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Transportation Lawyers Association

CHICAGO

Regional Seminar and Bootcamp

January 23–24, 2025

Radisson Blu Aqua Hotel ❇ Chicago, IL

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It All Starts with a Contract

Panelists:

Katherine M. Flett

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Moderator:

Lucas L. Lopez

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Agenda

1. Non-competes by Erick Harris
2. Non-solicitation and Confidentiality by Katherine M. Flett
3. Indemnity by Caroline Synakowski
4. Questions

Non-Compete Highlights

- A non-compete provision prohibits an employee from working for a competing business in a certain geographic scope for a certain length of time ***after*** their employment ends.

- Key provisions: (1) specified implementation date, (2) applies to a specific location, (3) prohibits competition (i.e. starting a business, full-time employment).

FTC Non-Compete Rule

- The Federal Trade Commission implemented a Rule which bans non-compete agreements/clauses between employers and workers.
- Anticipated effective date, September 4, 2024 (more to come).
- Supersedes conflicting state law.

FTC Non-Compete Rule
Key Provisions

- **Non-Compete clause**: "a term or condition of employment that **prohibits** a worker from, **penalizes** a worker for, or **functions to prevent** a worker from **(1)** seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or **(2)** operating a business in the United States after the conclusion of the employment that includes the term or condition."
  - Definition must be construed broadly.
- **Worker**: "a natural person who works or who previously worked, **whether paid or unpaid**, without regard to the worker's title or the worker's status under any other State or Federal laws, including, **but not limited to, whether the worker is an employee, independent contractor, extern, intern, volunteer, apprentice, or a sole proprietor** who provides a service to a person. The term worker includes a natural person who works for a franchisee or franchisor, but does not include a franchisee in the context of a franchisee-franchisor relationship."

FTC Non-Compete Rule
Key Provisions, Continued

- Exceptions:
  (1) Senior executives who are **currently** subject to a non-compete, earn more than $151,164 per year, and have policymaking authority—final authority to make policy decisions that control significant aspects of a business entity or common enterprise.
  (2) Sale of a business or a person's ownership interest in a business.
  (3) Exempt industries: financial institutions (banks, federal credit unions, loan institutions), common carriers, air carriers, and foreign air carriers.
- Prohibits an employer from **entering into, or attempting to enter into**, a non-compete clause with a worker or representing that a worker is subject to a non-compete clause.
- Employer must provide **clear and conspicuous** notice to workers, subject to a prohibited non-compete, an individual communication that the non-compete is invalid and unenforceable.

Pending Litigation

- ***Ryan v. Federal Trade Commission, ND of Texas***
  (1) Case Status: Summary judgment in favor of Plaintiffs. Rule determined to be an unconstitutional overreach by a federal agency without clear Congressional authority.
- Legal Concerns
  - Issues involving economic or political significance require clear and direct Congressional authority for an agency to act (Major Questions Doctrine).
  - Article 1 violation through delegation of legislative responsibility.
  - *Chevron* Deference overruled.

Transportation Considerations

- Independent Contractors
- Executive/senior officers
- State law requirements
- Customer/proprietary data

State Law Status

- **Complete:** California, Minnesota, North Dakota, Oklahoma.
- **Partial:** Remaining states have other restrictions.
- Multiple state legislatures are considering implementing a partial and/or complete ban on non-competes.
- **Practice Tip:** Follow your state's statute.

Resource: https://eig.org/state-noncompete-map/

2025 Outlook

- **Trump Administration**
  - Likelihood of Rule support—50/50.
  - President Trump used non-competes in the private sector.
  - Vice-President-elect JD Vance: “I look at [FTC Chairman] Lina Kahn as one of the few people in the Biden administration that I actually think is doing a pretty good job and that sort of sets me apart from most of my Republican colleagues.”
  - President Trump will appoint Lina Kahn’s successor.

Non-Solicitation Provisions

The difference between non-solicitation and non-compete provisions

- A non-compete provision prohibits an employee from working for a competing business in a certain geographic scope for a certain length of time after their employment ends.
- A non-solicitation provision prohibits an employee from soliciting the employer's customers, clients, or other employees for a certain length of time after their employment ends.

Non-Solicitation Provisions

The Federal Trade Commission's (FTC) position about non-solicitation provisions

- They are generally permissible, but can still face challenges if they are overly broad
- Before the FTC's ban of non-compete provisions got struck down by the federal court in Texas, the FTC said that if a non-solicitation provision functionally acts as a non-compete, it will not be enforceable

Non-Solicitation Provisions

The National Labor Relations Board's (NLRB) position about non-solicitation provisions

Targeting non-solicitation provisions in ***employment contracts*** – See in re *J.O. Mory, Inc*.

- An HVAC technician who was a "salt"—a union organizer who takes a non-union job intending to organize a workforce – was fired after the employer learned that he falsely claimed to have previously worked at a non-union shop.
- The employer then tried to enforce the restrictive covenants in the employment agreement, which included a non-solicitation provision intended to prevent "pirating" by prohibiting employees from "soliciting, encouraging, or attempting to persuade any other employee of the Employer to leave the employ of the Employer" for a period of 24-months after the separation of employment.
- The NLRB found that non-compete and non-solicitation provisions in an employment agreement that employees were required to sign chilled employees' rights to engage in union and other protected concerted activity under Section 7 of the NLRA.
- The ALJ ordered the employer to rescind the challenged provisions and notify current and former employees subject to the same that the provisions' requirements were no longer in effect.
- The ALJ referenced the NLRB's employee-friendly standard for evaluating work rules and policies adopted in its August 2023 decision in *Stericycle, Inc*.
- The J.O. Mory, Inc. decision is currently be appealed to the NLRB.

•j o mory inc. services
•j o mory inc
•j o mory
•in re **morris**

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Non-Solicitation Provisions

The NLRB's position about non-solicitation provisions

Targeting non-solicitation provisions in ***business-to-business contracts*** – See in re *Planned Companies*

- On September 12, 2024, the Regional Director of the NLRB in Newark, New Jersey, issued an unfair labor practice complaint against a building services company, alleging that employee non-hire (or "no poach") provisions in the company's contracts with its building clients violate the National Labor Relations Act (NLRA) because they could interfere with workers' mobility or organizing rights.
- This complaint is still pending.

Non-Solicitation Provisions

***Quality Transportation Services v. Mark Thompson Trucking*, 183 N.E.3d 260 (Ill. App. 2021)**

- Quality Transportation Services (broker) hired Mark Thompson Trucking (carrier) to provide transportation services for Quality Transportation Services.
- Agreement contained the following non-solicitation provision:

  > "CARRIER will not solicit traffic from any shipper, consignor, consignee, or customer of Broker where (1) the availability of such traffic first becomes known to CARRIER as a result of BROKER'S efforts, or (2) the traffic of the shipper, consignor, consignee or Customer of BROKER was first tendered to CARRIER by BROKER. If CARRIER breaches this Agreement and directly or indirectly solicits traffic from customers of BROKER and obtains traffic from such customer during the term of this Agreement or for twelve (12) months thereafter, CARRIER shall be obligated to pay BROKER, for a period of fifteen (15) months thereafter, commission in the amount of thirty-five percent (35%) of the transportation revenue resulting from traffic transported for the Customer, and CARRIER shall provide BROKER with all documentation requested by BROKER to verify such transportation revenue."

- An agent for one of the broker's customers initiated the first phone call to the carrier. There were additional communications arguably initiated by the carrier to the broker's customer after large gaps of time that followed the initial phone call.

Non-Solicitation Provisions

***Quality Transportation Services v. Mark Thompson Trucking*, 183 N.E.3d 260 (Ill. App. 2021)**

- The carrier submitted each bid to the broker's customer only after the broker's customer had requested that the carrier did so. The record also showed that when the broker's customer rejected the carrier's bid, the carrier did not re-bid or reinitiate contact with the broker's customer until the broker's customer requested a new bid from the carrier.
- Ultimately, the carrier began providing trucking services for the customer of the broker.
- The broker filed suit against the carrier, claiming that the carrier breached the non-solicitation agreement.
- The Circuit Court (LaSalle County) granted summary judgment in favor of carrier. After a series of appeals, the Third District Appellate Court of Illinois held that carrier's submission of bids for motor carrier service routes to the broker's customer was not solicitation and thus did not breach non-solicitation provision.
- The Court held that if it accepted the broker's argument, the carrier would have to either ignore or reject all inquiry from prospective clients even when it did nothing to initiate the inquiries. This obligation would place an undue burden on the carrier's livelihood. While the broker may protect its legitimate business interest by prohibiting the carrier from "taking affirmative measures" to obtain business away from the broker, it cannot prohibit the carrier from developing prospective business opportunity that came their way through no fault of theirs. To hold otherwise would be contrary to public policy.

Non-Solicitation Provisions

Active v. Passive Solicitation and Use of Social Media

- Former employee's act of sending invitations to connect with former co-workers via LinkedIn and using website to post job opening with new employer, did not constitute a breach of a non-solicitation agreement. ***Bankers Life & Cas. Co. v. Am. Senior Benefits LLC*, 2017 IL App (1st) 160687, 83 N.E.3d 1085.**
- Former employee's act of updating his LinkedIn account to reflect his new job after he joined a competitor and making a post encouraging his contacts to "check out" a website he designed for his new company did not constitute a breach of a non-solicitation agreement. ***BTS, USA, Inc. v. Executive Perspectives, LLC*, No. X10CV116010685, 2014 WL 6804545 (Conn. Super. Ct. Oct. 16, 2014) (unpublished order).**
- Former employee's postings on Facebook which touted his new employer's product and was viewed by former colleagues did not violate non-solicitation provision. ***Pre–Paid Legal Services, Inc. v. Cahill*, 924 F.Supp.2d 1281 (E.D. Okla. 2013).**
- Following an asset purchase agreement, a former business owner's act of sending friend requests to past employees on Facebook and LinkedIn and posting that his non-compete ends in eight months, he plans to open a competing business, and encouraging professionals to contact him to apply for a position with his new company violated his non-solicitation agreement. ***Coface Collections North America Inc. v. Newton*, 430 Fed. Appx. 162 (3d Cir. 2011).**
- Former employee's blog posting urging his former co-workers to leave employer by stating, "If you knew what I knew, you would do what I do" violated his non-solicitation provision, despite argument that blog was posted "passively" rather than "actively" sent to prior co-workers. ***Amway Global v. Woodward*, 744 F.Supp.2d 657 (E.D. Mich. 2010).**

Non-Solicitation Provisions

Best Practices

- Clearly define the scope and duration of non-solicitation clauses
- Ensure agreements comply with state laws
- Regularly review agreements in light of evolving state and federal scrutiny

Confidentiality Provisions

The NLRB's position on confidentiality provisions

- On February 21, 2023, the NLRB issued a decision in *McLaren Macomb*, 372 NLRB No. 58 (2023), that an offer of severance to a non-supervisory employee in exchange for confidentiality and non-disparagement terms that would have the "reasonable tendency to restrain, coerce, or interfere" with Section 7 rights, violates Section 8(a)(1) of the NLRA, irrespective of union status.
- While the provision at issue was standard, the NLRB held that by prohibiting any discussion of the agreement's terms, employees were in effect prevented from any future discussion of a possible "labor issue, dispute, or term and condition" found in or caused by the agreement.
- On March 22, 2023, NLRB General Counsel Jennifer Abruzzo issued a non-binding memorandum expressing her position that the *McLaren Macomb* decision applies retroactively to severance agreements already in effect.
- On September 19, 2024, the Sixth Circuit affirmed the NLRB's ruling that the specific severance agreements at issue were unlawful, but sidestepped the issue as to whether all broad confidentiality and non-disparagement provisions in employment and severance agreements are unlawful.

Confidentiality Provisions

The Securities and Exchange Commission's (SEC) position on confidentiality provisions

- In September 2024, the SEC settled with seven public companies for using employment, separation, and other agreements that violated rules prohibiting actions to impede whistleblowers from reporting potential misconduct to the SEC.
- Though these agreements were not enforced in practice, the SEC ruled that their existence alone could discourage whistleblowers. The penalties in these cases totaled over $3 million, and the companies were required to amend their agreements to explicitly allow protected whistleblower activities.
- ***Lesson Learned***: Even with carve-outs for regulatory reporting, provisions that could dissuade proactive communication with agencies regarding misconduct may lead to significant penalties.

Confidentiality Provisions

State Laws

- Some states have enacted laws restricting confidentiality provisions in agreements that may suppress disclosures about unlawful acts, including workplace issues.

Best Practices

- Narrowly tailor confidentiality provisions to focus on protecting legitimate business interests, such as trade secrets or sensitive operational data (i.e. route optimization data or proprietary logistics processes)
- Incorporate clear carve-outs for regulatory reporting and whistleblower protections
- Avoid language that could be interpreted as overly restrictive or coercive

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Indemnification, generally.

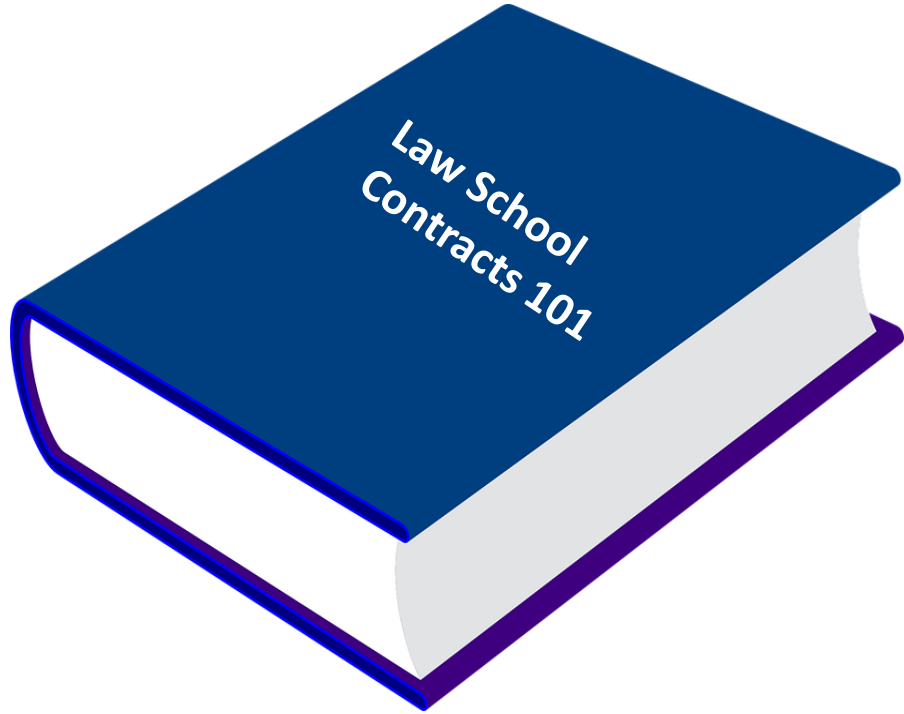
Indemnity according to websters:

Transitive verb;

To indemnify, also known as indemnity or indemnification, means compensating a person for damages or losses they have incurred or will incur related to a specified accident, incident, or event.

Etymology: Latin word *indemnis* unharmed, from in- + damnum damage.

History: The earliest use of the word indemnify is recorded in the work of J. Grisham in 1467. However, many early laws consider the compensation for damages caused by others. Specifically, the commercial laws in Hammurabi's code created relief from damages but also sought to protect the party with less bargaining power.



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The Law, the Contract, and Public Policy

- A variety of laws impact indemnification provisions. There is the obvious, such as state anti-indemnity statutes, and there is the philosophical public policy and political atmosphere that impact the enforcement and enforceability.
- Many states favor a plain reading of indemnification provisions. Specifically, this year the New Jersey Supreme Court held that attorneys fees do not include first-party claims unless the contract specifically provides for that. This was a continuation and reaffirmation of the plain text of the agreement reading and declining to read into words not squarely on the page. Boyle v. Huff, No. A-1965-21 (App. Div. Jan. 20, 2023).

Indemnification Classes

1. Limited
   The indemnitor assumes responsibility solely for negligence. All states allow limited indemnity provisions.
2. Intermediate
   The indemnitor assumes responsibility for its sole negligence or partial negligence.
3. Broad
   The indemnitor must indemnify regardless of fault. Anti-indemnity statutes generally attempt to limit the frequency of these types of agreements.

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Indemnification Concerns in Today's World:

1. Death & Personal Injury

This is a hot topic and often what is considered a worst-case scenario for indemnification claims. Transportation adds a nuance to death and personal injury claims specifically, based on the practice of indemnification for the actions and/or negligence of 3rd party contractors in an industry driven (pun intended) by the owner-operator contractor relationship. It's a see no evil, hear no evil approach to contracts and operations that creates this unavoidable blind spot in risk analysis. Of course, there is obvious attempts to mitigate the risk through carrier vetting but, the risk is never more than a grey abyss of possibility in the age of nuclear verdicts.

2. Cargo Loss & Property

Inflation and other economic impacts have driven up the cost of goods and services globally. The direct impact is the possible value of cargo and property damage and the risk assumed by the indemnification clause for that value.

3. Claims of Employment and Misclassification

The must-watch developing area of law for the Transportation industry generally. This is quickly becoming part of Shipper boiler plate language to broadly include claims of employment by the contractors and subcontractors of the transportation industry. It creates the looming concern of class action.

4. Bankruptcy and Insolvency

The economy generally, as well as the financial health of the contracting parties, should be a major consideration of the indemnification clause. You may have a fantastic clause, but it may be only worth as much as the paper if the agreed indemnitor is bankrupt or insolvent.

5. Attorneys Fees

Attorneys fees are becoming a more and more substantial consideration in contracting for indemnification. Specifically, in first and third-party claims.

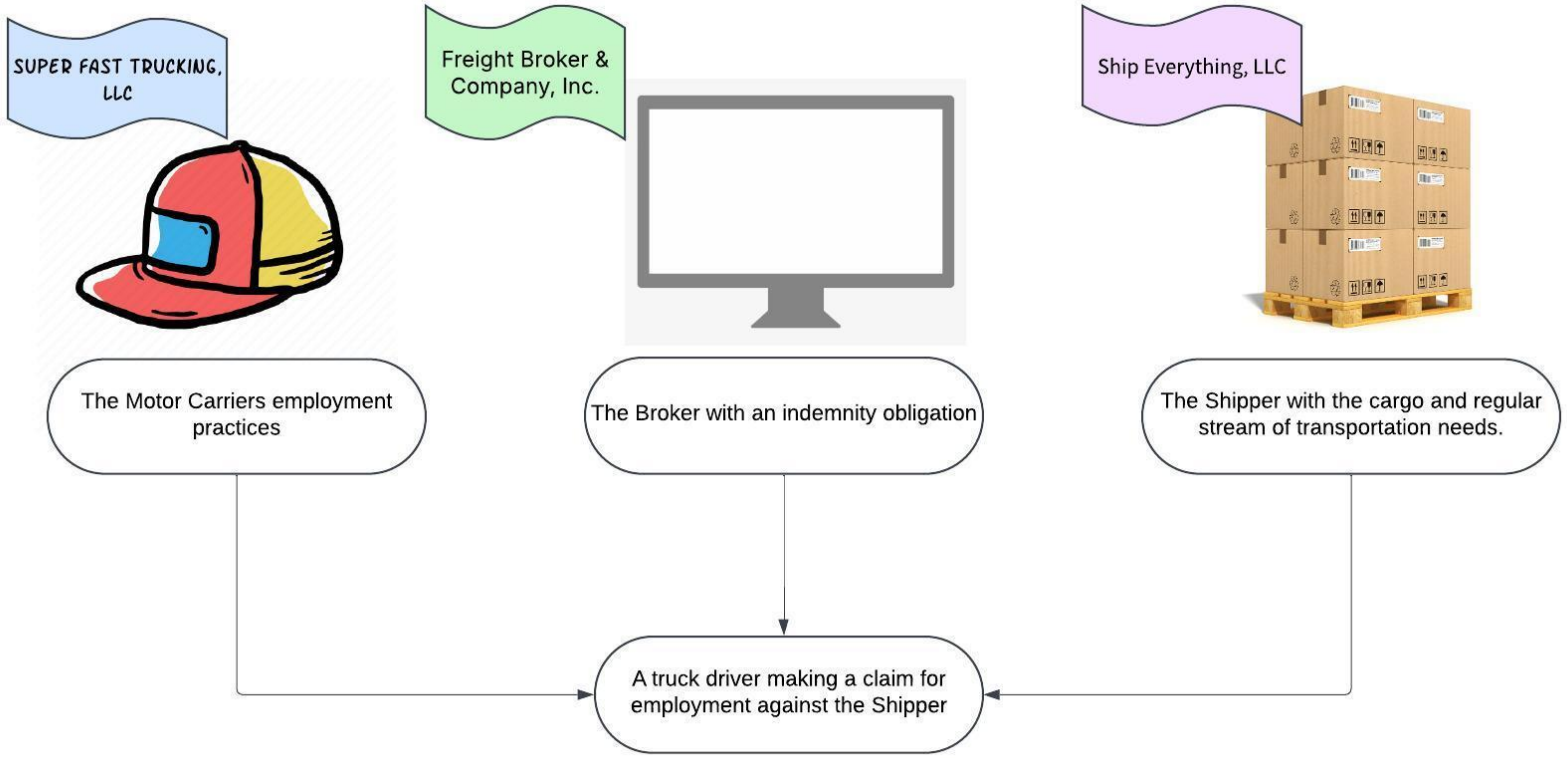
6. Insurance Coverage. Is there any and what might void coverage?

Misclassification Claims & the Indemnification Provision

- There is substantial information on the **direct risk** of the individual business misclassifying employees and contracts. It's estimated that 10% to 30% of US employers misclassify workers. See, National Employment Law Project.
- Counsel may have reasonable insight to the classification practices of its own client and the risk presented there. However, there is little direct visibility beyond known practices (bad or good) of contracted 3rd parties.
- It's an important reminder that many boilerplate clauses now seek to have the transportation intermediary indemnify shippers for classification practices of the underlying motor carrier in claims its drivers may make.

Don’t glaze over this language.

A truck driver, a Broker, and a Shipper all walk into a bar…



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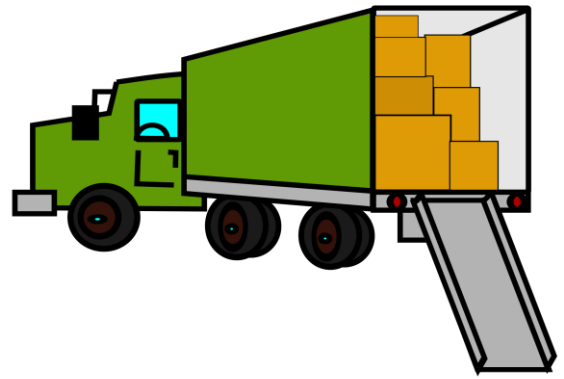
When can Misclassification in the Indemnification Provision be an Issue in Broker Agreements?

The short answer is when the relationship between the Shipper, Broker, and Motor Carrier is the perfect storm to create a reasonable question of law for an independent contractor of a motor carrier to make an employment claim against the shipper.

Possible Scenario in Operations:
Dedicated lanes where a broker is performing the same load/ service type for a Shipper on a continuing basis and using the same motor carrier or group of motor carriers for the shipper's work.

Example: Dedicated daily grocery runs or facility transfers.



Mitigating the Risk of an Indemnity Claim and/or Exposure

The Shipper's Obligation in the Indemnity Provision:

→ Consider including language that reasonably limits the exposure of the Broker and Motor Carrier by requiring that the Shipper not "act in a manner as to create an employment relationship, act in a manner that infringes on individual relationship with the underlying employer or contractor. "

→ Placing some obligation on the Shipper to not act in a way that could be considered employment brings some balance to misclassification in the indemnification provision.

→ Additionally, it may serve to help remind Shippers to review their own actual operations and policies to help avoid claims of misclassification.

Insurance:

When this language comes up it's always a good practice to review your insurance policies and determine if you might have coverage under one or more policies. If you think coverage might exist also review your exclusions including any specific actions/language that may void coverage.

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Lawyer and Philosopher

Fun considerations to contemplate on indemnity.

→ The state of politics and social views on employment and corporate accountability. This may sound like nonsense, but these are major factors when considering 1) the likelihood of an individual bringing a claim, 2) a court or jury finding the claim to be legitimate, and 3) the subsequent claims and monetary damages.
→ Example: In 2023 Cloud Truck polled 2,000 US Adults for their thoughts on truck drivers. 33% of those polled believed that Truck Drivers were undercompensated. See, Cloudtrucks, How America Thinks and Talks Trucks, (November 14, 2023).

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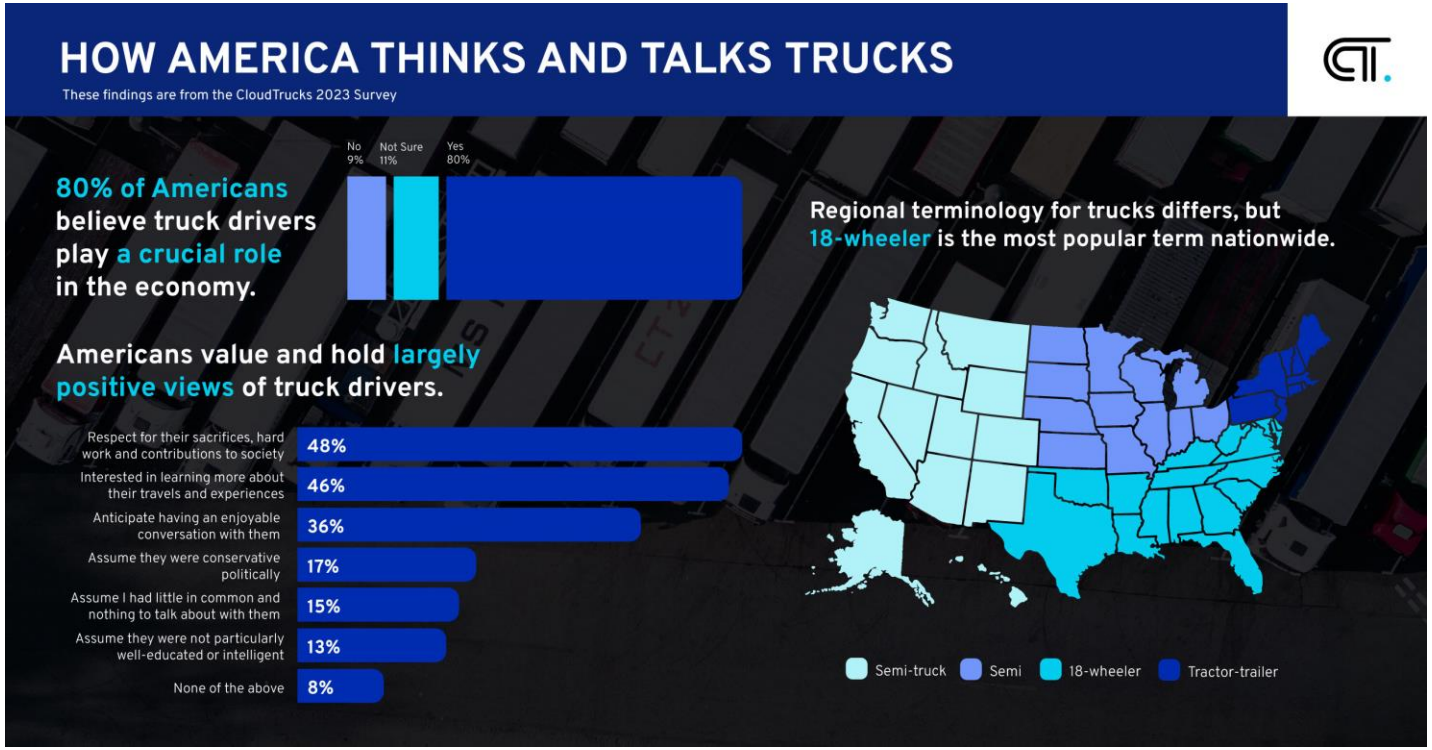

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