THE TRANSPORTATION BRIEF®

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

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NON-COMPETE AGREEMENT CONSIDERATIONS

Many motor carriers have experienced both the offensive and defensive side of non-compete agreements. On one hand, they have drafted agreements to protect their legitimate business interests (e.g., customer relationships and confidential information). On the other hand, they have tried to hire workers who are subject to their own non-compete agreements. Unfortunately, this area continues to be marked by uncertainty. Perhaps no other form of contract so frequently causes the relevant parties to huddle with their attorneys and ask the question, "Is this thing enforceable?"

Contributing to the uncertainty, these agreements are usually governed by state law, and the enforcement rules can vary significantly from state to state. For example, with a few exceptions, California courts will not enforce non-compete agreements against departing workers, and a Massachusetts statute places severe limits on post-employment restrictive covenants – giving it perhaps runner-up status as the most difficult jurisdiction for the enforcement of non-compete agreements. The result is a difficult-to-understand myriad of rules that apply nationwide.

In this challenging enforcement environment, motor carriers should pay close attention to the rules in their jurisdiction and endeavor to draft agreements that meet only their specific needs. Enforcement will depend on a motor carrier's success in convincing a court that it was deliberate in crafting a narrowly-tailored agreement designed to protect a legitimate, protectible interest. When enforcement problems arise, they usually result from over-reaching:

- Asking all employees to sign non-compete agreements rather than just those with customer relationships or access to confidential information.
- Inserting a geographic restriction that is too broad and far exceeds the worker's geographic area of responsibility.
- Insisting on a broad geographic non-compete when a more limited (and more enforceable) client-specific non-solicitation provision would suffice.
- Prohibiting a worker from working in any capacity for a competitor.

From a defensive standpoint, motor carriers should consider the consequences of hiring an employee who is subject to an ongoing non-competition obligation to a former employer. This consideration should include an analysis of whether the prospective employee can be effectively utilized as limited by the ongoing covenants, and the cost and distraction of becoming embroiled in a potential noncompete lawsuit.

David D. Robinson
Indianapolis

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BRIEFLY

Per Diem Plan – Is Now the Time?

The Tax Cuts and Jobs Act (the Act) has now been effective for just over a year. Many drivers may only now come to fully appreciate the impact of certain provisions of the Act as they prepare their 2018 tax returns. While the Act nearly doubled the standard deduction for all taxpayers, it eliminated many personal deductions. Accordingly, OTR drivers for motor carriers that do not sponsor a per diem expense reimbursement program can no longer deduct meals and incidental expenses (M&IE) on their individual tax returns.

This can have a significant impact on OTR drivers because up to $63 per day ($66 in 2019) is no longer available for a deduction. Motor carriers may be lobbied by OTR drivers to set up a per diem program to continue to take advantage of the M&IE deduction. Although the Act took away the business expense deductions for individuals, it allows employers to provide business expense reimbursements to employees on a tax-free basis. Motor carriers that do not provide a per diem program could face a driver recruiting and retention hurdle as OTR drivers come to fully appreciate the impact of the loss of the personal deduction.

Establishing a per diem program is not overly complicated, but motor carriers should be mindful when implementing a per diem plan to ensure compliance with the IRS "accountable plan" rules, requiring substantiation, business connection, and the return of any excess non-substantiated reimbursement. While this seems straightforward, implementation and compliance with the accountable plan rules can be tricky, and failure to comply may result in disqualification of the plan and assessment of employment tax on all reimbursed expenses.

Steven A. Pletcher
Indianapolis

U.S. EPA Enforcement of California Air Resources Board (CARB) Regulations Outside of California

Does your company hire or dispatch heavy-duty trucks to operate in California? If so, various CARB regulations may apply to your operations, even if your company is not based in California and regardless of whether it owns the trucks at issue.

EPA has been actively enforcing CARB regulations against certain out-of-state transportation companies since 2015. EPA enforcement efforts have thus far focused on violations of the Truck and Bus Regulation (TBR) by motor carriers (some holding dual authority as property brokers) headquartered outside of California. EPA may, however, expand the scope of its enforcement efforts at any time.

Proper record-keeping and reporting are critical to working through the EPA audit process. If a company has not implemented a compliance plan, it may be at risk when EPA comes calling, because EPA has discretion to propose significant penalties.

Kelli M. Block
Indianapolis,

Nathaniel G. Saylor
Salt Lake City

Plaintiffs' Bar Restless on Sleeper Berth Claims

For motor carriers whose drivers use sleeper berth equipment, there are two recent cases that will be of interest. The Fair Labor Standards Act requires employers to pay a minimum wage to employees for all "hours worked." Reasoning that over-the-road drivers are "on-duty" 24 hours per day, two federal district courts recently determined sleeper berth time logged in excess of eight hours per day is compensable and counts as hours worked. (*Julian v. Swift Transport. Co. Inc.* and *Browne v. P.A.M. Transp., Inc*).

The Ninth Circuit Court of Appeals and the U.S. District Court in Nebraska previously reached a different result. Citing a U.S. Department of Labor regulation that specifically addresses the issue, those courts held sleeper berth time was not compensable hours of work unless the driver actually performed work in the sleeper berth.

Given the different court holdings, carriers should review their policies to ensure that drivers—while logged as "off duty" or "sleeper berth"—are relieved of all duties related to the equipment and the load. For example, drivers should not be required to respond to communications or to guard a load during this time. Carriers should train drivers and then periodically remind them that they must log all work time as on duty.

James A. Eckhart
Indianapolis

Beware Your State Minimum Wage Increases for 2019

With a new year inevitably comes new laws. In Illinois alone, 200 new laws hit the books on January 1, 2019. Not surprisingly, many of these laws affect employee

compensation, expense reimbursement, and a whole host of other benefits and employment issues.

Employers should be aware of increases to the minimum wage rates across the country. In total, 20 states and the District of Columbia have increased their minimum wage rate as of the first of the year or in the months following. The states are Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Maine, Massachusetts, Minnesota, Missouri, Montana, New Jersey, New York, Ohio, Oregon, Rhode Island, South Dakota, Vermont, and Washington. Additionally, many local governments have also increased their minimum wage rates. Even though the federal rate under the FLSA remains at $7.25 per hour, that law does not prevent state or local laws that are more favorable to employees. Employers should check state and local laws to ensure compliance.

Donald J. Vogel
Chicago

SPOTLIGHT

Spotlight on Employment Law Practice Area

The cover article of this issue of *The Transportation Brief* addresses restrictive covenants and the uncertainty surrounding these unique contractual arrangements. Scopelitis attorneys work hard to craft employment agreements tailored to the needs of clients, with careful consideration of the evolving enforcement rules in this area.

The Firm's Employment Law Practice Area strives to help companies strike a balance between harmonious employee relationships and critical business needs. This practice team focuses on a wide range of employment issues, including but not limited to the following: drafting personnel policies and handbooks; developing compensation programs; defending employers in administrative filings before the Department of Labor and the EEOC; handling all aspects of employment discrimination litigation; assisting in employment investigations; advising on terminations; and negotiating severance arrangements.

To learn more about how Scopelitis Employment Law attorneys can help you, please visit our website or contact David Robinson, Jack Finklea, Don Vogel, or Sara Pettinger.

MILEPOSTS

ON THE ROAD

Kevin Phillips will present "Damages – Limiting Your Warehouse's Liability" as part of the International Warehouse Logistics Association's 2019 Webinar Training, January 17.

Jake Fisher will moderate a panel on TSA-related issues at the Air Cargo 2019 Conference, February 10-12, in **Las Vegas, Nevada**. Braden Core and Nathaniel Saylor will also attend.

Ryan Wright will present a Transportation Course, at the 55th World Food Logistics Organization Institute East, February 10-13, in **Atlanta, Georgia**. Kevin Phillips and Eric Meyers will also attend.

Ryan Wright will attend the National Association of Trailer Manufacturers' Convention & Trade Show, February 19-21, in **Lake Buena Vista, Florida**.

Jake Fisher and John Hove will attend the TAG Law and TAG Alliances Southwest & Midwest Regional Meeting, March 1-2, in **Tulsa, Oklahoma**.

Kevin Phillips will attend the 2019 World Food Logistics Organization Institute West, March 3-6, in **Los Angeles, California**.

Kevin Phillips and Eric Meyers will present "Evolving Warehouse: Are Your Contracts Evolving Too?" at the International Warehouse Logistics Association's 2019 IWLA Reimagine, March 9-13, in **Savanah, Georgia**. Don Vogel will also attend.

Kathleen Jeffries will present "Freight Claims – Questions and Answers" at the Transportation & Logistics Council's 45th Annual Conference, March 25-27, in **Memphis, Tennessee**. Fritz Damm will also attend.

Kevin Phillips will attend the 128th International Association of Refrigerated Warehouses – World Food Logistics Organization Convention, April 7-10, in **Santa Ana Pueblo, New Mexico**.

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DISPATCHES

Brandon Wiseman and Jerad Childress report that President Trump signed the 2018 Farm Bill into law on December 20, 2018, which, among other things, **removed hemp and its derivatives from the federal list of illegal controlled substances.** While this opens the door to possession and transportation of hemp products in interstate commerce, their legality at the state level remains somewhat in the air.

Braden Core reports that the **Transportation Security Administration recently approved several vendors as certified third-party canine screening providers**. Many forwarders, airlines, and cargo-screening companies are digging into this new method of screening cargo for transportation by air.

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