



# CALIFORNIA TRUCKING LAW QUARTERLY UPDATE

THE LAW OFFICES OF BORTON PETRINI LLP

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Borton Petrini LLP  
1600 Truxtun Avenue  
Bakersfield CA 93301  
e-mail [bpcebak@bpclaw.com](mailto:bpcebak@bpclaw.com)

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### Editors:

Calvin R. Stead  
(661) 322-3051

Brad Post  
(209) 576-1701

## CALIFORNIA'S THREE TYPES OF HAULING CONTRACT INDEMNITY AGREEMENTS — WHICH ONE ARE YOU USING?

*By Calvin R. Stead*

The general rule is that an indemnity agreement does not protect the indemnitee from a loss to which his negligence has contributed. Therefore, there must be, at least, an express undertaking in the contract that binds the indemnitor. The rationale of this rule is that an indemnity clause resembles an insurance agreement, and an indemnitor will not be held responsible for more than that to which he has obligated himself by contract.

All contractual indemnity provisions fall within one of three classifications. The first type of indemnity provision (often referred to as Type I) provides that the indemnitor is to indemnify the indemnitee for liability due to the indemnitee's active negligence. This means that if the indemnitee is concurrently and actively negligent, the indemnitor must still defend and indemnify the indemnitee for the whole loss.

However, courts do not readily interpret an agreement to provide Type I indemnity, unless the agreement is clearly drafted to express the intent that active negligence on the part of the indemnitor will be indemnified. When the language of a contract purporting to exculpate one of the parties for its own negligence is prepared entirely by the party relying on its terms, words clearly and explicitly expressing that this was the intent of the parties are required.

The California Supreme Court has explained that an indemnitor will not be made responsible for the actively negligent acts of an indemnitee over whose conduct it has no control, unless the language imposing such liability expressly and unequivocally states the intent so that the indemnitor is advised in definite terms of the liability to which it is exposed.

The second type of indemnity clause (Type II) provides that the indemnitor is to defend and indemnify the indemnitee for the indemnitee's liability without specification of negligence. A non-exhaustive list of examples include the language "howsoever same may be caused"; "regardless of responsibility for negligence"; "arising from the use of the prem-

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### Calvin R. Stead



Calvin R. Stead is a Partner in the Bakersfield office of Borton Petrini LLP, and he is a member of the Trucking Industry Defense Association. Cal's areas of legal expertise include trucking law, oil field litigation, construction accidents, product liability, toxic tort and environmental litigation.

Cal has defended personal injury and wrongful death cases on behalf of trucking companies, product manufacturers, product distributors, construction companies, oil companies and numerous other commercial entities. He has wide experience in all areas of casualty litigation.

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ises, facilities or services of [the indemnitee];” “which might arise in connection with the agreed work”; “caused by or happening in connection with the equipment or the condition, maintenance, possession, operation or use thereof”; and “from any and all claims for damages to any person or property by reason of the use of said leased property,” etc.

Under this type of indemnity provision, the indemnitee is indemnified from his own acts of passive negligence that caused his liability, but is not indemnified for his own acts of active negligence that caused his liability.

The third type of contractual provision (Type III) is that which provides that the indemnitor is to indemnify the indemnitee for the indemnitee’s liability caused by the indemnitor. This type of contract does not provide that the indemnitor is to indemnify the indemnitee for the indemnitee’s liabilities that were caused by someone other than the indemnitor. Under this type of provision, any negligence on the part of the indemnitee, either active or passive, will bar indemnification by the indemnitor irrespective of whether the indemnitor may also have been a cause of liability.

Thus, the law in California is clear that for a trucker to be contractually liable to indemnify for the active negligence of the hiring party, the contract must expressly say so in clear and explicit terms. However, the California legislature has weighed in on this subject, as well, and somewhat muddled the picture.

Under California Civil Code section 2784.5<sup>1</sup>, an indemnity clause in a hauling contract seeking to indemnify the indemnitee against liability for damages caused by the indemnitee’s sole negligence is void as against public policy. In other words, a Type I indemnity agreement that provides indemnification from a hauler for another’s sole negligence is not lawful. This means that a trucking company cannot be forced to act as an insurance company for an indemnitee under the circumstances of sole negligence of the indemnitee.

Unfortunately, there is no published opinion that deals with this statute. However, a similar statute applicable to construction contracts (Civ. Code § 2782) has been adjudicated, at least in part. Based on that line of cases, an indemnitee can be indemnified for its own active negligence by an indemnitor, such as a hauler, so long as the language of the indemnity agreement precludes those situations where the liability of the indemnitee is caused solely and exclusively by the indemnitee’s own negligence.

(Footnotes)

<sup>1</sup>The following is a citation of Civil Code section 2784.5, “Any provision, promise, agreement, clause, or covenant contained in, collateral to, or affecting any hauling, trucking, or cartage contract or agreement is against public policy, void and unenforceable if it purports to indemnify the promisee against liability for any of the following damages which are caused by the sole negligence or willful misconduct of the promisee, agents, servants, or the independent contractors directly responsible to the promisee, except when such agents, servants, or independent contractors are under the direct supervision and control of the promisor: (a) Damages arising out of bodily injury or death to persons. (b) Damage to property. (c) Any other damage or expense arising under either (a) or (b). This section shall not affect the validity of any insurance contract, workmen’s compensation insurance contract, or agreement issued by an admitted insurer as defined by Sections 23 and 24 of the Insurance Code or insurance effected by surplus line brokers under Section 1760 through 1780 of the Insurance Code.”

In one published appellate opinion involving a construction contract where the language of the statute was incorporated into the contract, the court found the language sufficient to comply with the requirements of both the California Supreme Court with regard to Type I indemnity agreements, and the legislature with regard to applicable public policies. Specifically, the court in *C.I. Engineers & Constructors, Inc. v. Johnson & Turner Painting Company, Inc.* has held that the following language is sufficient to comply with the notice requirements of the California Supreme Court, and the public policy requirements of the Civil Code:

“All work covered by this agreement done at the site of construction or in preparing or delivering materials to the site shall be at the risk of the subcontractor against any and all liability, claims, judgments, or demands, including the obligations of the contractor on account of any similar agreement contractor has with owner, including demands arising from injuries or deaths of persons (subcontractor’s employees included) and damage to property, arising directly or indirectly out of the obligations herein undertaken or out of the operations conducted by subcontractor, save and except claims or litigation arising through the sole negligence or sole willful misconduct of contractor, and will make good to and reimburse contractor for any expenditures, including reasonable attorneys’ fees, contractor may make by reason of such matters and, if requested by contractor, will defend any such suits at the sole cost and expense of subcontractor.”

*“. . . an indemnitee can be indemnified for its own active negligence by an indemnitor, such as a hauler, so long as the language of the indemnity agreement precludes those situations where the liability of the indemnitee is caused solely and exclusively by the indemnitee’s own negligence.”*

This indemnity clause does not expressly meet the requirement that the intent that active negligence as to indemnification must be expressly stated in the contract. According to the Supreme Court, this requirement is satisfied using the specific language of section 2782. The same reasoning and caveats should apply to trucking contracts subject to section 2784.5.

We strongly urge you to consult your lawyer before including this language into your hauling contracts, since any non-conforming language elsewhere in the contract could create a sufficient ambiguity to preclude application of Type I indemnity.

**DISCLAIMER: THE INFORMATION PROVIDED IN THIS UPDATE IS NOT A SUBSTITUTE FOR LEGAL ADVICE. READERS SHOULD BE ADVISED THAT IF THEY HAVE QUESTIONS ABOUT THIS OR ANY OTHER AREA OF TRUCKING LAW, THEY SHOULD SEEK THE ADVICE OF COMPETENT COUNSEL SPECIALIZING IN TRUCKING LAW.**

# Update of the Hours of Service Litigation and Current Status of the New Rules

By Calvin R. Stead

After a seven-year rule making process, in April 2003, the Federal Motor Carrier Safety Administration (FMCSA) issued new hours of service (HOS) rules applicable to the nation's three million truck drivers. The new rules were effective in January 2004, and replaced a set of rules that had been in place since the 1930s. The new rules were developed as a result of a Congressional mandate directing FMCSA to issue improved rules more consistent with current scientific literature on human fatigue and alertness. The new rules required the following:

- at least ten consecutive hours of off-duty time between work shifts;
- limit a driver's work shift to 14 consecutive hours;
- limit driving time to 11 hours within the 14 consecutive hours;
- limit total on-duty time (including driving time) in any week to 60 hours (commonly referred to as the weekly limit);
- allow the weekly limit to be reset to zero hours after at least 34 consecutive hours off duty; and
- allow a driver to split the ten hours of off-duty time into two rest periods if the rest is taken in a sleeper berth-equipped truck.

Shortly after the rules were issued, several consumer advocacy organizations sued FMCSA in the U.S. Court of Appeals for D.C. Circuit arguing that the rules were inconsistent with Congressional direction and intent. On July 16, 2004, the D.C. Circuit vacated and remanded the new rules to FMCSA based upon the Court's view that the agency had not fulfilled a statutory mandate to consider "*the impact of the rule on the health of drivers.*" The Court explained that FMCSA may conclude that the new rules do not cause driver health problems, or that any such problems are outweighed by other factors (cost issues, etc.), but that it was incumbent upon the agency to affirmatively address those issues and explain its conclusions. The agency's failure to expressly consider driver health consequences (other than driver fatigue issues) was more of a technicality than a significant flaw in the rules. On September 30, 2004, Congress passed a law that provided a one-year period for the new rules to remain in effect while FMCSA addressed the Court's concerns.

In January 2005, FMCSA issued a notice of proposed rule making (NPRM) in response to the Court decision. The NPRM "re-proposed" the new HOS rules and posed a series of questions in search of industry safety and economic data. In response, the trucking industry supported retention of the HOS rules and provided both safety and economic data collected from the industry. The data represented more than 80,000 drivers and 79,000 trucks that were operated more than 8.6 billion fuel tax miles. The data showed that there were decreases in total Department of Transportation (DOT) recordable accidents, total injuries and total DOT recordable-related injuries between 2003 and 2004. This sample of the industry also had a statistically lower average DOT recordable accident rate per million miles and a lower average injury rate per million miles in 2004 versus 2003.

In February 2005, FMCSA announced that the Bush Administration would be pursuing legislative codification of the new HOS rules in the pending highway reauthorization bill. The trucking industry supported the Administration's effort to codify the rules.

FMCSA began working on parallel legislative and regulatory tracks. On the legislative track, FMCSA worked with Congress to have the rules codified as part of the highway bill. In the event that Congress might not pass a highway bill with codification language included, FMCSA also geared up to publish a final HOS rule no later than September 30, 2005.

The FMCSA subsequently issued a new rule that spells out the length of time commercial drivers can operate trucks before they are required to take a break. The new rule replaces the HOS regulations that were contested in 2003. Parts of the rule, including the maximum driving time and minimum rest limits remain the same. However, the new rule includes changes affecting short-haul operators and longer distance drivers who use in-cab sleeper-berths for their rest.

The new rules are based on research that shows that drivers that are well rested are less likely to lose control, crash, or injure others. The new rule should improve driver health and safety and the safety of our roadways, by ensuring drivers obtain necessary rest and restorative sleep.

As in the 2003 regulations, the new rule prohibits truckers from driving more than eleven hours in a row, working longer than 14 hours in a shift and driving more than 60 hours over a seven day period or 70 hours over an eight day period. In addition, the new rule requires truckers to rest for at least ten hours between shifts and provides a 34-hour period to recover from cumulative fatigue.

FMCSA asked driver health and safety experts to review over 1,000 health- and fatigue-related articles and studies and considered thousands of comments received from drivers, truck companies, safety advocates and researchers before settling on the new safety provisions. Based on this research, FMCSA concluded the new rule will keep drivers healthy and reduce the 5.5 percent of fatal truck crashes that are caused by driver fatigue.

*The most important change under the new rule now allows short-haul operators not required to hold a commercial drivers license, like landscape crews and delivery drivers who work within a 150 mile radius of their starting point, to extend their work day twice a week. They also will no longer have to maintain log-books.* The change was prompted by safety data which shows that short haul drivers make up over half the commercial fleet yet are involved in less than seven percent of the nation's fatigue-related fatal truck crashes.

*Another change contained in the new rule requires truckers who use sleeper-berths to rest for eight hours in a row, and take another two consecutive hours off duty before resetting their daily driving schedule.* Studies show that drivers are less likely to be fatigued if they take a single eight hour block of rest than if they break their rest into smaller periods of time which was allowed under the previous rule.

As in 2003, the new rule applies only to commercial truck drivers, and not to passenger motor coach operators. Motor coach drivers are still covered by the HOS rules in effect prior to 2003.

The new rule went into effect October 1, 2005. FMCSA intends to work with states and the trucking community for the first three months the rule is in effect by allowing them time to update educational materials, train employees and re-program driving schedules. During this transitional period, FMCSA and state law enforcement officials will monitor carriers for egregious violations of the new rule and pursue enforcement actions where necessary.

For more details see [www.fmsca.dot.gov](http://www.fmsca.dot.gov).



# LAW OFFICES OF Borton Petrini LLP



## **Bakersfield**

1600 Truxtun Avenue  
Bakersfield, CA 93301  
(661) 322-3051  
E-mail: [bpcebak@bpclaw.com](mailto:bpcebak@bpclaw.com)  
Managing Partner: George Martin

## **Fresno/Visalia**

2014 Tulare Street, Ste. 830  
Fresno, CA 93721  
(559) 268-0117  
E-mail: [bp CFRs@bpclaw.com](mailto:bp CFRs@bpclaw.com)  
Managing Partner: Dave Petrie

## **Los Angeles**

707 Wilshire Blvd., Ste. 5100  
Los Angeles, CA 90017  
(213) 624-2869  
E-mail: [bpcla@bpclaw.com](mailto:bpcla@bpclaw.com)  
Managing Partner: Matthew Trostler

## **Modesto**

1104 12th Street  
Modesto, CA 95354  
(209) 576-1701  
E-mail: [bpmod@bpclaw.com](mailto:bpmod@bpclaw.com)  
Managing Partner: Brad Post

## **Orange County**

201 E. Sandpointe, Ste. 510  
Santa Ana, CA 92707  
(714) 424-6200  
E-mail: [bp coc@bpclaw.com](mailto:bp coc@bpclaw.com)  
Managing Partner: Rosemarie Lewis

## **Sacramento**

11025 Trade Center Dr., Ste. 150  
Rancho Cordova, CA 95670  
(916) 858-1212  
E-mail: [bp sac@bpclaw.com](mailto:bp sac@bpclaw.com)  
Managing Partner: Mark Newman

## **San Bernardino**

290 North D Street, Ste. 500  
San Bernardino, CA 92401  
(909) 381-0527  
E-mail: [bp sbdo@bpclaw.com](mailto:bp sbdo@bpclaw.com)  
Managing Partner: Dan Ferguson

## **San Diego**

402 W. Broadway, Ste. 880  
San Diego, CA 92101  
(619) 232-2424  
E-mail: [bp csd@bpclaw.com](mailto:bp csd@bpclaw.com)  
Managing Partner: Paul Kissel

## **San Francisco**

463 Pacific Avenue  
San Francisco, CA 94133  
(415) 677-0730  
E-mail: [bp csf@bpclaw.com](mailto:bp csf@bpclaw.com)  
Managing Partner: David Bremer

## **San Jose**

99 Almaden Blvd., Ste. 700  
San Jose, CA 95113  
(408) 535-0870  
E-mail: [bp csj@bpclaw.com](mailto:bp csj@bpclaw.com)  
Managing Partner: Sam Phillips

[www.bpclaw.com](http://www.bpclaw.com)

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