TRANSPORTATION matters
Winter 2021

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DOT/FMCSA Noteworthy Updates

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The Federal Motor Carrier Safety Administration (FMCSA) reports that the electronic logging device (ELD) mandate has reduced hours-of-service (HOS) violations by 50% since the initial rule took effect in December 2017. Over 8.8 million roadside inspections were conducted since that time with less than 1.25% resulting in citations for HOS violations or for failure to comply with the ELD mandate. The FMCSA claims it is too early to determine whether the ELD mandate, which took full effect in December 2019, has resulted in safer highways. Initial estimates expected avoidance of over 1,800 crashes and 26 lives saved each year. Reduced motor coach travel and lighter traffic in 2020 due to COVID have limited the opportunity to gauge the mandate's effectiveness.

The FMCSA reported 46,000 drug-related violations in the Drug and Alcohol Clearinghouse during the first 10 months of operation since January 2020. The majority of failing tests, over 24,000, were for marijuana use. Other high failure rates were for cocaine (6,650) and amphetamines (4,280). Of the total reported violations, only 8,000 have completed return-to-duty protocols, leaving 38,000 driver positions open. The Clearinghouse currently has registered over 1.3 million drivers and 153,000 employers. Employers are required to query the clearinghouse prior to employing a commercial driver and once a year thereafter.

On 1/4/21, the FMCSA published a proposed change to regulatory guidance clarifying how drivers record time moving material around private property (a "yard"). The guidance clarifies the definition of a "yard move" as driving while moving material within an intermodal yard or port facility, a motor carrier's place of business, a shipper's private parking lot, or moving short distances on public roads between private properties while traffic control or flaggers are utilized. Public comment on the guidance is due by 2/3/21. Currently, the HOS rules do not define "yard move." The ELD final rule similarly fails to define a "yard move" but requires drivers to enter duty status as "on duty, not driving." The FMCSA intends the new guidance to assist drivers in properly categorizing hours of service and avoid reducing drive time with simple "yard moves".

On 12/17/20, the FMCSA published a final rule permitting third-party commercial driver's license (CDL) instructors to also administer the skills test. Previously, regulations prohibited instructors from teaching the course and administering the skills tests. The FMCSA expects the new rule to give states flexibility on training and testing CDL applicants and alleviate delays and inefficiency in the application process. The new rule becomes effective in February 2021.

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AB5: A New Standard for Worker Classification Part 2

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In our last Newsletter, we discussed the status and potential impact of AB5, a law recently passed in California which went into effect on January 1, 2020, addressing the classification of certain workers. By way of review, prior to AB5's passage, the decision on whether a worker should be classified as an employee or an independent contractor in California was determined by a standard set forth in S.G. Borello & Sons vs. Department of Industrial Relations. The Borello test, similar to the common law independent contractor standard, has 11 factors, primarily focusing on whether a company has control over the means and manner of performing contracted work, and additional secondary factors, such as who provides work tools and the individual's opportunity for profit or loss, to determine contractor status.

Under the new AB5 law, all workers are presumed to be employees. However, a worker can still be classified as an independent contractor if they can satisfy the "ABC Test." In response to the passing of AB5, the California Trucking Association filed a lawsuit contending that AB5 was preempted by the supremacy and commerce clauses of the U.S. Constitution and is in direct conflict with the Federal Motor Carrier Safety Act and the Federal Aviation Administration Authorization Act of 1994. The California Truck Association was most concerned with prong "B" of the ABC Test, which states that for a worker to be an independent contractor, the worker must perform work that is outside the usual course of the hiring entity's business.

On January 16, 2020, Judge Roger Benitez of the US District Court issued a preliminary injunction prohibiting California from applying AB5 to motor carriers. On September 1, 2020, a panel of the ninth Circuit Court of Appeals heard the issue of whether the preliminary injunction issued by Judge Benitez was appropriate. To date, the Ninth Circuit Panel has not yet issued a decision on the preliminary injunction.

While observers await a decision from the Ninth Circuit Federal Court on the issue of the preliminary injunction, there has been action by State Courts in California with regard to AB5.

In People v. Cal Cartage Transportation Express, the State of California brought a lawsuit against Cal Cartage for misclassifying workers. In January, 2020, just after Judge Benitez issued his preliminary injunction in the Federal case, State Superior Court Judge William Highberger issued a ruling indicating that federal law preempted California from imposing AB5 on the trucking industry.

That State decision was appealed. In November, 2020, a three-Judge panel from the California Court of Appeals reversed the ruling of Judge Highberger and concluded that federal law did not preclude an employee classification law like AB5 from being implemented in California.

However, the federal preliminary injunction issued by Judge Benitez is still controlling. So even though a California State Court of Appeals Panel has ruled that AB5 is not preempted by federal law, the issue of whether AB5 is valid and controlling is still to be determined. All eyes now turn to the forthcoming decision from the Ninth Circuit, which should be issued in the near future.

We will continue to update our readers as this issue winds its way through both State and Federal Courts.

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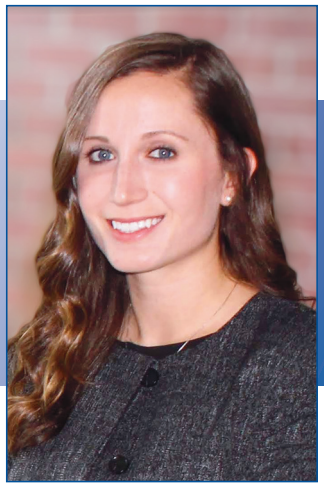

Attorney Spotlight: Lauren Travers

Lauren is an attorney in the firm's Wilmington office. Her insurance defense practice focuses in the area of workers' compensation. She is an active member of the North Carolina State Bar, North Carolina Association of Defense Attorneys, and the New Hanover County Bar Association.

Q: What is your proudest moment?

LT: Walking across the stage at my law school graduation and receiving my Juris Doctor degree. While at Campbell Law School, I participated on Law Review, worked several internships, ran the Volunteer Income Tax Assistance Program, and graduated with honors. My years at Campbell Law were not easy, but they were rewarding. I am thankful for the knowledge I gained and the people I met.

Q: What is your favorite vacation destination?

LT: I have been fortunate to travel oversees and visit a handful of countries in Europe. One of my favorite spots is the capital of Slovakia, Bratislava. It is a beautiful old city with cobble stone streets, many of which are limited to foot traffic. I enjoy traveling to new places, meeting new people, and learning about other cultures. I hope to see more of the world, and more of the United States. I am planning a trip (post-COVID) to some of our national parks and hope to see Arches National Park and Zion National Park in Utah.

Q: What is your favorite book?

LT: I love getting lost in a good fiction novel. Some of my favorite authors are Kristin Hannah and Jodi Picoult. I recently finished Kristin Hannah's The Great Alone, a story about a family living off the grid in the Alaskan frontier.

Q: What keeps you busy on the weekends?

LT: I try to spend as much time outside as possible, preferably on the water. I enjoy getting exercise out in the sun, taking my dog to hiking trails and parks. I also make a point to call a friend or family member I have not spoken to recently.

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Is Tort Reform the Answer?

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Currently, the Federal Motor Carrier Safety Administration requires commercial vehicles that engage in interstate commerce to maintain a minimum of $750,000 in liability insurance coverage. Congress passed 49 U.S.C. § 31139 in 1994 requiring that $750,000 be the minimum limit. The amount required has not changed in almost 27 years. However, in June 2020, the United States House of Representatives introduced the "Moving Forward Act" legislation that could have an impact on commercial motor carriers, claimants, and insurance companies. The "Moving Forward Act" would require motor carriers to have a minimum of $2,000,000 in liability insurance coverage.

After the Act's introduction, it quickly passed in the House, but was dead on arrival in the Senate. However, the recent election results have increased the likelihood of the "Moving Forward Act" or a similar bill. Even though $2,000,000 is more than double the current required amount, an amount up to $5,000,000 is rumored. Either way, it appears that an increase is likely.

There are many questions, including why change the requirement now and what consequences will an increase in liability requirements have on commercial motor carriers. One reason used to support increasing the minimum limits is the increase in the amount of claims against motor carriers coupled with the surge in jury verdicts.

In 2020, the American Transportation Research Institute (ATRI) conducted a study on the effects of large legal verdicts on the American trucking industry titled "Understanding the Impact of Nuclear Verdicts on the Trucking Industry." ATRI found jury verdicts since 2006 have skyrocketed. In 2006, only 4 jury verdicts exceeded $1,000,000. The amount increased to 26 cases from 2006 to 2010. There were 299 cases exceeding $1,000,000 from 2010 to 2018. Besides the increased number of cases, the amount of verdicts exceeding $1,000,000 also increased. ATRI found that in 2011, a jury returned a $40,000,000 verdict for a multiple fatality accident. However, in 2012, a single fatality accident generated an award of $281,000,000. Based on ATRI's litigation database, the average jury verdict increased from $2,305,736 to $22,288,000 from 2010 to 2018.

ATRI's report included additional factors that contributed to the rise in jury verdict amounts. These include failure by motor carriers to adhere to FMCSA guidelines and requirements. Specifically, the failure to perform background checks and conduct drug testing on drivers increased verdicts. For example, ATRI's report found that a driver with a history of alcohol or drug use had much greater difficultly prevailing on liability even when the facts were questionable.

As a result, tort reform is not the only answer for the surge in jury verdicts against motor carriers. In fact, it may not be the answer at all. Increasing minimum liability limits will also increase the premiums that motor carriers are required to pay. The increase in premiums takes away resources that motor carriers should allocate to additional safety measures and activities. Demonstrating to a jury that a motor carrier has not only complied but exceeded the minimum requirements by the Federal Motor Carrier Safety Administration is very beneficial in liability arguments. It can also help to avoid potential "nuclear" jury verdicts.

Nevertheless, it appears that a change is likely to come in the form of increased minimum liability insurance coverage. As a result, motor carriers should be prepared to balance the costs associated with increasing their policy limits and maintaining proper safety protocols as mandated by the Federal Motor Carrier Safety Administration.