

# THE TRANSPORTATION BRIEF®

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

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## THE NEW TAX LAW OVERVIEW

Late last year, President Trump signed the Tax Cuts and Jobs Act (the Act) into law, resulting in the most sweeping tax overhaul in decades.

Many of the changes in the Act—primarily those intended to favor businesses in an attempt to spur economic growth—are permanent. Other changes—primarily those benefitting individual taxpayers—are *temporary* (at least for now). Some of the temporary changes include provisions: (1) reducing the top individual tax rate from 39.6% to 37%; (2) nearly doubling standard deductions (\$12,000 for individual taxpayers; \$24,000 for married taxpayers filing jointly); (3) eliminating miscellaneous itemized deductions for employee taxpayers; and (4) doubling the child tax credit.

The impact of the Act on each individual and business will vary. While the Firm continues to analyze the potential implications for clients, below is a brief overview of those changes that may have the most significant impact upon the transportation industry:

- 1. Reduction in the corporate tax rate.** The corporate tax rate has been slashed from 35% to 21%.
- 2. New deduction for pass-through entities.** Pass-through entities continue to be taxed at the owner's individual income tax rate. The Act provides for a new 20% deduction for domestic "qualified business income" with some limitations.

- 3. Depreciation changes.** For equipment acquired and placed in service after Sept. 27, 2017, taxpayers can now write off 100% of the cost under revised bonus depreciation rules.

- 4. Like-kind exchanges.** The Act limits like-kind exchange treatment (previously used by transportation companies to defer gains on equipment sales) to real property transactions.

- 5. No employee deduction for unreimbursed employee business expenses.** Employee drivers can no longer deduct business expenses they incur while traveling away from home in the business of the employer. While this change does not directly impact the ability of motor carriers to offer per diem plans, it is not entirely clear what effect this change may have on how per-diem plans are administered nor how the IRS may view the continuation of such plans.

This issue of *The Transportation Brief* provides additional insight on some of the above changes. The Firm will continue to analyze the Act in an effort to identify its intended and unintended consequences for the transportation industry.

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



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 **SCOPELITIS**  
GARVIN LIGHT HANSON & FEARY

Please fax or e-mail address changes to:  
*The Transportation Brief*  
fax (317) 687-2414  
tbrief@scopelitis.com    www.scopelitis.com

# BRIEFLY

## Business Income Tax Rates

The centerpiece of the Act, which became effective on January 1, 2018, is a permanent reduction to the corporate income tax rate from a maximum rate of 35% to a flat rate of 21%. Congress intends this change to make the U.S. tax system more competitive with other nations. Because the Act repealed or modified a number of existing provisions (e.g., limits on like-kind exchanges and interest expense deductions), the overall impact on businesses is less clear. In addition to permanently lowering corporate tax rates, for tax years 2018 through 2025, the law provides a temporary 20% taxable income deduction for owners of pass-through entities (e.g., S-Corporations), subject to numerous limitations. A pass-through entity's taxable business income is taxed at the individual owner's rate with a maximum rate of 37%, but when the 20% deduction is applied, this can lower the tax rate to 29.6%. The new rates may affect business structuring and choice-of-entity options, and decision makers should also consider state income tax implications.

**Ronald J. Morelock,**  
**Indianapolis**

## Temporary 100% Expensing

For qualified property acquired and placed in service after September 27, 2017, and before 2023, the Act temporarily increases the additional first-year bonus depreciation percentage from 50% to 100% with the percentages phasing down annually through 2026. The law extends the bonus depreciation opportunity to qualified used property as well, provided the purchaser had not previously used the property, and the property was not acquired from a related party. Given the availability of an immediate deduction on used assets, buyers and sellers may want to explore the possibility of

mutually beneficial means to structure transactions as asset deals.

**Ronald J. Morelock,**  
**Indianapolis**

## Like-Kind Exchange

Under the prior tax law, owners of investment and business property could defer paying tax on gains if they exchanged property held as an investment or use in the taxpayer's trade or business for property of a "like-kind" (1031 exchange). The Act retains like-kind treatment for real estate exchanges. However, after December 31, 2017, tax deferral for transactions involving personal property is no longer available. Therefore, motor carriers and others in the transportation industry will no longer be able to defer gains and losses through like-kind exchanges of trucks and other transportation equipment. While this seems detrimental, the impact may be temporarily mitigated by the 100% bonus depreciation allowance.

**Ronald J. Morelock**  
**Elizabeth M. Bolka,**  
**Indianapolis**

## The Tax Law and Motor-Carrier-Sponsored Per Diem Plans

The Act suspended the ability of employee truck drivers from itemizing deductions related to meal and incidental expenses they incur while on the road. But the Act did not affect a motor carrier's ability to treat the amount of an over-the-road driver's compensation that accounts for those expenses as nontaxable under a properly structured per diem plan. As a result, some pundits are encouraging motor carriers to make more aggressive use of per diem programs to increase interest among potential new hires.

While the Act's suspension of itemized deductions renders sponsorship of a per diem program more attractive on some levels, caution

is warranted! The IRS has traditionally taken a dim view of these plans and may perceive the change in the deductibility of per diem expenses by individual employee drivers as a means to undercut the ongoing viability of such plans.

Caution is also warranted on the wage and hour front. A driver's participation in a properly structured per diem program does not impact the motor carrier's obligation to comply with federal minimum wage laws and pay the driver a proper rate. The plaintiffs' bar has doggedly pursued motor carriers in an effort to prove otherwise. The Firm anticipates that some will view the Act's changes as an opportunity to revisit the impact of per diem plan participation on minimum wage law compliance.

While the Act did not change the motor carrier's side of the balance sheet when it comes to properly structured per diem plans, motor carriers must ensure their per diem plans are carefully structured to withstand increased scrutiny by adversaries.

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

# MILEPOSTS

## Spotlight on Taxation Practice Area

This issue of *The Transportation Brief* focuses on recent tax issues affecting companies in the transportation industry. When federal laws took effect at the beginning of 2018, Scopelitis attorneys acted quickly to assist with federal compliance issues, and with the subsequent issues that continue to arise as states readjust to align with the new tax environment. Each member of Scopelitis' Taxation Practice offers a unique set of

## Mileposts, continued

experiences and thought leadership.

- Andy Light leads Scopelitis' Taxation Practice. His diverse transportation taxation experience includes state sales and use tax strategies, motor carrier fuel taxes, vehicle registration related taxes, state highway use tax, property tax, and business restructurings.
- Steve Pletcher directs the Firm's federal and state employment tax section, regularly defending against IRS and state revenue department employment and unemployment tax controversies, including worker classification challenges and accountable plan employee expense reimbursement matters. Steve also directs the Firm's employee benefits section.
- Ron Morelock focuses on federal, multi-state, and local transportation-related tax issues and regulatory fees, business restructurings, and motor vehicle dealer licensing matters.
- Becky Trenner's practice primarily centers around state and federal employment and unemployment tax controversies, with a particular focus on defending the classification of transportation owner-operators as independent contractors.
- Kelli Block regularly counsels motor carriers and transportation intermediaries on a wide array of state and federal employment tax, wage and hour law, and regulatory issues that affect the transportation industry.

Scopelitis attorneys address complex taxation issues on a regular basis and assist clients with proactive tax planning and compliance issues. State and federal taxation can have a significant financial impact upon trucking operations in a variety of ways. Recently, our team has helped companies with issues ranging from:

- Identifying tax exemptions and refund opportunities
- Providing guidance on state and local tax matters
- Evaluating corporate business tax nexus standards
- Defending federal, state and local audit assessments
- Procuring voluntary disclosure and tax amnesty agreements
- Providing property and ad valorem tax guidance
- Advising on IRP and IFTA issues
- Assessing federal excise tax issues

To learn more about how Scopelitis' Taxation Practice can help your business, please visit our website.

## FOR THE RECORD

We are pleased to announce that Jerry Cooper, a Partner in the Firm's Chicago office, has been reappointed as a member of the Illinois Workers' Compensation Commission Self-insurance Advisory Board effective through January 1, 2022.

## ON THE ROAD

Braden Core, Alania Hawley and Ryan Wright presented "Transportation Industry Legal Challenges in 2018" at the Trucking Owners Business Roundtable, February 1, in **Indianapolis**.

Braden Core, Nathaniel Saylor and Jake Fisher attended the Airforwarders Association's Annual Air Cargo Conference, February 18-20, in **Austin, Texas**.

Jerry Cooper will present "Use of Medical Marijuana, Opioids and Formulary Drugs in Workers' Compensation" at the New Hampshire Motor Transport Association's Winter Conference, February 23-28, in **Key West, Florida**.

Ryan Wright and Jerad Childress will attend The Work Truck Show 2018, March 6-8, in **Indianapolis**.

John Hove will attend the North American West Regional Meeting of TAGLaw, March 9-18, in **Seattle, Washington**.

Kathleen Jeffries will be a panelist on "Freight Claims – Questions and Answers" at the Transportation & Logistics Council Annual Conference, March 19-21, in **Charleston, South Carolina**.

John Greene will present "The Impact on Trucking Company Drug Policies of New Drug Testing Requirements for Opioids" at the Texas Trucking Association's Safety Management Conference, March 22, in **Waco, Texas**.

Robert Henry and Tim Cochren will attend the American Moving & Storage Association's 2018 Annual Education Conference & Expo, April 8-10, in **Fort Lauderdale, Florida**.

Greg Feary will conduct a presentation on Unexpected Liabilities at the Truck Renting & Leasing Association's 2018 Annual Meeting, April 10, in **Scottsdale, Arizona**.

Nathaniel Saylor will participate as a panelist on "Bridging the Gap Between Shipper Contract and Insurance Requirement" and Kelli Block will present "Did You Hear the One About the Attorney?" at the Transportation Intermediaries Association Capital Ideas Conference and Exhibition, April 11, in **Palm Desert, California**.

Fritz Damm will attend the DRI Trucking Law Committee and Seminar, April 26-27, in **Chicago**.

Don Vogel will attend the Transportation Lawyers Association Annual Conference as a Voting Past President, May 2-5, in **Orlando, Florida**.

Jeffrey S. Toole, Editor  
Allison O. Smith, Editor  
10 West Market St., Suite 1500  
Indianapolis, IN 46204

## DISPATCHES

Ron Morelock reports, as of January 1, 2018, the California State Board of Equalization (Board) was fully restructured into three separate entities with the Board only retaining duties assigned to it under the California Constitution. **The new California Department of Tax and Fee Administration will now perform statutory duties previously assigned to the Board, such as administering franchise tax, personal income tax, sales and use tax, and other special taxes and fees.** The new independent Office of Tax Appeals will now adjudicate appeals of the statutory taxes and fees.

According to Kelli Block, **The U.S. Department of Labor recently increased the amount of civil monetary penalties** it may impose for some violations of the federal Fair Labor Standards Act to \$1,964 per violation. This equates to an approximate 2% increase over the penalty rates the DOL established last year and applies to penalties imposed after January 2, 2018, for predicate violations that occurred after November 2, 2015.

Jerad Childress reminds us that approximately 40 million **Kidde fire extinguishers with plastic handles are under recall** due to failure to discharge and nozzle detachment. For information related to this recall, consumers may call (855) 271-0773 or visit Kidde's website at [www.kidde.com](http://www.kidde.com).

Jeffrey S. Jackson reminds **home delivery transportation providers to be cautious when providing appliance installation services.** Any kind of plumbing or electrical hookup work (oftentimes defined as anything more than plugging the appliance into an existing receptacle) can invoke state and local licensing requirements.

Jeffrey S. Jackson reports an increase in the number of **California-based operations being audited by workers' compensation insurers**, with the insurers taking the unilateral action of assessing back premiums for independent contractor owner-operators. An important strategy for defending against these assessments is to strongly assert the drivers' independent contractor status.

Jeffrey S. Jackson notes that many online retailers are developing their own delivery services and, in doing so, engaging local courier companies to provide the final-mile delivery services. It is important for the parties to **understand the interstate vs. intrastate** nature of such services and consider whether the courier companies are required by federal law to have interstate motor carrier authority from the FMCSA even if their vehicles do not cross state lines.

## LOCATIONS

INDIANAPOLIS  
10 W. Market St., Suite 1400  
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  
Phone: (202) 551-9030

LOS ANGELES  
2 N. Lake Avenue, Suite 560  
Pasadena, CA 91101  
Phone: (626) 795-4700

CHATTANOOGA  
600 Republic Center  
633 Chestnut Street  
Chattanooga, TN 37450  
Phone: (423) 266-2769

DETROIT  
535 Griswold Street, Suite 1818  
Detroit, MI 48226  
Phone: (313) 237-7400

SPOKANE  
505 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  
150 N. Radnor Chester Rd  
Suite F200  
Radnor, PA 19087  
Phone: (215) 240-1444

SALT LAKE CITY  
345 W 600 South, Suite 107  
Heber City, Utah 84032  
Phone: (435) 339-0730

TULSA  
321 S. Boston Ave, Suite 300  
Tulsa, Oklahoma 74103  
Phone: (539) 202-2400