

The Transportation Brief®



TRENDING

- › Nevada and Hawaii are looking at IC legislation, while Idaho and Virginia have enacted a new IC law.
- › Brokers are re-evaluating use of CSA BASIC scores due to recent case law and capacity issues.
- › Impact of “ban the box” law is preventing certain approaches to driver background checks.
- › California labor organizations are launching an “amnesty” bill to draw carriers into converting to employee drivers.
- › Transportation companies have begun to facilitate stand-alone cargo insurance coverage.
- › FMCSA is cracking down on fraudulent marketing based on new entrant application information.
- › Big box retailers are requiring delivery driver/contractors to follow a detailed script.
- › New Jersey regulators are looking at unemployment tax revenue via audits.
- › Private equity firms are looking at last mile segment and brokerage platforms.

Emerging Transportation Issues in the Sharing Economy

Two high-profile lawsuits, in the Northern District of California, against companies symbolic of the sharing economy—*O’Connor v. Uber Technologies, Inc.* and *Cotter v. Lyft, Inc.*—are shaping the way courts and regulators approach the application of modern technologies to the age-old work of moving people and goods. In March, judges in both lawsuits, brought by California-based drivers who allege they were misclassified as independent contractors, determined that juries must decide the worker classification issue and rejected the argument that Uber and Lyft (and companies like them) are technology firms *only*, and not engaged in the business of transportation. Along with other challenges to the use of independent contractors in the sharing economy, these cases shine a light on important questions:

1. Will other companies in the sharing economy, like those that arrange the delivery of small parcels, face similar difficulties in convincing judges and regulators that they are not in the transportation business? If so, the regulation of these companies as transportation providers likely raises a host of compliance-related issues (i.e., motor-carrier and broker registration, food-safety regulations and FDA regulation of 3PLs).
2. Will the implicit holding that the drivers are in the same business as Uber and Lyft spread to other companies? There is recognition in transportation law that owner-operators and motor carriers can operate different types of businesses even though they share the same goal of providing safe, timely, and legal transportation. Yet, the judges in *Uber* and *Lyft* gave short shrift to this distinction.
3. Will the law evolve to recognize such companies as a new type of business altogether? Some states have taken this approach with Uber and Lyft, regulating them as “Transportation Network Companies,” a new type of business designation. The *Lyft* judge openly wondered whether “Lyft drivers should be considered a *new category of worker altogether* . . .”

Laws governing companies in the sharing economy are changing quickly, and the *Uber* and *Lyft* cases suggest a trend in favor of viewing companies of their ilk as transportation providers. Firms that are in this space—or considering entering it—should carefully consider the regulatory, safety, and financial responsibility issues surrounding this quickly-changing business model.

Gregory M. Feary
Craig J. Helmreich
Braden K. Core
Shannon M. Cohen,
Indianapolis

Briefly...

States Should Reform Laws on Seatbelt Non-Admissibility

Overwhelming evidence demonstrates that seatbelts save lives and reduce injuries. All states, except New Hampshire, mandate seatbelt use. Most states, however, prohibit or limit seatbelt nonuse evidence in lawsuits, and many states prohibit this evidence for any purpose. Sixteen states do not entirely preclude seatbelt nonuse evidence but limit the defense by admitting this evidence for specific purposes, such as proof of comparative fault, causation or mitigation of damages. Some of these states allow unlimited damage reductions, while other states set relatively low damage reduction caps. In Missouri, seatbelt nonuse evidence may be admitted with expert testimony to mitigate damages up to a 1% cap. Wisconsin caps the reduction at 15%.

The inadmissibility of seatbelt evidence blocks fairness in litigation. The time has come for state legislatures to revise outdated inadmissibility provisions in favor of equitable apportionment of fault for injuries.

*Michael B. Langford
Renea E. Hooper,
Indianapolis*

Surviving Government Enforcement Actions

When the government investigates a business (whether onsite, roadside, or backtrace), a few best practices should be kept in mind. Staff should be cooperative and document requests should be complied with promptly (keep a list of what is provided). If violations are discovered, determine the root cause and move quickly to fix it.

If the investigation leads to a Notice of Claim or Letter of Investigation, strongly consider retaining counsel. The company's

written response should admit confirmed violations and detail what measures and corrections have been implemented to prevent recurrence. If the facts do not show a violation, or if the company has a legal argument in defense of its conduct, the response should respectfully explain those matters in detail.

Diligence in all stages of a government investigation will help position the company for the best possible result.

*Braden K. Core
Kathryne Feary-Gardner,
Indianapolis*

Don't Let Tax Turtles Creep Into Your Per Diem Plan

In *Jacobs v. Commissioner*, the Tax Court recently labeled an over-the-road truck driver as a "tax turtle"—i.e., a taxpayer "with no fixed place of residence who carries his 'home' with him" for tax purposes. The court therefore found that the driver inappropriately deducted various expenses as away from home businesses expenses.

While the court focused on an individual taxpayer, the IRS may use the reasoning in the *Jacobs* case as another avenue for exploring the veracity of transportation industry per diem plans. If the IRS identifies a tax turtle participant, it may argue the business connection requirement has not been met as to that participant, potentially rendering payments made to any driver under the plan taxable. Motor carriers should therefore implement safeguards during the application process to ensure against tax turtle participation in *per diem* plans.

*Steven A. Pletcher
Kelli M. Block,
Indianapolis*

Mileposts

On the Road

Kevin Phillips will address warehouse legal liability issues at the Inland Marine Underwriters Association's Midwest Regional Advisory Committee Seminar, April 8, in **Chicago**.

Renea Hooper and Andy Marquis will speak at the Indiana Motor Truck Association's 3rd Annual Spring Transportation Summit, April 22, in **Indianapolis**.

Don Vogel will moderate a panel titled "It's a Multi-Modal World: Dissecting the Anatomy of a Cargo Claim Dispute in a Mock Mediation", and Kathleen Jeffries will moderate a panel titled "How Effective Implementation and Management of Internal Corporate Policies Can Eliminate Claims and Make Lawsuits Defensible" at the Transportation Lawyers Association's Annual Conference, May 12 – 16, in **Scottsdale, Arizona**. Kim Man will also attend.

Robert Henry will attend the American Trucking Associations' Government Traffic Committee meeting, May 17-20, in **Scottsdale, Arizona**.

Kevin Phillips will present "Product Contamination In a Warehouse" at the 6th Annual NLS Food Chain Summit, June 10 – 11, in **Miami**.

Greg Feary, Katie Feary-Gardner and Allie Feary will present "Legal Traps and Trends" at the South Carolina Trucking Association's Annual Conference, June 11-14, in **Myrtle Beach**.

Kathleen Jeffries and Mike Tauscher will attend the Conference of Freight Counsel meeting, June 13 – 15, in **Charleston, South Carolina**.

Greg Feary, Shannon Cohen, Jeff Jackson and Allie Feary will present on owner-operator issues at the American Trucking Associations 2015 Forum for Motor Carrier General Counsel, July 19 – 22, in **La Jolla, California**. Allison Smith will also attend.

Kathleen Jeffries will attend the Transportation Lawyers Association's Executive Committee meeting, July 31, in **Madison, Wisconsin**.



Scopelitis, Garvin, Light, Hanson & Feary is truly a full-service transportation law firm with more than 25 practice areas devoted to the unique issues affecting the transportation industry. Below are summaries of just a few of these practice areas.

Corporate Structuring and Business Transactions

The Firm provides legal assistance concerning virtually all corporate and business matters, including initial corporate structuring and restructuring, mergers and acquisitions, tax, insurance, real estate, financing, commercial law, bankruptcy, and general contract review.

Independent Contractor Issues

The Firm has considerable experience in assisting clients in protecting the independent contractor status of the owner-operators they engage to provide trucks and perform services. This experience includes, among other things, defending reclassification attempts by the plaintiff's bar or state/federal agencies and drafting legislation, subsequently adopted into law by many states, presumptively defining owner-operators as independent contractors in various contexts.

Insurance & Risk Management and Regulatory Compliance

The Firm assists motor-carrier clients and insurance carriers serving the trucking industry to better understand the complex legal interrelation between insurance coverages and the trucking business. It has helped insurance carriers design policies that respond to the needs of the trucking industry, such as occupational accident insurance policies. The Firm continues to counsel motor carriers and their insurance brokers

in tailoring insurance coverages that provide the optimum insurance protection given the practical considerations of cost and the individualized operations of the motor carrier client.

Regulatory, DOT, and Hazardous Materials Compliance

Even in today's "deregulated" environment, the transportation industry is still heavily regulated from a safety perspective. The Firm regularly counsels clients on the myriad of safety-related obligations imposed by state and federal agencies. It also assists them in disputes arising from regulatory compliance issues and conducts "mock" DOT audits to proactively spot potential problems and minimize exposure.

Complex Litigation

Scopelitis litigators are spending a growing share of their time defending transportation, logistics, and courier companies against federal collective actions and state and federal class actions. The actions seek many millions of dollars in damages on behalf of thousands of drivers (both employee and independent contractor) or other workers under federal and state wage and hour laws, including claims for minimum wage, wage deduction, overtime, meal and rest break periods, employee expense reimbursement, and other claims.

The Firm's other practice areas include: Air and Ocean Regulation, Transactions, and Litigation; Antitrust and Trade Regulation; Commercial and Bankruptcy; Driver Leasing; Employee Benefits; Estate Planning, Wills, and Probate Administration; Government Affairs; International Transportation Law and Customs; Labor & Employment; Litigation and Appellate; Mergers & Acquisitions; Negotiation Counsel; Personal Injury, Property Damage, and Cargo Claims; Real Estate; Taxation; Warehousing & Logistics; and Workers' Compensation.

More information about these services is available at www.scopelitis.com/services/.



Dispatches

Jeff Jackson reports that after receiving approval from US EPA in August 2014, the California Air Resources Board (“CARB”) now has the authority to begin enforcement of its 2009 greenhouse gas emission-reduction rule for 2011-2013 tractors and 2011 and newer 53 foot box trailers. **The rule requires carriers to use SmartWay-approved technology such as trailer skirts, low rolling-resistance tires, and trailer tails on their equipment – carriers should be prepared for heightened enforcement during 2015.**

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 20036-5804
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