

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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Warning To Employers – Beware of Pension Fund Withdrawal Liability

Long-time transportation industry employers often participate in multiemployer pension funds. Due to expensive benefit costs, many employers have recently ceased participating in such funds. Under the Multiemployer Pension Plan Amendments Act (MPPAA), withdrawal from the pension fund can cause significant adverse financial impact.

Liability can be caused by unexpected events

In a case tried by SGL&H attorneys, a private carrier discontinued part of its participation in Central States Pension Fund and outsourced its product delivery to independent for-hire motor carriers. Central States imposed a withdrawal liability assessment, which the carrier was forced to pay up front under the “pay first, fight later” provisions of the MPPAA. A federal court recently overturned the assessment and ordered Central States to return the more than \$2 million paid by the carrier.

Pension funds assess withdrawal liability to cover future retirement benefits for the withdrawing employers’ workers. The MPPAA authorizes such assessments to ensure that the government-funding safety net for pension funds is used only as a last resort. In this case, liability hinged on whether the private carrier could distinguish the for-hire carriers’ drivers from the company drivers it previously used. Relying on a case involving leased employees, the private carrier succeeded by showing that its collective bargaining agreement did not require contributions for hours worked by for-hire motor carrier employees.

Employers must evaluate withdrawal liability prior to operational changes

Withdrawal liability can impose harsh consequences if operational decisions are made without analyzing MPPAA’s complex provisions. The case reviewed above offers support for private carriers that outsource transportation to independent contractors or leased employees, but it details only one of several liability scenarios. All contributing employers contemplating operational changes should carefully assess the potential effect on multiemployer pension fund contribution requirements. Withdrawal liability can be lawfully avoided, and proper review of options before decisions are made may prevent an inadvertent assessment.

*James H. Hanson,
A. Jack Finklea,
Indianapolis*

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Briefly...

Ohio Corrects Inadvertent UM/UIM Coverage for Employees

The Ohio Supreme Court has dramatically limited an earlier decision in 1999 that awarded an employee uninsured/underinsured motorist (UM/UIM) coverage from an employer's automobile liability insurance policy. In the earlier case, benefits were awarded even though the employee was operating his personal vehicle and was not driving in the course and scope of his employment when the accident occurred.

Although the recent decision does not expressly overrule the court's prior ruling, the employee must now be within the course and scope of his employment at the time of the accident in order to receive UM/UIM benefits from the employer. The new decision should stem the onslaught of Ohio employees seeking UM/UIM coverage that their employers never intended to provide and will hopefully give employers some much-needed relief from these unexpected claims.

*Angela S. Cash,
Gregory M. Feary,
Indianapolis*

Clarification on "Opt Outs" Under Illinois Workers' Compensation Law

A recent circuit court decision affirmed an Illinois Department of Insurance determination that Travelers Indemnity was not entitled to impose workers' compensation premiums on a courier for its owner-operator workforce. Acknowledging that a sole proprietor owner-operator is normally entitled to benefits but can opt out of the Illinois Workers' Compensation Act, the Department ruled that the purchase of occupational accident insurance evidenced by a certificate of such insurance is tantamount to an opt out.

The Department disagreed with the insurer's argument that, by purchasing occupational accident insurance, the owner operators expressed their desire for workers' compensation coverage. Reasoning that the owner operators would have obtained workers' compensation coverage had they wanted it, the Department further ruled that sole proprietors who wish to opt out "should be encouraged to obtain alternative insurance coverages so they do not become charges on society if they are injured."

The decision is on further appeal and, if upheld, should provide greater clarity to carriers on the heretofore ambiguous "opt out" mechanism for sole proprietors under Illinois workers' compensation law.

*Gregory M. Feary,
Indianapolis*

Non-Compliance With New HOS Rules Is Risky Business

Many transportation experts are predicting that the new hours-of-service (HOS) regulations will substantially reduce the productivity and driving time availability of many drivers. Some fear that the expected loss of income may lead drivers to ignore or circumvent the new regulations.

Non-compliance with the HOS rules can produce serious consequences. Recently, a driver in Pennsylvania was sentenced to ten months in prison for falsifying his daily logs. The company owner and dispatcher were also indicted and are awaiting sentencing. Under current federal criminal law, any driver or company official who conspires to falsify logs is subject to 5 years in prison for each violation.

In addition, non-compliance with the new HOS rules can substantially increase the liability exposure of a motor carrier in the event of a highway accident. Carriers that encourage or allow drivers to violate the HOS rules can be exposed to punitive damages if a driver is involved in an accident while driving in violation, and punitive damages are often not covered under liability insurance policies. Accordingly, it is important for all trucking companies to actively enforce the new HOS rules to avoid not just criminal, but also civil liability.

*Timothy W. Wiseman,
Indianapolis*



Mileposts

Senior Labor and Employment Team Joins SGL&H in Chicago

The labor and employment practice at SGL&H added a valuable resource with the arrival March 1 of Leonard R. Kofkin, Donald J. Vogel, and Sara L. Pettinger in the Chicago office.

The trio comes to SGL&H from the Chicago office of Michael Best & Friedrich LLP, a large regional firm, where they served as partners.

Kofkin continues to enjoy a long, distinguished career in transportation law. He has represented transportation clients nationwide in all aspects of their business, and his work with the Transportation Lawyers Association earned him the Distinguished Service and Lifetime Achievement awards.

Vogel and Pettinger's practices cover all areas of labor and employment relations law. Vogel has represented management in defense of Title VII, ERISA, and multiemployer pension plan claims and in related employment litigation. He also handles corporate and commercial litigation involving insurance, real estate, contracts, sales, leasing, and related business issues.

Vogel currently serves as Secretary-Treasurer of the Transportation Lawyers Association, from which he received the Distinguished Service award, and is also a member of the Canadian Transport Lawyers Association. He earned his undergraduate and law degrees at Indiana University.

Pettinger's practice includes management defense in employment discrimination litigation, employment agreements, and employee benefits issues. She is an active speaker on topics such as harassment, employee handbooks, and wrongful termination. Pettinger earned her undergraduate degree at the University of Chicago and her law degree at DePaul University.

The practice areas and experience of the new Chicago team complement those of the Indianapolis labor and employment group, which includes Jim Hanson, David Robinson and Jack Finklea. Hanson and Finklea recently tried the withdrawal liability case featured on the cover of this *Transportation Brief*.

For The Record

Greg Feary has been appointed to the American Trucking Associations' Insurance Task Force and will chair its Lawyers' Subcommittee.

Steven Pletcher has been named Chairman of the Legal Advisory Council of the National Association of Professional Employer Organizations.

Indianapolis partner **Tim Wiseman** was appointed to the Firm's Management Committee, effective January 1, 2004.

On The Road

Greg Feary will present "Alternative Risk Strategies for Motor Carriers with Owner-Operator Fleets" at the Transportation Lawyers Association's Regional Seminar on Insurance in the Trucking Industry, March 5, in **New Orleans**.

Dan Barney will moderate a panel titled "Cargo Security Update" at the AirCargo 2004 Conference, March 7-9, in **Tampa**.

Greg Feary and Dan Barney will present "Order in the Court: Getting a Handle on OOIDA Lawsuits," at the Truckload Carriers Association's 66th Annual Convention, March 14-17, in **Waikoloa, Hawaii**.

Steven Pletcher will be a panelist at the Midwestern Association of Professional Employer Organizations' Chapter Meeting, March 17-18, in **Detroit**.

Bob Browning will serve on a panel titled "The Sophisticated Shipper" at the Transportation Loss Prevention and Security Association's 4th Annual Joint Conference, March 21-24, in **Orlando**.

Jim Hanson will discuss Screening Driver Applicants at Fleet Solutions Inc.'s Loss Control Meeting, March 24-25, in **New Orleans**.

Dan Barney will attend the Truck Renting and Leasing Association's Annual Conference, March 31-April 4, in **Phoenix**.

Todd Metzger will discuss trucking industry mergers and acquisitions at Delta Nu Alpha's Annual Dinner, April 20, in **Louisville**.



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Dispatches



◆ **Jim Hanson cautions employers to review pay practices for their male and female employees.** In a recent case, a motor carrier was found to have violated the Equal Pay Act (EPA) because it paid male and female trade show specialists different salaries and benefits for the same work. Under the EPA, reasons for pay levels must be based on factors other than gender and may include experience, length of service, and education.

◆ **States cannot convert motor carriers into tax collection agents, according to the Maryland Tax Court.** Kim Mann reports that the court dismissed a tax assessment of more than \$1,000,000 against a motor common carrier for refusing to collect Maryland's sales/use tax at the time of delivery. Maryland had attempted to subject out-of-state shippers and their carriers to **joint and several liability for collecting sales/use tax** from Maryland residents and then penalized both in the full amount of the tax for failure to collect and remit.

◆ **David Robinson advises that vacation policies have become an increasing source of confusion and litigation, particularly upon the termination of employment.** A well-drafted vacation policy should clearly identify (a) how vacation time is accrued; (b) when an employee may be considered to have "earned" vacation time; (c) whether vacation time may be carried over from year to year; and (d) how vacation time is handled when the employment relationship ends.