

The Transportation Brief®



TRENDING

- › U.S. DOL's July interpretation of employees misclassified as independent contractors reveals the DOL is refocusing its independent contractor test by suggesting it is merely using its own version of the "economic realities" test to cloak its application of the ABC test.
- › Motor carriers are carefully examining the benefits and risks of in-cab cameras to identify bad driving behavior given the voluminous data that must be processed and the possible effect on morale and privacy issues.
- › Concerns over Map 21's unauthorized brokerage penalties are causing motor carriers to audit the manner in which they use subcontractors.
- › The topic of whether class action lawsuit liabilities can be reduced through insurance coverages has gained greater traction within the merger & acquisition arena.
- › Motor carriers continue to focus on reducing driver shortages through increased compensation, better trucks, more in-cab technology and more local or regional operations to minimize extended time away from home.
- › A spike in foreign trade and international transportation inquiries indicates another major step toward the global logistics market by smaller transportation companies.
- › Early signs exist that traditional longhaul truckload carriage is gaining private equity firm attention.

Opening of Mexican Border is Unlikely to Alleviate Driver Shortage

After a long-running dispute with Mexico under the North America Free Trade Agreement, and several bouts of litigation with various interested parties, the Federal Motor Carrier Safety Administration announced that it would begin accepting applications from Mexican domiciled motor carriers to provide long-haul operations in the U.S. Prior to that announcement, Mexican carriers were generally limited to operating in the so-called "commercial zone" adjacent to the U.S.-Mexico border, although a few were admitted to operate in the U.S. pursuant to the FMCSA's cross-border pilot program which terminated in October of 2014. Now such carriers can obtain authority to operate anywhere in the U.S., subject to, among other things, passing a Pre-authorization Safety Audit ("PASA") performed by the FMCSA.

Does allowing Mexican carriers to operate in the U.S. provide a possible solution to the current U.S. driver shortage? While Mexican carriers are allowed into the U.S., much like their Canadian counterparts, Mexican drivers and Mexican based tractors and trailers are significantly limited in the operations they can perform in the U.S.

Regulations of U.S. Customs and Border Protection ("CBP") only allow foreign-based equipment arriving from Canada or Mexico to pick up or deliver cargo moving in international commerce, or to be used for a single "point-to-point" move that is incidental (for instance, a move that is generally in the direction of export) to such international use. The problem is that a Mexican- or Canadian-based driver is subject to a stringent set of immigration regulations that only allow the driver to transport international cargo and do not allow a single point-to-point move within the U.S., as addressed elsewhere in this Brief. Thus, a foreign-based driver entering the U.S. needs to have a profitable backhaul in order to make long-haul operations in the U.S. practical. There are visa programs available that would help alleviate some of the restrictions on drivers (but not foreign-based equipment), but those programs are generally not applicable to the trucking industry. Taken together, these limitations mean the use of foreign drivers is unlikely to make a material dent in a carrier's efforts to locate additional drivers.

*Nathaniel Saylor,
Indianapolis*

Briefly...

Immigration Programs No “Silver Bullet” for Driver Shortage

The driver shortage has led some carriers to look abroad for foreign labor. Several immigration programs offer hope but also present obstacles that make it difficult for foreign drivers to find a home in the U.S. Two examples include:

1. The B-1 visa allows Mexican and Canadian drivers to operate in the U.S. for moves originating in one country and destined for another, but “cabotage”—transportation between points within the U.S.—is prohibited.

2. The H-2B visa permits U.S. carriers to employ foreign drivers where there is a “temporary” need and the Department of Labor declares a shortage of U.S. workers to fill that need. It can be difficult to establish both requirements on a case-by-case basis.

Carriers exploring the use of foreign drivers should carefully review any immigration program targeted for that purpose because the fine print might make it a poor fit or infeasible.

*Braden Core,
Indianapolis*

The New Tool in the FMCSA’S Tool Box

Since the chameleon carrier regulation took effect in 2013, the FMCSA has been quite active in consolidating the safety records of affiliated motor carriers under 49 C.F.R. § 386.73. This regulation allows the agency to consolidate the safety records of two or more affiliated motor carriers if it is determined that operations of one motor carrier were moved to another to avoid a negative safety history, civil penalty, or an out-of-service order. Some of the 13 factors used in determining if an affiliated entity is being used to evade regulatory requirements are commonality of ownership, officers, addresses, equipment and drivers. While the agency has primarily used the chameleon carrier regulation to address carriers attempting to avoid an unsatisfactory rating or out-of-service order, it is clear the regulation is broad enough to also cover carriers attempting to manipulate their fleets to avoid unfavorable CSA scores. Motor carriers seeking to restructure their operations by forming separate motor carrier entities should carefully consider this new regulation.

*Timothy W. Wiseman,
Indianapolis*

Multiple DOT Numbers?

Businesses with multiple affiliates operating commercial motor vehicles often operate as separate motor carriers under their own U.S. DOT numbers. While this structure makes sense under some circumstances, for other multi-carrier companies centralizing fleet operations under a single U.S. DOT number is a better model.

Pros and cons exist under both scenarios, but operating multiple affiliated fleets under a single U.S. DOT number can avoid duplicative administrative fees; centralize safety management; consolidate separate IRP, IFTA and state highway use tax accounts; streamline rebranding initiatives and eliminate duplicative operating authorities and permits. These objectives can normally be achieved without disrupting existing equipment ownership and registration, employment and corporate tax treatment.

*Andrew K. Light
Ronald J. Morelock,
Indianapolis*

For the Record

We are pleased to announce that **John N. Hove** and **Jacob R. Fisher** have joined the firm. John is in the firm’s Dallas/Ft. Worth office and Jake is in the firm’s Philadelphia office. Both John and Jake will practice in the firm’s International Transportation and Logistics Law practice area.

The Scopelitis firm has been retained as counsel by the International Warehouse Logistics Associations (IWLA). IWLA members include companies that provide warehousing; fulfillment; reverse logistics; transportation; freight-forwarding and brokerage services; inventory and supply chain management; and a broad range of manufacturing and value-added services. For more information contact **Kevin M. Phillips** in the Chicago office.

Bill Brejcha has been appointed as a Certified Mediator in Cook County’s Law Division.

Congratulations to **Emily Quillen** who was recognized as an Emerging Leader by the Texas Trucking Association.



Mileposts



On the Road

Kathleen Jeffries participated as a Voting Past President in the Transportation Lawyers Association Summer Executive Committee Meeting on August 1, in **Madison, Wisconsin**. Fritz Damm also attended.

John Greene, John Dimitry, Emily Quillen and Lynn Winter attended the Texas Trucking Association's Annual Conference, August 12, in **Austin, Texas**.

Don Vogel provided an update on employment law for NATERA's web cast, August 12.

Greg Feary spoke on Independent Contractor issues at the National Home Delivery Forum, August 13 – 14, in **Chicago**.

Mike Langford will attend the American College of Transportation Attorney's Annual Conference, August 20-21, in **Chicago**.

Mike Langford will appear as a guest legal commentator on SIRUS/XM Radio's Road Dog Network, September 8.

Nathaniel Saylor will conduct a legal Question & Answer session at the Intermodal Association of North America's Intermodal Expo 2015, September 22, in **Ft. Lauderdale**.

Jim Hanson will present "Avoiding Retaliation Charges and Managing Wage-Hour Collective Action Lawsuits" at NATERA's Annual Conference and Board of Directors Meeting, September 20-23, in **New Orleans**. Don Vogel and Fritz Damm will also attend.

Greg Feary will present at the Motor Carrier Insurance Education Foundation's Annual Conference, October 1-2, in **Orlando**.

Don Vogel, Kathleen Jeffries and Fritz Damm will attend the Canadian Transport Lawyers Association Annual General Meeting and Educational Conference, October 1-3, in **Kelowna, British Columbia**.

Greg Feary and Annette Sandberg will attend the ATA's Management Conference and Exhibition, October 17-20, in **Philadelphia**.

Mike Tauscher will be part of an employment law panel at TLA's Transportation Law Institute, October 30, in **Columbus, Ohio**. Don Vogel, Kathleen Jeffries and Fritz Damm will also attend and participate in the TLA's Executive Committee Meeting, October 31.

Earlier this year, the Scopelitis firm announced the expansion of its International Transportation & Logistics Law practice with the addition of John Hove and Jake Fisher as partners in the firm's Dallas/Ft. Worth and Philadelphia offices, respectively. John has more than 30 years of experience as an international lawyer. His practice focuses on regulatory compliance (including Foreign Corrupt Practices Act issues); the establishment, acquisition and divestiture of U.S. and foreign business entities; and other business transactions. Jake brings a wealth of knowledge and experience from his in-house counsel role at an international air freight forwarder and ocean transportation intermediary and bolsters the Firm's existing capabilities with respect to several key areas of international transportation law.

Members of the firm's international practice group (Nathaniel Saylor, Chris McNatt and John Dimitry, in addition to John and Jake), regularly counsel international transportation and logistics clients in a wide array of matters, including the following:

- Obtaining appropriate licenses and registrations for international operations (such as indirect air carrier authorization from the Transportation Security Administration; ocean transportation intermediary licensing and registration with the Federal Maritime Commission; foreign indirect air carrier approval; and Cargo Network Services/International Air Transport Association authorized intermediary approvals, among others);
- Reviewing and revising contracts and other transactional documentation, including air waybills, multi-modal bills of lading, powers of attorney, customer and vendor agreements and standard trading conditions;
- Air cargo security and hazardous materials compliance (compliance audits and government enforcement actions);
- Foreign trade zones, container freight stations, and customs bonded carrier and warehouse operations;
- Foreign Corrupt Practices Act training and compliance;
- Export/import compliance from the forwarders' perspective;
- Due diligence required in connection with acquisitions and other business relationships, including agents and other intermediaries;
- Freight charge disputes, cargo claims and other dispute settlement matters; and
- Insurance and risk management issues.

With the addition of John and Jake, members of the firm's international practice group have experience handling transactions in approximately 120 countries. In addition, the firm has long-standing relationships with other highly qualified lawyers in many parts of the world, and has the ability to call upon nearly 300 legal and accounting firms worldwide in its role as the transportation niche member of a professional network of law firms and accountants that have offices in more than 100 countries.

Scopelitis Expands Global Footprint

Scopelitis has been named the Transportation and Logistics Niche Specialty Firm for TAG Alliances, an international alliance of approximately 145 independent law firms and 115 independent accounting firms which, collectively, employ more than 15,000 professionals in more than 580 offices in more than 100 countries. TAGLaw, the law firm segment of TAG Alliances, has been ranked by *Chambers & Partners* as an “Elite” legal alliance in their annual *Global* rankings guide and is one of the four largest networks receiving that

ranking. Scopelitis makes its transportation and logistics expertise available to all of the TAG Alliances members worldwide. Advantages for Scopelitis clients include the ability to immediately access local expertise in virtually every part of the world, as well as potential exposure to foreign transportation and logistics buyers who may seek U.S. market information through their local TAG Alliances contacts. See Page 3 for a description of the International Transportation & Logistics Law practice.

Dispatches

The NLRB invited interested parties to weigh in on whether to overturn its current policy of requiring employer consent before allowing employees solely employed by a company to be combined with the company’s temporary or otherwise jointly employed workers for collective bargaining. The deadline for filing amicus briefs was August 5, 2015. Jack Finklea warns that the invitation, combined with the pending joint employment cases involving Browning-Ferris Industries and McDonalds franchises, is yet another signal of the NLRB’s shift in joint employment standards.

Braden Core reports that the Pipeline and Hazardous Materials Safety Administration (PHMSA) has delayed the mandatory compliance date for new rules on the transportation of lithium batteries for modes other than air, which was February 6, 2015. The new effective date for all other modes was August 7, 2015.

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