

The Transportation Brief®

TRENDING

- › Courts are starting to adopt economic dependency as principal justification for employment determinations.
- › ELD battle-lines are forming.
- › Shippers are starting to bend internal procedures and loosen contract provisions to gain access to more truck capacity.

Grassroots Efforts are Critical to Legislative Success or Failure

Motor carriers often ask how they can impact the laws and regulations that affect their daily operations. Old-fashioned grassroots campaigns (launched via traditional networking routes or through using social and digital media) can have a direct impact on legislation. Motor carriers interested in shaping the legislative landscape can more effectively do so when fully informed of how such issues are being addressed at the state and federal levels.

Feedback is particularly effective when it is well timed and well informed. New Jersey is an example of the efficacy of well timed opposition to adverse legislation. In 2013, industry participants' opposition to AB 1578 resulted in a veto of the legislation by Gov. Christie. The Firm's Legislative Counsel subscription service entry on the legislation, which helped advise some participants of the need for opposition, is set forth below.

PENDING INITIATIVES

JURISDICTION	BILL #	STATUS	BRIEF DESCRIPTION	INDUSTRY IMPACT
OCTOBER 2013 SUMMARY UPDATES (CURRENT AS OF INFORMATION AVAILABLE OCTOBER 31, 2013)				
NEW JERSEY	NJ AB 1578	Vetoed 9/9/2013	Misclassification Act applicable to drayage and parcel delivery drivers. Applies to Prevailing Wage Act, unemployment compensation law, Temporary Disability Benefits Law, Income Tax, and Wage and Hour laws. Uses ABC Test to determine whether drayage truck operators or parcel delivery truck operators are independent contractors for purposes of the Act, and expressly excludes such drivers from the current owner-operator exemption contained in unemployment compensation act. NOTES OF INTEREST: To Assembly Labor Committee PROJECTED ADJOURNMENT: January 13, 2014 PROJECTED GOVERNOR'S DEADLINE: February 27, 2014	Negative impact. As currently drafted, effectively creates presumption that drayage and parcel delivery drivers should be considered employees. Oppose legislation.

TRENDING, continued

- › Joint employment is becoming the latest brand of organized labor activity.
- › Smaller companies are attracting interest from private equity firms.

This legislation was reintroduced almost immediately in January 2014 and is still pending as AB 2860/SB 992. The Firm and active industry participants are closely monitoring the legislation and will present arguments against the legislation if it appears likely to pass and be enacted.

When the industry is called upon for grassroots support or opposition to a particular legislative measure, it is critical, if you are not already aware of such efforts, to engage in these grassroots campaigns and contact your legislators.

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

Briefly...

National Labor Relations Board (NLRB) Expands Scope of Joint Employer Status Under National Labor Relations Act (NLRA)

In a move the dissenting member described as certain to trigger “a sea change in labor relations and business relationships,” the NLRB recently issued a controversial decision addressing the test for joint employer status.

In *Browning-Ferris Industries of California, Inc.*, the NLRB found the right to control the work is as probative of joint employer status as “the actual exercise of control, whether direct or indirect.” Thus, a joint employment relationship may arise when the putative employer merely reserves the right to direct work performance. Moreover, evidence of joint employment may exist not only through direct control, but also through indirect control, including directives issued through an intermediary.

An appeal is undoubtedly forthcoming. In the interim, motor carriers should expect a cautionary stance from shipper-customers because *Browning-Ferris* may have opened the floodgates for joint employer claims against such “upstream” contractors.

Kelli M. Block
A. Jack Finklea,
Indianapolis

Carriers' Charge-Back Practices Drawing the Attention of Plaintiffs' Bar

While OOIDA-led challenges to motor carrier compliance with the Federal Leasing Regulations have tapered off significantly in recent years, industry observers have

identified a surge in class-action cases brought by small groups of owner-operators targeting charge-back practices. In a recent lawsuit, *Fox v. TransAm Leasing*, owner-operators alleged that the carrier’s practice of requiring them to pay, through charge-backs, for the cost of Qualcomm service was a violation of the prohibition against forced purchases. The lower court agreed, and that decision is now on appeal to the Tenth Circuit. This case—and other similar cases—serve as a reminder for carriers to carefully vet their charge-back practices, both in terms of the disclosures contained in their lease agreements and their adherence to those terms in practice.

Braden K. Core,
Indianapolis

Potential Effort to Expand Joint Employment Under OSHA

Based on industry reports, OSHA may have informally expanded the scope of the companies it views as susceptible to a determination of joint responsibility for worker health and safety. This follows the recent NLRB decision in *Browning-Ferris*, which unquestionably expanded joint employment under the NLRA.

According to the International Franchise Association, OSHA investigators have recently requested documents detailing franchisor/franchisee relationships, even though such documents do not address the franchisor’s direct involvement in safety issues. Reportedly, these inquiries stem from an internal draft OSHA memorandum suggesting a joint employer relationship may arise if a franchisor merely holds the unexercised potential to control the working conditions of a franchisee employee.

While early indications of a potential policy shift seem rooted in the franchise arena, any company contracting with others for labor services should monitor this issue in the wake of *Browning-Ferris*.

A. Jack Finklea
Kelli M. Block,
Indianapolis

U.S. Department of Labor's New Interpretation Broadens Its Attack on Misclassification of Independent Contractors

The latest pronouncement from the U.S. Department of Labor (DOL) related to its Misclassification Initiative is Administrator’s Interpretation 2015-1 (Interpretation), issued on July 15. The Interpretation leaves no doubt that the DOL’s aggressive campaign against alleged worker misclassification under the Fair Labor Standards Act (FLSA), and the laws that use the same test, remains in full gear.

The Interpretation urges the DOL’s view that agencies and courts should apply the broadest possible definition of employment under the FLSA by stating that the traditional economic realities test must be applied consistent with the statute’s definition of “employ” as to “suffer or permit to work.” According to the Interpretation, “most workers are employees under the FLSA.”

Although the Interpretation does not carry the force of law, companies using independent contractors should anticipate stepped-up scrutiny of their models in light of the Interpretation.

James T. Spolyar,
Indianapolis



Mileposts

Legislative Counsel Service Tracks Key Industry Developments

The legislative and regulatory developments highlighted in this issue of the *Transportation Brief* are only a few of the current initiatives that are bound to significantly impact the transportation industry in the coming months and years. In an industry as highly regulated as transportation, it is easy to lose track of the multitude of state and federal laws that are on the horizon.

Headed by Indianapolis partners Greg Feary and Shannon Cohen, and with the addition of Prasad Sharma, former American Trucking Associations Senior Vice President and General Counsel, to the firm's Washington, D.C. office, the firm's legislative counsel service monitors and analyzes state and federal legislative and regulatory developments impacting the independent contractor status of drivers. A number of the Firm's clients rely on this service to gauge the impact potential legislation may have on their unique business operations and also to inform their decision to proactively engage in the legislative process.

As part of the legislative service, the firm provides client-customized reports during the peak legislative season – typically January through June. Among other things, these reports highlight the current status of the legislation and its potential impact on the industry once passed.

An ongoing target of the Firm's Legislative Counsel services has been state and federal legislation affecting the independent contractor status of drivers. A number of additional topics may also bear watching, including U.S. Department of Transportation safety regulations, a wide range of labor and employment issues, regulation of Transportation Network Companies, and many more. The Firm is poised to respond to client demand for analysis of these developing issues.

For the Record

We are pleased to announce that Prasad Sharma, Lynn Winter, E. Ashley Paynter and Ary Avnet, have joined the Firm. Prasad, based in the firm's Washington, D.C. office, will join the Firm's Legislative Counsel practice, Lynn and Ary join the Litigation and Appellate practice group in Dallas/Ft. Worth and Indianapolis, respectively, and Ashley joins the Complex Litigation practice in Indianapolis.

Congratulations to Jerad T. Childress and Peter C. Morton, who began their law practices this fall as associates in the Indianapolis office.

On the Road

Greg Feary, Jim Golden, Jake Fisher and John Hove will attend TAG Alliance's Fall 2015 International Conference, October 26-28, in **Santa Monica**

Jake Fisher will attend the U.S. Department of Commerce's Bureau of Industry and Security Update 2015, November 2-4, in **Washington, D.C.**

Tim Wiseman, Todd Metzger and Tom Schulte will attend the Indiana Motor Truck Association's Annual Convention, November 5-7, in **Orlando**

Nathaniel Saylor will participate in the Transportation Intermediaries Association's Executive Leadership Forum, November 10, in **Houston**

Eric Meyers will attend the Cargo Logistics America Expo & Conference, December 2-3, in **San Diego**

Kathleen Jeffries and Fritz Damm will attend the Conference on Freight Counsel's Winter Meeting, January 9-11, in **Nashville**.

Nathaniel Saylor will present at the Broker Boot Camp to be held at the Transportation Lawyers Association's 2016 Regional Seminar, January 21-22, in **Chicago**. Andy Light, Don Vogel, Greg Ostendorf, Kathleen Jeffries, and Fritz Damm will also attend.

Jim Hanson, Adam Smedstad and Chris McNatt will present a 2016 Labor Law Update at the California Trucking Association's Annual Membership Conference 2016, January 29 – February 1, in **Newport Beach, California**. Alaina Hawley and Ashley Paynter will also attend.

Dispatches

David Robinson advises employers using the official FMLA forms published by the U.S. Department of Labor (doctor's certification, notice of rights, designation notices) should ensure that they are using the updated forms recently issued by the DOL. These forms can be obtained on the DOL's website at: <http://www.dol.gov/whd/fmla/>.

Chris McNatt reminds motor carriers that the California Air Resources Board (CARB) regulations affect all heavy duty trucks and most trailers operating in California. With many significant compliance dates having passed or on the near horizon, CARB is now focusing on audits and enforcement. Proper record-keeping and reporting, as mandated by the regulations, are critical to working through the CARB audit process.

Locations

Indianapolis

10 W. Market St., Suite 1500
Indianapolis, IN 46204
Phone (317) 637-1777

Chicago

30 W. Monroe Street, Suite 600
Chicago, IL 60603
Phone (312) 255-7200

Washington, D.C.

1850 M Street, N.W., Suite 280
Washington, DC 20036
Phone: (202) 783-9222

Los Angeles

2 N. Lake Avenue, Suite 460
Pasadena, CA 91101
Phone: (626) 795-4700

Chattanooga

633 Chestnut Street
Chattanooga, TN 37450
Phone: (423) 266-2769

Detroit

535 Griswold Street, Suite 1818
Detroit, MI 48226
Phone: (313) 237-7400

Spokane

503 W. Riverside Ave., Suite 583
Spokane, WA 99201
Phone: (509) 747-1800

Dallas/Fort Worth

801 Cherry Street, Suite 1075
Fort Worth, TX 76102
Phone: (817) 869-1700

Milwaukee

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

Mt. Ephraim

851 Green Avenue
Mt. Ephraim, NJ 08059
Phone: (856) 203-6611

Philadelphia

1650 Market Street, Suite 3600
Philadelphia, PA 19103
Phone: (215) 240-1444