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Agricultural Law Update

January 2014

WHEN TRUCKS SPILL THEIR LOAD

- Dirk H. Beckwith

Last December, Michael Wilson of Rex, Ga. was driving his semi on Interstate 55/74 near Bloomington, Ill. when he clipped an Illinois Department of Transportation (IDOT) truck parked in the center lane. The truck, which had a signboard trailer attached, was there to warn drivers of roadwork ahead.

Wilson's truck overturned and skidded onto the concrete barrier between the lanes. The trailer was completely torn open and his load of pudding cups littered the highway. The highway was closed for several hours while cleanup crews used a snowplow to scoop up the mess.

Pudding is not a dangerous spill; it is simply a nuisance as were the 14 million honeybees that escaped when the truck carrying them overturned. It took almost 15 hours for bee keepers to round up the bees and for crews to clean the sticky honey off the highway.

When the products involved are not dangerous, a single call to 911 brings responders who are usually local law enforcement, the fire department or department of transportation. More serious and dangerous spills such as fertilizer, pesticide, soil amendment or fuel used and transported by farmers require specialized assistance.

The Federal Hazardous Materials Regulations, (FHMR) found in title 49 of the Code of Federal Regulations, applies to all commercial transportation including farmers. While Section 173.5 provides some relief for farmers transporting hazardous materials within the state, travel outside Michigan boundaries must comply with all the regulations. And regardless of where you are traveling, even if over local roads between your fields, packages have to be secured in the truck and containers must be free of leaks.

Accidents happen and if the accident results in a hazardous waste spill, it must be reported to the local authorities (call 911), and:

- Michigan State Police Operations Desk (517-241-8000) available 24 hours a day, and
- Agriculture Pollution Emergency Hotline (Michigan Department of Agriculture, 800-292-4706), or
- Pollution Emergency Alerting System (Department of Natural Resources & Environment, 800-406-0101)

Control of chemical spills should only be attempted by qualified and equipped personnel. The first step, if it can be done safely, would be to control the spill by turning off nozzles, or by plugging puncture type holes with a wooden plug, putty, or a bolt. Next the mess is cleaned up following specific procedures for the type of material spilled provided by the hazardous materials investigator assigned by the Michigan State Police.

At Foster Swift we have an Emergency Response Team available 24/7 to assist you at the scene of the accident and resultant spill. The team consists of experts in accident reconstruction, a forensic photographer/videographer to take photos at the scene, an investigator to take statements from witnesses and an experienced defense lawyer.

For more information please contact Dirk H. Beckwith at dbeckwith@fosterswift.com or 248.539.9918. Dirk is the president of the Transportation Lawyers Association and a member of the Trucking Insurance Defense Association.

IS YOUR INDEPENDENT CONTRACTOR REALLY AN EMPLOYEE?

- Deanna Swisher

If you obtain services from an "independent contractor," you need to be prepared for this question – is that independent contractor really an employee? The probability that you will be accused of misclassifying an employee continues to increase as governmental agencies remain under pressure to recover revenue. The IRS, Department of Labor and Michigan's Unemployment Agency coordinate enforcement efforts and share information. Michigan's Department of Treasury is aggressive in its pursuit of revenue from employers that misclassify employees. If any one of these agencies questions your classification of a worker as an independent contractor, you will need to be prepared to convince all of them that your workers are independent contractors or suffer significant financial consequence.

Classification questions often arise when an ex-worker files a claim for unemployment or an injured worker seeks worker's compensation. Random audits may also lead to an inquiry. In any event, the financial risk of misclassification is too high to ignore. While not an exhaustive list, the risks include: unpaid federal income tax plus a penalty for failure to withhold; your share of FICA plus a substantial percentage for failure to withhold; state and federal unemployment tax, plus interest and penalties; worker's compensation liabilities to include a percentage of the worker's wages plus fines; Department of Labor penalties, fees and back wages including overtime. Additionally, where you have misclassified a worker, you are effectively penalized under the Worker's Compensation Act by losing your immunity from tort claims.

Determining whether your classification reflects the current state of the law and the reality of your relationship with the worker is worth the cost of what may be a fairly complex analysis. While a discussion of all of the factors that need to be examined is beyond the scope of this article, start by considering:

1. Is the worker engaged in an "independent occupation," meaning that they provide self-directed services to you and to others with the worker's own resources? If you tell the worker how to perform tasks, they do not offer their services to others, and the worker uses your resources (i.e. equipment, tools, telephone), they are not an independent contractor.
2. Does the worker have other sources of income? If you are the only source of the worker's income, be forewarned of what appears to be a trend to find that the worker is an employee even if all other aspects of the relationship support classification as an independent contractor.

If you question whether you have accurately classified a worker as an independent contractor, promptly call an attorney with experience in this area or your accountant. If they question your classification you need to know what can be done to change and document the relationship to increase the likelihood that your worker will be determined to be an independent contractor. If you cannot make necessary changes to convert what you have to a true independent contractor relationship, your attorney or accountant will likely soften the financial blow by finding an appropriate "amnesty" program and guiding you through other voluntary corrections.

If you are advised that you have properly classified the worker as an independent contractor, you need to examine whether the documents and information within your control will convince an agency or court that the worker is in fact an independent contractor. While you need to have signed independent contractor agreements in your file, this alone, even if perfectly worded, will not protect you from an adverse determination. An annual audit, which we can tailor to your business, is a means of requiring the worker to provide to you the information and documents that will allow you to defend an independent contractor classification.

For more information on misclassifying an employee contact Deanna Swisher at dswisher@fosterswift.com or 517.371.8136.

MICHIGAN'S EQUINE ACTIVITY LIABILITY ACT: ARE WE GALLOPING IN THE RIGHT DIRECTION?

- Julie I. Fershtman

Horses, by their nature, present risks because they are large, powerful, unpredictable animals that act on instinct. Indeed, a horse with no dangerous or aggressive history nevertheless has the potential to hurt anyone who is riding, driving, handling, or near it. Injuries bring the possibility of litigation.

Michigan's Equine Activity Liability Act, M.C.L. § 691.1661, et seq. (the "EALA") is one of 46 state laws nationwide (all but California, New York, Maryland and Nevada) that in various ways limit or control liabilities in their equine industries. Michigan's EALA states that qualifying defendants (horse owners, stables, industry professionals, trainers, breeders and others) should not be liable if an "equine activity participant" sustained injury, death or damage from an "inherent risk" of equine-related activities, subject to numbered exceptions. Michigan's EALA includes four exceptions, including providing "faulty tack or equipment," providing an equine and "failing to make reasonable and prudent efforts to determine the ability of the participant to safely engage in the equine activity," and "dangerous latent conditions of land" where an equine activity takes place "for which no conspicuous warning sign is posted." Michigan's fourth EALA exception departs substantially from the national trend and applies when a qualifying defendant "commits a negligent act or omission that constitutes a proximate cause of the injury, death or damage."

In the years that followed the Michigan EALA's passage, many have debated the existence and purpose of the "negligence" exception. Some, like this author, believe the EALA's "negligence" exception has been interpreted to improperly swallow up its immunities. This author believes that Michigan should eliminate the negligence exception.

LEGISLATIVE HISTORY

The EALA had no "negligence" exception when introduced in the Michigan legislature in 1993 as HB 5006. In its place, by comparison, was an exception for "an act of omission that constitutes willful or wanton disregard for the safety of the participant, and that act of omission was a proximate cause of the injury or death." HB 5006 also included a fifth exception, removed from the bill before its enactment that allowed liability for intentionally caused injuries. When HB 5006 proceeded to the Senate, a substitute bill deleted its 'willful or wanton" exception and replaced it with an exception for a "negligent act or omission that constitutes a proximate cause of the injury, death, or damage." That version became the law.

THE PROMISE OF IMMUNITIES

Section three of the EALA promises liability limitations when an "equine activity participant" sustains injury from an "inherent risk of equine activity." More specifically, Section three provides:

> Except as otherwise provided in Section five [the law's list of exceptions, discussed below], an equine activity sponsor, an equine professional, or another person is not liable for an injury to or the death of a participant or property damage resulting from an inherent risk of an equine activity. Except as otherwise provided in section five, a participant or participant's representative shall not make a claim for, or recover, civil damages from an equine activity sponsor, an equine professional, or another person for injury to or the death of the participant or property damage resulting from an inherent risk of an equine activity.

Continued on page 4 |Equine Activity Liability Act

Equine Activity Liability Act | Continued from page 3

Section two of the EALA provides important definitions that include "equine" (a "horse, pony, mule, donkey, or hinny"), "engage in an equine activity," "equine activity sponsor," "equine professional," and "inherent risk of an equine activity." Section four excludes regulated horse race meetings and provides that "two persons may agree in writing to a waiver of liability beyond the provisions of this act and such waiver shall be valid and binding by its terms." Section six requires "equine professionals" to post warning signs with specified language and to repeat this "warning" language in their contracts.

In 2010, the Michigan Supreme Court in B*eattie v. Mickalich,* 486 Mich. 1060; 784 N.W.2d 38 (2010), addressed the interplay between the EALA's immunity provisions and the scope of its "negligence" exception. In *Beattie*, the plaintiff was injured while helping the defendant saddle a horse named "Whiskey" that was described as "green broke," but the horse allegedly reared up and injured her. The lawsuit alleged claims under the EALA's "negligence" exception. The trial court dismissed the case, and the Michigan Court of Appeals affirmed. In doing so, it suggested that the EALA's "negligence" exception was not intended to swallow up the immunities. As to whether "negligence" claims could be viable, the Court held that this could occur only if that act or omission involves something other than inherently risky equine activity. A divided Michigan Supreme Court reversed. The majority held that the EALA did not abolish negligence claims, and a plaintiff has no obligation to plead a claim in avoidance of the law's "negligence" exception.

The divided Supreme Court in *Beattie v. Mickalich* reflects the differing opinions involving the scope of the EALA's immunities and its "negligence" exception. In this author's opinion, the Michigan EALA's "negligence" exception should be eliminated and replaced with a "willful and wanton" or "willful or wanton" exception for five reasons.

First, this amendment would put Michigan in line with approximately 27 states whose EALAs have "willful/wanton" exceptions instead of "negligence" exceptions.

Second, this would restore the EALA's intent when introduced into the legislature 20 years ago.

Third, lawsuits could still proceed under a "willful/wanton misconduct" exception.

Fourth, the amendment would not disturb the EALA's three other exceptions of "faulty tack or equipment," providing an equine and "failing to make reasonable and prudent efforts to determine the ability of the participant to safely engage in the equine activity," and "dangerous latent conditions of land."

Fifth, this amendment would offer meaningful protection to Michigan's equine industry.

ABOUT THE AUTHOR

Julie I. Fershtman, a shareholder with Foster Swift, is widely considered to be one of the nation's most experienced Equine Law practitioners. Her practice also focuses on commercial litigation and insurance coverage and defense. She is listed in *The Best Lawyers in America*® 2013 and 2014.

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I-9 COMPLIANCE – 2014 UPDATES & PLANNING ITEMS

- Ryan E. Lamb

Since 1986, the U.S. has placed upon employers the burden of acting as gate-keepers in the enforcement of the immigration laws. The government's policies view employers as "magnets," and the primary root cause of illegal immigration. The I-9 Form, deceptively simple in appearance, creates numerous and complex compliance issues for the employer. I-9 enforcement is not primarily concerned with locating illegal workers with the goal of deporting them. Instead, I-9 enforcement is heavily focused on Form I-9 itself, and the employer's strict accuracy in completing the form and complying with related regulations in assembling its workforce. Thus, employers who do not dot every "i" and cross every "t" in strict compliance with U.S. Immigration and Customs Enforcement's (ICE) exacting standards are at risk for penalties, **regardless of whether any unlawful employment exists!**

As we begin 2014, here are some updates and reminders for your consideration:

- **New Form I-9.** On March 8, 2013, U.S. Citizenship and Immigration Services (USCIS) issued a new and updated version of Form I-9, which was intended to be more explicit, detailed and user-friendly. U.S. employers should be using the new form as of May 7, 2013. The new form expands the I-9 from 1 to 2 pages, among other changes.

- **Enforcement Activity Continues to Increase.** I-9 audits, assessment of fines and charging of criminal penalties by ICE continues to increase and has increased dramatically since fiscal year 2007.

- **Internal I-9 Compliance Policy.** Every employer should have a formal internal I-9 Compliance Policy detailing the employer's exact policies and procedures for properly completing, verifying and retaining I-9 and employment authorization documentation, for assigning supervisory responsibility within the company for these duties, for ensuring adequate training of I-9 responsible employees, and for self-audits or other periodic internal monitoring efforts to ensure compliance. The best defense and response to an I-9 Audit or ICE investigation is documentation establishing the employer's consistent pattern of responsible good faith efforts to maintain an I-9 compliant workforce.

- **Conduct an I-9 Self-Audit.** Once an employer has its compliance policy in place, it should promptly conduct its initial self-audit, guided by its attorney. If an employer has a good compliance policy in place and has processed self-audits before, this is typically a good time of year to engage in an annual review and self-audit.

- **Provide Training for all Hiring and I-9 Compliance Personnel.** All human resources (HR) and other employees involved in the I-9 and immigration compliance process should receive proper initial and ongoing training to ensure I-9 compliance. If self-audits are to be performed internally, the responsible persons should also receive specialized I-9 audit training. It is the employer's responsibility to provide these resources and properly train its work force.

The experienced immigration and employment attorneys at Foster Swift welcome an opportunity to discuss a comprehensive approach for labor needs in your agricultural business.

For more information on immigration and employment please contact Ryan Lamb at rlamb@fosterswift.com or 616.796.2503.

UPCOMING AG EVENTS

Jan. 16, 2014	MSU Field Crops IPM Meetings, Alma- http://bit.ly/19VDgtw
Jan. 17, 2014	Farm Safety Seminar (click on the link to see the various locations and dates of the Farm Safety Seminar)- http://bit.ly/1lIowAC
Jan. 20, 2014	Webinar | Getting Started with Soil Improvement on Your Farm- http://bit.ly/1aKCeea
Jan. 21, 2014	Managing Corn Rootworm in Intensive Corn Production Systems, St. Johns- http://bit.ly/1diG44i
Jan. 22, 2014	Shrinking Your Feed Shrink, East Lansing- http://bit.ly/K8XJ18
Jan. 22-23, 2014	Great Lakes Crop Summit, FireKeepers Casino & Hotel, Battle Creek- http://bit.ly/1jKamhr
Jan. 22-23, 2014	2014 Voice of Agriculture Conference, Lansing- http://bit.ly/1diGKGP
Jan. 29, 2014	Last day to receive early registration prices for the Growing Michigan Agriculture Conference- http://bit.ly/1dk1tKc
March 19, 2014	Ag Day at the Capitol - http://bit.ly/KOyoeh

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