

# Legal Exposure Issues Affecting Employers, Including Those Who Provide or Use Transportation Services

Robert T. Franklin, Esq.  
Franklin & Prokopik

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# I. Scope of Topic

## A. Approach

1. Address “litigation” long before suit filed
2. Plaintiff’s bar becoming more sophisticated
  - a. Information used in litigation
  - b. Novel theories of liability

# I. Scope of Topic

## B. Format

1. Focus on frequent “problem areas”
  - a. Personnel policies & practices
  - b. Loss control
  - c. Accident responses
  - d. Docs/retention
  - e. Contracts

# I. Scope of Topic

## B. Format

2. Practical approach (“real world”)

3. Questions/comments welcome

C. Key message: you CAN make a difference (\$)

# II. Personnel Policies & Practices

## A. Hiring/retention (eg “bad drivers”)

### 1. Driver shortage (“bottom of barrel”)

- a. Tension (safety/operations)
- b. “Real world” considerations
- c. But is a potential “cost”

### 2. Accidents (*respondeat superior*) [Cost No. 1]

- a. Frequency
- b. Severity

# II. Personnel Policies & Practices

## A. Hiring/retention (eg “bad drivers”)

### 3. Independent theories of tort liability (beyond “driver error”)

#### a. Negl. Hiring/Retention

(1) Does (like “respond super”)req. “in scope” of employment

(2) Diff timing re “negligence”

(a) Hire – one shot

(b) Retention – ongoing duty to monitor/train

# II. Personnel Policies & Practices

## A. Hiring/retention (eg “bad drivers”)

### 3. Independent theories of tort liability (beyond “driver error”)

#### b. Negl. Entrustment

(1) Theory – “knew or should’ve known”

(2) Not req. “in course of employment”

# II. Personnel Policies & Practices

## A. Hiring/retention (eg “bad drivers”)

### 4. Impact on damages

- a. Additional theories based on personnel decisions may make potentially explosive docs/info. discoverable/admissible

# II. Personnel Policies & Practices

## A. Hiring/retention (eg “bad drivers”)

### 4. Impact on damages

#### b. Can result in additional damages

##### (1) Punitive

(a) “Standard” will impact “disc/admiss”  
(varies per State)

(b) Poss re “hire/retention” count when not  
avail re “driver error”

(c) Jury will hear re all their decision

(d) “Limiting instruction” (but “bell rung”)

# II. Personnel Policies & Practices

## A. Hiring/retention (eg “bad drivers”)

### 4. Impact on damages

#### b. Can result in addl. damages

##### (2) Compensatory

##### (2) Not “additional” per se

##### (b) Real world impact

### 5. Potential Qs re ins. coverage

#### a. CA gen not cover punitive

#### b. AL v. GL

##### (1) AL/GL arg “not insure re labor dec”

##### (2) GL exclusion re claims “arising out of ownership, maint, or use of veh.”

# II. Personnel Policies & Practices

## A. Hiring/retention (eg “bad drivers”)

### 6. Exposure for claims by Applicants/Employees [Cost No. 2]

- a. Exclusivity of WC remedy
  - (1) Gen rule can't sue (“trade off”)
  - (2) Exceptions
    - (a) Statutory
      - i) “Intentional acts”
      - ii) no WC ins.
    - (b) “Fellow employee” situations
    - (c) “Bargained away”
      - i) Agreement to indemnify
      - ii) Bailment agreement

# II. Personnel Policies & Practices

## A. Hiring/retention (eg “bad drivers”)

### 6. Exposure for claims by Applicants/Employees [Cost No. 2]

#### b. Other laws (“big picture”)

(1) Title VII

(2) ADA

(3) FMLA

(4) Fair Credit Reporting Act (FCRA)

(5) Common law claims

(a) Wrongful term.

(b) Invasion of privacy

(c) Intentional/negl. infliction of emotional distress

# II. Personnel Policies & Practices

## A. Hiring/retention (eg “bad drivers”)

### 6. Exposure for claims by Applicants/Employees [Cost No. 2]

#### c. Handling employee’s WC claim

##### (1) Possibly contested in whole/part

(a) Create bad transcript

(b) Hostility (carried into civil suit)

(c) Possible conflict of interest for Company’s attorney

##### (2) Third party claims

(a) Subro by Company

i) Who to represent employee

ii) Fees/costs for recovery of lien (Collins)

# II. Personnel Policies & Practices

## A. Hiring/retention (eg “bad drivers”)

### 6. Exposure for claims by Applicants/Employees [Cost No. 2]

#### c. Handling employee’s WC claim

##### (2) Third party claims

##### (b) Employee’s claim beyond lien

##### i) Possibly different interests

a) Exaggeration by employee may hurt  
Co.’s recovery

b) Co. poss not want to “sue customer”

c) “Excess” recovery may be credit to  
E/I re WC

# II. Personnel Policies & Practices

## A. Hiring/retention (eg “bad drivers”)

### 6. Exposure for claims by Applicants/Employees [Cost No. 2]

#### c. Handling employee’s WC claim

##### (2) Third party claims

##### (b) Employee’s claim beyond lien

##### ii) Who to represent

a) Cooperation of different attorneys

b) Possible conflict for Company’s attorney

# II. Personnel Policies & Practices

## A. Hiring/retention (eg “bad drivers”)

### 6. Exposure for claims by Applicants/Employees

[Cost No. 2]

#### c. Handling employee’s WC claim

(3) Employee’s return to work following injury (eg of “whipsaw”)

(a) Take employee back?

i) Ongoing WC exposure

ii) Negligent entrustment claim

# II. Personnel Policies & Practices

## A. Hiring/retention (eg “bad drivers”)

### 6. Exposure for claims by Applicants/Employees [Cost No. 2]

#### c. Handling employee’s WC claim

(3) Employee’s return to work following injury (eg of “whipsaw”)

(b) Not take employee back?

i) Increased WC exposure now

ii) Hostility of employee (carried into civil case)

iii) Labor claims

a) Diff laws/diff stds. (ADA, FMLA, etc.)

1) Often evid “upside down”

# II. Personnel Policies & Practices

## A. Hiring/retention (eg “bad drivers”)

### 6. Exposure for claims by Applicants/Employees [Cost No. 2]

#### c. Handling employee’s WC claim

(3) Employee’s return to work following injury (eg of  
“whipsaw”)

(b) Not take employee back?

iii) Labor claims

a) Diff laws/diff stds. (ADA, FMLA, etc.)

2) Examples

a WC v. ADA

b TT v. unempl.

b) NOTE: labor claims sep. from WC

1) Gen not barred by “exclusivity”

2) Poss. settle WC and “labor Qs”

3) Govt./agency as “party”

# II. Personnel Policies & Practices

## B. Interaction of laws – again, a “whipsaw”

### 1. Dilemmas (eg decision to hire/retain)

a. Person may meet “min” std and yet not want to hire/retain

b. May need to “pick poison” – labor suit v. liab

(1) Speeding and alcohol

(2) Epileptic/false med. card

(3) Two ‘99 S.Ct. decisions

(a) Monocular vision (Kirkenburg)

(b) High blood pressure (Murphy)

# II. Personnel Policies & Practices

## C. Impact of “bad employees” re regulatory issues

[Cost No. 3]

1. Violations/fines
2. Government audit/rating
  - a. Audits (DOT, OSHA, etc.)
    - (1) Generally a game of “gotcha”
    - (2) Will gen find something
    - (3) Q of revenue (& polit. grandstanding)
    - (4) May impact contracts (eg req. “satisfactory”)

# II. Personnel Policies & Practices

## C. Impact of “bad employees” re regulatory issues [Cost No. 3]

### 2. Government audit/rating

#### b. Triggers

- (1) Generally not “random”
- (2) Disgruntled employee/contractor
- (3) Big accident
- (4) Numbers beyond “average”

## II. Personnel Policies & Practices

### C. Impact of “bad employees” re regulatory issues [Cost No. 3]

#### 3. Importance of monitoring your co.’s performance

a. Internal

b. Internet (eg SAFESTAT, etc.)

(1) Available to public (incl. plaintiffs’ bar)

(2) Used to target audits

(3) Q re accuracy of data

(a) Need to monitor yours

(b) Challenge as “evidence” (disclaimer)

# III. Loss control (“cheapest = not happen”)

A. Formal policy

B. All must “buy in” (“send right signal”)

C. Practice (“for real”)

1. Per “policy”

2. “On shelf” not enough (“lip service”)

# III. Loss control (“cheapest = not happen”)

## D. Tools

1. Forms/materials
2. Inside help
  - a. Safety
  - b. Risk
  - c. Legal

# III. Loss control (“cheapest = not happen”)

## D. Tools

### 3. Outside help

a. Ins. co./brokers

b. “Consultants”

(1) Private/hire

(2) Trade organizations

c. Attorneys

# III. Loss control (“cheapest = not happen”)

## E. Documentation re safety/loss control

1. Shows “concern”
2. NOTE – “two edged sword” (support claim against Company if don’t follow own stated procedures)

# IV. Accident Response

## A. Cooperate with insurer (& possibly excess)

1. Impt. to play active role (from outset)
2. Impact on “bottom line”
  - a. Payout (SIR)
  - b. Premium/renewal

# IV. Accident Response

## B. Plan/proc. in place (acc. inevitable)

1. “Go team” (24/7)
  - a. Company representatives
  - b. Attorneys
  - c. Government agencies (contact info)
2. Checklist to follow

# IV. Accident Response

## C. Driver at Scene

1. Train/prepare driver (tough situation)
  - a. Know proc./co policy (game plan)
    - (1) Legal responsibilities
      - (a) Stop vehicle
      - (b) Avoid another accident
      - (c) Flashers/triangles
      - (d) Aid to injured
      - (e) Drug and alcohol test
    - (2) Strategy

# IV. Accident Response

## C. Driver at Scene

1. Train/prepare driver (tough situation)
  - b. Have tools available
    - (1) Forms
      - (a) Checklist
      - (b) Accident card
      - (c) Exoneration card
    - (2) Names, phone, etc. (24/7)
    - (3) Camera (and training re use)

# IV. Accident Response

## C. Driver at Scene

### 2. Initial reaction

#### a. No “admissions”

(1) Impact of “I’m sorry.”

(2) Concern is ok

(3) Questions to others re accident/condition

#### b. Witnesses

(1) Good – preserve evid

(2) Bad – don’t confront

# IV. Accident Response

## C. Driver at Scene

### 2. Initial reaction

#### c. Police

##### (1) Attitude (warn driver)

(a) Effect on whether cited

(b) Evidence at trial

##### (2) Inspection of vehicle

(a) External devices

(b) Cab

# IV. Accident Response

## C. Driver at Scene

### 2. Initial reaction

#### c. Police

#### (3) Statements – verbal/written

(a) Company policy re giving statements

(b) Language/wording

(c) Beware estimates

i) time

ii) speed

iii) distance

# IV. Accident Response

## C. Driver at Scene

### 2. Initial reaction

#### d. Photographs

- (1) Selective use of
- (2) Show context
- (3) Document what taken

# IV. Accident Response

## C. Driver at Scene

### 2. Initial reaction

#### e. Preservation of physical evidence

(1) Skid marks, debris, etc.

(2) Landmarks/location

(3) Vehicles

(a) Damage (“four corners”) (cars too)

(b) Point of impact

(c) Point of rest

# IV. Accident Response

## C. Driver at Scene

### 2. Initial reaction

#### f. Make notes re important info

(1) Location, time, etc.

(2) Info gathered at scene (admissions, witnesses, etc.)

(a) No admissions

(b) Don't speculate (eg causation)

# IV. Accident Response

## C. Driver at Scene

### 2. Initial reaction

#### g. Documentation

##### (1) EOBRs (“two edged sword”)

(a) Many available

(b) Cost/benefit

(c) Problems if have (info/docs)

(d) Problems if don't (“dollars over lives”)

(e) Cars too

i) ECM etc.

ii) Use as sword

# IV. Accident Response

## C. Driver at Scene

### 2. Initial reaction

#### g. Documentation

##### (2) Logs (and back-up documents)

(a) More focus in litigation

(b) May hurt credibility

i) “Gut equity”

ii) Impact on exposure

# IV. Accident Response

## C. Driver at Scene

### 2. Initial reaction

#### g. Documentation

##### (3) Accident reports

(a) Disc./admiss.

(b) How/who to prepare

##### (4) Statements

(a) Disc./admiss.

(b) How/who to prepare

# IV. Accident Response

## C. Driver at Scene

### 2. Initial reaction

#### g. Documentation

#### 5. Background information

(a) DQ file/personnel records

(b) PM records re equipment

#### 6. Gather early/retain

#### 7. All poss. impact acc. recon.

# IV. Accident Response

## D. Post-accident response

### 1. Typical procedure

a. Internal investigation

b. Determ. re “preventable”

(1) Prev. reqd. (49 CFR 394); repealed in 1993

(2) Many still use

# IV. Accident Response

## D. Post-accident response

2. Again, “tension” (safety/labor v. operations/risk)

a. Legit. reasons to do inv./assign fault

(1) Driver incentives

(2) “Paper the file” re labor actions

(3) Avoid future accidents

# IV. Accident Response

## D. Post-accident response

2. Again, “tension” – safety/labor v.  
operations/risk

But b. Legit concerns re risk/exposure  
(1) Info/docs gen discoverable

# IV. Accident Response

## D. Post-accident response

2. Again, “tension” – safety/labor v. operations/risk

b. Legit concerns re risk/exposure

(2) May impact liability

(a) “Preventable” as admission

(b) Impact on subro claim too

(3) Impact of fired/bitter employee

(4) Keep “big picture” in mind (“acid test” re docs)

# IV. Accident Response

## D. Post-accident response

### 3. Equipment

- a. Repairs (impt. re revenue)
- b. But preservation of evid. impt. too  
("spoliation")
  - (1) Timing
  - (2) Procedure
  - (3) Poss impact
    - (a) Separate legal claim (D.C., Fl.)
    - (b) Inference (Md., Va.)

# IV. Accident Response

## E. Cites/charges against employee

1. Beware “on his own” approach
2. Findings/pleas
  - a. v. Co/you too
  - b. Vicarious criminal liability
  - c. Impact on civil suit (varies by State)
    - (1) Finding
    - (2) Plea
    - (3) Potential conflict of interests

# IV. Accident Response

## E. Cites/charges against employee

### 3. Transcript

- a. Employee's testimony (always can be used)
- b. "Witnesses" (incl. future plaintiffs)

# V. Docs/retention

(NOTE: increasingly used in lit!)

## A. Types

1. DQ file (§391)
2. Employment Application
  - a. Need to verify credentials
  - b. Spot potential probs (“red flags”)
  - c. Document efforts/results

# V. Docs/retention

(NOTE: increasingly used in lit!)

## A. Types

### 3. Logs

#### a. HOS (“hot button” in lit.)

(1) Recap re time

(2) Lines/description

(3) Beware “in a hurry” inference

# V. Docs/retention

(NOTE: increasingly used in lit!)

## A. Types

### 3. Logs

#### b. Supporting docs

- (1) Receipts
- (2) Shipping papers
- (3) GPS/ECM data

# V. Docs/retention

(NOTE: increasingly used in lit!)

## A. Types

### 3. Logs

c. Retention of logs and back-up docs.

- (1) Organization (eg match receipts to driver)  
(compare)
- (2) Destruction (law/reality)

# V. Docs/retention

(NOTE: increasingly used in lit!)

## A. Types

### 4. Docs re equipment

a. Specifications

b. Maintenance

c. Repairs re occ. (again, “spoliation”)

### 5. Cargo/freight

### 6. Internal investigations

# V. Docs/retention

## B. Organization/purpose of docs.

### 1. “Accident file”

- a. FMCSR
- b. “Ord. course” if “do it every time”
- c. Discoverable

### 2. Poss. Privileges

- a. Anticipation of litigation
- b. Atty-client (if atty. involved)
- c. Self-critical analysis

# V. Docs/retention

## C. E-Discovery

1. The shift in technology
2. What has changed re fed law
  - a. Amendments to FRCP (effective 12/1/06)
    - (1) Rules 16, 26, 33, 34, 37, 45
    - (2) IMPORTANT: mandatory – even if other party not ask!

# V. Docs/retention

## C. E-Discovery

### 2. What has changed re fed law

#### b. Requirements

##### (1) Emphasis on early disclosure

(a) Rules 16 and 26 require discussion at initial conference

(b) Types of ESI at issue

(c) Form in which ESI to be produced (“reasonably useable”)

# V. Docs/retention

## C. E-Discovery

### 2. What has changed re fed law

#### b. Requirements

(2) Procedure re inadvertent disclosure

### 3. Electronically stored information (“ESI”)

#### a. Definition

(1) Broad/vague

(2) Basic/obvious (eg e-mails)

(3) Obscure

#### b. Federal Rule 34(a)

c. Form – “stored in any medium from which info can be obtained”

# V. Docs/retention

## C. E-Discovery

### 4. Issues re scope of production

- a. Standard: Not need to produce if “not reasonably accessible because of undue burden or cost” [FR 26(b)(2)(B)]
- b. Court’s evaluation
  - (1) Protecting party’s initial BOP
  - (2) Even if met, court may order if “good cause”
  - (3) Possible issue/procedure re “cost shifting”
  - (4) Vague/uncertain scope

# V. Docs/retention

## C. E-Discovery

5. “Best practices” to follow re new rules
  - a. Know what ESI you do/don’t have (or poss. “liar”)
    - (1) More complex than often thought
      - (a) Company/internal
      - (b) Drivers
      - (c) Equipment
      - (d) Freight

# V. Docs/retention

## C. E-Discovery

5. “Best practices” to follow re new rules
  - a. Know what ESI you do/don’t have (or poss. “liar”)
    - (2) Policies re retention/storage
      - (a) Internal
      - (b) Third parties
    - (3) Accessibility
    - (4) Forms
    - (5) Ability to retrieve
    - (6) Costs
    - (7) Proof
    - (8) Witnesses (eg “IT geek”)

# V. Docs/retention

## C. E-Discovery

5. “Best practices” to follow re new rules
  - b. Have procedures in place
  - c. Work with service providers
    - (1) IT vendors
    - (2) Manufacturer/service reps
    - (3) Insurers
    - (4) Attorneys

# V. Docs/retention

## D. “Litigation Hold”

1. Duty
2. Triggers (“notice”)
3. Response
  - a. Timing
  - b. Scope
4. Documentation of steps taken

## E. Docs. Retention per regs (eg § 379)

# VI. Contracts

## A. Formal/obvious

1. Equipment leases (49 CFR § 376.12)
  - a. Proper TSA
    - (1) Often ignored
    - (2) Specific regs.
    - (3) Real exposure
      - (a) Liability claim
      - (b) “Truth in leasing” action
  - b. Practices (eg escrow)

# VI. Contracts

## A. Formal/obvious

### 1. Equipment leases (49 CFR § 376.12)

#### c. Lease – purchase agreements

(1) Def. “owner” (§ 376(2))

(2) Charge-backs against LP debts

(3) Enforceability

(4) “Gut equity”

### 2. Hauling or broker agreements

#### a. Interstate v. intrastate

# VI. Contracts

## A. Formal/obvious

### 2. Hauling or broker agreements

b. Whose “operating authority”

c. Responsibility/indemnification

(1) Insurance

(2) Poss. claim re “selection of MC”

(a) broker (Shramm)

(b) shipper (Puckrein)

(3) Attorneys (and courts) creative re “deep pocket”

# VI. Contracts

## A. Formal/obvious

### 2. Hauling or broker agreements

#### d. Insurance

- (1) Which policy is applicable (eg trailer as “insured vehicle”)
- (2) Poss. viol. coverage (eg “insured contracts” exclusion)
- (3) Your right to control claims

# VI. Contracts

## A. Formal/obvious

3. Other agreements with “contractors”
  - a. Beware possible classification as “employee”
    - (1) Regulatory
    - (2) Liability
  - b. Beware “statutory employment” for work comp. purposes
  - c. Require/verify insurance

# VI. Contracts

## B. Other

1. Verbal (“handshake”/ “friends”)
2. “Forms” (poss use “master agmt.”)

# VI. Contracts

## C. General approach

1. Understand terms/impact (“more than meets eye”)
  - a. Eg “indem for inj to employees on premises”
    - (1) 3<sup>rd</sup> pty claims
    - (2) “Bargain away immunity” (“on both sides of v.”)
    - (3) Decision to accept
      - (a) Market forces
      - (b) Poss. statute (eg Md; Tx)
  - b. Eg “Maintain satisfactory rating” (poss. “viol. own std.”)

# VI. Contracts

## C. General approach

2. Beware “standard” / “forms”
  - a. One size NOT fit all
  - b. Most terms are negotiable (market forces)
3. Fund exposure
  - a. Price
  - b. Insurance
  - c. Self-funding (“take chances”)

# VII. Conclusion

## A. Importance of “big picture” approach

1. Real policies
2. Real practices (that follow policies)
3. Consistency
4. Communication (“yolo tango”)
  - a. internal
  - b. external

# VII. Conclusion

## A. Importance of “big picture” approach

### 5. Documentation

- a. consistent
- b. careful preparation
- c. retention

## B. You CAN make a difference (\$)

- 1. Investment of resources
- 2. Willingness to change ways

# VII. Conclusion

## C. Questions

1. Now
2. Later

Robert T. Franklin, Esq.  
Franklin & Prokopik

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