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Raising the Threshold: A Closer Look at the Impact of the FLSA's New Overtime Exemptions on the Transportation Sector

Stephanie V. McGowan

Christopher J. Lalak

In May 2016, the Department of Labor released its long-awaited Final Rule on changes to the Fair Labor Standards Act (FLSA). The Final Rule—which will take effect in three months—will impact transportation employers nationwide, and it is paramount for each and every employer in the transportation industry to prepare for this change.

Three Important Changes to the FLSA

First, the new regulations will raise the minimum annual salary requirement to qualify for "white collar" executive, administrative and professional exemptions from $455 per week to $913 per week. In other words, all currently exempt workers making an annual salary between $23,660 and $47,476—and their employers—are affected.

Next, the new regulations will allow up to 10% of salary for these employees to be met by nondiscretionary bonuses, incentive pay or commissions, provided these payments are made on at least a quarterly basis.

Finally, the new regulations provide an "automatic update" of the salary threshold every three years. These automatic updates—which will be keyed to the 40th percentile salary benchmark—will ensure that compliance must not only be achieved but also revisited on an ongoing basis moving forward.

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FMC Under Steam to Increase Flexibility for Filing Service Contracts and NVOCC Service Arrangements

Stephanie S. Penninger

Jonathan Todd

On August 22, 2016, the Federal Maritime Commission (FMC) published in the Federal Register a Notice of Proposed Rulemaking (NPR) for amendments to the regulations governing vessel-operating-common-carrier (VOCC) Service Contracts and non-vessel-operating-common-carrier (NVOCC) Service Arrangements (NSAs). The deadline for submitting comments to the FMC in response to the proposed amendments is September 23, 2016.

These changes are of interest to all parties to contracts for ocean carriage. On the whole, they advance the FMC's charge to modernize and increase flexibility of the regulations in order to align with business needs. The changes will impact effective dates, the timeline for filing amendments and corrections, as well as the information required for filing. These are clearly of benefit to Ocean Transportation Intermediaries (OTIs) and shippers alike. Certain areas will require careful consideration by OTIs, however, including a new definition of "Affiliates" for VOCCs, a required field in SERVCON for NVOCC Organization Numbers, and a new requirement for NVOCCs to obtain shipper certifications.

New Timeline for Filing Amendments

The proposed amendments seek to relax filing requirements for amending both in Service Contracts and NSAs. Changes to the definition of "Effective Date" will permit the filing of amendments to Service Contracts and NSAs up to thirty (30) days after their Effective Dates. This generally well-received change accommodates the speed of business by allowing for the implementation of agreed-upon terms even in advance of the FMC filing process. However, the deadline for filing initial Service Contracts or NSAs will not change. Each must be filed on or prior to the Effective Dates.

New Timeline for Correcting Errors

The proposed amendments also seek to relax filing requirements for correcting errors in Service Contracts and NSAs. For each, the deadline for Corrected Transmission filings to address technical data transmission errors will be extended from 48 hours to 30 days. Likewise, the deadline for filing Correction Requests for substantive errors will be extended from 45 days to 180 days. As with the increased flexibility in filing amendments, these changes are intended to accommodate business needs where typographic and substantive errors may go unnoticed until the current deadlines have passed.

New Definition of "Affiliate" for Service Contracts

The FMC will add the definition of "Affiliate" to the Service Contract regulations. The term "Affiliate" will refer to "two or more entities which are under common ownership or control by reason of being parent and subsidiary or entities associated with, under common control with, or otherwise related to each other through common stock ownership or common directors or officers." The proposed definition mirrors similar language applicable to NSAs. The FMC received frequent questions about inclusion of Affiliates under Service Contracts due to the lack of parity with the NSA regulations.

This definition is significant because it governs the scope of parties that may book as shippers under any particular Service Contract. In the interest of flexible, consistent application of the regulations, the FMC contends that the proposed definition does not implement a minimum ownership requirement and achieves consistency with commonly understood definitions of "Affiliate" even beyond its jurisdiction. However, at least one commentator to the advance notice observed that it would be most pro-competitive to instead eliminate the definition from NVOCC Service Arrangement regulations, rather than extending it to Service Contract regulations.

New Field for NVOCC Organization Number

The proposed amendments will add a new required field to the FMC's SERVCON filing system for the input of a NVOCCs six-digit

Organization Number when they are the contract holder or an affiliate. This data entry will allow the FMC to alert filers immediately if the NVOCC is not in compliance with FMC requirements for tariff filing and proof of financial responsibility. Although this field will be required, the FMC expects that the change will assist filers in complying with the obligation to not knowingly or willfully enter into Service Contracts or NSAs with noncompliant NVOCCs by receiving alerts at the time of filing. OTIs must continue to be vigilant in identifying their NVOCC customers, as well as maintaining and entering accurate records.

New NVOCC Requirement for Shipper Certification

The proposed amendments will also add a new requirement for NVOCCs to obtain certifications of shipper and affiliate status. As with other proposals, this seeks to increase parity between VOCC and NVOCC regulations and eliminate uncertainty in application. VOCCs are presently required to obtain certifications for Service Contracts. This amendment will require NVOCCs to review and update NSA forms to ensure that certifications are included and the business processes required to obtain and manage completion.

Regulatory Requirements Remaining Unchanged

The FMC received comments during this rulemaking on certain areas that will not result in amendments to the regulations. The significant areas that will remain unchanged include the requirement to publish essential terms, the list of excepted and exempted commodities, and the option to provide consolidated amendments in a single filing.

VOCCs and NVOCCs should consider how compliance with the proposed regulations would impact their operations, and inform the FMC of any anticipated issues that should be addressed by way of submitting comments. Meanwhile, begin considering updates to business policies and procedures for filing amendments to and correcting errors in Service Contracts and NSAs, to accommodate the proposed new timelines, and including NVOCC organization numbers and shipper certifications in NSAs. VOCCs may also want to further define "Affiliate" within Service Contracts to specify a certain minimum level of ownership percentage to the extent they are not already doing so, in light of the new broad definition being proposed. Overall, the temperature of the proposed regulations suggest greater flexibility, particularly in filing amendments, and should facilitate transparency as to the status of contracting parties, and the prompt implementation of service contracts.

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Raising the Threshold: A Closer Look at the Impact of the FLSA's New Overtime Exemptions on the Transportation Sector

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These changes will affect employers in the transportation sector in both the short term and long term.

Immediate Short-Term Impact

The transportation industry employs a significant portion of workers impacted by the new FLSA regulations,[1] including dispatchers, frontline supervisors and managers, brokers, and office workers, to name a few. For those employers now facing a December 1, 2016, compliance deadline, confronting the new rule may include a choice between several options: (1) raise the annual salary for the affected employees to $47,476 per year or more; (2) pay affected employees time-and-a-half for all weekly hours worked over 40; or (3) implement a "fluctuating work week" method for workers whose hours tend to fluctuate to a certain degree from week to week.[2]

In addition, some transportation industry workers rely on commissions as a portion of their salary. Nondiscretionary bonuses and incentive payments (including commissions) are forms of compensation promised to employees that are set to preannounced standards. The new FLSA regulations will allow employers to satisfy up to 10% of the standard salary level with nondiscretionary bonuses and incentive payments. Thus, if an employee is actually paid $4,747.60 ($91.30/wk; $1,186.90/qtr.) in commission payments, then the employer need only pay a salary of $42,729 per year. Further, one make-up payment is allowed at the end of quarter, allowing employers to make one final payment to achieve the salary threshold.

Looking Ahead

While the most drastic impact of the rule is its escalation of the "white collar" exemptions from $23,660 to $47,476, the rule's "automatic update" provision ensures that salary thresholds remain a moving target in years to come. Indeed, it is estimated that the first automatic update in 2020 will raise the forthcoming $47,476 annual salary threshold for the white-collar exemptions to $51,168, and, moreover, this amount will increase again in 2023 and every three years thereafter. Thus, it is critical that employers who have prepared for 2016's deadline keep their eyes on the horizon as well, and have plans in place not only for immediate compliance but also for sustained compliance.

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[1] The new rule has no impact on the FLSA's "motor carrier exemption," which exempts, for example, drivers, driver's helpers, loaders and certain mechanics from overtime regulations. 29 U.S.C. § 213. This rule does, however, impact the many transportation industry employees who do not fall within this narrow exemption.

[2] Although the fluctuating work week method is permitted under federal regulations, employers should also check to ensure that this method is permitted under applicable state law, as well. A minority of jurisdictions, for example, California and Pennsylvania, prohibit the fluctuating work week method.

Carmack Preemption and Separate Contracts for Storage Services

Jonathan Todd

Justin P. Clark

This summer, an interstate van line was granted a motion to dismiss of all state law claims associated with a storage contract. The court observed that the execution of a separate contract for storage of household goods, a service delivered entirely in the state of origin, does not permit recovery under state law because it may be deemed incidental to interstate transportation and therefore storage-in-transit.

In *Lloyd v. All My Sons Moving & Storage*, the plaintiff alleged the existence of a contract with the defendant for storage services to be provided in addition to an interstate household goods move from Florida to Connecticut.[1] The plaintiff sought damages for (1) Breach of Contract, (2) carrier liability under the Carmack Amendment, and (3) Intentional Infliction of Emotional Distress (IIED). The plaintiff asserted that the Breach of Contract and IIED claims arose out of the contract for storage rather than the interstate household goods transportation for which she separately contracted. In granting the defendant's motion to dismiss the counts for Breach of Contract and IIED, the court noted that a separate contract for storage does not render associated claims outside the ambit of Carmack preemption.

The plaintiff hired the defendant household goods mover to load her goods in Florida, store the goods for an indefinite period of time, and then ultimately deliver to goods to her residence in Connecticut. The plaintiff's goods were held in storage at a Florida location for approximately one year until she provided instructions for the defendant to transport the goods to Connecticut and complete delivery. The plaintiff alleged that performance did not meet her expectations because the shipment involved multiple deliveries over a lengthy period of time, not all services were provided, the cost exceeded the contracted amount, and her goods sustained loss and damage.

The plaintiff maneuvered to position the Breach of Contract and IIED claims as arising under the contract for storage services rather that for interstate moving services. This strategy was an attempt to maintain both state law claims in the face of the defendant's motion relying on the Carmack Amendment. As interstate carriers are well aware, the Carmack Amendment provides a uniform national standard of liability for common carriers providing interstate service.[2] In general, the Carmack Amendment governs claims and limits carrier liability for loss, damage or injury to cargo, and preempts common or state law remedies related to such loss, damage or injury, while claims based on conduct separate and distinct from the delivery, loss of or damage to goods survive preemption.[3] State law claims related to incidental storage provided as part of interstate transportation are preempted by the Carmack Amendment.[4]

The plaintiff's strategy to emphasize separate contracts and services had some merit based on other decisions.[5] Courts have noted the "problematic" analysis involved in extending Carmack preemption to separate and distinct contracts for nontransportation services, as compared to services rendered under single contracts or bills of lading.[6] The timing of the separate contracts can be dispositive, as cases involving separate contracts for storage are often remanded back to state court where the shipper's request and contract for interstate transportation occurred later in time.[7]

Here, the court ruled in favor of the defendant on both counts despite the plaintiff's attempt to bifurcate the services she hired the defendant to perform. The plaintiff specifically failed to demonstrate that the state law claims were in fact separate and distinct from the performance of interstate transportation services and the alleged loss and damage to her goods.

The plaintiff's Breach of Contract claim suffered from the fact that there was no evidence that the storage service, while allegedly agreed and performed under a separate contract, was in fact separate and distinct from the interstate transportation service. Rather, the goods were under the defendant's care, custody and control for performance of interstate transportation services from loading at the point of origin, throughout the storage services, and finally to delivery at the ultimate destination. The court specifically observed that the purported storage contract had no bearing on the case: "[e]ven assuming Plaintiff and Defendant executed a separate contract for storage, Defendant maintained possession of the belongings from the time they left Plaintiff's Florida residence until they were delivered to her Connecticut residence…[t]his illustrates that storage of the belongings was part of the agreed transportation."[8]

As for the plaintiff's IIED claim, the court noted that the plaintiff only contended that the defendant's alleged actions in connection with the delivery of her goods caused IIED. She did not argue that IIED specifically resulted from the defendant's activities in performance of the storage services. In the words of the court, the allegation of IIED in the context of delivery services "falls squarely within the preemptive scope of the Carmack Amendment, and therefore…must be dismissed."[9]

While the court's ruling on this motion to dismiss is favorable to the carrier, care must always be taken to ensure that the limitation of liability and preemption available under the Carmack Amendment extend as broadly as possible across the portfolio of transportation and related services. If the defendant's operations team had chosen or had been requested to handle this shipment in a different manner, then the outcome could have been less favorable. Suppose, for example, that the defendant converted the shipment to permanent storage during the year-long service. Under such scenario, the termination of interstate transportation service would certainly complicate the assertion of Carmack preemption to dismiss the state law claims.[10] Of course, operational best practices are always

dependent on the services actually requested and performed. Conversion to permanent storage may be requested by a shipper or even required of the carrier if interstate transportation in fact terminates or auction proceedings are necessary.

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[1] *Lloyd v. All My Sons Moving & Storage*, 2016 U.S. Dist. LEXIS 92962 (M.D. Fla. July 18, 2016).

[2] 49 U.S.C. § 14706.

[3] *REI Transp. v. C.H. Robinson Worldwide, Inc.*, 519 F.3d 693, 697 (7th Cir. 2008); See e.g., Rini v. United Van Lines, Inc., 104 F.3d 502, 506 (1st Cir. 1997) (holding that "all state laws that impose liability on carriers based on the loss or damage of shipped goods are preempted" but "liability arising from separate harms… apart from the loss or damage of goods… is not preempted.").

[4] *See Harris v. Crown Moving*, No. 07-CV-126-JLQ, 2007 U.S. Dist. LEXIS 43111, at *5 (E.D. Wash. June 14, 2007).

[5] *See Lippold v. Father & Son Moving & Storage*, No. 08cv0719 BTM(RBB), 2008 U.S. Dist. LEXIS 47300 (S.D. Cal. May 30, 2008); and *Brake Parts, Inc. v. Hosea Project Movers, LLC*, No. 12 C 50031, 2012 U.S. Dist. LEXIS 179247 (N.D. Ill. Dec. 19, 2012)

[6] *Brake Parts*, 2012 U.S. Dist. Lexis 179247 at *5 n.1.

[7] *Lippold*, 2008 U.S. Dist. LEXIS 47300 at *2.

[8] *Lloyd*, 2016 U.S. Dist. LEXIS 92962, at *7.

[9] *Id.* at *6.

[10] *See Hansen v. Wheaton Van Lines, Inc.*, 486 F. Supp. 2d 1339, 1347 (S.D. Fla. 2006) (Carmack jurisdiction terminates upon the conversion of the shipment from storage-in-transit to permanent local storage.).

Now You See Them, Now You Don't: Long-Standing Terms of the NMFC's Uniform Bill of Lading Vanish

Martha J. Payne

Marc S. Blubaugh

On July 14, 2016, the National Motor Freight Traffic Association (NMFTA) published a supplement that changed the terms and conditions of the Uniform Straight Bill of Lading (USBL) published in the National Motor Freight Classification (NMFC). NMFC 100-AP Supplement No. 2 became effective on August 13, 2016. The Transportation Logistics Council (TLC) and the National Shippers Strategic Transportation Council NASSTRAC), two trade groups representing shippers, filed a Petition for Suspension and Investigation of the changes with the Surface Transportation Board (STB).

On August 12, 2016, the STB denied the request by TLC and NASSTRAC and allowed the changes to take effect on the following day, August 13, 2016. The STB did indicate, however, that it will consider comments on the matter, if filed by September 12, 2016, to determine whether to investigate the issue further. In its decision, the STB gave guidance as to the substance of comments that it will consider. First, does review of this issue fall under the jurisdiction of the STB? Secondly, does the STB's prior decision to terminate its approval of all remaining motor carrier rate bureau agreements affect the STB's authority to review these changes? An investigation by the STB has the potential of prompting a modification to the NMFTA changes.

The changes that went into effect on August 13 significantly alter the terms and conditions that govern most motor carrier transportation of goods within the United States that is not subject to contracts negotiated with the motor carriers. Some of the changes are as follows:

- Section 1 (a). The motor carrier responsible for cargo loss or damage is the one shown on the bill of lading, rather than the one in possession of the goods when they are lost or damaged.
- Section 1 (b). Under the old terms and conditions, no motor carrier is liable for loss, damage or delay caused by one of the five common law exceptions to carrier liability, if the carrier can prove freedom from negligence. The new language adds riots, strikes and any related causes to the five exceptions and changes the burden of proof from that of the carrier to that of the shipper.
- Section 3 (b) The old language required claims to be filed within nine months after the delivery of the cargo, except that claims for failure to make delivery must be filed within nine months after a reasonable time for delivery has elapsed. The new language shortens the time allowed for filing claims for failure to make delivery to nine months from the date of the bill of lading.
- Section 5 (a). The old language states that limitations of liability may apply if the cargo value has been stated by the shipper or has been agreed upon in writing as the released value. The new language allows a carrier to limit liability simply by publishing the limitation in its tariff.

Please contact us with any questions about the important implications that these changes may have for your particular business.

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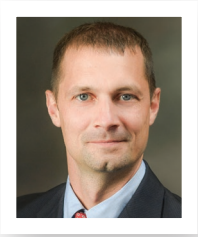
Oregon Cases Offer Lessons for Use of Owner-Operators

J. Allen Jones, III



Matthew J. Selby

On July 20, 2016, Judge Garrett of the Court of Appeals for the State of Oregon issued four favorable decisions in cases challenging the classification of drivers as independent contractors. These cases are worthy of closer review even if your business has no independent contractor operations in Oregon for at least two reasons.

First, more so than most judicial opinions, these practically sequential decisions highlight the important nuances between the use of owner-operators in, for example, manufacturing, versus the trucking industry, where state and federal governments impose regulations on motor carriers that, if ignored or misunderstood, can lead a judge (or panel of judges) to improperly conclude that carriers direct and control all of the means and methods used by owner-operators in the performance of services to those carriers. To that end, the Oregon decisions further stand as excellent examples of judicial panels that took the time to consider the economic realities of the independent contractor owner-operator business model within the context of the trucking industry.

Second, and perhaps more importantly, the four decisions underscore the significance of carefully crafting written agreements with your owner-operator fleets. At minimum, the Oregon Court of Appeals shows carriers how to properly use written agreements to avoid ambiguities and unintended consequences.

In *Delta Logistics v. Employment Department Tax Section*, Delta appealed the Administrative Law Judge's (ALJ's) decision that services provided by Delta's owner-operators constituted employment.[1] Delta disagreed because, under Oregon law, transportation services performed by any person that "leases their equipment to a for-hire carrier and that personally operates, furnishes and maintains the equipment and provides service thereto" are exempt from employment.[2] Surprisingly, the ALJ agreed that Delta was a for-hire carrier, it did not own its own trucks, the trucks used were furnished by owner-operators who either personally operated those trucks or hired drivers to operate them, and the owner-operators maintained the trucks.[3]

Nevertheless, the ALJ still determined that the exemption did not apply because Delta's agreement with its owner-operators did not constitute a lease under the statute.[4] The ALJ reasoned that there was "no transfer of legal possession and use of the vehicle in exchange for compensation" under Delta's agreements with its owner-operators.[5] On appeal, however, the Court concluded that "an arrangement that has the effect of transferring to the for-hire carrier the right to legal possession and use of the vehicle, while requiring the owner to retain physical possession, control, and use of the vehicle" meets the requirements of a lease under the exemption statute.[6]

The ALJ also ruled that that the owner-operator agreements were not leases because they did not specifically "include a provision for remuneration for Delta's use of the vehicles."[7] The Court of Appeals found that while the Owner Operator Contracts did not allocate a portion of Delta's payment to the owner-operators for the lease of their vehicles, the Court was unaware of a requirement that such leases contain a specific allocation or that consideration was required to be "separately stated."[8]

Last, the Employment Department argued on appeal that the ALJ's order should be affirmed as to owner-operators who hired drivers and did not personally drive their vehicles.[9] The Court of Appeals interpreted the statute to include the owner-operators' drivers under the definition of "services performed in operation of the motor vehicle," and, therefore, the exemption applied to the hired drivers as well.[10]

In *Market Transport, Ltd. v. Employment Department*, Market Transport was operating with independent contractors that either personally operated their trucks or leased their vehicles from third parties.[11] The Court noted this common industry practice while reversing the ALJ's decision as to assessments to Market Transport for independent contractors who operated their own vehicles.[12] With respect to Market Transport's drivers that leased their vehicles from third parties, the Court vacated the ALJ's decision and sent the issue back for further proceedings as to whether those drivers "furnished" or "maintained" their vehicles under the statute and, therefore, qualified for the exemption from employment.[13]

The ALJ's decision with respect to contractors that operated their own vehicles was that those contractors were not exempt from employment under Oregon law due to a lack of specific consideration in the applicable agreements for the period in which the vehicle was not in use.[14] The Court reasoned that even when the vehicle was idle, Market Transport was still required to maintain and pay for operating licenses, taxes, and insurance, and those continued obligations were, in fact, consideration.[15]

In *May Trucking Company v Employment Department*, the Court of Appeals reversed, in part, tax assessments imposed with respect to May's owner-operator drivers who owned their trucks outright.[16] May's fleet included approximately 200 owner-operator drivers.[17] Seventy of those drivers either leased or purchased their vehicles from May, and then leased those vehicles back to May by agreement. The remaining 130 drivers owned their vehicles outright, and also leased their vehicles back to May by agreement.[18]

Based on "the documents [i.e., agreements] under which the contract drivers were leasing or purchasing their vehicles from May," the Court of Appeals affirmed the ALJ's determination that the drivers who leased or purchased their vehicles from May were not exempt from employment.[19] In effect, the

agreements between drivers leasing vehicles from May did not provide the drivers with any "transferrable interest" in the vehicles. Similarly, the agreements between drivers purchasing vehicles from May expressly provided that the "purchase" was a "bailment only" until the purchase price was paid in full. Relying upon Oregon case law providing that furnishing "their equipment" to a for-hire carrier requires a transferrable interest in the vehicle, the Court of Appeals easily found that May's lease and purchase agreements failed to create such an interest for the owner-operator drivers.[20]

The drivers who owned their vehicles outright leased those vehicles back to May pursuant to an Independent Contractor Agreement (ICA). The ALJ concluded that the ICA failed as a lease under the exemption statute for three reasons.[21]

First, the ALJ found that the lease "lacked a definite duration."[22] The ICA provided that it terminated when either party gave 30 days written notice, or immediately upon the owner-operator's breach. The Court of Appeals adopted May's argument that a lease was not required to state an end date, as long as "the circumstances under which the lease terminates" could be determined.[23] Under Oregon law, "a lease or personal property that does not state a specific duration is construed to be terminable at will."[24]

Next, the ALJ found that "the [ICA] failed because of an absence of consideration for the use of the equipment" on the grounds that the leased "did not allocate remuneration specifically for May's use of the vehicle or for the truck's 'idle time.'"[25] But, as the Court of Appeals noted, it had previously rejected that reasoning (in the *Market Transport* case), and rejected it again here.[26]

Third, the ALJ concluded that May did not show that owner-operators personally maintained their vehicles. The ICA required the owner-operators to maintain their vehicles, but since they frequently used May's maintenance facilities and only "nominally" paid for services there,

[T]he four decisions underscore the significance of carefully crafting written agreements with your owner-operator fleets.

the ALJ concluded that the owner-operators did not "personally perform them."[27] The Court of Appeals held that the ALJ erred because "a contractor with financial responsibility under an agreement for the maintenance of equipment, and the freedom under an agreement to select a third party to perform maintenance, satisfies the requirement for personally performing the maintenance under [the statute]."[28]

In *CEVA Freight, LLC v. Employment Department*, the Court of Appeals reversed tax assessments imposed by the Employment Department and found that the services performed by CEVA's owner-operator truck drivers (and drivers who worked for owner-operators) were excluded from employment under Oregon law.[29] The ALJ concluded that the owner-operators were not independent contractors for three reasons.

First, the ALJ found that the owner-operators did not meet the statutory definition of an independent contractor because they did not obtain the requisite licenses to perform services pursuant to their agreements with CEVA. The Court of Appeals looked to the agreements between CEVA and its owner-operators and reasoned that since the owner-operators were providing services *to* CEVA, and not the public in general, the owner-operators were only required to obtain state drivers licenses, and were not required to obtain USDOT operating authority (they were operating under CEVA's authority).[30] As a result, the owner-operators met the third prong of the statute "because they were responsible for obtaining all of the licenses—namely, state driver licenses—necessary to accomplish their pick-up and delivery services."[31]

Second, the ALJ concluded that CEVA had the right to exercise direction and control over the owner-operators' means and manner of providing services under the agreements.[32] The Court of Appeals again disagreed, holding that, on balance, the owner-operators "provided the fundamental means of carrying out the services" even though CEVA provided certain resources to its owner-operators that were similar to "means" described in the Oregon Administrative Rules. Likewise, owner-operators "controlled the method by which they performed the delivery services required by their agreements with CEVA," even though CEVA imposed certain requirements upon the owner-operators that "suggested a degree of control over the 'manner' of providing the services."[33]

Third, under Oregon law, a person is engaged in an independently established trade or business if three of the five criteria in ORS 670.600(3) are met. The ALJ found that CEVA had failed to show that the owner-operators were engaged in "an independently established business."[34] The Court of Appeals reversed the ALJ's findings based upon the "unambiguous terms" of the agreements, holding that the owner-operators:

> (1) bore the risk of loss related to their business through their responsibility for loss of their vehicles due [to] accident or break-down and responsibility for loss to CEVA's customers, ORS 670.600(3)(b); (2) made significant investments in their business through the ownership or lease of their vehicles and payment of all operating expenses, ORS 670.600(3)(d); and (3) had the authority to hire or fire helpers to provide or to assist in providing the services. ORS 670.600(3)(e).[35]

Since CEVA's owner-operators met the statutory definition of independent contractor based upon the Court of Appeals' review, the services of CEVA's owner-operators were exempt from employment under Oregon law.

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Oregon Cases Offer Lessons for Use of Owner-Operators

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As described above, there are notable commonalities among these four decisions that are instructive for drafting purposes in your agreements with independent contractor owner-operators. For example, the Employment Department and ALJ may not have challenged May Trucking's exemption had May drafted its agreements with a careful eye on Oregon law. Since Oregon law requires owner-operator drivers to have a "transferrable interest" in their vehicles, May could have chosen to only engage owner-operators who owned their trucks outright or purchased those trucks from May and refrained from including the "bailment" language in its agreements. Delta Logistics (as well as Market Transport) could have been more precise in its agreements regarding the consideration given to owner-operators for the use of their vehicles, specifically with respect to what portion of remuneration represented compensation for use of the vehicle, including any down or idle time. May Trucking could have described its owner-operators' duties to personally maintain their vehicles in greater detail, including drawing a clear line between those duties and the services (and costs therefor) offered by May at its facilities.

We do not want to assume that the carriers in these cases used generic form agreements with their owner-operators, but if they were, these cases illustrate that "cookie-cutter" or generic form agreements can be dangerous. With independent contractor arrangements under such intense scrutiny, carefully-drafted, customized agreements are warranted. Work with your advisors to understand the regulatory landscape in the jurisdictions in which your owner-operate fleets are based to ensure that your agreements will be more likely to withstand regulatory scrutiny. Of course, if you have questions about your agreements or your independent contractor owner-operator operations, Benesch's Transportation & Logistics team would be happy to help.

We do not want to assume that the carriers in these cases used generic form agreements with their owner-operators, but if they were, these cases illustrate that "cookie-cutter" or generic form agreements can be dangerous.

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[1] 279 Or. App. 498 (2016).
[2] *Id.* at 503.
[3] *See id.*
[4] *See id.*
[5] *Id.* at 504.
[6] *Id.* at 509.
[7] *Id.* at 512.
[8] *Id.*
[9] *See id.*
[10] *Id.* at 514.
[11] 279 Or. App. 515, 517 (2016).
[12] *See id.*
[13] *See id.* at 529.
[14] *See id.* at 524.
[15] *See id.* at 527.
[16] 279 Or. App. 530 (2016).
[17] *See id.* at 532.
[18] *See id.* at 539-40.
[19] *Id.* at 539.
[20] *See id.*
[21] *See id.* at 540.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 541.
[25] *Id.* (citing *Market Transport, Ltd., supra*)
[26] *See id.*
[27] *Id.*
[28] *Id.* at 542.
[29] 279 Or. App. 570 (2016).
[30] *See id.* at 578.
[31] *Id.* at 579.
[32] *Id.*
[33] *Id.* at 580-82.
[34] *Id.* at 582.
[35] *Id.* at 582-83.

Making the Grade: Hiring "Unrated" or "Nonrated" Carriers

Stephanie S. Penninger

Brittany L. Shaw

The question keeps popping up… what is a freight broker's exposure to vicarious liability and negligent section claims associated with selecting an unrated or nonrated carrier? An unrated or nonrated carrier rating means that a safety rating has not been assigned to the motor carrier by the Federal Motor Carrier Safety Administration (FMCSA) as part of the U.S. Department of Transportation's Carrier Safety Rating System,[1] and has nothing to do with the carrier's performance. Many carriers, e.g., new carriers, do not have a safety rating. Earlier this year, the Fifth Circuit Court of Appeals shed some light on the issue. While the broker in that case sidestepped liability, how the facts would play out in other jurisdictions remains an open-ended story.

In *Dragna v. KLLM Transp. Servs., LLC*,[2] shipper BASF Chemical (BASF) engaged motor carrier KLLM Transport Services, L.L.C. (KLLM Transport) to haul chemicals from Louisiana to Michigan. KLLM Transport determined it could not handle the load, so it transferred the job to its sister company, freight broker, KLLM Logistics (KLLM Logistics). KLLM Logistics arranged the shipment to be transported by another motor carrier, A&Z Transportation (A&Z). En route, A&Z's driver injured Plaintiff, Dragna, when he crashed into Dragna's car. Dragna sued KLLM Transport, KLLM Logistics and A&Z, asserting vicarious liability, negligent hiring and joint venture[3] theories. Luckily for KLLM Logistics and KLLM Transport, the court did not hold either liable to Dragna under any of these theories.

Settling the Score: Negligent Selection and Carrier Ratings

The court determined that KLLM Logistics was not negligent in hiring the "unrated" motor carrier (the Department of Transportation had not yet conducted a safety audit of A&Z). Helpful to KLLM Logistics in succeeding on this claim was that KLLM Logistics had selected the motor carrier twice before without any problems. Although Dragna argued that the carrier's three high BASIC scores, particularly the unsafe driving score, supported that KLLM Logistics should have known that the carrier had safety problems, the court did not agree. Instead, the court found that there was no evidence that KLLM Logistics knew or should have known at the time it obtained the safety scores (before hiring the carrier in November 2011) that the three high BASIC scores indicated that the carrier was unsafe. At that time, the BASIC scores had only been made publicly available less than a year before the November 2011 accident, and the March 2011 report that KLLM had obtained with the BASIC scores, prior to hiring the carrier in the first instance (in March 2011), did not give any indication as to how to use the BASIC scores. Thus, the court was not swayed by Dragna's expert, who testified regarding the BASIC scores actually correlating with unsafe driving—this is because KLLM did not know about any correlation at the time that it had downloaded the scores.

Other Lessons Learned: Vicarious Liability

KLLM Logistics was not held vicariously liable for A&Z's driver's alleged negligence in causing the truck accident. Applying Louisiana law, the court found KLLM Logistics had insufficient "operational control" over A&Z to convert their independent contractor relationship to one of employment. This was despite evidence that KLLM Logistics had required A&Z's drivers to call KLLM Logistics to check in or for emergencies, and *penalized or fined A&Z* for the failure to make such calls. The court reasoned that KLLM Logistics had a contractual right to receive check-in and emergency calls, and the resulting penalties were viewed as an appropriate remedy for failing to comply. Further, A&Z, and not KLLM Logistics, directed how it transported the BASF load, so long as the delivery was made on time. This was different than in *Sperl v. C.H. Robinson, Inc.*,[4] where C.H. Robinson was found vicariously liable for the motor carrier's truck driver's negligence in causing a truck accident primarily for *fining drivers* who did not comply with its special driver instructions.

As was KLLM Logistics in *Dragna*, a freight broker certainly could find itself wrapped into a lawsuit stemming from a truck accident caused by the negligent acts of a carrier it selects. Plaintiffs' attorneys have routinely looked to the information provided by the FMCSA to argue that a freight broker has been negligent in selecting a motor carrier. However, it is unlikely that hiring an unrated carrier, alone, would subject a broker to negligent selection liability. Even high BASIC scores would likely have to be associated with violations that actually caused the accident at issue for a freight broker to be found liable for negligently selecting a carrier. Nor would the rating have anything to do with operational control over a carrier resulting in vicarious liability. Nonetheless, before using an unrated carrier, brokers should engage in further due diligence, including: (1) determining whether any adverse reports have been made regarding the carrier on www.tiawatchdog.net; (2) obtaining and contacting carrier references; (3) verifying that steps are being taken by the carrier to obtain a satisfactory safety rating; and (4) maintaining a current file on the carrier.

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[1] Eventually, as part of the FMCSA's Compliance, Safety, Accountability (CSA) initiative, the current Carrier Safety Rating System will be replaced with the Safety Fitness Determination (SFD). The Notice of Proposed Rulemaking (NPRM), published on January 21, 2016, proposed a new methodology, based on BASIC scores, to determine whether a motor carrier is unfit to operate commercial motor vehicles. The time for comments on this NPRM closed on March 21, 2016. If SFD ever replaces CSA, brokers should not use a motor carrier that is rated "unfit."

[2] 2016 U.S. App. LEXIS 182 (5th Cir. Jan. 15 2016).

[3] Dragna was unable to demonstrate the existence of a joint venture between KLLM Transport, KLLM Logistics and A&Z when there was no evidence of proportionate contributions, a joint effort, a sharing of profits, or a mutual risk of losses, essential elements of a joint venture claim. Moreover, the parties lacked "an equal right to direct and govern" the other's activity because A&Z alone determined how to move the BASF load.

[4] 946 N.E.2d 463 (Ill. Ct. App. 2011).

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"Lawyer of the Year" is a distinction given annually to one single outstanding lawyer in each practice area and designated metropolitan area. Rich has been active in the transportation industry for over 46 years as both a businessman and a lawyer. Throughout his career, he has been involved in nearly every facet of the industry, including developing a national reputation as a leading authority on the use of independent contractors within the industry through a variety of innovative, cutting-edge approaches. He continues to deliver superb advice and counsel to our transportation and logistics clients across the country.

RECENT EVENTS

Conference of Freight Counsel
Martha J. Payne and **Eric L. Zalud** attended.
June 4–6 | Toronto, ON

Air Cargo Conference
Stephanie S. Penninger, Martha J. Payne and **Jonathan R. Todd** attended.
June 8–10 | Phoenix, AZ

American Trucking Associations General Counsel's Forum
Martha J. Payne, Stephanie S. Penninger, Matthew J. Selby, Steven M. Moss, Marc S. Blubaugh and **Eric Zalud** attended. **Steven M. Moss** presented *NLRB Aggressively Driving Its Agenda: Trials, Tribulations & Legal Responses.* **Stephanie S. Penninger** presented *Justin-Time: New Food Safety Rules and What They Mean for Motor Carrier Counsel?*
July 17–20, 2016 | Bellevue, WA

TCA Refrigerated Food Division Meeting
Stephanie S. Penninger attended.
July 20–22, 2016 | Stevenson, WA

NTTC Summer Membership and Board Meeting
Richard A. Plewacki and **J. Allen Jones, III** attended.
July 24–27, 2016 | Coeur d'Alene, ID

Ohio Trucking Association
Joseph N. Gross and **Steven M. Moss** copresented the Webinar *The New Overtime Regulations* on how the new federal overtime regulations affect the trucking industry.
July 30, 2016 | Webinar

ABA TIPS Admiralty and Maritime Law Committee Meeting at the ABA Annual Meeting
Stephanie S. Penninger attended.
August 4–7, 2016 | San Francisco, CA

TrueNorth Transportation Risk Summit
Matthew J. Selby attended.
August 8–9, 2016 | Cedar Rapids, IA

NEOTEC Annual Logistics Conference
Jonathan R. Todd attended.
August 22, 2016 | Akron, OH

Ohio Conference on Freight
Jonathan R. Todd and **Joel Pentz** attended.
August 22–24, 2016 | Cleveland, OH

Trip Insurance Board of Directors Meeting
Matthew J. Selby attended.
August 23–25, 2016 | Charleston, SC

Transportation & Logistics Group

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ON THE HORIZON

Truckload Carriers Association 22nd Annual Independent Contract Division Annual Meeting
J. Allen Jones and **Matthew J. Selby** are attending.
September 8, 2016 | Chicago, IL

Arkansas Trucking Seminar
Eric L. Zalud and **J. Allen Jones** are attending.
September 13, 2016 | Fayetteville, AR

The FTR Transportation Conference
Stephanie V. McGowan is attending.
September 13–15, 2016 | Indianapolis, IN

Airfreight Forwarders Association Webinar
Stephanie S. Penninger is presenting *Let's Give 'Em Something to "Taco" 'Bout*
September 15, 2016 | Webinar

Ohio Trucking Association Annual Conference
Steven M. Moss is presenting *What Employers Need to Know About the New Overtime Regulation.*
Matthew J. Selby is attending.
September 18–20, 2016 | Columbus, OH

Intermodal Association of North America EXPO
Marc S. Blubaugh is presenting *Intermodal Legislative & Regulatory Report: What's the Impact on Your Business?* **Martha J. Payne** and **Stephanie S. Penninger** are attending.
September 19, 2016 | Houston, TX

Truckload Carriers Association (TCA) Wreaths Across America Charitable Gala
Richard A. Plewacki is attending.
September 20, 2016 | Washington, DC

Truckload Carriers Association (TCA) Policy Committee and Board of Directors Meeting
Richard A. Plewacki is attending.
September 21, 2016 | Washington, DC

The Annual Conference on Transportation Innovation and Savings
Eric L. Zalud is attending.
September 21–24, 2016 | Toronto, Canada

The Global TerraLex Conference
Eric L. Zalud is attending.
September 21–24, 2016 | New York City, NY

Indiana Motor Truck Association (IMTA) Future Leaders Council Annual Conference
Stephanie S. Penninger and **Brittany L. Shaw** are presenting *How the FDA Got "Jalapeño" Business With the Publication of the Final Sanitary Food Transportation Regulations.*
September 22–23, 2016 | Bloomington, IN

Canadian Transportation Lawyers Association Annual Conference
Marc S. Blubaugh will be presenting *Regulatory Investigations Affecting The Transportation and Logistics Industry.* **Martha J. Payne** is attending.
September 23, 2016 | Toronto, ON

APICS 2016 Supply Chain Conference
Jonathan R. Todd is attending.
September 25–27, 2016 | Washington, DC

American Trucking Associations (ATA) Management Conference & Exhibit
Marc S. Blubaugh, Richard A. Plewacki and **Matthew J. Selby** are attending.
October 1–4, 2016 | Las Vegas, NV

International Warehousing Logistics Association "Essentials" Course
Marc S. Blubaugh is presenting *Fundamentals of Transportation Law: What You Need to Know About Transportation.*
October 6, 2016 | Phoenix, AZ

ELEVATE 2016 Air Freight Conference
Jonathan R. Todd and **David M. Krueger** are attending.
October 10, 2016 | Miami, FL

Trucking Industry Defense Association (TIDA) Annual Seminar
Eric L. Zalud is attending.
October 12–14, 2016 | Baltimore, MD

LTNA National Conference
Jonathan R. Todd and **Martha J. Payne** are attending.
October 19–21, 2016 | Las Vegas, NV

Joint 50th Anniversary Meetings of the Tulane Admiralty Law Institute & Maritime Law Association of the U.S.
Stephanie S. Penninger is attending.
October 26–28, 2016 | New Orleans, LA

The 49th Transportation Law Institute (TLI)
Stephanie S. Penninger will be moderating "One if By Land, Two if By Sea: The Latest on MAP 21, Safely Transporting Food, Ocean Carriage and Hello Cuba!" **Marc S. Blubaugh** will be presenting *There's a Meltdown at the Port . . . Now What?* **Eric L. Zalud, Richard A. Plewacki, Martha J. Payne** and **J. Allen Jones** are attending.
November 4, 2016 | Houston, TX

Accelerate Conference & Expo Sponsored by Women in Trucking
Martha J. Payne and **Stephanie S. Penninger** are attending.
November 7–9, 2016 | Trisco, TX

Indiana Logistics Summit
Brittany L. Shaw is attending.
November 16–17, 2016 | Indianapolis, IN

Private Equity Investing in Transportation & Logistics Companies Capital Roundtable
Ira C. Kaplan, Marc S. Blubaugh, James M. Hill, Jennifer R. Hoover and **Eric L. Zalud** will be attending.
November 17, 2016 | New York City, NY

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