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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)

■ **TIMBER! FLSA Defense Falls.** An Employer's "Motor Carrier Exemption" defense to driver FLSA overtime claims was given the axe when the court held that there was no evidence establishing the required interstate character of the subsequent transportation of lumber mill products derived from logs hauled by drivers from the field to mills in the same state.

Sec of Labor v Timbnerline South
(6th Cir 2019)

■ **Matter of Perspective.** Citing the FLSA Motor Carrier Exemption to reject driver overtime claims, a court held that it was required to evaluate the Exemption's applicability on a company-wide basis rather than on an employee-by-employee basis. Even though 5 of the company's 52 drivers never drove interstate, it was deemed dispositive that, on a company-wide basis, and consistent with described job duties, all drivers could reasonably have been expected to drive interstate.

Rychorcewicz v WellTec Inc
(5th Cir 2019)

■ **Insurance: Better Read that Again.** A leased driver's injuries were covered by a liability policy issued to a truck company containing an "injury to employee" exclusion even though the leased driver fell within a "statutory employee" definition in the Federal Motor Carrier Safety Rules. Per the court, the policy contained its own definition of "employee" which included no reference to the federal regulations, thus providing no indication that the parties intended to use the "statutory employee" definition.

Canal Insurance v Butler
(USDC ND Ala 2019)

ON THE DOCK

(CURRENT D&F PROJECTS)

■ **Going West.** For the second consecutive year, D&F's Transportation Group has been asked to provide speakers at the West Michigan Transportation Seminar, hosted by the Michigan Trucking Association and the MTA West Michigan Council of Safety Management. D&F's Bob Cleary, Eric Wagman, Kevin Summers and Neill Riddell are covering a wide range of topics of keen interest to the transportation industry.

■ **Collecting Freight Charges.** D&F recently assisted a trucking client in collecting unpaid freight charges by means of first asserting a claim against a contractor's bond on a construction project.

D&F Attorney: Kevin Summers

■ **Cargo Claim Investigation Pays Off.** D&F's thorough investigation in defense of a cargo claim revealed the load had already been rejected for non-conformity by claimant's customer prior to the alleged loss and, therefore, had a claim value only as scrap rather than the \$330k demanded.

D&F Attorney: Karen Liberty Ludden

■ **Mitigating Claim on Customs Bond.** D&F has recently been asked to provide assistance to address a significant penalty asserted against a carrier's bond by US Customs alleging failure to properly document final disposition of in-transit merchandise.

D&F Attorney: Jim O'Brien

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MICHIGAN'S PAID MEDICAL LEAVE ACT - EFFECTS ON TRUCKING EMPLOYERS

By Janet E. Lanyon

In late December, 2018, Michigan's Paid Medical Leave Act (PMLA) was enacted, replacing a ballot proposal on the same issue approved in the November, 2018 election. There since has been considerable confusion among trucking industry employers about how the PMLA affects them. The goal, here, is to shed light on some of the issues involved.

50 or More Employees. A company employing fewer than 50 persons is not covered by the PMLA. To make this determination, all full-time, part-time and temporary employees are counted, whether or not they work in Michigan, *and whether or not they would be eligible for PMLA benefits.* Also, because the PMLA treats a person as an employee if the IRS requires treatment as a W-2 employee, a "leased employee" or an owner-operator may also count as an employee if he/she would be classified by the IRS as your employee rather than an independent contractor.

No Automatic Exemption for Truck Drivers. There are several exclusions from the PMLA's definition of "Eligible Employee." None automatically include truck drivers. For example, employees exempt from the

minimum wage and overtime pay requirements of the Fair Labor Standards Act (FLSA) because they satisfy the professional, managerial, administrative or outside sales employee exemptions are not eligible for PMLA leave. While interstate drivers are exempt from the FLSA overtime pay requirement, that exemption arises under an entirely different FLSA section – the so-called "Motor Carrier Exemption." Drivers, therefore, are not excluded from the PMLA's "Eligible Employee" definition by virtue of the FLSA.

Work Location. An employee whose primary work location is outside of Michigan is not eligible for PMLA leave. That said, the Act does not explain how to determine "primary work location." One might assume that a truck driver's "primary work location" is the driver's truck and that, if the driver's duties require more time outside than within Michigan, the driver is not PMLA eligible. Under this theory, at least some interstate drivers could be carved out from an employer's PMLA obligations. Nonetheless, employers making this argument will likely need driver-by-driver analysis, with detailed records of individual employee activities, calculating the percentage of each driver's non-Michi-

gan time. Keep in mind that, ultimately, a different method of determining an employee's primary work location may be adopted by the Michigan Department of Labor, such as the location of an employee's "home base," reporting location or "domicile." Importantly, any employer position that employees are "located" in other states may give rise to *unintended* consequences. Could the company then be exposed to other states' labor laws? Taxes? Employers should contact their labor counsel for help thinking through questions of any employee's "primary work location."

Satisfying Complex Leave Accrual and Availability Requirements With Existing Paid Leave Policies. The PMLA requires employers to accrue one hour of PMLA leave for every 35 hours worked by a covered employee, but not more than 1 hour per calendar week. The employer may limit an employee's PMLA leave accrual to 40 hours per "benefit" year (which can be any consecutive 12 month period). In addition to allowing delay of leave accrual until completion of 90 days' employment, employers have 2 options for making accrued PMLA leave available: (i) allow leave use only as it accrues (40 hour cap) but allow unused leave up to 40 hours to be carried forward to next benefit year; or (ii) prohibit any "carry forward" but "front load" 40 leave hours at start of each benefit year. The Act creates a "rebuttable presumption" of PMLA compliance if the employer provides at least 40 hours "paid leave" each benefit year useable for any PMLA defined purposes. There is no guidance on what would rebut the created presumption, and special care should be taken to review PMLA leave substitutes for compliance with other PMLA requirements, such as the not so simple notice and documentation rules.

(Space considerations constrain fuller discussion of this important new Act. For Janet Lanyon's more detailed PMLA review, click [here](#) or visit our website media center at www.dflaw.com)

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.

ROAD REPORT

(CONTINUED)

■ **Property Broker Should Have Known Better.** Following a personal injury accident, the property broker who contracted the truck company sought dismissal of a negligent hiring claim. Finding sufficient evidence of negligence for a jury, the court said the broker knew the carrier was a newly licensed company. Because new entrants have a statistically higher rate of collisions, the broker was on notice to go beyond mere verification of authority/insurance which, if done, may have revealed violations calling into question whether the carrier was "competent."

*Scott v Milosevic
(USDC ND 2019)*

ON THE DOCK

(CONTINUED)

■ **Contract Review.** D&F has recently assisted a motor carrier client in reviewing agreements submitted by 3rd party logistics companies in order to identify and guard against unintended contract exposures.

D&F Attorney: Neill Riddell

■ **Business Organization.** D&F attorneys recently assisted a foreign based client establish a US subsidiary intended to market and provide freight bill auditing services.

*D&F Attorneys: Keith Aretha
Jerry Byrd*