

THE TRANSPORTATION BRIEF®

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

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DOL INDEPENDENT CONTRACTOR RULE— AND NOW WE WAIT

As most are aware, the Department of Labor (DOL) issued a proposed rule (the Proposed Rule) on worker status under the Fair Labor Standards Act (the FLSA) on October 13, 2022. In the Proposed Rule, the DOL (1) formally rescinds the prior rule promulgated in 2021 under the Trump Administration; and (2) replaces it with a multifactor economic realities test that tilts in favor of finding employee status under the FLSA when compared to the 2021 rule and even the legal status quo prior to the 2021 rule. The public comment period for the Proposed Rule closed on December 13, 2022. The real work for the DOL now begins.

Interest in the Proposed Rule is extremely high, with over 55,000 comments submitted. Among them were industry comments submitted by various entities including Scopelitis (on behalf of several clients), American Trucking Associations, National Home Delivery Association, state trucking associations, REAL Women in Trucking, Western States Trucking Association, motor carriers, and independent contractor truck drivers writing in support of independent contractor status in the industry. Commenters opposing the proposal across industries argue that the Proposed Rule deviates from existing case law applying the FLSA, imposes greater costs than DOL calculated, and generally is improper under the law. Even the Small Business Administration's Office of Advocacy, which held a roundtable with DOL officials and small businesses

about the Proposed Rule, suggests the DOL should revisit the Proposed Rule due to the burdens the Proposed Rule would place on small businesses that contract with independent contractors and on independent contractors themselves.

There is no deadline for the DOL to publish a final rule. Any final rule will almost certainly be challenged by business groups as improperly promulgated. As a result, DOL is likely to take its time to review the comments and explain its consideration of them as part of the final rule. The final rule will likely take effect 60 days after publication in the Federal Register. Given that some courts have become more skeptical of deferring to agencies and considering the DOL's change in views coincided with a political change, it is unclear to what extent courts will be influenced by any final rule that survives a legal challenge.

Gregory M. Feary
Shannon M. Cohen
Indianapolis,

Prasad Sharma
Washington, D.C.



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BRIEFLY

Staggering Jury Award in Fingerprint Collection Case

A class of truck drivers recently won a \$228 million judgment in the first jury trial under the Illinois Biometric Information Privacy Act (BIPA). The Illinois drivers alleged the defendant, BNSF Railway Co., collected their biometric information via a fingerprint reader for identification verification purposes and to gain access to defendant's facilities. The fingerprint readers were supplied by and operated by a third-party technology company retained by the defendant. At the conclusion of a five-day trial, the jury found the defendant had not only violated BIPA, but it did so intentionally or recklessly (rather than negligently). That finding quintupled plaintiffs' damages. Although defendant has notified the court of its intent to appeal, this judgment will undoubtedly pique the interest of plaintiffs' counsel to identify other Illinois companies that may be inadvertently collecting biometric identifiers from employees, contractors, or visitors—either directly or via third-parties—without following the strict procedures required by BIPA. Companies are reminded to review internal procedures to ensure compliance with BIPA.

Chip Andrewscavage
Chicago,

Alaina Hawley
St. Louis

California Court Invalidates Employer's Time Rounding Policy

Motor carriers that employ California workers and use time rounding policies should be aware of the recent decision in *Delmer Camp v. Home Depot*. The employer used an electronic timekeeping system to track worktime for wages. Although the system recorded the specific

minutes when the worker clocked in and out, the employer rounded the worker's total daily worktime to the nearest quarter hour and paid the employee based on those rounded hours. Because the rounding policy was neutral on its face, the trial court ruled in favor of the employer. But the appellate court reversed, holding that because the employer in fact tracked the employee's worktime by the minute, it was not entitled to round the employees' hours. Employers using rounding policies in California should review their timekeeping and payroll systems to ensure compliance with this new decision.

Chris J. Eckhart
James A. Eckhart,
Indianapolis

What Constitutes "Interstate Commerce" Under the Federal Arbitration Act Remains Murky

Courts continue to grapple with whether certain workers are "engaged in interstate commerce" for purposes of the exemption from the Federal Arbitration Act for transportation workers. The Ninth Circuit recently held that drivers transporting goods from Domino's Pizza supply centers to franchisees were engaged in interstate commerce, even though the drivers did not cross state lines. Domino's asked the U.S. Supreme Court for review. In a surprise move, the Court granted review and, without oral argument or merits briefing, vacated the Ninth Circuit's decision, sending the case back for further proceedings in light of its decision this summer in *Southwest Airlines Co. v. Saxon*. The Court's action is difficult to interpret, because in *Saxon*, the Court specifically noted it was not opining on what it means to be "engaged in interstate commerce," the issue at the heart of the *Domino's Pizza* case. Lower courts are left to decipher the Court's meaning, a process we are

closely watching as it unfolds.

Braden K. Core
Indianapolis,
Prasad Sharma
Washington, D.C.

Proposed NLRB Rule on Joint Employer Status

The National Labor Relations Board recently announced a proposed rule to replace the current rule on joint-employer status under the National Labor Relations Act. Under the current rule, joint employer determinations rest on whether the alleged joint employer has the right to and *actually* exercises "direct and immediate" control over essential conditions of employment. Under the proposed rule, an entity may be deemed a joint employer if it has the authority to exercise direct or *indirect* control over essential conditions of employment, *regardless of whether it actually exercises control*. In the transportation industry, the *right* to communicate even basic service details and/or monitor the location of freight may cause the NLRB to allege joint employer liability pursuant to the proposed rule. A final version of the rule could come as soon as late February 2023. We are closely monitoring any developments.

A. Jack Finklea,
Kelli M. Block
Indianapolis

Jury Rejects "Nuclear" Verdict in Truck Accident Case

Nuclear verdicts may be on the rise around the country, but there remain signs of reasonableness, particularly in federal court jury pools. In November 2022, a jury in Detroit, Michigan entered a complete defense verdict in a motor vehicle accident personal injury case brought by a high-profile plaintiff's firm, with the **continued on back page**

SPOTLIGHT

Spotlight on The Scopelitis Workplace & Data Privacy Practice

The supply chain industry has an intimate understanding of how technology and the accumulation of data have shaped today's economy. With the proliferation of data collection, governments around the world have created a confusing, contradictory, and patchwork set of laws and regulations targeted at data privacy. The laws often have consequences for businesses that fail to adhere to their complex requirements.

Each year, more states and countries enact new privacy and biometrics laws, including European Union's General Data Protection Regulation (GDPR) and California's Consumer Privacy Act/ Privacy Rights Act (CCPA/CPRA). Businesses that violate these laws may be subject to significant penalties, including fines, lawsuits, reputational risk, and more.

Businesses involved with the brokerage of shipments, transportation, logistics, or storage of products unavoidably process and accumulate data regulated by these privacy laws. Companies must be knowledgeable about these laws to keep pace and avoid costly penalties. The Firm's Data Privacy Practice helps clients navigate this uncertain and ever-changing legal environment. Scopelitis attorneys provide clients with services tailored to the needs of their company, including:

- A comprehensive overview of the regulatory and legal requirements relating to data privacy and security;
- A risk analysis of conducting business in certain states or countries;
- A review and negotiation of contract provisions relating to data privacy and security to ensure clients do not take on more obligations than those required by data privacy laws;
- Monitoring both emerging and existing laws and regulations in the data privacy space and subsequently providing timely, relevant advice accordingly

To mitigate risk relating to the collection and processing of data in the operation of your business, contact Prasad Sharma, Chip Andrewsavage, Andy Butcher, Alaina Hawley or Dylan Goetsch.

MILEPOSTS

FOR THE RECORD

Cari Sheehan joined the firm as Conflict Counsel. Cari will be working in the Firm's Indianapolis office.

ON THE ROAD

Kathleen Jeffries participated in Case Presentations at the Conference of Freight Counsel's Winter 2023 Meeting, January 7-9, in **St. Petersburg, Florida**.

Kevin Phillips attended the Global Cold Chain Alliance - World Food Logistics Organization's Institute West, January 8-10, in **Tempe, Arizona**.

Kevin Phillips presented "Warehousing Law" at the International Warehouse Logistics Association's Essentials of Warehousing Conference, January 17, in **Orlando, Florida**.

Don Vogel, Kathleen Jeffries and Fritz Damm will attend the Transportation Lawyers Association's Chicago Regional Conference, January 19-20, in **Chicago, Illinois**.

Tom Schulte and Renea Hooper will conduct a Mock Trial Presentation "Catastrophic Loss" at the Captive Resources' Risk Control Workshop, January 24-26, in **New Orleans, Louisiana**.

Kevin Phillips will attend the International Warehouse Logistics Association's 2021 IWLA-IC Winter Meeting, January 24-28, in **Lahaina, Hawaii**.

Don Vogel will present "You Just Got a Union Election Petition. Now What?" at the North American Transportation Employee Relations' Annual Meeting, February 26-28, **Tampa, Florida**.

Greg Feary will deliver the Keynote Presentation "IC Final Mile Volatility" at the Customized Logistics & Delivery Association's Final Mile Forum, February 10-11, in **New Orleans, Louisiana**.

Braden Core will serve as the moderator for the "Washington Perspectives" panel at the Airforwarders Association's AirCargo 2023 Conference, February 11 - 14, in **Nashville, Tennessee**.

Ryan Wright will attend the National Association of Trailer Manufacturers' 2023 NATM Convention & Trade Show, February 14-16, in **Fort Worth, Texas**.

Jim Hanson will attend the North American Transportation Employee Relations Association's 2023 Annual Conference: Are You Ready? February 26-28, in **Tampa, Florida**. Fritz Damm will also attend the Conference and attend the Executive Board Meetings as Past Chair and Director.

Shannon Cohen and Michael Reed will attend the Truckload Carriers Association's Annual Convention, March 4-7, in **Kissimmee, Florida**.

Jim Golden will be presenting a Negotiation Class at the Harvard Business School, March 31, in **Cambridge, Massachusetts**.

Don Vogel will attend the Transportation Association's Annual Meeting, April 26-29, in **San Diego, California**. Fritz Damm will also attend the Business Meeting and the TLA Executive Committee as Past President of Membership and Recruitment Chair.



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Briefly, continued

Scopelitis Accident Litigation Team on the defense.

Despite no injuries being reported at the accident scene, the Plaintiff asked the jury to award \$3,000,000.00 for lost wages and pain and suffering against the Ohio-based motor carrier and its truck driver. After a full week of trial including testimony from many medical expert witnesses, the jury returned a verdict for the Defense and therefore awarded no damages. With jurors drawn from several counties in the Detroit metropolitan area, the decision came down to credibility of the Plaintiff, particularly due to the lack of objective signs of injury and the inflated demand.

The case highlighted advantages inherent in removing cases to federal court when possible, as well as the importance of finding credible expert witnesses to deliver objective evidence to the jury. Scopelitis Partner, Andy Marquis noted, “the jurors really seemed to understand the degenerative/acute issues from a medical standpoint, and, more broadly, they did not subscribe to inflated damages in connection with an objectively minor motor vehicle accident.”

Andrew F. Marquis
Peter C. Morton,
Indianapolis

DISPATCHES

According to Ashley Paynter, California passed SB 1162 in 2022, which is a pay transparency law requiring **employers with 100 or more employees to submit a report to the state detailing pay information for different demographics of employees.** Additionally, private employers with 100 or more employees hired through labor contractors (e.g., staffing agencies) must submit separate pay data reports for those employees.

Ron Morelock reports that Connecticut’s new Highway Use Fee went into effect on January 1, 2023. Carriers operating **Class 8 through 13 motor vehicles with a gross weight of at least 26,000 lbs. in Connecticut must hold a permit and file monthly tax returns.** The Connecticut Department of Revenue Services (DRS) recently released key information about the new program (e.g. registration, monthly filing and payment procedures), that is available at <https://portal.ct.gov/DRS/Businesses/Highway-Use-Fee/HUF>. Affected carriers must register with the DRS and the first Highway Use Fee return is due on or before February 28, 2023.

Nathaniel Saylor reports that the window for submitting comments to the Federal Maritime Commission (FMC) with respect to its Notice of Proposed Rulemaking regarding Demurrage and Detention Billing Requirements closed late in 2022. The **proposed rule includes detailed requirements about invoice content and identifies who can be billed** and is of interest to steamship lines, cargo owners, and Ocean Transportation Intermediaries among others. Details on a Final Rule will be reported when available.

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