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News on industry developments and transportation projects from the Transportation and Logistics Law Group at Dean & Fulkerson

ROAD REPORT

(INDUSTRY LEGAL NEWS)

■ **PRE-EMPLOYMENT SCREENING ENHANCED** The FMCSA announced plans to launch a new Driver Pre-Employment Screening Program which will allow commercial motor carrier companies to electronically access driver inspection and crash records as a part of the hiring process. The program is expected to begin in December 2009.

USDOT News Release 10/7/2009

■ **"UNDER PROTEST" AND LACK OF ACTUAL VIOLATION SINK STAA CLAIM** A driver's retaliatory discharge claim under the STAA failed in part where the driver either continued to drive, albeit "under protest" notwithstanding safety related complaints, thus not triggering the Act's "refusal to drive" protections, or failed to prove any condition constituting an actual FMCSA violation, thus not bringing himself within the Act's "complaint" protections.

Calhoun v DOL, 4th Cir 2009

■ **SINGLE STATE OPERATIONS FLSA-EXEMPT WHEN CONTINUATION OF INTERSTATE MOVE** Bus drivers transporting inbound passengers wholly within a single state from airports to cruise ships were deemed to be engaged in part of a continuous movement in interstate commerce and, therefore, within the FLSA's motor carrier overtime exemption despite the carrier's "incidental to air" exemption from economic regulation.

Walters v American Coach, 11th Cir 2009

ON THE DOCK

(CURRENT D&F PROJECTS)

■ **DETROIT AREA TRUCKING SEMINAR** D&F and the Michigan Trucking Association are co-sponsoring the annual Detroit Area Trucking Seminar on December 3. D&F and outside speakers will discuss Truck Safety Audits and Compliance, MPSC Compliance, Negotiating Truck Tickets, Worker Comp Issues, and more.

D&F Attorneys: Janet Lanyon, John Bryant, Neill Riddell

■ **HOUSEHOLD GOODS COLLECTION SUITS** D&F has initiated a program for collection of unpaid moving charges for a Michigan household goods carrier, including preparation of standard language for enforcement of Michigan HHG tariff requirements and establishing HHG carrier immunity from the Michigan Consumer Protection Act.

D&F Attorney: John Bryant

■ **"AUTOMOBILE TRANSPORTER" CHALLENGE** D&F is assisting a client contesting recent enforcement efforts to apply a novel definition of "automobile transporter" for purposes of determining permitted equipment lengths on both the Interstate System and state roads.

D&F Attorneys: Neill Riddell, Jerry Swift

FEATURE:
HITECH Act INCREASES
HIPAA COMPLIANCE REQUIREMENTS FOR
GROUP HEALTH PLANS

Page Two

HITECH ACT INCREASES HIPAA COMPLIANCE REQUIREMENTS FOR GROUP HEALTH PLANS

By Janet Lanyon

The February, 2009 stimulus included the Health Information Technology for Economic and Clinical Health (HITECH) Act. The HITECH Act imposed significant new compliance obligations on employers by expanding HIPAA privacy requirements on group health plans and other covered entities. Some of these new requirements are already in effect; others become effective February 17, 2010. A brief summary of these new requirements follows. For more detail, please read the full article on our web site at www.DFLaw.com.

■ **Increased Civil Penalties.** Civil penalties increase for HIPAA violations up to \$1,500,000 for multiple violations. There are a series of tiered penalties based upon the type of violation and other factors.

■ **New Notice Obligations for Prohibited Protected Health Information Disclosure.** If there has been a disclosure of protected

health information (PHI) in violation of HIPAA, the HITECH Act requires that affected individuals be notified of the privacy breach. There are a series of strict procedures on how notification must occur which include publication in broadcast media.

■ **Individual's Right to Restrict Disclosures of PHI.** The HITECH Act requires that a group health plan comply with an individual's request that his/her PHI not be disclosed if the disclosure is for payment or health care operations and the PHI pertains solely to an item for which the individual has paid the health care provider out of pocket and in full.

■ **Access to Electronic PHI.** If a group health plan uses an electronic health record containing an individual's PHI, the HITECH Act grants an individual access to his/her electronic PHI as well as the

ability to request that the PHI be transferred to a third party of their choice. The group health plan is only allowed to charge for the labor costs associated with producing that information.

■ **Right to Receive Accounting of PHI Disclosures.** Presently, an individual can obtain an accounting of disclosures by a group health plan of his/her PHI for the previous six years, except for disclosures made to carry out payment, treatment or health care operations. The HITECH Act broadens this right by extending it to disclosures for payment, treatment or health care operations during the previous three years, provided that the disclosures were made via an electronic health record.

■ **Tightening of "Minimum Necessary" Requirement.** Group health plans must make reasonable efforts to limit the disclosure of PHI to the "minimum necessary" when disclosing PHI or requesting it from another covered entity, but not for (1) disclosures to or requests by a health care provider for treatment; (2) disclosures made to the individual who is the subject of the PHI; (3) disclosures made pursuant to an authorization by the individual; and (4) disclosures that are required by law.

The Secretary of Health and Human Services will issue regulations prior to August 17, 2010, defining what constitutes the "minimum necessary". Until then, the "minimum necessary" is defined as either (a) a "limited data set" or (b) if needed by the group health plan, the "minimum necessary" to accomplish the intended purpose of the use, disclosure or request. A limited data set excludes most identifiers, such as name, address, social security number, telephone number, fax number, medical record number, health plan beneficiary number, or account number.

■ **New Business Associate Agreement Requirements.** HIPAA requirements, including many penalty provisions, will now apply directly to business associates. Business associate agreements must be revised to reflect these new requirements. Organizations that provide data transmission of PHI to a group health plan and certain other vendors that require access to PHI, must enter into business associate agreements with the covered entity.

ROAD REPORT

(CONTINUED)

■ **"TIME OF THE ESSENCE" PROVISION STICKS CARRIER FOR LATE DELIVERY** Although the carrier was only an hour or two late for a delivery, it agreed to a 2:00pm completion, and the consignees' dock refused delivery when busy loading outbound trailers. The carrier breached a transportation contract for delivery of time-sensitive advertising brochures which contained a "time is of the essence" provision. The court distinguished the obligation under that term from the obligation of "reasonable dispatch."

Donnelley v Vanguard Transportation, ND Ill 2009

■ **FMCSR VIOLATIONS NET FINES** Employing a driver who tested positive for a controlled substance, failing to conduct periodic random drug and alcohol testing, operating vehicles without the required federal minimum levels of insurance and operating vehicles that had not been inspected for safety defects as federally required netted the offending carrier a \$83,120 fine from the FMCSA.

LeHane's Bus Service, FMCSA 9/2009

ON THE DOCK

(CONTINUED)

■ **WITHDRAWAL LIABILITY** D&F is advising a motor carrier employer on issues relating to liabilities arising from participation in, and withdrawal from, a multi-employer pension plan.

D&F Attorney: Janet Lanyon

■ **HAZARDOUS MATERIALS PLACARDING** A hazardous materials carrier has recently requested D&F assistance in dealing with enforcement challenges to the proper display of hazmat placards.

D&F Attorney: Jim O'Brien

■ **WORKER COMP/RETALIATORY TERMINATION** D&F is defending a truck company sued by a former driver alleging his termination was in retaliation for an earlier worker comp claim.

D&F Attorney: Ian Hunter

The information contained in this newsletter is not intended to be legal advice. Readers should not act or rely on this information without consulting an attorney.