

The Transportation Brief



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

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Indianapolis Office:
10 W. Market Street, Suite 1500
Indianapolis, IN 46204
phone (317) 637-1777
fax (317) 687-2414

8

Chicago Office:
120 S. LaSalle Street, Suite 1700
Chicago, IL 60603
phone (312) 422-1200
fax (312) 422-1224

8

Editor
Lynne D. Lidke

Assistant Editor
Karla Cooper-Boggs

8

*Please mail, fax or e-mail
address changes to:*
The Transportation Brief
Scopelitis, Garvin,
Light & Hanson
10 West Market St., Suite 1500
Indianapolis, IN 46204
fax (317) 687-2414
tbrief@scopelitis.com



A Second Look At Driver Leasing

Although driver leasing has long been one solution to driver recruiting problems, it often was viewed with disfavor in the late 1980's due to several high-profile fraud lawsuits. In recent years, the employee leasing industry, now commonly known as the professional employer organization (PEO) industry, has flourished and grown explosively. As a result, driver leasing is worthy of renewed consideration by the trucking industry.

Increased regulation leads to less risk for PEO clients

The risk of associating with a disreputable PEO has decreased dramatically due in large part to ever-increasing state and federal regulation. Today, at least 39 states license, regulate, or define PEOs. Also, several federal employment regulations address PEOs, and trade groups such as the National Association of Professional Employer Organizations (NAPEO) continue to seek federal guidelines for PEO-sponsored employee benefit programs. At the same time, driver leasing offers benefits such as lower recruiting costs, a reduction in employment issues relating to seasonal business fluctuations, a greater number of employee benefit options, a more reliable workforce, and lower traditional employer-related costs.

Potential clients should thoroughly evaluate PEOs

When evaluating a driver leasing PEO, some of the factors that should be considered are

- ❖ The number of years the PEO has been in business
- ❖ The PEO's membership in trade groups such as NAPEO, which maintains independent audit requirements for its accredited members
- ❖ Whether the PEO is properly licensed or registered where required
- ❖ The PEO's trucking expertise concerning, for example, hiring procedures, safety compliance, and risk management
- ❖ Whether the PEO's financial stability can be verified through review of financial statements or bank references
- ❖ The manner in which the PEO addresses cash advances for road expenses as well as *per diem* programs
- ❖ Whether the PEO maintains proper insurance coverage, particularly with respect to additional named insureds

Driver leasing may not be the perfect solution to the driver shortage. However, it is now a more appealing option that appears to be finding a legitimate and viable niche in the trucking industry.

Steven A. Pletcher



Briefly...

Plan Ahead To Reduce Permit Costs

Besides operating authority, there are other types of regulatory approval and permits of which many motor carriers are unaware, such as

- ❖ U.S. Customs Bond approval for Canadian movements
- ❖ Alcoholic beverage transportation permits
- ❖ Hazardous material and hazardous waste permits
- ❖ Special license plates or fuel permits, such as those required by Kentucky, New Mexico, New York and Oregon

Other permits allow the use of certain types of equipment and travel that may increase a carrier's efficiency. Frequency of the route and cost of the permit normally dictate whether these permits should be procured on a fleet wide or a per-vehicle basis and whether annual or per-move permitting is appropriate. Operations for which such permits are required include

- ❖ Overlength, combination, or California IRP-authorized trailers
- ❖ Overweight vehicles
- ❖ Toll road access

Proper permitting is a must for regulatory compliance. In addition, carriers that plan ahead and conduct a careful evaluation of their operations

can often achieve savings by obtaining necessary permits in a more efficient and cost-effective fashion.

*Norman R. Garvin
Andrew K. Light*

Policy Manual Terms Bind Employers In Illinois

The Illinois Supreme Court has ruled that employers can be bound by the terms of their employee handbooks or policy manuals and are barred from making unilateral changes to existing employee rights established by those handbooks or manuals. The court held that an employer's unilateral attempt to amend a policy was ineffective as to employees hired before the amendment because the policy had become a contractual right of the employees.

The ruling is significant to motor carriers because they are required by federal law to promulgate and distribute formal drug and alcohol testing policies and may also voluntarily distribute employee handbooks. Some states, such as Indiana, do not follow the strict Illinois rule, but carriers should nevertheless use appropriate disclaimers in their handbooks or manuals to avoid the question of whether they have created contractual obligations to their employees.

William D. Brejcha

U.S. Supreme Court Limits Liability Under The ADA

In recent decisions that impose limitations on the Americans With Disabilities Act (ADA), the U.S. Supreme Court has highlighted two important defenses for trucking employers.

First, the Court ruled that evaluation of a person's claimed "disability" should take into account medication or devices (for example, eyeglasses) that are used to treat the person's impairment. If the treated impairment is corrected or mitigated to such a degree that it no longer substantially limits a major life activity, the person is not "disabled" within the meaning of the ADA.

Second, the Court confirmed that the ADA does not prohibit employment decisions based on Department of Transportation (DOT) standards for the physical qualification of commercial motor vehicle drivers. Also, in the case under review, the Court did not require the employer to accept a DOT waiver of the employee's impairment. Whether trucking employers must ever justify decisions to refuse DOT waivers is left for further evaluation in future cases.

James H. Hanson



Mileposts

Pro-active Approach Reduces Exposure to Harrassment Claims

A recent U.S. Supreme Court ruling offers protection to employers that take a pro-active approach to discouraging harassment in their companies, according to labor and employment associate **David Milne**. Under the new ruling, employers that establish and communicate good-faith policies against harassment cannot be liable for punitive damages if managers commit harassment in violation of the policies. Milne observes that effective in-house communication of harassment policies can also limit exposure to the filing of claims.

Milne recently completed a tour of a major motor carrier's facilities at which he provided management training on employee behaviors that could lead to harassment charges. His program, called "Insulating Your Company From Harassment Complaints," focuses on sexual harassment, but also addresses all claims of harassment among employees on the basis of sex, race, disability, religion, national origin and age. The training includes the use of hypothetical scenarios, case law, and practical suggestions for motor carrier management.

Without daily oversight, large corporations have found that the behavior of employees at their outlying facilities may not adhere to corporate policy and may lead to harassment charges, according to Milne. The purpose of the training program is to leave each management group with a sense of what behaviors are appropriate, what to look for, and how to respond when necessary.

Milne is a member of the Firm's labor and employment section headed by Indianapolis partner Jim Hanson. He devotes his practice primarily to representing management in a wide variety of labor and employment law matters. A co-author of *Model Employee Policies for Indiana Employers with Legal Commentary*, Milne has spoken on a variety of labor and employment subjects before such groups as the Indiana Motor Truck Association and the North American Trucking Industrial Relations Association.

For the Record

Bill Brejcha and **Jerry Cooper**, partners in the Chicago office, have been chosen by the Illinois Trucking Association (ITA) as two of the millennium's Top 100 Influential Executives of the Trucking Industry. They will be honored at the ITA's Annual Convention Gala on October 9 in Chicago.

Congratulations are due to Firm clients **Catherine A. Langham of Langham Transport Services**, **Rex V. Ecoff and Lanny L. Wilhelm of Liquid Transport Corp.**, and **Craig Roeder of Pro-Trans International** on their selection as Indiana finalists in the Ernst & Young Entrepreneur of the Year Award. They were the three finalists in the transportation category.

On the Road

Tom Farrell, Greg Feary, Victor Shane, and Mike Langford will attend the American Trucking Associations Litigation Center's Conference on Highway Accident Litigation, September 26 - 29, in **Beaver Creek, Colorado**. Tom will speak on "Defending Against Brain Injury Claims." Greg will speak on "Y2K Liability Issues; Legislative Relief."

Norm Garvin, Andy Light, and Steve Pletcher will attend the Indiana Motor Truck Association's Annual Convention in **San Antonio**, October 13-16.

Norm also will attend the Association for Transportation Law Logistics and Policy's 32nd Law Institute, October 31 - November 3, in **San Francisco**.

Steve Pletcher and Greg Feary will attend the National Association of Professional Employer Organizations' Annual Convention in **New Orleans**, October 28 - 30. Steve will be a featured speaker on "SUTA Successor Employer Status: Benefit, Burden or Both for the PEO."

Bob Browning and Norm Garvin will speak on "Logistics and Logistics Contracting" at the October meeting of the Council on Logistics Management in **Indianapolis**.

Greg Feary, Andy Light, and Jerry Cooper will attend the American Trucking Associations' Management Conference and Exhibition in **Orlando** on October 30 - November 2.



SCOPELITIS, GARVIN, LIGHT & HANSON

Lynne D. Lidke, Editor
10 West Market St., Suite 1500
Indianapolis, In 46204

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Dispatches



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- ◆ The Indiana legislature has made **safety compliance** an even higher priority than before. Tim Wiseman reports that the Indiana Department of Revenue and the Indiana State Police have statutory authority as of July 1, 1999 to revoke and confiscate a carrier's registrations, license plates, or cab cards upon the issuance of an out-of-service order against the carrier.
- ◆ Also on the legislative front, a new law in Indiana will make it easier for plaintiffs to recover wrongful death damages in **highway accident litigation**. According to Tom Farrell, effective January 1, 2000, parents and children who were not financially dependent upon an adult person killed in an accident will be permitted to sue for loss of love and companionship. Under current law, a recovery for such emotional damage is limited to spouses, minor children, and next of kin who were financially dependent upon the decedent.
- ◆ Finally, Terry Fewell notes that the Indiana Department of Revenue (IDR) will soon begin accepting **fuel use tax refunds** applicable to the operation of power take-off (PTO) equipment. As reported previously in *The Transportation Brief*, IDR had ceased processing refund claims. However, a new statute with various new limitations requires IDR to reinstate the PTO program starting with third quarter, 1999 tax filings. Importantly, in order to file their PTO claims for the third quarter, taxpayers must undergo a "certification" process by October 1.

The Transportation Brief is intended as a report to our clients and friends on legal developments affecting the transportation industry. The published material does not constitute an exhaustive legal study and should not be regarded or relied upon as individual legal advice or opinion. Scopelitis, Garvin, Light & Hanson would be pleased to provide more specific information or individual advice on matters of interest to our readers.

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