

# THE WANADA BULLETIN

NEWS AND INFORMATION FOR AND ABOUT FRANCHISED NEW CAR DEALERS IN THE WASHINGTON AREA

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## NLRB joint employer decision marks trend to extend liability



As manufacturers increasingly impose controls such as standards for dealership employee appearance, the manufacturer may be held jointly liable for National Labor Relations Act violations.

A recent decision by the National Labor Relations Board (NLRB) is noteworthy for dealers both in their relationship with their franchisor and as the hiring entity for contractors such as F&I service companies.

The NLRB ruled that a California-based recycling facility is a "joint employer" for collective bargaining negotiations with employees of a temporary staffing company. The term now applies if the company has the right of "actual control, whether direct or indirect." This latest decision, coupled with an NLRB memo on McDonald's franchisees in July, "points to a trend in the NLRB to extend liability under the National Labor Relations Act to companies not previously considered to

be employers," said Michael Charapp, auto dealer lawyer with Charapp & Weiss and a WANADA Kindred-line member. The following is from Charapp's analysis:

*Manufacturer incentive plans.* Incentives plans announced by manufacturers sometimes provide specific standards for dealership employee appearance, activities or performance. Sometimes manufacturers create performance plans for dealership employees and pay them directly. The more manufacturers try to impose controls that affect dealer employees, the more likely they can be held jointly liable for violations of the National

Labor Relations Act. It may be useful to remind the factory of this in any discussions about increasing efforts to control dealer practices.

*Manufacturer-supplied marketing personnel.* Sometimes a manufacturer will provide temporary marketing personnel to a dealership. To the extent the dealer and the manufacturer have the right of control over the activities of the workers, the manufacturer, the dealer and any staffing company involved could all be joint employers under the National Labor Relations Act.

*Dealers hiring contractors.* Dealers sometimes contract with F&I service companies to provide specialists to close deals and sell finance and insurance. To the extent the dealer may oversee and control the worker's activities and performance, this increases the possibility that the dealer can be held liable under the National Labor Relations Act with the F&I service company.

The NLRB's recent decisions indicate that it will broaden its interpretation of the law to become involved and protect concerted action by personnel, regardless of whether they are considered employees under state law.

## Another stellar new vehicle sales month in September: 18.17 m., SAAR

U.S. auto sales just keep on pointing upward, and September brought yet another round of impressive sales figures, including some records. Sales rose 16 percent from a year ago, bringing a seasonally adjusted annual sales rate (SAAR) of 18.17 million – substantially above industry forecasts.

Some driving factors for the strong sales: SUVs, crossovers and light trucks again dominated the market as gas prices kept dropping and the job market continued to brighten. Credit remained available, with no interest rate hike, and incentives were high. The average incentive spending per unit rose \$117 to \$3,090, according to TrueCar. It helped, too, that this year September included Labor Day weekend sales.

Top makes saw double-digit increases: Ford was up 23 percent, General Motors 12 percent, and Fiat Chrysler up 14 percent, accomplishing its 66<sup>th</sup> month of increased sales. The Volkswagen emissions scandal broke in September, and sales suffered, rising less than 1 percent, but rising just the same.

“Staying focused on core values, like initial quality, sales and service satisfaction, cost of ownership, dependability and advanced technology is paying off in higher sales and share, stronger transaction prices and lower incentives,” said Kurt McNeil, GM's vice president for U.S. sales.

TrueCar raised its 2015 sales forecast to 17.4 million; NADA's remains at 17.2 million. If TrueCar is right, this year would top the industry record set in 2000.

Though incentives were high, said Kelley Blue Book analyst Akshay Anand, “Transaction prices continued to rise, with month-over-month increases spurred primarily by luxury utility vehicles,



The Camry was the best-selling car last month and the fourth best-selling vehicle.

while year-over-year numbers are driven by strength in trucks, vans, crossovers and full-size cars.”

Three of the top five best-selling vehicles for September, and all of the top three, were trucks. The top sellers were, in descending order, the Ford F-series, Chevrolet Silverado, Ram Truck, Toyota Camry and Honda Accord.

## Members of Congress, NADA criticize CFPB actions



Rep. David Scott (D-Ga.) said the CFPB's disparate impact methodology is insulting to African-Americans.

It's been a busy couple of weeks for the Consumer Financial Protection Bureau. First, the agency took action against Fifth Third Bank for discriminatory auto loan pricing. The joint CFPB-Justice Department enforcement action requires Fifth Third to substantially reduce, or eliminate dealer discretion and to pay \$18 million to harmed African-American and Hispanic borrowers.

Fifth Third is required to reduce dealer markup to 1.25 percent above the buy rate for auto loans of five years or less and 1 percent for longer loans. As a result, said NADA, consumers will lose as much as 1.25 percent of available savings on their loans.

“By cutting the discount zone so dramatically, the government has significantly reduced the amount of money consumers can save on auto financing at the dealership,” said NADA Chairman Bill Fox. “Consumers have every right to continue benefiting from a system

that saves them money every day, but bank by bank, percent by percent, the CFPB is taking those rights away, and without giving consumers any say in the matter.”

As a tool for dealers, NADA, AIADA and the National Association of Minority Automobile Dealers (NAMAD) have created the [Fair Credit Compliance Program](#), modeled after a program originally implemented by the Civil Rights Division of the Justice Department.

The day after the Fifth Third enforcement action was announced, at a House Financial Services Committee hearing, members of both parties lit into the CFPB for restricting auto lenders. Committee members referenced media reports citing internal memos showing the agency knew its “disparate impact” theory could overestimate potential discrimination in auto lending (reported in the [October 2 WANADA Bulletin](#)). Rep. David Scott, an African-American Democrat from Georgia, said the CFPB’s disparate impact methodology is “downright insulting” to African-Americans, reported *American Banker*. Other members of Congress joined Scott in castigating the agency for using lenders to go after dealers, which it does not have the jurisdiction to regulate, pointing out that the agency’s actions will result in higher prices for consumers.

## Reminder: WANADA Annual Meeting with keynote Laura Ingraham Dec. 8 at Ritz/Tyson's

WANADA members should receive registration information soon about the association’s Annual Meeting and Luncheon, scheduled for Tuesday, December 8, at the Ritz-Carlton in Tysons Corner. After a networking reception at 11:30, followed by lunch and an regional automobile business presentation, attendees will hear a keynote talk by popular political commentator and talk radio host, Laura Ingraham, host of *The Laura Ingraham Show* and author of several *New York Times* bestsellers. The occasion is always a *premier event* for WANADA members and regional notables, so be sure and mark your calendar.

## Registration is open for NADA 2016 Convention next spring in Las Vegas

The NADA Convention has moved to the spring, but it will be here before you know it. It runs from March 31 to April 3, 2016, in Las Vegas. With all that's going on in the industry, it's sure to be a popular event, and you can now visit <http://www.nadaconvention.org/> to register and book a hotel room before your top choice sells out.

## 10,000 deaths could be stopped with current vehicle technologies



Consumers don't want to pay the real cost of safety technologies that could prevent serious accidents.

If widely adopted, advanced driver assistance systems could prevent about 9,900 deaths and save \$251 billion a year, says a new study from the Boston Consulting Group (BCG).

“Because the vast majority of crashes in the United States are caused by driver error, the lack of adoption of these technologies with the U.S. fleet is a significant missed opportunity,” said Xavier Mosquet, a coauthor of the study, which was commissioned by the Motor & Equipment Manufacturers Association (MEMA). He said that fully autonomous vehicles could further reduce crashes by 90 percent or more.

The study focused on seven driver technologies: forward collision warning/assist/adaptive cruise control, blind spot detection, night vision, lane departure warning/lane keep assist, adaptive front lighting, surround view and park assist features. BCG said wider use of these systems could prevent 28 percent of all crashes in the U.S.

But relatively few vehicles on the road today have these features, and their market penetration is growing at just 2 to 5 percent annually. Part of the reason for slow adoption is that consumers are unwilling to pay as much for the features as they cost to make and market. In a recent consumer survey, most car owners said they would be willing to pay \$100 to \$400 for blind spot detection, but its retail cost is \$595 per vehicle.

## Bill promoting remanufactured auto parts passes House

A bill encouraging the use of remanufactured parts in federal vehicle repairs is headed to President Obama's desk for his signature. The legislation in Congress specifies that remanufactured parts must be used when doing so lowers costs, maintains quality and performance and does not compromise safety. The bill originated in the Senate and passed the House unanimously, after being proposed by representatives from Michigan.

“The federal government spends nearly \$1 billion per year on maintenance for federal vehicles, and promoting the use of less expensive remanufactured parts for repairs will cut costs and save taxpayer dollars,” said Sen. Gary Peters (D-Mich.). The Motor & Equipment Manufacturers Association endorsed the bill.

## **Would have, should have, could have-- Rep. McCarthy's plans would have included a 6-year highway bill, if he became Speaker**

If House Majority Leader Kevin McCarthy (R-Calif.) had become House Speaker, which isn't happening, he said he would have passed a six-year highway bill so "we don't wait 10 years when we approve a road to be built." He made the promise on MSNBC's "Morning Joe" when it seemed a near-certainty that he would become the next Speaker. In the face of conservative Republicans challenging McCarthy, he opted this week *to pass* on the position of Speaker.

Like most members of Congress, McCarthy doesn't favor a gas tax. He prefers a tax on overseas corporate profits as a way to fund infrastructure, an idea with bipartisan approval that has been discussed for months. But fellow Republican Paul Ryan (Wis.), chairman of the House Ways and Means Committee where the discussions have been centered, recently acknowledged that the talks remain stalled and told the Transportation Committee to go ahead and pass a highway bill without a funding mechanism. Highway funding runs out October 29.

## **Washington area businesses optimistic, with plans to hire**

Washington area businesses are feeling more optimistic than they were in the spring, according to a PNC Bank economic outlook. They are planning to hire more people and pay higher wages.

A robust 33 percent say they plan to increase hiring, up from 26 percent in the spring. Additionally, 38 percent expect to increase staff pay, much more than the 28 percent who said that last fall. These employees could feel that now they can afford a new car.

More good news from Washington area businesses: 84 percent feel optimistic about the local economy, up from 76 percent in the spring.

### **Staying Ahead...**

The purpose of life is not to be happy. Rather, it is to be useful, honorable, and compassionate and to have it make some difference that you have lived and lived well.

-- Ralph Waldo Emerson