Practice Symposium, November 12-14, in Leesburg, Virginia.

Todd Metzger will attend the Indiana Motor Truck Association's Annual Conference, November 14-16, in Orlando, Florida.

Michael Tauscher will present a caselaw update at the Conference of Freight Counsel's Winter 2020 Meeting, January 4-6, in Palm Springs, California. Kathleen Jeffries and Fritz Damm will also attend.

Kathleen Jeffries will chair "Focus on the Industry" boot camp at the Transportation Lawyers Association's Regional Seminar, January 23-24, in Chicago. Don Vogel, Fritz Damm, Michael Tauscher and Tim Cochren will also attend.

California Takes Aim at Mandatory Arbitration

The Governor of California recently signed into law AB 51. This new law makes it an “unlawful employment practice”—and a misdemeanor criminal violation—for an employer to require employees to arbitrate claims arising under the California Labor Code (encompassing wage-and-hour claims), as well as certain discrimination claims.

AB 51 applies to “contracts of employment” entered into, modified, or extended after January 1, 2020.

Notably, the law states that a mandatory arbitration agreement is not saved by an “opt out” provision, a right built into many arbitration agreements for the express purpose of strengthening enforceability.

While a preemption challenge to the law under the Federal Arbitration Act (FAA) is likely, even if it is successful, it may not help transportation businesses, because many “contracts of employment” with transportation workers are exempt from the FAA. This means that a favorable preemption ruling may not offer the industry relief.

AB 51 is a negative development for employers. However, it does not mean that every transportation provider’s arbitration agreement will be rendered unenforceable. Now is the time to review your approach to arbitration in California in light of AB 51.

Braden Core
Ryan Wright
Prasad Sharma
Tyler Biddle

DISPATCHES

According to Jack Finklea, effective January 1, 2020, overtime-exempt white collar workers must earn a salary of at least \$35,568 to remain exempt under the U.S. DOL’s new final overtime regulation. The regulation also raises the threshold for exempt “highly compensated individuals” to \$107,432 and includes some non-discretionary bonuses in the salary threshold calculation.

Tim Cochren reports that the start of the 2020 UCR registration period is delayed until further notice while the FMCSA completes its rulemaking process concerning a proposed reduction in UCR registration fee levels for the 2020 registration period and future years. Once the final rulemaking is published, the registration period will be opened. The UCR Board of Directors has advised that it will recommend that states delay enforcement for approximately three (3) months from that time.

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