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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)

■ **Carrier OT Exemption Claim All Wet.** Transport of water within a single state from retention ponds to hydraulic fracking sites was not within the FLSA "motor carrier" overtime exemption. While single-state operations can qualify, the carrier/employer failed to prove a practical continuity of movement in interstate commerce when relying upon an internet article describing water movements in the local fracking industry to show water typically moves to the retention pond from points outside of the state. *Mazzarella v Fast Rig Support* (3rd Cir 2016)

■ **Identity Crisis? Broker Liable for Claim.** A property broker was properly considered a motor carrier subject to Carmack liability for loss and damage claims where the broker's website featured graphics of trucks bearing the broker's logo together with the statement "total transportation provider," and broker's emails to shipper affirmatively stated broker's responsibility for "picking up" and "delivering" shipper's cargo. *National Union Fire Ins v All American Freight* (DC SD Fla 2016)

■ **Wait a Minute, Man! State Driver Classification Preempted.** A Massachusetts statute having the practical effect of classifying all drivers as employees, and none as independent contractors, was deemed preempted by the Federal Aviation Administration Authorization Act's prohibition of state laws having impact on a motor carrier's prices, routes or services. The preempted provision would have denied independent contractor classification to any driver whose service is performed within the usual course of the carrier's business – which, arguably, is pretty much every driver. *Mass. Delivery Assn v Healy* (1st Cir 2016)

■ **Doctor Knows Best. ADA Dismissal Vacated.** A driver-applicant testing positive for Dexedrine taken under

ON THE DOCK

(CURRENT D&F PROJECTS)

■ **Detroit Area Trucking Seminar.** D&F and the Michigan Trucking Association are co-sponsoring the Eleventh Annual Detroit Area Trucking Seminar on Wednesday, December 7, 2016, at the Sheraton Hotel in Romulus. Invitations will go out in early November.

■ **MTA Annual Convention.** The MTA held their annual convention recently on Mackinac Island. The featured speakers included Pat Thomas, Chairman of the American Trucking Association, David Schaller from the North American Council for Freight Efficiency, and Curt Mistele from Dean & Fulkerson. A summary of Curt's presentation is included in this issue's feature article.

■ **IRS Classification Audit Success.** A trucking company subjected to an audit directed principally to the issue of whether owner-operators were properly classified as independent contractors for wage and benefit purposes successfully convinced the IRS, with the assistance of D&F, that the carrier's classification of the drivers was correct. (NTR/KMA)
D&F Attys: Neill Riddell, Keith Aretha

■ **FLSA Compliance.** D&F counselled on compliance with new FLSA salary level requirement as to supervisors.
D&F Attorney: Janet Lanyon

FEATURE: BUSINESS SUCCESSION PLANNING FOR TRUCKING COMPANIES

Page Two

FEATURE ARTICLE

BUSINESS SUCCESSION PLANNING FOR THE TRUCKING COMPANY

By Curt Mistele

Many companies within the trucking industry are family owned and operated. It is a unique aspect of the industry and part of the fabric of trucking.

Succession Planning is, simply put, an orderly process by which ownership and management of a business are transferred to the next generation in a tax-effective manner. Easy enough to define, yet somehow made complicated when it involves a family business. Families can be complicated. Succession Planning within a family-run business is about much more than just the money. And that's what makes it hard. How should you divvy up the business among multiple heirs? What if only some of the children are interested in working the family business? What if the next generation is unprepared? These are the kind of questions that owners of a family business dwell on.

To help simplify the complexities of Succession Planning within complicated families, the following are the "simple" steps toward transferring a family business to the next generation:

Step 1: Identify Your Goals. At this stage, forget the realities, the law, the tax issues, or family dynamics. Now is the time for brainstorming – what are your goals and dreams? What do you want the business to look like without you? Who should manage the business after you? When do you want to relinquish control? Are you comfortable relinquishing control? What in-

come do you need for a secure retirement? Identifying your goals will help you and all others involved establish a direction.

Step 2: Feasibility. Once you have identified your goals, it's time to look at how feasible it is. Are your dreams realistic? Legal? Smart? What are the tax ramifications? At this step, it helps to assemble a team of advisors (i.e., CPA, financial planner, attorney, key family members, etc.) that will help shape your dreams and goals. Develop actions steps and then outline a Succession Plan. At this step, it is also a good idea to talk to your family, any co-owners, and key employees. Nothing at this step is final. Now is a good time to listen and understand all who will be impacted by decisions.

Step 3: Shape and Develop the Succession Plan. Now it's time to fine tune the plan. The owner should have an idea of how much money he/she will receive in return for the sale of equity in the business. Who will hold what positions in the business after you leave, and what will their responsibilities include? Create a list of tasks for the team of advisors to complete and establish a timetable.

Step 4: Explore Options. No two businesses are alike. What may be an ideal Succession Plan for one business, may be hazardous to another. The options to consider in Succession Planning are numerous. The following are merely a listing of commonly used strategies. Each has its own

strengths and weaknesses. Keep in mind that the law changes often. A court ruling, an IRS regulation or a change in tax rate may significantly change a strategy.

- Family Limited Partnerships or Family LLC
- Trusts
- Stock Gifts
- Grantor Retained Annuity Trusts (GRAT)
- Grantor Retained Unitrusts (GRUT)
- Supplemental Executive Retirement Plan
- Buy-Sell Agreement
- Stock Redemption Agreement
- Cross Purchase Agreement
- Stock Sales
- ESOP
- Sale to outside entity
- Liquidation
- Passed thru an Estate

Step 5: Implementation. Start drafting the business plan and estate plan documents. Continue coordinating with your team of advisors. Your business advisors will likely need to coordinate with your personal estate planning advisors. At this step, it is wise to keep the family and key business employees up to date. Now is the time to understand exactly what the plan is, eliminate all questions, and really focus on how the business will transition.

Step 6: Execution. Finalize the documents, sign the documents, fund the trust (if applicable), and begin executing the plan. Some options in Step 4 may require immediate action, and others are more structured. It helps to revisit the plan regularly. Remember, things change over time, so it's important to revisit the plan every couple of years or when unforeseen changes impact you or the business.

Most trucking company owners have spent the majority of their lives building their business. Deciding when and how to transition out of the business can be overwhelming and mentally draining. Working with a team of advisors who bring focus to a potentially chaotic process allows business owners to continue doing what they do best – run their companies.

ROAD REPORT

(CONTINUED)

prescription for treatment for suspected narcolepsy complied with directions by a carrier's physician to return after switching to Provigil, a drug the carrier's physician deemed to be non-disqualifying. After making the switch, however, the driver was denied employment due to previous findings of Dexedrine use/abuse. The driver's ADA claim was not precluded for failure to exhaust FMCSR medical dispute procedures because there was no "dispute" as to the driver's qualifications while taking Provigil and, thus, those procedures were never triggered.

Lisotto v New Prime (4th Cir 2016)

ON THE DOCK

(CONTINUED)

■ **Motor Carrier Exemption.** D&F assisted a client in fashioning an argument successfully convincing federal Wage & Hour that drivers performing switching duties at customer locations are not subject to FLSA overtime requirements by virtue of the "motor carrier exemption."

D&F Attorney: Neill Riddell

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.