

## **Motor Carrier Service and Federal and State Overtime Wage Coverage**

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I. INTRODUCTION

One of the nations basic labor laws, the Fair Labor Standards Act of 1938,<sup>1</sup> was designed to correct and eliminate labor conditions detrimental to the maintenance of the minimum standards of living necessary for the health, efficiency, and general well-being of workers.

The numerous and complex provisions of the Act were all designed (1) to establish minimum wage levels to assure wage earners a minimum standard of living;<sup>2</sup> (2) to encourage the employment of the maximum number of persons by requiring a premium or penalty rate for work above a weekly maximum number of hours;<sup>3</sup> (3) to restrict and/or eliminate oppressive child labor provisions;<sup>4</sup> and (4) to assure that male and female workers subject to the minimum wage provision receive equal pay to work requiring equal skill, effort, responsibility, and performed under similar working conditions.<sup>5</sup>

Now in its seventh decade, the FLSA has had a significant role in the country’s intent to give greater dignity, security, and economic freedom to millions of workers and has undoubtedly played an influential part in the economic growth of our country.

II. BASIS OF LIABILITY

An employer’s liability under the Act is dependent upon the existence of an employer-employee relationship. The term “employ” is de-

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1. Fair Labor Standards Act of 1938, Pub. L. No. 718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (2007)) [hereinafter the Act or FLSA].

2. *Supra* note 1, at 1062-63 (current version at 29 U.S.C. § 206 (2007)). Effective July 24, 2007, the federal minimum wage for non-exempt employees is \$5.85 per hour. If a state has a minimum wage law and an employee is subject to both federal and state law, the employee is entitled to the higher of the two minimum wages. U.S. Department of Labor, *Wages - Minimum Wage*, [www.dol.gov/dol/topics/wages/minimumwage.htm](http://www.dol.gov/dol/topics/wages/minimumwage.htm) (last visited Jan. 20, 2008).

3. *Supra* note 1, at 1063 (current version at 29 U.S.C. § 207 (2007)). All covered workers must be paid at least one and one-half times their regular rate of pay for all hours worked in excess of 40 in a work week. 29 U.S.C. § 207(a)(1) (2007).

4. *Supra* note 1, at 1067 (current version at 29 U.S.C. § 213 (2007)). Sixteen years is the minimum age for most employment within the scope of the Act. *See* 29 U.S.C. § 213 (2007). In the case of motor vehicle drivers and outside helpers, the minimum age is 18 years. 29 C.F.R. § 570.120 (2007).

5. *Supra* note 1, at 1062-63 (current version at 29 U.S.C. § 206 (2007)). Compensation differentials in respect to employees not covered by the minimum wage provisions of the Act would be precluded by the Civil Rights Act of 1964. *Compare* Pub. L. No. 88-352, 78 Stat. 241, 253-66 (codified as amended in scattered sections of 49 U.S.C.) *with* 29 U.S.C. § 206 (2007).

fined in the Act as “. . . to suffer or permit to work.”<sup>6</sup> As a result of judicial construction, the term has been held to mean any physical or mental exertion controlled or required by the employer and pursued necessarily or primarily for the employer and his or her business.<sup>7</sup>

The mere label “independent contractor” does not remove a worker from protection of the Act.<sup>8</sup> There must be a bona fide independent contractor relationship to render the Act inapplicable.<sup>9</sup>

A concise and clear test to determine whether “an employment relationship exists” was set forth in *Goldberg v. Warren Bros. Road Co.* and depends upon:<sup>10</sup>

- (1) the extent to which the services in question are an integral part of the ‘employer’s’ business;
- (2) the amount of the ‘employee’s’ investment in facilities and equipment;
- (3) the nature and degree of control retained or exercised by the ‘employer’;
- (4) the ‘employee’s’ opportunities for profit or loss;
- (5) the amount of initiative, skill, judgment or foresight required for the success of the claimed independent enterprise; and
- (6) the permanency and duration of the relationship.

The determination of whether an employer-employee relationship exists, in fact, as well as in name, is an intensive process which requires considered judgment in applying the law to the facts.

In the motor carrier industry, the “employment classification” determination is frequently critical because of the high incidence of use of “owner-operators.”<sup>11</sup> Owner-operators evolved as the recognition of independent contractor relationship grew in the federal Leasing and In-

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6. 29 U.S.C. § 203(g) (2007).

7. See *Walling v. Jacksonville Terminal Co.*, 55 F. Supp. 302, 304 (S.D. Fla. 1944), *aff’d*, 148 F.2d 768 (5th Cir. 1945).

8. *Rutherford Ford Corp. v. McComb*, 331 U.S. 722, 729 (1947) (citing *Walling v. Am. Needlecrafts*, 139 F.2d 60 (6th Cir. 1943)).

9. See *Maddox v. Jones*, 42 F. Supp. 35, 42 (N.D. Ala. 1941).

10. *Goldberg v. Warren Bros. Rd. Co.*, 207 F. Supp. 99, 102 (D. Me. 1962) (citing *Mitchell v. Nutter*, 161 F. Supp. 799, 805 (D. Me. 1958)).

11. See James C. Hardman, *Workers’ Compensation and the Use of Owner-Operators in Interstate Motor Carriage: A Need for Sensible Uniformity*, 20 *TRANSP. L.J.* 255, 256 (1992). The term “owner-operator” reflects individuals who lease motor carrier equipment to a motor carrier with driver services. *Id.* Normally, the lessor performs the driver service. See *id.* The exact number of owner-operators is unknown as no governmental or private entity accumulates such data, *PORT JOBS, BIG RIG, SHORT HAUL: A STUDY OF PORT TRUCKERS IN SEATTLE 13* (2007), [http://www.portjobs.org/bigrig\\_shorthaul.pdf](http://www.portjobs.org/bigrig_shorthaul.pdf), but it can reasonably be said that the number exceeds 750,000. Donna Ryun, *It’s Your Business*, *LAND LINE MAGAZINE*, July 2005, available at [http://www.landlinemag.com/Archives/2005/Jul05/bottom\\_line/its\\_your\\_business.htm](http://www.landlinemag.com/Archives/2005/Jul05/bottom_line/its_your_business.htm). One trade association has filed in court documents that it has a membership in excess of 140,000. Motion to Dismiss at 11, *Owner-Operator Indep. Drivers Assoc., Inc. v. United Van Lines*, No. 4-06-cv-00219-JCH (D. Mo. 2007).

terchange Regulations<sup>12</sup> and by state common law and statutes in virtually all states.<sup>13</sup> There are distinct advantages in utilizing owner-operators<sup>14</sup> and, in the truckload segment of the industry, most motor carriers use such persons exclusively while other carriers operate a fleet utilizing driver-employees as well as owner-operators.<sup>15</sup>

Since the “employment classification” issue arises in many other phases of motor carrier operations,<sup>16</sup> it is important to consistently maintain the status of the individuals proverbially “across the board.” Otherwise, it would be impossible to operate effectively or economically.

The issue could also arise in the context of non-employee individuals who might not fall under the motor carrier exemption as a driver, but could still be subject to the Safety Regulations of the Department of Transportation.<sup>17</sup>

12. See 49 C.F.R. § 376.12(c)(4) (2007). For a discussion of the underlying reasons for this section, see Petition to Amend Lease and Interchange of Vehicle Registrations, 8 I.C.C.2d 669 (1992).

13. While the concept is well-recognized, its application to motor carrier operations has caused many problems. See Hardman, *supra* note 11, at 255-74.

14. CHARLES A. TAFT, *COMMERCIAL MOTOR TRANSPORTATION* 245 (Richard D. Irwin, Inc., 3rd ed. 1961). In the early years of trucking in this country, many entrants were small and undercapitalized and by using owner-operators they could avoid the capital burden of purchasing equipment. See *id.* at 233, 245. Likewise, during the history of entry regulation, carriers frequently were limited significantly as to what commodities they could haul and territory they could serve. See *REGULATION AND DEREGULATION OF THE MOTOR CARRIER INDUSTRY* 16-25 (John Richard Felton & Dale G. Anderson eds., 1989). These limitations frequently led to extreme peaks and valleys in their businesses. See *id.* If they owned their equipment and used driver-employees, varying amounts of equipment would be idled and drivers unemployed during the down cycle. See *id.* Owner-operators, on the other hand, at the down cycle, would travel the “circuit” and seek a carrier who was experiencing a different business cycle. See MICHAEL H. AGAR, *THE DILEMMAS OF INDEPENDENT TRUCKING: INDEPENDENTS DECLARED* 45-46 (Smithsonian Institution Press 1986). Since many founders of carriers were embedded with the entrepreneurial spirit and the feeling that if they worked hard to become their “own boss” and succeeded, that same spirit would be instilled in current owner-operators. See *id.* This instinct is true today as many owner-operators expanded and operate a fleet of vehicles or ultimately become a carrier. See *id.*

15. See David Cullen, *Rebirth of the Owner-Operator*, *FLEET OWNER*, August 1, 2004, [http://fleetowner.com/management/feature/fleet\\_rebirth\\_owneroperator/](http://fleetowner.com/management/feature/fleet_rebirth_owneroperator/). The mixed fleet is a rather recent phenomenon which generally arose because of the shortage of drivers which has existed in the industry in the past ten years. See *id.* Using each type of operators allows the motor carrier to tap two sources of manpower. See *id.*

16. “Employment classification” issues, for example, arise in terms of workers’ compensation, unemployment compensation, affirmative action, ERISA, and employment taxes. See James C. Hardman, *Unemployment Compensation and Independent Contractors: The Motor Carrier Industry as a Case Study*, 22 *TRANSP. L.J.* 15, 17 (1994).

17. This could occur, for example, in the case of loaders. JAMES C. HARDMAN, *THE FAIR LABOR STANDARDS ACT AND MOTOR CARRIER OPERATIONS* 38-40 (Pilgrim Enterprises, Ltd. 1974).

### III. GENERAL COVERAGE OF THE ACT

Once it is determined that an “employer-employee relationship exists, it is essential to determine if the employee is covered by the Act. The Act applies to employees, not specifically exempt,<sup>18</sup> who are:

- A. Engaged in commerce;<sup>19</sup> or
- B. Engaged in the production of goods for commerce;<sup>20</sup> or
- C. Employed in an enterprise engaged in commerce or the production of goods for commerce.<sup>21</sup>

The first two standards are determined on the basis of the duties performed by the individual employee, whereas the third standard is based on and determined on the business of the “enterprise.” The standards are applied liberally and, thus, a significant number of businesses and individuals fall within the Act.

Application of these standards can be seen, for example, as they relate to the operations of motor carriers.

#### A. ENGAGED IN COMMERCE

It is generally conceded that employees of motor carriers handling freight, which has crossed a state line or moved from or to a foreign country, are within the Act’s coverage because their employment is “engaged in commerce.”<sup>22</sup> Questions have arisen, however, in respect to employees of distributors and wholesalers.

In *Walling v. Jacksonville Paper Co.*,<sup>23</sup> the court held that the Act would apply to employees of local distributors or wholesalers of goods if they spend a substantial part of their time in (1) procuring or receiving goods from other states, or (2) handling or delivering to the local customers goods imported from other states in response to either special orders or a pre-existing contract or understanding with the customer. Even though the Supreme Court held that “substantial” time must be devoted to such activities, it has been held that a plant manager is “engaged in commerce” when he spent one-half hour per week, out of a work week of 59½ hours, unloading and storing out-of-state shipments of goods to be distributed later within the state.<sup>24</sup>

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18. An exemption exists from the overtime provision, for example, for employees whose hours of service and qualifications are subject to regulations by the Secretary of Transportation under the Motor Carrier Act of 1935. 29 USC § 213(b) (2007). For other exemptions, see HARDMAN, *supra* note 17, at 31-71.

19. 29 U.S.C. §§ 206(a)-(b), 207(a)(1) (2007).

20. *Id.*

21. *Id.*

22. 29 C.F.R. §§ 776.9-776.10 (2007).

23. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 566-67, 572 (1943).

24. *Wirtz v. Durham Sandwich Co.*, 367 F.2d 810, 812 (4th Cir. 1966).

This latter decision appears to be more consistent with the general understanding that the Act should apply on the basis of the activity involved and not the extent to which the employee is engaged in the activity.<sup>25</sup> In any event, it appears that employees involved in the local delivery and handling of goods are considered engaged in commerce if the goods are imported from a second state or country in response to a special order, pre-existing contract, or other understanding with the customer.<sup>26</sup>

Although coverage of the Act might not be extended under the “engaged in commerce” standard of the Act if there is not a pre-existing or special order, it seems clear that any movement of goods, which initially came from outside the state, would be covered under the Act as a result of the “engaged in the production of goods for commerce” standard.

#### B. ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE

The second standard is a broad one and is particularly so in respect to motor carrier operations, as the term “engage in the production of goods for commerce” has been held specifically to include the transportation of goods for commerce.<sup>27</sup>

The extent of the Act’s coverage can be seen by the decision in *Wirtz v. Ray Smith Transport Co.*<sup>28</sup> In this case, the Act’s coverage extended to the drivers of an intrastate hauler of gasoline, kerosene, and diesel fuel products that were transported solely within one state.<sup>29</sup> Although the carrier was not engaged in interstate commerce, the court held that the carrier engaged in the “production of goods for commerce” since the lading was subsequently used in interstate transportation or as fuel for equipment engaged in the building and maintenance of interstate highways, waterways and railroads.<sup>30</sup> The courts also specifically noted that if the product can reasonably be expected to move in interstate commerce,

25. See *Davis v. Goodman Lumber Co.*, 133 F.2d 52, 53-54 (4th Cir. 1943); *Kruger v. Los Angeles Shipbuilding and Drydock Corp.*, 74 F. Supp. 595, 598-98 (S.D. Cal. 1947).

26. Transportation employers of retail businesses such as truck drivers or truck drivers’ helpers who regularly and recurrently cross state lines to make deliveries to or to pick up goods for their employers; or who regularly and recurrently pick up at railheads, air, bus, or such other terminals, goods originating out-of-state, or deliver such goods destined to points out-of-state; and dispatchers who route, plan, or otherwise control such out-of-state deliveries and pick ups are engaged in interstate commerce within the meaning of the Act. See 29 C.F.R. § 779.114 (2007).

27. *Wirtz v. Instravaia*, 375 F.2d 62, 65 (9th Cir. 1967).

28. *Wirtz v. Ray Smith Transp. Co.*, 280 F. Supp. 54, 55-57 (E.D. Tex. 1968), *aff’d* 409 F.2d 954 (5th Cir. 1969); see also *Hodgson v. Erving*, 64 Lab. Cas. (CCH) ¶ 44,621, 44,621-624 (S.D. Tex. 1971).

29. *Ray Smith Transp. Co.*, 280 F. Supp. at 55-59.

30. *Id.*; see also *Wirtz v. Crystal Lake Crushed Stone Co.*, 327 F.2d 455, 457-459 (7th Cir. 1964); *Goldberg v. Morris*, 205 F. Supp. 302, 303-305 (E.D. Ky. 1962).

in determining whether the product was produced for commerce it is immaterial that the actual interstate movement is several steps removed from the actual operation involved.<sup>31</sup>

This same principle has been applied in other cases involving motor carrier operations. In *Griffin Cartage Co. v. Walling*, for example, the employees of a cartage company were found to be within the provisions of the Act where 90% of the employer's business consisted of transporting parts from one manufacturing plant to another manufacturing plant within the same state for additional processing and then to a manufacturer within the same state to be placed in automobiles sold and shipped in interstate commerce.<sup>32</sup>

The broad scope of coverage under this standard can also be seen in decisions relating to the transportation of fuel and in-flight meals to military or commercial aircraft destined to make flights in interstate or foreign commerce. Such operations have been held to be included with the term "engaged in the production of goods for commerce."<sup>33</sup>

### C. "ENTERPRISE" CONCEPT OF COVERAGE

The "enterprise" concept of coverage is not predicated on the activities of the individual employees, but rather on the business of the enterprise or establishment. An enterprise, as defined in the Act,<sup>34</sup> consists of (1) related activities performed, (2) either through unified operation or common control, (3) by any person<sup>35</sup> for a common business purpose. It does not matter whether the activities are performed in one or more establishments or by one or more corporate or other organizational units. An enterprise shall be deemed to be "engaged in commerce or in the production of goods for commerce" if it has employees engaged in commerce or in the production of goods for commerce or employees handling, selling, or otherwise working on goods or materials that have moved in or been produced for commerce by any person; and which:<sup>36</sup>

- (1) is engaged in any of the following businesses: laundering, cleaning or repairing clothing; construction or reconstruction, or both; or the operation of a hospital, nursing home, or a school for mentally or physically handicapped or gifted children; or elementary or secondary school or

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31. See *Ray Smith Transp. Co.*, 280 F. Supp. at 55-59.

32. *Giffin Cartage Co. v. Walling*, 153 F.2d 587, 587 (6th Cir. 1946).

33. See *Wirtz v. B.B. Saxton Co.*, 365 F.2d 457, 461 (5th Cir. 1966); *Wallace v. Tenn. Airmotive, Inc.*, 238 F. Supp. 206, 209 (E.D. Tenn. 1965); *Wirtz v. Dunmire*, 239 F. Supp. 374 (W.D. La. 1965).

34. 29 U.S.C. § 203(r)(1) (2007).

35. "Person" is defined as an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons. 29 U.S.C. § 203(a) (2007).

36. *Id.* at § 203(s)(1)(A)(i).

- college, whether public or private, or operated for profit;<sup>37</sup> or  
 (2) has an annual gross volume of sales of at least the amount prescribed by the Act.<sup>38</sup>

A specific exception is provided for family-operated establishments. If the only employees of an establishment are the spouse, parents, or children of the owner, the establishment will not be covered as an enterprise or part of an enterprise for purposes of coverage of the Act.<sup>39</sup>

As a practical matter, any motor carrier – unless “family operated,” or not having revenue in the amount prescribed – will find that its employees are covered under this standard unless it is engaged solely in intrastate commerce including the handling of goods of the same nature. Seldom will both conditions exist.

#### IV. EXEMPTIONS IN GENERAL

The exemption provisions of the Act are varied and complex. In some instances they suspend all of the four standards, *i.e.*, minimum wage, equal pay, overtime and child labor, whereas in other instances they merely exempt one or more of the standards.

Furthermore, some of the exemptions apply to all employees while others only apply to certain employees and may be based on the nature of the duties performed by the individual employee, or upon the nature of the employer’s duties.<sup>40</sup>

In determining whether an exemption exists, the employer must prove the applicability of all exemptions and that all exemptions are subject to a rule of strict construction and that any doubt will be resolved in favor of the employees.<sup>41</sup> It should also be noted that a federal exemption may not preempt a state law regulating the same subject.<sup>42</sup>

The remainder of this paper shall focus on the Act’s motor carrier exemption and other exemptions specifically related to motor transportation.

37. *Id.* at § 203(s)(1)(B).

38. The amount prescribed is \$500,000.00 “exclusive of excise taxes at the retail level that are separately stated. *Id.* at § 203(s)(1)(A)(ii).

39. *Id.* at § 203(s)(2).

40. In addition, an exemption may also arise because of the definition of the term “employer” under which any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization is excluded. *Id.* at § 203(d).

41. See generally *Glowienke v. Hawaiian Dredging Co.*, 84 F. Supp. 678, 679 (N.D. Ill 1949).

42. Although the Act specifically speaks of minimum wage or maximum workweek or child labor provisions not being pre-emptive, it should be noted that no mention is made of overtime exemptions. See 29 U.S.C. § 218 (2007).



## V. THE MOTOR CARRIER EXEMPTION

A unique exemption in respect to motor carrier operations arises under Section 13(b)(1) of the Act<sup>43</sup> which provides an overtime pay exemption<sup>44</sup> for employees whose hours of service and qualifications are subject to regulation by the Secretary of Transportation under Title 49 of U.S.C.<sup>45</sup>

The Department of Transportation's<sup>46</sup> jurisdiction to regulate hours of service extends to all employees whose activities affect the safety of operation of interstate motor vehicles.<sup>47</sup> The exemption is based on the nature of the duties and not the proportion of time spent in performing such duties.<sup>48</sup> Thus, an employee may be within the exemption even though portions of his duties do not affect safety.<sup>49</sup> Likewise, the exemption will apply regardless of whether DOT has actually exercised its authority to regulate employment. It is the existence, not the exercise, of the authority that determines the scope of the exemption.<sup>50</sup>

Generally, the following classes of motor carrier employees are exempt under this provision of the Act:

1. Drivers of motor vehicles operating in interstate commerce;
2. Drivers' helpers on such vehicles;
3. Mechanics who repair and service such vehicles;
4. Loaders of such vehicles.<sup>51</sup>

Care must be taken, however, in determining the scope of the exemption as it is based on the actual work done and not on the basis of the title applied to the employee.<sup>52</sup> Likewise, there appear to be some variations from the strict rules previously alluded to, namely, that the amount of time spent in such duties does not bear on the question of the exemption's application.

The question of the time spent in duties within DOT's jurisdiction has arisen in many cases involving drivers and their helpers.

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43. 29 U.S.C. § 213(b)(1) (2007) [hereinafter Motor Carrier Exemption or MCA].

44. *Walling v. Palmer*, 67 F. Supp. 12, 14 (M.D. Pa. 1946) (holding employees are still subject to the minimum wage provision of the Act).

45. See 49 U.S.C. § 31502 (2007). See generally 29 C.F.R. §§ 782.0 – 782.8 (2007).

46. Hereinafter referred to as "DOT".

47. See *U.S. v. Am. Trucking Ass'n*, 310 U.S. 534, 549 (1940).

48. *Levinson v. Spector Motor Serv.*, 330 U.S. 649, 681 (1947); *Quinn v. Earl Bray, Inc.*, 108 F. Supp. 355, 358 (W.D. Okla. 1952).

49. *Tobin v. Mason Dixon Lines, Inc.*, 102 F. Supp. 466, 469 (E.D. Tenn. 1951), *appeal dismissed*, 202 F.2d 425 (6th Cir. 1953).

50. *Levinson*, 330 U.S. at 675; *Morris v. McComb*, 332 U.S. 422, 436 (1947).

51. 29 C.F.R. § 782.2 (b)(3) (2007).

52. *Quinn*, 108 F. Supp. at 357.

## A. DRIVERS AND DRIVER HELPERS

In *Walling v. Comet Carriers*, for example, a driver, who engaged in interstate movements for 3 hours a week, was found not to be within the exemption because of the minimal time involved in the affected operations.<sup>53</sup> A similar decision was rendered in *Walling v. Griffin Cartage Co.*, where the driver spent one percent of his time driving in interstate commerce.<sup>54</sup> On the other hand, in *Southland Corp. v. Shew*, a driver who spent three or four percent of his time driving in interstate commerce was found to be within the exemption.<sup>55</sup>

At best, it can be said that the exemption will apply to drivers except where the amount of interstate driving is sporadic and unsubstantial in terms of time and that the interpretation of this standard will vary according to the court deciding the matter.

*Starrett v. Bruce*<sup>56</sup> is another interesting example of the applicability of the exemption to driver personnel. In this case, the driver was engaged in crushing stone and delivering it within the same state to contractors building and maintaining roads.<sup>57</sup> The employer acknowledged coverage under the Act, but claimed the motor carrier exemption was applicable because it held interstate authority from the Interstate Commerce Commission;<sup>58</sup> held itself out to perform interstate service; and had done so on an irregular basis prior to the driver's employment. The court held the exemption applicable because the driver was subject to be assigned to hauling an interstate shipment.<sup>59</sup>

In *Baird v. Wagoner Transportation Co.*,<sup>60</sup> an opposite result was reached in a similar factual situation. The driver hauled fuel intrastate from a marine terminal to the company's bulk plants, service stations, and ultimate consumers.<sup>61</sup> The carrier held authority from the Interstate Commerce Commission but had not used the authority. Refusing to follow the *Starrett* case, the Court held that the mere fact that a carrier holds

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53. *Walling v. Comet Carriers*, 151 F.2d 107, 111 (2nd Cir. 1945).

54. *Walling v. Griffin Cartage Co.*, 62 F. Supp. 396, 400 (E.D. Mich. 1945), *aff'd.*, 153 F.2d 587 (6th Cir. 1946); *see also* *West Ky. Coal Co. v. Walling*, 153 F.2d 582, 586 (6th Cir. 1946).

55. *Southland Corp. v. Shew*, 248 F. Supp. 12, 15 (N.D. Tex. 1965), *aff'd.*, 370 F.2d 376 (5th Cir. 1966).

56. *Starrett v. Bruce*, 391 F.2d 320 (10th Cir. 1968).

57. *Id.* at 322.

58. The Interstate Commerce Commission [ICC] was the federal regulatory agency that regulated for-hire interstate motor carriers, with some exceptions, under the Motor Carrier Act of 1935. Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 (1935). The ICC was abolished and its functions were essentially transferred to the Surface Transportation Board, effective January 1, 1996. 49 U.S.C. §§ 701-702 (2007).

59. *Starrett*, 391 F.2d at 324.

60. *Baird v. Wagoner Transp. Co.*, 425 F.2d 407 (6th Cir. 1970).

61. *Id.* at 409.

such authority is not enough to bring the carrier within the authority of the Commission.<sup>62</sup>

The *Baird* decision seemingly overlooked the fact that under the Motor Carrier Act of 1935, a carrier with authority is subject to the authority of the Commission until such time as the authority is revoked.<sup>63</sup> The *Baird* case is also interesting, however, from another viewpoint. In order to reach the decision rendered, it was necessary to determine that the transportation involved was intrastate in character and thus not performed pursuant to the authority from the Commission.<sup>64</sup> This issue arose despite the fact that the parties conceded the movement was interstate for purposes of the Act. This emphasizes the broad scope of coverage and liberal interpretation of the term “interstate commerce” under the Act and the importance of not relying on interpretations under other statutes.

The *Baird* court reached the conclusion that the movement from the bulk plant to the various final destinations was intrastate because the fuel that came from the second state lost its identity at the bulk plant.<sup>65</sup> The question of when a sufficient interruption has occurred to cause the transportation to be intrastate rather than interstate and thus outside the scope of the exemption is, of course, a factual question.

One controversial area involves whether spotters or “hostlers” are within the Motor Carrier Exemption. In *Walling v. Gordon’s Transportation, Inc.*,<sup>66</sup> drivers who were spotting tractor and trailers at the carrier’s dock were held to be outside the exemption on the basis that the drivers merely moving tractor and trailers for loading or unloading or for repairs were not engaged in activities directly affecting safety.<sup>67</sup>

In *Walling v. Silver Fleet Motor Express*,<sup>68</sup> on the other hand, yard drivers were found to be within the exemption when the tractors and

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62. *Id.* at 413; *contra* *Wirtz v. Caddell Transit Corp.*, 253 F. Supp. 378 (W.D. Okla. 1966).

63. Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 (1935). Currently, each registration (*i.e.* authority) is effective from the date specified by the Secretary of Transportation and remains in effect for such period as the Secretary determines appropriate by regulations. 49 U.S.C. 13905(b) (2007). On application of the registrant, the Secretary may amend or revoke a registration. A suspension, amendment, or revocation may also occur as a result of a complaint or upon the Secretary’s own initiative. 49 U.S.C. 13905(c) (2007).

64. *Baird*, 425 F.2d at 412 (distinguishing cases relied on by Appellants based on the “intra-state factors involved in the instant case”).

65. *Compare id.* at 411, with *Galbreath v. Gulf Oil Corp.*, 294 F. Supp. 817 (N.D. Ga. 1968), *aff’d.*, 413 F.2d 941 (5th Cir. 1969) (holding that a similar movement was interstate in nature even though only an average of 0.1% of sales were unpredictable at the time of arrival at the tank terminal). See also *Mid Continent Petroleum Corp. v. Keen*, 157 F.2d 310 (8th Cir. 1946); *Shew v. Southland Corp.*, 370 F.2d 376 (5th Cir. 1966).

66. 4 Fed. Carr. Cas. (CCH) ¶ 80, 272, *aff’d.*, 162 F.2d 203 (6th Cir. 1947).

67. *Id.*

68. *Walling v. Silver Fleet Motor Express*, 67 F. Supp. 846 (W.D. Ky. 1946).

trailers moved and spotted and would be used over-the-road; and when the yard driver determined whether the equipment was ready for that movement, lubricated the fifth wheel, connected the break hose and lights, and took the tractor and trailer to the carrier's safety lane.<sup>69</sup>

In both instances the service was performed on the carrier's premises and it is not clear whether the yard personnel ever were used for over-the-road movements or subject to being called for such movements. If so, it appears that a different result may have been reached as authority exists that motor carrier personnel, who are or could be subject to the hours of service requirement of the DOT, would be included within the exemption.<sup>70</sup>

There is a "general class" concept that drivers, who are within the class of workers subject to the hours of service requirement of the DOT, are included within the exemption whether or not they individually performed service in interstate commerce.<sup>71</sup> This concept is consistent with the Hours-of-Service regulation that defines the scope of the Rules as applying ". . . to all motor carriers and drivers" except as otherwise provided, none of which are relevant to this issue.<sup>72</sup>

Spotters, like over-the-road drivers, are subject to the hours-of-service and other safety regulations.<sup>73</sup> In Letter Ruling of Chief, Wage and Hour Section, USDOL,<sup>74</sup> however, it was held that a driver who never left the property of the employer was not under the Motor Carrier exemption based on a letter from Director of Motor Carriers of the Interstate Commerce Commission in which it was stated the Interstate Commerce Commission ". . . has no jurisdiction over drivers to establish qualification and maximum hours of service for transportation solely on private property and using public highways only to the extent the private road crosses a public highway".<sup>75</sup>

This advice from the Director of Motor Carriers was predicated on a unique factual situation<sup>76</sup> and should not apply to a situation where the spotting of equipment is a continuation or initiation of an interstate ser-

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69. *Id.* at 853.

70. *See* Starrett v. Bruce Trucking, 391 F.2d 320 (10th Cir. 1968).

71. *See, e.g.,* Morris v. McComb, 332 U.S. 422 (1947); Mitchell v. Farber Indus., Inc., 188 F. Supp. 370 (S.D. Ill. 1960), *rev'd*, Goldberg v. Farber Indus., Inc., 291 F.2d 232 (7th Cir. 1961); Texas Farm Prods. Co. v. Williams, 406 S.W.2d 256 (Tex. Civ. App. 1966).

72. 49 C.F.R. 395.1 (2006). Other provisions of the Safety Regulations also do not differentiate between drivers operating on yard property or on public highways. *See* 49 C.F.R. 390.1, 390.5, 391.1 (2006).

73. 49 C.F.R. 395.1 (2006).

74. 5 Fed. Carr. Cas. (CCH) ¶ 80, 295 (1945).

75. *Id.*

76. Significantly, in the formal ruling, the carriage performed by the drivers and/or motor carriers never involved motor carriage of property over the highway. The carrier's operation was performed solely on private property.

vice. In *Joe Hughes Jr. Contract Carrier Application*,<sup>77</sup> Interstate Commerce Commission jurisdiction was found not limited to services and transportation upon the highway and “transportation” for jurisdictional purposes, but clearly included the receipt of shipments from the consignor and delivery to the consignee whether receipt or delivery involves a point on a public highway. It was specifically noted that the safety rules applied whether the vehicles are on or off the highway.<sup>78</sup>

Commissioner Lee, in dissenting on other grounds, noted that operations of trucks by motor carriers of property on private premises for loading and unloading shipments to be transported over highways in interstate or foreign commerce is a service in connection with such highway transportation and is subject the I.C.C.’s jurisdiction.<sup>79</sup>

The Wage & Hour Division’s interpretation, however, states that hostlers or spotters are not exempt.<sup>80</sup> Helpers of drivers on trucks engaged in interstate movements under the jurisdiction of the Commission have also been held to be within the exemption.<sup>81</sup>

The premise for the inclusion of drivers’ helpers in the exception is that these employees assist in loading and unloading vehicles and also assist in directing the trucks into streets.<sup>82</sup>

## B. LOADERS

One area where there has been substantial litigation is the exempt status of loaders. Generally, it can be said that loaders, as a class, are exempt,<sup>83</sup> whether they are closely supervised or not.<sup>84</sup> The mere handling of freight on a dock or placing lading on a vehicle, however, is not within the term “loading” for purposes of the exemption.<sup>85</sup> This is also true of a freight checker who does not actually load or supervise the loading of the vehicle.<sup>86</sup>

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77. 23 M.C.C. 562 (1940).

78. *Id.*

79. *Id.*; see also *C. Hobson Dunn Contract Carrier Application*, 28 M.C.C. 476 (1940).

80. 29 C.F.R. 782.3 (2006).

81. *Levinson v. Spector Motor Serv.*, 330 U.S. 649 (1947).

82. See *Opelika Royal Crown Bottling Co. v. Goldberg*, 299 F.2d 37, 42-43 (5th Cir. 1962); see also Wage and Hour Div. Opinion Letter (Dep’t of Labor May 1, 1968).

83. *Levinson*, 330 U.S. at 656; see also *Walling v. Silver Fleet Motor Express, Inc.*, 67 F. Supp. 846, 853 (W.D. Ky. 1946) (holding unloaders are not within the exemption).

84. *Blankenship v. Turston Motor Lines, Inc.*, 415 F.2d 1193, 1195 (4th Cir. 1969), *rev’g*, 295 F. Supp. 632 (W.D. Va. 1968); see also *In the Matter of Maximum Hours of Service of Motor Carrier Employees, Ex Parte No. MC-2*, 28 M. C. C. 125, 133-34 (Mar. 4, 1941) (making no distinction based on the amount of supervision).

85. *Pyramid Motor Freight Corp. v. Ispass*, 330 U.S. 695, 707-08 (1947); see also *McKeown v. S. Cal. Freight Forwarders*, 49 F. Supp. 543 (S.D. Cal. 1943).

86. *Compare Porter v. Poindexter*, 158 F.2d 759, 761 (10th Cir. 1947) (“[T]he title of checker or loader or some other title is immaterial. His status is determined by the actual duties per-

The work contemplated under the exemption involves the actual stacking or placing of freight on the vehicles to be moved, or the supervision of this task. Moreover, it must affect the "safety of operation."<sup>87</sup> Normally the work will involve some amount of skill and judgment, although it might be highly supervised.<sup>88</sup>

A dock foreman or supervisor will be included within the exemption if any of his or her duties have an effect on the safe loading of vehicles regardless of the time spent performing such duties.<sup>89</sup>

### C. MECHANICS

Mechanics engaged in the inspection, repair, and general maintenance of trucks engaged in interstate commerce, or supervisors of such mechanics, are within the exemption.<sup>90</sup>

It appears that the work performed by the mechanics must be on the vehicles themselves and be directly related to putting them in proper condition for safe operation. Thus, the exemption has been held not to involve the mere rebuilding of batteries or parts or the repairing of tires that are removed from the truck and will not ordinarily be replaced on the same truck from which they were removed.<sup>91</sup> Likewise, it has been held that an employee who has principally engaged in repairing heaters and radiators but who did some work on air lines, gas lines and water lines, and did practically all of work in the shop was not exempt from coverage of the FLSA.<sup>92</sup> An employee engaged in the installation of new accessories making it possible for a carrier to begin its business with a particular piece of equipment has also been found to be outside the exemption.<sup>93</sup> Also outside the exemptions are employees who have been engaged in the manufacture of new trailers or such substantial repair of

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formed."), with *Walling v. Huber & Huber Motor Express, Inc.*, 67 F. Supp. 855, 859 (W.D. Ky. 1946) ("A loader includes a checker if the checker supervises the loading of the trailer and is responsible for the proper loading.").

87. *Levinson*, 330 U.S. at 671.

88. See *Wirtz v. C & P Shoe Corp.*, 336 F.2d 21, 27-28 (5th Cir. 1964).

89. Compare *Yellow Transit Freight Lines, Inc. v. Balven*, 320 F.2d 495, 498 (8th Cir. 1963) (holding that the question of exemption should address motor vehicle safety, not merely the safety of operation), with *Mitchell v. Meco Steel Supply Co.*, 183 F. Supp. 777, 778-779 (S.D. Tex. 1956) (holding that a night watchman, who from time to time assisted in loading trucks in the evening, was outside the exemption).

90. *Robbins v. Zabarsky*, 44 F. Supp. 867, 869 (D. Mass. 1942); *McComb v. N.Y. & N.B. Auto Exp.*, 95 F. Supp. 636, 639-40 (D.N.J. 1950) (holding that the exemption also included mechanics' helpers).

91. *Kelling v. Huber & Huber Motor Express, Inc.*, 57 F. Supp. 617, 618-19 (W.D. Ky. 1944).

92. *Tobin v. Mason & Dixon Lines, Inc.*, 102 F. Supp. 466, 469-70 (E.D. Tenn. 1951).

93. *Anuchick v. Transamerican Freight Lines, Inc.*, 46 F. Supp. 861, 865 (E.D. Mich. 1942).

them as to amount to be rebuilding<sup>94</sup> and an employee who checked parts and accessories to see that they were not discarded before their useful life expired.<sup>95</sup>

It is important to note also that the mechanics, to be exempt, must be the employees of the motor carrier. Mechanics in the employment of a leasing corporation would be governed by the FLSA regardless of the fact that the lessor leased all of its equipment exclusively to the motor carrier.<sup>96</sup>

Mechanics employed by an independent contractor who services the vehicles of a carrier or vehicles engaged in interstate operation are outside the exemption.<sup>97</sup>

#### D. MISCELLANEOUS NON-EXEMPT SERVICE EMPLOYEES

In various cases it has been held that gas pump attendants,<sup>98</sup> washers and cleaners,<sup>99</sup> painters,<sup>100</sup> janitors,<sup>101</sup> and night watchmen<sup>102</sup> are not within the exemption even though they may perform incidental duties on a sporadic basis which might incidentally affect the safety of operations.<sup>103</sup>

#### E. OTHER MISCELLANEOUS OCCUPATIONAL EXEMPTIONS INVOLVING MOTOR CARRIAGE TRANSPORTATION

Certain miscellaneous occupational exemptions peculiar to specific types of motor carrier operations also exist under the Act.

##### *i. Trip Rate Drivers:*

A specific exemption exists in respect to “any employee employed as a driver or driver’s helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment

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94. *McDuffie v. Hayes Freight Lines, Inc.*, 71 F. Supp. 755, 758 (E.D. Ill. 1947).

95. *Tobin v. Hudson Transit Lines, Inc.*, 95 F. Supp. 530, 534-35 (D.N.J. 1951).

96. *Wirtz v. Dependable Trucking Co.*, 260 F. Supp. 240, 242 & 244 (D.N.J. 1966); *Moore v. Universal Coordinators, Inc.*, 423 F.2d 96, 99 & 100-01 (3rd Cir. 1970) (holding that drivers leased from a leasing company are subject to the Secretary of Transportation’s regulations); 49 C.F.R. § 390.5 (2007) (defining the term “employee” as including independent contractors).

97. *Boutell v. Walling*, 148 F.2d 329, 331 (6th Cir. 1945), *aff’d*, 327 U.S. 463 (1946).

98. *Green v. Riss & Co.*, 45 F. Supp. 648, 649-50 (W.D. Mo. 1942).

99. *Tobin*, 95 F. Supp. at 535.

100. *Id.*

101. *Anuchick v. Transamerican Freight Lines, Inc.*, 46 F. Supp. 861, 863 (E.D. Mich. 1942).

102. *Id.*

103. *McComb v. N.Y. & N.B. Auto Exp.*, 95 F. Supp. 636, 639 (D.N.J. 1950) (holding that a gas pump attendant who incidentally inspected lugs on wheels of motor vehicles was within the scope of the Fair Labor Standards Act of 1938); *Mitchell v. Meco Steel Supply Co.*, 183 F. Supp. 777, 779 (S.D. Tex. 1956) (holding that a night watchman, whose duties included the loading and unloading of trucks, was not exempt from the Fair Labor Standards Act).

plan . . .” if the Secretary of Labor finds that the agreement establishing such a basis of employment has the general purpose and effect of reducing the hours worked by the employees to, or below, the maximum work-week applicable to them under the Act.<sup>104</sup>

It is clear that the exemption is intended to cover local operations that are not subject to the regulation of DOT. Thus the government has disallowed the exemption where the payment plans involve intercity journeys.<sup>105</sup>

Because of the use of the word “deliveries,” the statute excludes the transportation of persons.<sup>106</sup> It has also been found that the exemption does not cover the transportation of employer’s goods from one segment of his business to another segment.<sup>107</sup>

Overall, this exemption, like the Motor Carrier Act of 1935 exemption, applies only insofar as the overtime compensation provisions of the Act would otherwise be applicable.<sup>108</sup>

## *ii. Specific Industries:*

Employees engaged in motor carrier operations might also fall within the exemption provided for other industries and/or occupations within such industries. Section 13(b)(16) of the Act, for example, provides for an exemption from the overtime pay requirements for employees engaged in:

- (A) the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same state, or
- (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables.<sup>109</sup>

Likewise, drivers of motor vehicles employed by airlines in air cargo pickup and delivery service would be exempt from the overtime pay requirements under Section 13(b)(3) of the Act which is applicable to “any employee of a carrier by air subject to the provisions of Title II of the Railway Labor Act.”<sup>110</sup> A similar exemption exists for “any employee of

104. 29 U.S.C. § 213(b)(11) (2007); 29 C.F.R. § 551.1-551.9 (2007); 29 C.F.R. § 551.3-551.5 (stating that a written petition must be filed to qualify for this exemption).

105. Wage and Hour Div. Opinion Letter (Dep’t of Labor Mar. 7, 1962); Wage and Hour Div. Opinion Letter (Dep’t of Labor Sept. 23, 1965).

106. 29 U.S.C. § 213(b)(11) (2007).

107. Wage and Hour Div. Opinion Letter (Dep’t of Labor Sept. 30, 1964); Wage and Hour Div. Opinion Letter (Dep’t of Labor Feb. 17, 1965).

108. 29 U.S.C. § 213(b)(11) (2007).

109. *Id.* at § 213(b)(16).

110. *Id.* at § 213(b)(3).



an employer engaged in the operation of a rail carrier subject to Part A of Subtitle IV of Title 49.”<sup>111</sup>

The overtime compensation provisions of the Act are also inapplicable to taxi drivers<sup>112</sup> and drivers and other related transportation employees employed in forestry or lumbering operations who are exempt from the overtime pay requirements of the Act to the extent they are engaged in transporting logs or other forestry products to a mill, processing plant, railroad or other transportation terminal, if the number of employees employed by the employer in such forestry or lumbering operation does not exceed eight.<sup>113</sup>

Likewise, an exemption would exist for a driver-employee of an independently owned and controlled local enterprise engaged in the wholesale or bulk distribution of petroleum products.<sup>114</sup>

The exemption is a partial one from the overtime pay provisions of the Act, and is only applicable if: (A) “the annual gross volume of sales of each enterprise is less than \$1,000,000.00[,] exclusive of excise tax,” (B) more than 75% of its “annual dollar volume of sales is made within the State in which it is located,” and (C) not more than 25% of its sales may be made to “customers who are engaged in the bulk transportation of such products for resale.”<sup>115</sup>

## VI. SAFETEA-LU AND ITS POSSIBLE IMPLICATIONS

The enactment of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users has had an important impact on the Motor Carrier Exemption and its coverage after August 10, 2005.<sup>116</sup>

As previously noted, the MCA exemption applies to employees for whom the Secretary of Transportation may prescribe requirements for qualifications and maximum hours of service under the Motor Carrier

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111. *Id.* at § 213(b)(2).

112. *Id.* at § 213(b)(17); *see Wirtz v. Cincinnati, Newport & Covington Co.*, 375 F.2d 513, 515 (6th Cir. 1967).

113. 29 U.S.C. § 213(b)(28) (2007).

114. 29 U.S.C. § 207(b)(3) (2007) (the exemption does not apply to establishments operated by major oil firms).

115. *Id.* (“[E]mployee receives compensation for employment in excess of forty hours in any work-week at a rate not less than one and one-half times the minimum wage rate applicable to him under section 6 [29 U.S.C. § 206], and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.”).

116. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users, Pub. L. No. 109-59, 119 Stat. 1144, 1761 & 1765 (2005) [hereinafter SAFETEA-LU].

Act.<sup>117</sup> Prior to SAFETEA-LU, the exemption applied to “motor carriers” providing motor vehicle transportation for compensation or “motor private carriers” meeting three criteria.<sup>118</sup> There was no reference to the size or weight of the vehicle which would be used in the transportation.<sup>119</sup>

In SAFETEA-LU, Congress enacted a section directly related to the MCA exemption and dealing with (a) “safe operations of commercial motor vehicles”; (b) the minimization of “dangers to the health of operators of commercial motor vehicles and other employees whose employment directly affects motor carrier safety”; and (c) increase “compliance with traffic laws and with commercial motor vehicle safety. . . .”<sup>120</sup>

A commercial motor vehicle is defined as follows:<sup>121</sup>

(1) “commercial motor vehicle” means a self-propelled or towed vehicle used on the highways in interstate commerce to transport passengers or property, if the vehicle—

(A) has a gross vehicle weight rating or gross vehicle weight of at least 10,000 pounds, which ever is greater;

(B) is designed or used to transport more than 8 passengers (including the driver) for compensation;

(C) is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation; or

(D) is used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of this title and transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103.

In the same Section, the following two definitions appear:<sup>122</sup>

(2) “employee” means an operator of a commercial motor vehicle (including an independent contractor when operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who—

(A) directly affects commercial motor vehicle safety in the course of employment; and

(B) is not an employee of the United State Government, a State, or a political subdivision of a State acting in the course of the employment by the Government, a State, or a political subdivision of a State.

(3) “employer”—

(A) means a person engaged in a business affecting interstate commerce

117. 49 U.S.C. § 31502(b) (2007); 29 U.S.C. § 213(b)(1) (2007).

118. 49 U.S.C. § 13102(14)-(15) (2007).

119. *See id.* at § 13102(14)-(16).

120. 49 U.S.C. § 31131 (2007).

121. 49 U.S.C. § 31132(1) (2007).

122. *Id.* at § 31132(2), (3).

that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate it; but

(B) does not include the Government, a State, or a political subdivision of a State.

Further, the Secretary of Transportation was ordered to prescribe regulations related to commercial motor vehicle safety operations which included a specific provision that the operation of commercial motor vehicles would not have a detrimental effect on the physical condition of the operators.<sup>123</sup>

In the Motor Carrier Act, the definition of “Motor Carrier” was amended to include the modifier “commercial” to the term “motor vehicle transportation”<sup>124</sup> and the same modifier was added to the term “motor vehicle” in the definition of “motor private carrier.”<sup>125</sup>

As a result of SAFETEA-LU, the MCA exemption has eliminated drivers and other personnel directly involved in safety duties unless commercial vehicles are involved.<sup>126</sup>

There are large segments of the motor carrier industry that are now subject to overtime payments because the vehicles that are commonly used in courier, package delivery, and local delivery services would not be considered a commercial vehicle.

## VII. STATE COVERAGE

The following was presented in the July 7, 2004 Issue of the Tax Researcher:<sup>127</sup>

The state wage and hour laws are far from uniform in their treatment of overtime premiums. Seventeen states have NO general provision for maximum hours before “overtime” premium pay is required. Therefore, these states do not need and do not have any prescribed overtime premium rate of pay. The states are Alabama, Arizona, Delaware, Florida, Georgia, Iowa, Louisiana, Mississippi, Nebraska, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming.

Two states generally allow a work week longer than 40 hours before the overtime premium rate must be paid.<sup>128</sup>

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123. 49 U.S.C. § 31136 (2007).

124. 49 U.S.C. § 13102(14) (2007).

125. *Id.* at § 13102(15).

126. See *Musarra v. Digital Dish, Inc.*, 454 F. Supp.2d 692 (S.D. Ohio 2006); *Kautsch v. Premier Commc'ns*, 502 F. Supp.2d 1007 (W.D. Mo. 2007).

127. Alabama, Arizona, Delaware, Georgia, Iowa, Louisiana, Mississippi, Nebraska, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. *State Premium Pay Rules Vary for Overtime Work*, TAX RESEARCHER NEWSLETTER, July 2004, [http://smallbusiness.adp.com/accountants/newsletter/tr\\_pay\\_rules.asp](http://smallbusiness.adp.com/accountants/newsletter/tr_pay_rules.asp).

128. Kansas (in excess of 46 hours) and Minnesota (in excess of 48 hours). *Id.*

For example,

Kansas defines overtime as hours worked in excess of 46 hours in a week, while in Minnesota hours worked in excess of 48 hours in a week are paid an overtime premium.<sup>129</sup>

Four states and Puerto Rico require overtime premium pay for excess hours worked in a single day. Alaska and Nevada require [1.5] times the regular rate for hours worked in excess of 8 hours in a day, 40 hours in a week. Puerto Rico has the same threshold, but requires the employer to pay twice the regular rate. Colorado requires premium pay [1.5 times] after 12 work hours in a day, and after 40 work hours in a week. However, California goes even further by requiring [1.5] times the regular rate for hours worked: (a) in excess of 8 hours per day, (b) in excess of 40 hours per week, and (c) for the first 8 hours worked on the 7th work day in the week. Furthermore, California requires the employer to pay twice the regular rate for hours worked: (a) in excess of 12 in a work day, or (b) after 8 hours on the 7th work day in the week.

The remaining 27 states and the District of Columbia use the same standard as FLSA, requiring [1.5] times the regular pay rate for any hours worked in excess of 40 in a week.<sup>130</sup>

If a state's law is more demanding than federal law, state law must be followed even though it surpasses the minimum compliance of the federal law.<sup>131</sup> Likewise, if state law is less demanding, federal minimums must be met in order to be in compliance.<sup>132</sup>

The general principles of overtime coverage, however, do not specifically address the issue of exemptions. For example, in 2004 the federal Department of Labor published new regulations "Defining and Determining the Exemptions for Executive, Administrative, Professional, Computer, and Outside Sales Employees,"<sup>133</sup> and the issuance caused considerable confusion in terms of state laws.

At the time of promulgation, the new Regulations automatically went into effect in 32 states and the District of Columbia.<sup>134</sup> In 18 states, however, the new regulations could not take place automatically and legislative or administrative action was required. States were indecisive in what action to take and the State of Illinois even passed a law keeping the old definitions before the Regulations were adopted merely on the scare

129. *Id.*

130. *Id.*

131. 29 C.F.R. § 541.4 (2007).

132. *Id.*

133. Defining and Delimiting the Exemptions for Executive Administrative, Professionals, and Outside Sales Employees, 29 C.F.R. § 541 (2007).

134. James C. Hardman, *The Fair Labor Standards Act – The 2004 Revised Overtime Pay Regulation*, Innovative Business and Law Communications, at 23-24, (2004).

of “change”.<sup>135</sup>

In terms of the Motor Carrier Exemption, the situation is similarly diverse. In the thirty-two states, where no overtime provisions exist under state laws, it is obvious that the Motor Carrier Exemption and federal law will apply.<sup>136</sup> In respect to other states, a state-by-state investigation must be made. The investigation must be exhaustive since a simple answer may not be forthcoming.

In Minnesota, for example, the State has adopted the federal regulations of the Department of Transportation with some minor exceptions,<sup>137</sup> but its statutory provision regarding “overtime” does not indicate that the federal motor carrier exemption would apply; however, reference to the federal motor carrier exemption appears in the definition section of the statute under the term “employee.”<sup>138</sup>

In New Jersey, however, the issue was resolved by judicial litigation. In *Keeley v. Loomis Fargo & Co.*, it was decided specifically that the federal exemption did not preempt the state’s Wage and Hour Law which did not contain a motor carrier exemption.<sup>139</sup>

A review of the *Keeley* case and cases cited therein leads to the conclusion that, in the absence of the adoption of the federal Motor Carrier Exemption by the state, it will not apply if the state law overtime provision is to the contrary.

## VIII. REVIEW AND REFLECTION

In reviewing and reflecting upon the FLSA, the Motor Carrier Exemption, and state law, it appears that the status of the law leads to the following conclusions:

### A. THE FLSA HAS GENERALLY ACHIEVED ITS PURPOSE

The objectives of the Act, as enacted in 1938 and minimally amended thereafter, have achieved its sage objectives.

There has not been any real attempt to repeal the Act, or a proposed significant amendment, which is some strong evidence that citizens have accepted the Act’s goals and its implications. This is also true of the spe-

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135. *Id.*

136. See 29 U.S.C. § 213(b)(1) (2007); 29 C.F.R. § 541.4 (2007).

137. Minn. Stat. § 221.0314 (2007).

138. Minn. Stat. § 177.25 & 177.23 Subd. 7(16) (2007).

139. *Keeley v. Loomis Fargo & Co.*, 11 F. Supp. 517 (D.N.J. 1998), *rev’d*, 183 F.3d 257 (3rd Cir. 1999) (The District Court specially rejected a motion to have the case dismissed on preemption grounds arguing that the FLSA and the Federal Motor Carrier Act preempted New Jersey’s minimum wage and overtime law. The reversal involved the interpretation of a regulation allowing the state Commission of Labor to exempt putative employers from overtime and also damage issues.).

cific motor carrier exemption and the other transportation-related exemptions discussed in this paper.

At best, the only real challenge outstanding is to assure that the Act reflects the realities of the changing work world which was evidenced by and wisely reflected in the issuance of the administrative regulatory provisions regarding the "White Collar" exemptions in 2004.<sup>140</sup>

#### B. STATE LAWS CONSTITUTE A SIGNIFICANT BARRIER TO INTERSTATE MOTOR CARRIERS

While businesses with multiple physical locations in different states may be able to adapt reasonably to state laws in which they are located, it is different where employees are not performing their tasks at a point within one state, but essentially operate in multiple states which really have little continuing "relationship" with the individual employee.

State wage laws, including the federal laws, were enacted envisioning that essentially employees would "punch in" at a set time and perform their work in a specific facility until he or she "punched out" at the conclusion of the "shift." Rest breaks and lunch times could be fixed and controlled by supervisory oversight. Even agricultural workers were more amendable to the foregoing type of work environment.

At the time when most wage and hour laws were enacted, motor carrier operations were basically local in nature especially when compared to their operations today. Many operations were for short distances between two points. Driver-employees were utilized and were paid hourly wages. It was easy to measure how many hours it should take to provide the service and paid drivers actually started and ended the day at the carrier's facility.

A large segment of the industry now operates across the 48 contiguous states and in Alaska and Canada. Drivers are frequently away from the motor carrier's office or terminals for weeks with little oversight. The drivers take upon themselves the time and specific tasks to complete a freight movement.

Currently, because of the length of hauls and the relative freedom of the driver while on the road, most drivers, whether employee or an owner-operator, are paid on a "per mile" basis or on a percentage of the revenue charged to the shipper. In some cases, a negotiated-fixed rate is used. In the truckload segment of the industry, hourly wages are virtually null or limited to drivers utilized on local hauls.

While regulations under the FLSA have issued covering non-hourly payment plans such as piece work, commissions, and other variations of

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140. Hardman, *supra* note 139.

payment, these are not really responsive to the remuneration process used in the motor carrier industry. To develop a reasonable methodology of adopting an essentially “hourly” system to normal motor carrier operations would present an extremely challenging and administratively costly project. State control of such a project could lead to diverse formalities and results leading to many problems. Further, it would not address and might exacerbate the critical problems related to safety.

It is obvious that a driver and owner-operator could increase his “pay” by driving more miles and handling more loads and “overtime” as “dessert” would increase the temptation to do so despite the wear and tear on the equipment and more important, to the health and safe performance of the driver.

Significantly, the federal legislators recognized this and felt that two different units of the government and approaches to wage and hour issues should not interfere with each other. “Safety” of the public and the operators won out and thus the Secretary of Transportation, who was presumably more knowledgeable of trucking operations, was given the power to dictate the hours of service which drivers could drive based, in part, on the normal operations of carriers.<sup>141</sup>

## IX. CONCLUSIONS

The motor carrier industry, from the standpoint of management, collective bargaining agents, and even independent owner-operators and others under the exemption, have not indicated any real problems with the federal motor carrier exemption which reflects that it should continue until industry changes occur to establish that its application is inconsistent with the purposes of the FLSA.

It would also behoove the motor carrier industry and supporters of the motor carrier exemptions to take affirmative steps to enact a federal statutory provision that would preempt any state law inconsistent with the federal exemption or seek state legislation adopting the federal preemption where necessary.

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141. In developing the hours-of-service regulations, the Federal Motor Carrier Safety Administration (FMCSA) of the Department of Transportation systematically and extensively researched both United States and International health and fatigue studies and consulted with Federal Safety and health experts. It recognized our roads are better designed, constructed, and maintained in a nationwide network to provide greater mobility, accessibility, and safety for all highway users. It also recognized that vehicles have been dramatically improved in terms of design, construction, safety, comfort, efficiency, emissions, technology, and ergonomics. These factors, combined with years of driver fatigue and sleep disorder research has led to the Regulations and recent review and support the position that the Motor Carrier Exemption should prevail over the general overtime provisions.

