

Understanding Motor Carrier Claims

The Law Firm of Rogers & Goldberg, LLC

Our firm specializes in handling trucking and commercial vehicle accidents involving serious personal injuries or wrongful death. Over the years, we have litigated hundreds of trucking cases, both in federal and state courts, and obtained multiple seven figure verdicts and settlements for our clients. To learn more about our firm, please visit our website at <http://www.rogold.com>.

In 2003, we used our extensive experience and knowledge in this field to publish the first version of *Understanding Motor Carrier Claims*. The Second Edition of our publication includes updated federal regulations and case law and reflects new theories and doctrines we have applied to our cases. Our main goal in publishing this guide is to explain the complexities of motor carrier law so that other practitioners can understand the basics of trucking claims. The biggest mistake a lawyer can make is treating a trucking case like a typical automobile accident. We hope that our guide will help others avoid this pitfall and provide the reader with insight into the multitude of issues presented by a trucking case. In addition to our guide, we also maintain a website at <http://www.motorcarrierclaims.com> and invite you to visit our site for additional resources on motor carrier law.

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I. The Basics of Interstate Motor Carriers

There are two kinds of motor carriers: (1) interstate carriers and (2) intrastate carriers. An interstate carrier provides transportation services across state borders and is required to register with the Secretary of Transportation¹ while an intrastate carrier has its operations entirely within one state and does not affect interstate commerce.² Because the federal government is limited to regulating only “interstate commerce,” federal regulations governing motor carriers are only applicable to interstate carriers, and intrastate carriers only have to comply with state laws governing commercial motor vehicles.³ Many states, through their legislature or Public Service Commission, have adopted the federal regulations governing motor carriers as applicable to intrastate carriers and as a practical matter, removed the distinction between the two kinds of carriers.⁴ The importance of federal regulations on the motor carrier industry is discussed throughout this handbook, and it is critical to an analysis of a trucking claim to determine the applicability of these regulations to the carrier’s operations.

****Practice Pointer:** If a motor carrier operates as an intrastate carrier, review state laws to determine the applicability of federal regulations to the carrier’s operations.

¹ 49 U.S.C. § 13901.

² Progressive Casualty Insurance Co. v. Hoover, 809 A.2d 353 (Pa. 2002).

³ Texas v. United States, 866 F.2d 1546 (5th Cir. 1989).

⁴ See Transportation Rules of the Georgia Public Service Commission.

A. Federal Registration

Before a motor carrier can begin interstate operations, the carrier must register with the Federal Motor Carrier Safety Administration (“FMCSA”), obtain a USDOT number, and obtain operating authority from the FMCSA.⁵ The motor carrier then must file an identification report with the FMCSA⁶ and mark each commercial motor vehicle with the name of the motor carrier and the USDOT number.⁷ The motor carrier must be willing and able to comply with (1) the regulations of the Secretary of Transportation and the Surface Transportation Board, (2) any safety regulations and safety fitness requirements imposed by the Secretary, and (3) the minimum financial responsibility requirements.⁸ Each interstate carrier is also required to register and pay filing fees to a single participating State as its registration state, sometimes referred to as its “Home State.”⁹ The carrier must select the State in which it maintains its principal place of business as its Home State unless such State is not participating in the program.¹⁰ The carrier’s registration with a single State shall be deemed to satisfy the registration requirements of all participating States.¹¹

As part of the registration process, the carrier must file with its Home State: (1) copies of its certificates and/or permits, (2) a copy of its proof of public liability security, (3) a designation of an agent for service of process, and (4) a fee for the filing of proof of insurance.¹² A carrier must file any notices of cancellation or any replacement certificates of insurance with its Home State in a timely manner.¹³ A carrier must maintain in each of its motor vehicles a copy of its receipt indicating that it has filed with its Home State the required proof of insurance and paid the required registration fees.¹⁴ Each motor carrier must designate a registered agent for service of process in each state that the carrier operates.¹⁵ A registered agent may be canceled only by designating a substitute agent.¹⁶ A form for the designation of a registered agent must be filed with the FMCSA.¹⁷

In 2004, a safety permit program was instituted for the registration of all carriers of hazardous materials.¹⁸ The safety permit program applies to both intrastate and interstate carriers.¹⁹ As required by the program, intrastate carriers of hazardous materials

⁵ 49 C.F.R. § 385.301.

⁶ 49 C.F.R. § 390.19.

⁷ 49 C.F.R. § 390.21.

⁸ 49 U.S.C. § 13902.

⁹ 49 C.F.R. § 367.3(a).

¹⁰ 49 C.F.R. § 367.3(a).

¹¹ 49 C.F.R. § 367.4(b).

¹² 49 C.F.R. § 367.4(c).

¹³ 49 C.F.R. § 367.4(d).

¹⁴ 49 C.F.R. § 367.5(e).

¹⁵ 49 C.F.R. § 366.3 & 366.4(a).

¹⁶ 49 C.F.R. § 366.6.

¹⁷ 49 C.F.R. § 366.2.

¹⁸ 49 C.F.R. § 385.401.

¹⁹ 49 C.F.R. § 385.403.

must apply for a USDOT number and be subject to a compliance review but are not subject to additional federal safety regulations.²⁰ Intrastate carriers of hazardous materials, like interstate carriers, must also file a motor carrier identification report and mark their vehicles with the motor carrier's name and USDOT number.²¹

In August of 2005, the President signed into law the "Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users" otherwise known as SAFETEA-LU.²² This legislation does not go into effect until January 1, 2007. SAFETEA-LU makes drastic changes to the registration requirements for motor carriers and does away with the current single state registration and service of process agent systems.²³ In its place, SAFETEA-LU establishes a Uniform Carrier Registration System.²⁴

****Practice Pointer:** Send a public records request directly to the state Public Service Commission or similar body to obtain a copy of any filings with the carrier's "Home State."

B. Safety Fitness Ratings

An interstate carrier is required to meet minimum safety fitness standards.²⁵ In order to meet these standards, a carrier must have adequate safety management controls in place to reduce the risks associated with (1) commercial driver's license standard violations, (2) inadequate levels of financial responsibility, (3) the use of unqualified drivers, (4) improper use and driving of motor vehicles, (5) unsafe vehicles operating on the highways, (6) failure to maintain accident registers and copies of accident reports, (7) the use of fatigued drivers, (8) inadequate inspection, repair and maintenance of vehicles, (9) improper transportation of hazardous materials, and (10) motor vehicle accidents and hazardous materials incidents.²⁶ The Federal Highway Administration ("FHWA") performs an annual compliance review on each carrier and assigns it a safety rating.²⁷ A carrier's safety rating is based on the adequacy of safety management controls, frequency and severity of regulatory violations, frequency and severity of regulatory violations identified in roadside inspections, the number and frequency of out-of-service driver/vehicle violations, frequency of accidents, and the number and severity of violations of state safety rules.²⁸

The Federal Motor Carrier Safety Administration ("FMCSA") provides notice to the carrier of its safety rating and reports a list of compliance deficiencies which the

²⁰ 49 C.F.R. § 385.403.

²¹ 49 C.F.R. § 390.3.

²² Pub. L. 109-59, August 10, 2005, 119 Stat. 1144.

²³ Pub. L. 109-59, Title IV, § 4305.

²⁴ Pub. L. 109-59, Title IV, § 4304.

²⁵ 49 C.F.R. § 385.1.

²⁶ 49 C.F.R. § 385.5.

²⁷ 49 C.F.R. § 385.9.

²⁸ 49 C.F.R. § 385.7.

motor carrier must correct.²⁹ A “satisfactory” rating means that the motor carrier has in place adequate safety management controls to meet the safety fitness standards.³⁰ A “conditional” or “unsatisfactory” rating means a motor carrier does not have adequate safety management controls in place.³¹ A carrier rated “unsatisfactory” is prohibited from operating commercial vehicles.³² A carrier may petition the FMCSA for a review of its rating after taking corrective actions to remedy any problems and defects in its operations.³³ Motor carriers domiciled in Mexico are subject to intensified monitoring by frequent safety audits and inspections.³⁴ A complete overview of the safety rating process can be found at Appendix B to 49 C.F.R. § 385. The safety rating and other information for each registered interstate carrier is available at the website: www.safersys.org.³⁵

****Practice Pointer:** Review the carrier’s rating profile on www.safersys.org for safety deficiencies and other information on the carrier.

II. Theories of Liability

A. Employer Liability

When the driver is an actual employee of the trucking company, sometimes referred to as a “company driver,” the company’s liability is governed by state common law theories of agency.³⁶ In such a situation, the motor carrier, as the employer of the driver, is only responsible for the driver’s actions while he is acting within the scope of his employment.³⁷ A driver acts within the scope of his employment if his actions further the carrier’s business in any manner even if the driver’s conduct also benefits himself.³⁸ A driver who violates a trucking company’s policies or procedures still acts within the scope of his employment while his activities are related to the company’s business.³⁹ When a driver who has just delivered a load is operating a tractor-trailer while waiting for another dispatch, a jury issue exists as to whether he is acting within the scope of his employment with the motor carrier since his actions are not purely personal.⁴⁰

A driver is outside the scope of his employment as a matter of law when he drops off his trailer at a carrier’s facility and then departs on a personal mission.⁴¹ A carrier cannot be held vicariously liable for the rape of a hitchhiker by a long haul driver since

²⁹ 49 C.F.R. § 385.11.

³⁰ 49 C.F.R. § 385.3.

³¹ 49 C.F.R. § 385.3.

³² 49 C.F.R. § 385.13(a).

³³ 49 C.F.R. § 385.17.

³⁴ 49 C.F.R. § 385.103.

³⁵ 49 C.F.R. § 385.19.

³⁶ Warner Trucking, Inc. v. Carolina Casualty Insurance Co., 686 N.E.2d 102 (Ind. 1997).

³⁷ Id. at 105.

³⁸ Id.

³⁹ Id. at 106.

⁴⁰ Wright v. Transus, Inc., 434 S.E.2d 786 (Ga. 1993).

⁴¹ Parker v. Erixon, 473 S.E.2d 421 (N.C. 1996).

his actions are not in furtherance of the interests of his employer and are clearly outside the scope of his employment.⁴² However, most jurisdictions hold that common carriers of passengers are responsible for assaults and intentional torts against passengers by an employee, even if the employee's motivation was entirely personal, under the theory that a passenger carrier has a non-delegable duty to protect its passengers.⁴³

****Practice Pointer:** If the driver is employed by the trucking company, review state law governing agency.

B. Lease Liability

Federal regulations require a trucking company that leases a vehicle and driver, commonly referred to as an "owner/operator" lease, to have "exclusive possession, control and use" of the leased vehicle.⁴⁴ Courts have used this requirement to hold the trucking company responsible for accidents caused by a leased driver's negligence under the theory that the company, by allowing a driver to operate a commercial vehicle under its interstate authorization, permits an otherwise unregulated truck and driver to be on the road in interstate commerce.⁴⁵ Prior to the 1986 amendment to the Federal Motor Carrier Safety Regulations ("FMCSR"), a lessee motor carrier was required to remove its placards and other identification markers from its vehicle before returning the equipment to the owner and terminating the lease.⁴⁶ Based on this former regulation, courts created the doctrine of "logo" or "placard" liability by focusing on the use of a motor carrier's placards as a method of imputing liability to the carrier.⁴⁷ A motor carrier could not eliminate its responsibility for the operation of leased equipment until it removed the identifying placards from the unit even if it had made every attempt to obtain the placards from the driver.⁴⁸ Under the theory of logo liability, the trucking company could be held liable for the driver's negligence if the placards remained on the vehicle even though the leased truck was not being driven on behalf of the company.⁴⁹

In 1986, the provisions requiring the lessee motor carrier to remove the placards before terminating the lease were deleted, and instead the regulations allowed the lease to state which party would remove the identification markers from the vehicle.⁵⁰ Since this amendment, courts have shifted away from relying on a carrier's placards on a vehicle as determinative of the existence of a lease relationship and instead focused on the intent of

⁴² C.C. v. Roadrunner Trucking, Inc., 823 F.Supp. 913 (D.Utah 1993).

⁴³ Rabon v. Guardsmark, Inc., 571 F.2d 1277 (4th Cir. 1978); Commodore Cruise Line, Ltd. v. Kormendi, 344 So.2d 896 (Fla. 1977); St. Michelle v. Catania, 250 A.2d 874 (Md. 1969); Berger v. Southern Pacific Co., 300 P.2d 170 (Cal. 1956); But see Sebastian v. District of Columbia, 636 A.2d 958 (D.C. 1994).

⁴⁴ 49 C.F.R. § 376.12(c).

⁴⁵ Rediehs Express, Inc. v. Maple, 491 N.E.2d 1006 (Ind. 1986).

⁴⁶ Cosmopolitan Mutual Insurance Co. v. White, 336 F.Supp. 92 (D.Del. 1972).

⁴⁷ Kreider Truck Service, Inc. v. Augustine, 394 N.E.2d 1179 (Ill. 1979).

⁴⁸ Mellon National Bank & Trust Co. v. Sophie Lines, Inc., 289 F.2d 473 (3rd Cir. 1961); Kreider Truck Service, Inc. v. Augustine, 394 N.E.2d 1179 (1979).

⁴⁹ Rodriguez v. Ager, 705 F.2d 1229 (10th Cir. 1983).

⁵⁰ 49 C.F.R. § 376.12(c).

the parties to the lease.⁵¹ If the trucking company terminates the lease and attempts to retrieve its placards and a cancellation receipt from the owner but is unable to obtain them, then the company is no longer responsible for a driver's actions even though its placards are on the unit.⁵² Although the existence of a carrier's placards on the truck is no longer determinative in defining the duration of the lease, the use of the placards is still evidence to be considered in determining if the lease was in effect at the time of the accident.⁵³ If a leased vehicle is under a permanent lease to one motor carrier but then a trip lease is executed to haul a load for another carrier, both carriers can be held responsible under the regulations governing lease liability.⁵⁴ The reason that the federal regulations place responsibility on the lessee motor carrier for the operation of the equipment is (1) to prevent carriers from avoiding safety regulations by the practice of leasing equipment from non-regulated carriers, (2) to promote highway safety by insuring that drivers furnished by exempt carriers as part of lease agreements do not violate safety regulations in the operation of the leased equipment, and (3) to provide shippers and other members of the public with financially responsible carriers.⁵⁵

The current lease provisions in the federal regulations require an interstate carrier that leases a vehicle to (1) make the arrangement in writing signed by the parties specifying the duration and the compensation to be paid by the carrier, (2) carry a copy of the arrangement in each motor vehicle to which it applies during the period the arrangement is in effect, (3) inspect the motor vehicle and obtain liability and cargo insurance on it, and (4) have control of and be responsible for operating the vehicle in compliance with the federal regulations and other applicable laws as if the motor vehicle was owned by the carrier.⁵⁶ Although federal regulations require a written lease, the failure to have a written lease does not absolve a trucking company from liability if an oral lease exists.⁵⁷

There is a split in authority as to whether a motor carrier may avoid liability for a driver's actions by showing that the driver was acting outside the scope of his agency relationship when a lease is in effect at the time of the accident.⁵⁸ Most jurisdictions hold that a trucking company is always responsible for a driver's operation of a leased vehicle for the duration of the lease.⁵⁹ Other jurisdictions hold that a rebuttable presumption of

⁵¹ Jackson v. O'Shields, 101 F.3d 1083 (5th Cir. 1996)

⁵² Jackson v. O'Shields, 101 F.3d 1083 (5th Cir. 1996); Graham v. Malone Freight Lines, Inc., 948 F.Supp. 1124 (D.Mass. 1996).

⁵³ Williamson v. Steco Sales, Inc., 530 N.W.2d 412 (Wis. 1995); Davis v. Rajbar, 266 A.D.2d 828 (N.Y. 1999).

⁵⁴ Simmons v. King, 478 F.2d 857 (5th Cir. 1973); Laux v. Juillerat, 680 F.Supp. 1131 (S.D. Ohio 1987); Zamalloa v. Hart, 31 F.3d 911 (9th Cir. 1994).

⁵⁵ Indiana Refrigerator Lines, Inc. v. Dalton, 516 F.2d 795 (6th Cir. 1975).

⁵⁶ 49 U.S.C. § 14102(a).

⁵⁷ Wilson v. Riley Whittle, Inc., 701 P.2d 575 (Ariz. 1985); Fuller v. Reidel, 464 N.W.2d 97 (Wis. 1990); Zamalloa v. Hart, 31 F.3d 911 (9th Cir. 1994).

⁵⁸ Parker v. Erixon, 473 S.E.2d 421 (N.C. 1996).

⁵⁹ Baker v. Roberts Express, Inc., 800 F.Supp. 1571 (S.D. Ohio 1992); Wyckoff v. Marsh Bros. Trucking, 569 N.E.2d 1049 (Ohio 1991); Ryder Truck Rental Co., Inc. v. UTF Carriers, Inc., 719 F.Supp. 455 (W.D.Va. 1989); Planet Insurance Co. v. Transport Indemnity Co., 823 F.2d 285 (9th Cir. 1987); Harvey v. F-B Truck Line Co., 767 P.2d 254 (Id. 1987); Rodriguez v. Ager, 705 F.2d 1229 (10th Cir. 1983); Schedler

agency exists when a lease is in effect, and a motor carrier is only responsible for a driver's acts within the scope of his agency.⁶⁰ Although the owner cannot be held liable for a driver's conduct under a theory of lease liability, the owner may always be held liable under common law theories of vicarious liability.⁶¹ The mere presence of the carrier's logo on the side of a truck in a hit and run accident is not sufficient to hold the carrier responsible for the driver's actions.⁶²

Passengers in leased vehicles are "members of the public" who are protected by the federal provisions governing a motor carrier's liability for the operation of a leased vehicle.⁶³ There is a split in authority as to whether drivers or co-employees in a leased vehicle are "members of the public" who are protected by the federal regulations. Some jurisdictions allow drivers and fellow employees to assert a cause of action against the trucking company as would any member of the public.⁶⁴ Other jurisdictions hold that drivers and co-employees are not intended beneficiaries of the federal regulatory scheme and cannot rely on lease provisions to bring an action against the lessee motor carrier.⁶⁵

A manufacturer of goods which is not a motor carrier cannot be held liable for a driver's actions based on leasing a vehicle from a registered carrier where the manufacturer does not control the transportation process under the lease arrangement.⁶⁶ A trucking company is not responsible for the actions of a driver escorting an oversized load unless the escort driver is an agent and employee of the driver of the tractor-trailer unit.⁶⁷ The trucking company is not responsible for the conduct of the owner of the unit while the owner is repairing the vehicle in warehouse or performing other functions outside of the lease agreement.⁶⁸ The lease regulations do not render invalid indemnification agreements between carriers, and an owner may be required by contract to indemnify the trucking company for any loss caused by the owner's negligence.⁶⁹

****Practice Pointer:** Request copies of any lease agreement related to the tractor or trailer.

C. Negligent Hiring, Entrustment or Retention

v. Rowley Interstate Transportation Co., Inc., 368 N.E.2d 1287 (Ill. 1977); Simmons v. King, 478 F.2d 857 (5th Cir. 1973).

⁶⁰ Mensing v. Rochester Cheese Express, Inc., 423 N.W.2d 92 (Minn. 1988); Penn v. Virginia International Terminals, Inc., 819 F.Supp. 514 (E.D.Va. 1993); Wright v. Transus, Inc., 434 S.E.2d 786 (Ga. 1993); Parker v. Erixon, 473 S.E.2d 421 (N.C. 1996).

⁶¹ Hiltgen v. Sumrall, 47 F.3d 695 (5th Cir. 1995).

⁶² Thi v. Schneider National Carriers, Inc., 2005 WL 1703116 (W.D.Mo.)

⁶³ Price v. Westmoreland, 727 F.2d 494 (5th Cir. 1984); Powers v. Meyers, 655 N.E.2d 1358 (Ohio 1995).

⁶⁴ Proctor v. Colonial Refrigerated Transport, Inc., 494 F.2d 89 (4th Cir. 1974); Johnson v. S.O.S.

Transport, Inc., 926 F.2d 516 (6th Cir. 1991); Smith v. Johnson, 862 F.Supp. 1287 (N.D.Pa. 1994).

⁶⁵ White v. Excalibur Insurance Co., 599 F.2d 50 (5th Cir. 1979), cert denied, 444 U.S. 965, 100 S.Ct. 452, 62 L.Ed.2d 377 (1979); Riddle v. Trans-Cold Express, Inc., 530 F.Supp. 186 (S.D.Ill. 1982).

⁶⁶ LaPlant v. Cutlip, 258 A.2d 769 (N.Y. 1999).

⁶⁷ Brown v. Pettinari, 994 P.2d 1231 (Or. 2000); Kahrs v. Conley, 729 N.E.2d 191 (Ind. 2000).

⁶⁸ Zimprich v. Broekel, 519 N.W.2d 588 (N.D. 1994).

⁶⁹ Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc., 96 S.Ct. 229, 423 U.S. 28, 46 L.Ed.2d 169 (1975).

Negligent hiring involves the claim that the trucking company should not have hired the driver because the company should have known that the driver was incompetent at the time of his application for employment. Negligent entrustment is a slight variation on this theme and encompasses the allegation that the trucking company should not have entrusted a truck to the driver because of his inexperience or his inability to safely operate a commercial vehicle. Negligent retention occurs when a trucking company learns during the course of a driver's employment that the driver is incompetent but continues to retain the driver and allow him to operate a commercial vehicle.

A carrier has a duty to take steps to prevent injury to the driving public by determining the competency of its drivers to operate a commercial vehicle.⁷⁰ Federal regulations outline a carrier's responsibilities to obtain background information on a driver before the carrier can hire him, and a failure to comply with these regulations will subject a carrier to a claim for negligent hiring if compliance would have identified the driver as incompetent.⁷¹ If the driver fails to meet the minimum standards required by the federal regulations, then the trucking company can clearly be held liable for injuries resulting from the driver's operation of a commercial vehicle under a theory of negligent hiring or retention.⁷² The real issue in most cases concerns the trucking company's liability for hiring a driver who has been involved in several prior accidents or has prior moving violations but is not disqualified from operating a commercial vehicle under the federal regulations. Whenever a trucking company hires or retains a driver who has more than one accident or moving violation, then the company exposes itself to potential liability for negligent hiring, entrustment or retention.⁷³ A trucking company is also responsible for negligent hiring if the company hires the driver in violation of its own policies and procedures concerning the number and severity of allowable traffic violations.⁷⁴ As such, a carrier exposes itself to potential liability for negligent hiring whenever it employs a driver who identifies past motor vehicle violations in his application for employment or whose violations are identified in the driver's moving violations report obtained from a State agency.⁷⁵ If the trucking company fails to investigate the driver's qualifications as required by the regulations, the company is deemed to have knowledge not only of the violations and accidents disclosed to it, but also of any facts about the driver's history which would have been revealed had the company performed the appropriate background checks.⁷⁶ This doctrine of imputed knowledge keeps the company from being rewarded for its failure to discover a driver's record when it has a duty to obtain this information.⁷⁷

Effective January 29, 2003, the federal regulations governing driver disqualifications have been amended to provide for disqualification of commercial

⁷⁰ Guidry v. National Freight, Inc., 944 S.W.2d 807 (Tx. 1997).

⁷¹ Wallen v. Allen, 343 S.E.2d 73 (Va. 1986).

⁷² Lakes v. Minor, 620 N.E.2d 1015 (Ohio 1993).

⁷³ Boyd v. L.G. DeWitt Trucking Co., Inc., 405 S.E.2d 914 (N.C. 1991).

⁷⁴ Morris v. JTM Materials, Inc., 78 S.W.3d 28 (Tx. 2002).

⁷⁵ Boyd v. L.G. DeWitt Trucking Co., Inc., 405 S.E.2d 914 (N.C. 1991).

⁷⁶ Smith v. Tommy Roberts Trucking Co., 435 S.E.2d 54, 57 (1993).

⁷⁷ Id. at 57.

vehicle drivers for various lengths of time for serious traffic violations.⁷⁸ Under this comprehensive scheme, drivers are disqualified from operating a commercial vehicle for 60 days for any second conviction within a three year period of any combination of any offense committed in a commercial vehicle of (1) speeding in excess of 15 mph over the speed limit, (2) driving recklessly, (3) making improper or erratic lane changes, (4) following the vehicle ahead too closely, (5) violating any motor vehicle traffic control law arising in connection with a fatal accident, or (6) driving without a commercial driver's license.⁷⁹ (MVR with Disqualification, Appendix of Forms, X-9) A driver is disqualified for one year for driving under the influence of alcohol or controlled substances or leaving the scene of an accident, whether the offense occurs in a commercial vehicle or a non-commercial vehicle.⁸⁰ A driver is also disqualified for a year if he continues to operate a commercial vehicle after having been disqualified.⁸¹ Motor carriers have an obligation to monitor the drivers for any disqualifying offenses,⁸² and these new provisions should give additional grounds for negligent hiring and retention claims.

Negligent hiring, entrustment or retention claims are causes of action based on a trucking company's direct negligence in employing an incompetent driver rather than on vicarious liability for the driver's actions.⁸³ The company's liability is not dependent upon a finding that the driver was acting within the scope of his employment when the tortious act occurred.⁸⁴ Most jurisdictions will not allow a plaintiff to bring claims for negligent hiring and retention when the trucking company admits an agency relationship with the driver.⁸⁵ The basis for this rule is that a company's admission of agency establishes the liability link from the negligence of the driver to the carrier rendering proof of negligent hiring and retention unnecessary and irrelevant.⁸⁶ An exception to this general rule exists when the plaintiff asserts a separate claim for punitive damages based on the issues of negligent hiring and retention.⁸⁷ In this situation, evidence of negligent hiring and retention can be presented to the jury as a basis for an award of punitive damages.⁸⁸

While a trucking company clearly has a duty to investigate the driving experience and qualifications of a driver, most jurisdictions have held that the company does not have a duty to investigate the driver's non-vehicular criminal background.⁸⁹ Because

⁷⁸ 49 C.F.R. § 383.51.

⁷⁹ 49 C.F.R. § 383.51.

⁸⁰ 49 C.F.R. § 383.51.

⁸¹ 49 C.F.R. § 383.51.

⁸² 49 C.F.R. § 383.51(a).

⁸³ Boyd v. L.G. DeWitt Trucking Co., Inc., 405 S.E.2d 914 (N.C. 1991).

⁸⁴ Morris at 14.

⁸⁵ Cole v. Alton, 567 F.Supp. 1084 (N.D. Miss. 1983); Bartja v. National Union Fire Insurance Co. of Pittsburgh, PA, 463 S.E.2d 358 (Ga. 1996); Brown v. Larabee, 2005 WL 1719908 (W.D. Mo.); Lee v. J.B. Hunt Transport, Inc., 308 F.Supp.2d 310 (S.D.N.Y. 2004).

⁸⁶ Bartja at 361.

⁸⁷ Smith at 57.

⁸⁸ Id. at 57.

⁸⁹ Connes v. Molalla Transport System, Inc., 831 P.2d 1316 (Col. 1992); C.C. v. Roadrunner Trucking, Inc., 823 F.Supp. 913 (D.Utah 1993); Guidry v. National Freight, Inc., 944 S.W.2d 807 (Tx. 1997).

drivers are hired to transport freight and not to interact with the public as the company's representative, a trucking company does not have to perform an independent investigation into a driver's criminal past to determine if he is a violent individual who may attack or sexually assault a person.⁹⁰ It would also be cost-prohibitive for a trucking company to conduct a criminal search on each driver since the company would have to review court records from every jurisdiction with which the driver had any significant contacts to complete the search.⁹¹ Accordingly, a trucking company cannot usually be held responsible under a negligent hiring or retention theory for an intentional assault inflicted by a driver.⁹²

****Practice Pointer:** Conduct discovery on the issues of negligent hiring and retention by requesting relevant documents and deposing the company's safety director. If there is evidence of negligent hiring and retention, amend the complaint to add these claims and a punitive damages claim based on the hiring of the driver to avoid any chance of having the claims dismissed if the company admits agency.

D. Actions against Insurers for Negligent Hiring

Insurance companies are playing a larger role in the hiring process of new drivers for small trucking companies. Instead of making an independent assessment of a driver's qualifications, small trucking companies rely on their insurance company to make this decision for them. The trucking company obtains the necessary information from the new applicant and then submits the information to the insurance company. The insurance company reviews the information and then determines if the insurer will provide coverage for the new applicant. The trucking company's decision to hire the driver is based entirely on the "insurability" of the driver. In effect, the insurer is screening new drivers for the trucking company and making the decision as to whether to hire the driver. Although the insurer has no duty under state or federal law to screen drivers, the insurer may be held responsible for negligently undertaking this duty if the insurer fails to reject an unqualified or incompetent driver. There are no reported appellate decisions on this theory of liability. However, state law on negligent undertaking appears to support a basis of recovery.⁹³

****Practice Pointer:** If the trucking company is a small business and there is not sufficient liability coverage for the plaintiff's injuries, examine the relationship between the insurer and motor carrier to determine if the insurer controlled the screening of new drivers.

E. Broker Liability

⁹⁰ Connes at 1321-1322. But compare, Malorney v. B&L Motor Freight, Inc., 496 N.E.2d 1086 (Ill. 1986) (Because trucking company did not present any evidence that it would be unduly burdensome to conduct criminal background checks on its drivers, company can be held responsible for failing to discover that driver who raped hitchhiker had long history of sexual crimes.)

⁹¹ C.C. at 924.

⁹² Id.

⁹³ Osowski v. Smith, 586 S.E.2d 71 (Ga. 2003).

Another new theory of liability is broker liability. A broker is an entity that does not transport the load but deals with the shipper and motor carrier in arranging the transportation.⁹⁴ A broker is often the “middle man” between the shipper and motor carrier. Traditionally, the broker has avoided liability for any injuries caused by the driver transporting the load by demonstrating that the motor carrier was an independent contractor.⁹⁵ Because the broker is not the employer of the driver, it cannot be held liable under a theory of agency or vicarious liability.⁹⁶ The broker may be held liable under a negligent hiring theory if the broker did not properly screen the motor carrier and failed to investigate the carrier’s safety record.⁹⁷ Prior to hiring a motor carrier to transport a load, a broker must at a minimum check the general safety statistics and evaluations of the carrier and review any internal records of the carrier’s safety performance.⁹⁸ A failure to properly evaluate a carrier’s safety record will subject the broker to liability for negligent hiring.⁹⁹

****Practice Pointer:** Determine if a broker was involved in arranging the transportation and if the broker checked the motor carrier’s safety record.

F. Negligent Inspection, Maintenance or Repair

Many accidents are attributable to mechanical failures of parts or systems in a commercial vehicle. Federal regulations require motor carriers to systematically inspect, maintain, and repair all motor vehicles subject to their control.¹⁰⁰ The regulations also provide that all parts and accessories on a commercial vehicle must be kept in safe and proper operating condition at all times.¹⁰¹ A trucking company must maintain the following records for each vehicle under its control: (1) the identification of the owner and style of the vehicle, (2) a list of the nature and due date of various inspection and maintenance operations to be performed on the vehicle, and (3) a record of inspection, repairs and maintenance performed on the vehicle.¹⁰² These records must be maintained for one year while the vehicle is either housed or maintained by the carrier and for six months after the motor vehicle leaves the carrier’s control.¹⁰³ A motor carrier can be held responsible for any injury caused by its failure to properly inspect, maintain or repair any equipment in its control.¹⁰⁴ For example, if the brakes are discovered to be out of adjustment after an accident, the trucking company can be found liable for failing to properly conduct a pre-trip inspection and failing to properly adjust the brakes to keep them within the federal limits.¹⁰⁵

⁹⁴ 49 U.S.C. § 13102(2).

⁹⁵ Graham v. Malone Freight Lines, Inc., 314 F.3d 7 (1st Cir. 1999).

⁹⁶ Schramm v. Foster, 341 F.Supp.2d 536, 545 (Md. 2004).

⁹⁷ Id. at 551.

⁹⁸ Id.

⁹⁹ Id.

¹⁰⁰ 49 C.F.R. § 396.3(a).

¹⁰¹ 49 C.F.R. § 396.3(a)(1).

¹⁰² 49 C.F.R. § 396.3(b).

¹⁰³ 49 C.F.R. § 396.3(c).

¹⁰⁴ Lynden Transport, Inc. v. Haragan, 623 P.2d 789 (Alaska 1981); Knight v. Schneider National Carriers, Inc., 350 F.Supp.2d 775 (N.D. Ill. 2004).

¹⁰⁵ Indian Trucking v. Harber, 752 N.E.2d 168 (Ind. 2001).

****Practice Pointer:** Have a qualified trucking expert conduct an inspection of the vehicle as soon as possible after the accident to determine if mechanical problems played any role in the accident and obtain a copy of any post-accident DOT, PSC or FHWA inspection of the vehicle.

G. Violations of the Federal Motor Carrier Safety Regulations

The Federal Motor Carrier Safety Regulations (“FMCSR”) are a comprehensive list of guidelines and specifications governing the operation and maintenance of commercial vehicles. Every interstate motor carrier is required to be knowledgeable of and comply with all the provisions of the FMCSR applicable to that motor carrier’s operations.¹⁰⁶ Every driver and employee must be instructed regarding compliance with the FMCSR.¹⁰⁷ Equipment and accessories required by the regulations must be maintained in compliance with all applicable performance and design criteria.¹⁰⁸ No person may aid, abet, encourage or require a motor carrier or its drivers to violate any safety regulation.¹⁰⁹ A trucking company can be held liable for any injury resulting from its violation an applicable provision of the FMCSR.¹¹⁰ An intrastate carrier or an entity transporting an exempt commodity may not be held liable for injuries resulting from an accident based on a violation of the FMCSR but may be held liable under common law theories of negligence.¹¹¹ As with other federal regulations, agencies in most states have adopted the provisions of the FMCSR as applicable to any commercial vehicles operated within the state.¹¹²

****Practice Pointer:** Review the FMCSR to determine if the driver’s tractor-trailer met federal specifications.

H. Shipper Liability

The shipper may be held liable if the accident was related to improper loading of the vehicle. Under this theory of liability, a shipper who participates in the loading process is responsible under a common law theory of negligence for failing to properly secure the load.¹¹³ Although the basis of recovery is common law negligence, the FMCSR provides evidence of the applicable standard of care.¹¹⁴ If the trailer is sealed

¹⁰⁶ 49 C.F.R. § 390.3(e)(1).

¹⁰⁷ 49 C.F.R. § 390.3(e)(2).

¹⁰⁸ 49 C.F.R. § 390.3(e)(3).

¹⁰⁹ 49 C.F.R. § 390.13.

¹¹⁰ Hageman v. TSI, Inc., 786 P.2d 452 (Col. 1989).

¹¹¹ Disidore v. Mail Contractors of America, Inc., 2001 WL 506838 (D. Kan. 2001); Stanley v. Fiber Transport, Inc., 470 S.E.2d 767 (Ga. 1996).

¹¹² See Transportation Rules of the Georgia Public Service Commission.

¹¹³ Burke v. J.F. Allen Co., 182 F.3d 907 (W.Va. 1999); Skeie v. Mercer Trucking Co., Inc., 61 P.3d 1207 (Wash. 2003).

¹¹⁴ Reed v. Ace Doran Hauling & Rigging Co., 1997 WL 177849 (N.D. Ill. 1997); Symington v. Great Western Trucking Co., Inc., 668 F.Supp. 1278 (S.D.Iowa 1987); Locicero v. Interpace Corp., 266 N.W.2d 423 (Wis. 1978).

before it is picked up by the motor carrier, it is presumed that the shipper participated in the loading process.¹¹⁵

****Practice Pointer:** If the accident involved a load shift, overweight vehicle or improperly secured load, consider an action against the shipper for negligently loading the vehicle.

I. Driver Fatigue

Many commercial vehicle accidents are caused by a driver's inattentiveness or fatigue resulting from the operation of a vehicle for an excessive amount of time. Federal regulations prohibit a trucking company from allowing a driver to operate a commercial vehicle while the driver's ability or alertness is impaired by fatigue, illness, or any other cause which would make it unsafe for the driver to operate the commercial vehicle.¹¹⁶ These regulations also prescribe a maximum number of hours that a driver can be on duty during any day or week and require a driver to maintain a daily log of his work status.¹¹⁷ (Driver's Log, Appendix of Forms, X-5) A carrier has a duty to monitor its driver's logs through an appropriate log verification procedure and to establish proper controls of driving time to ensure compliance with maximum hours of service regulations.¹¹⁸ The purpose of these regulations is to prevent accidents caused by driver fatigue, and any violation of these requirements is admissible to prove negligence for a subsequent accident.¹¹⁹ Courts will usually not allow a plaintiff to proceed under a theory of liability based on violations of the maximum hours requirements or driver's logs provisions if there is no evidence that the accident was related to driver inattentiveness or fatigue.¹²⁰

****Practice Pointer:** Retain a qualified expert to examine the trucking company's system of monitoring its drivers' hours of service.

J. Spoliation of Evidence

Federal regulations require interstate carriers to maintain and preserve records for various lengths of time.¹²¹ After an accident, a carrier will often destroy pertinent records, either purposefully or in the ordinary course of its document retention procedures. The destruction of documents, often referred to as spoliation, can lead to sanctions against the trucking company.¹²² As a sanction for spoliation of evidence by a party to an action, a court may (1) charge the jury that spoliation of evidence creates the rebuttable presumption that the evidence would have been harmful to the spoliator, (2) exclude any testimony about the evidence, or (3) enter judgment against the party which

¹¹⁵ Miller v. Rollins Leasing Corp., 1999 WL 739539 (Ohio 1999).

¹¹⁶ 49 C.F.R. § 392.3.

¹¹⁷ 49 C.F.R. § 395 *et. seq.*

¹¹⁸ Torres v. North American Van Lines, Inc., 658 P.2d 835 (Ariz. 1982).

¹¹⁹ NeSmith v. Bowden, 563 P.2d 1322 (Wash. 1977); Greist v. Phillips, 906 P.2d 789 (Or. 1995).

¹²⁰ Smith v. Printup, 938 P.2d 1261 (Kan. 1997); Burke v. Maassen, 904 F.2d 178 (3rd Cir. 1990).

¹²¹ 49 C.F.R. Pt. 379, App. A.

¹²² R.A. Siegel Co. v. Bowen, 539 S.E.2d 873 (Ga. 2000).

tampered with the evidence.¹²³ The severity of the sanction must be determined according to (1) whether the party seeking sanctions was prejudiced as a result of the destruction of the evidence, (2) whether the prejudice can be cured, (3) the importance of the evidence, (4) whether the party who destroyed the evidence acted in bad faith, and (5) the potential for abuse if expert testimony about the evidence is not excluded.¹²⁴ A few jurisdictions even recognize a separate cause of action for spoliation of evidence.¹²⁵ These jurisdictions have set forth the element of the tort as (1) the existence of pending or probable litigation involving the plaintiff, (2) defendant's knowledge of the pendency or fact of the litigation, (3) destruction of evidence by the defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts.¹²⁶

The driving force behind imposing sanctions for spoliation is the concept that it is unfair to have a plaintiff's case adversely affected by the trucking company's failure to preserve and maintain relevant evidence. The company will usually argue that the destruction of the evidence was inadvertent and that the evidence would have been preserved if it had only known that it was relevant to plaintiff's case. The solution to this problem is to send a spoliation letter by certified mail to the trucking company and its representatives as early in the litigation as possible. (Spoliation Letter, Appendix of Forms, X-1) A standard spoliation letter lists in detail certain items of evidence which are to be "maintained and preserved" and not be "destroyed, discarded, changed, repaired, or altered in any manner." The letter states that this evidence is relevant to the plaintiff's cause of action and that the plaintiff will seek all sanctions allowed under the law if the evidence is destroyed. Once the spoliation letter is received, the motor carrier is on notice of the relevance of the listed items and must take affirmative steps to maintain and preserve this evidence or risk the imposition of harsh sanctions. Because of ethical considerations concerning direct contact with opposing parties, an attorney should always review State Bar rules and regulations to make sure the content of his spoliation letter is consistent with any ethical requirements.

Federal regulations designate the amount of time that most records must be maintained.¹²⁷ Trucking companies must exercise reasonable care in choosing retention periods for records that do not have a specific period of time designated in the federal regulations, and the choice of retention periods shall reflect past experiences, company needs, pending litigation, and regulatory requirements.¹²⁸ States and other governmental entities may prescribe longer retention periods for any category of records.¹²⁹ A carrier may destroy any records at its discretion after the required retention period expires.¹³⁰

¹²³ Chapman v. Auto Owners Insurance Co., 469 S.E.2d 783 (Ga. 1996).

¹²⁴ Id. at 783.

¹²⁵ Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986); Smith v. Howard Johnson Co., 615 N.E.2d 1037 (Ohio 1993); Coleman v. Eddy Potash, Inc., 905 P.2d 185 (N.M. 1995) Guillory v. Dillard's Department Store, Inc., 777 So.2d 1 (La. 2000); Smith v. Atkinson, 771 So.2d 429 (Ala. 2000).

¹²⁶ Rosenblit v. Zimmerman, 766 A.2d 749 (N.J. 2001).

¹²⁷ 49 C.F.R. § 379 et. seq.

¹²⁸ 49 C.F.R. Pt. 379, App. A, Note A.

¹²⁹ 49 C.F.R. § 379.3.

¹³⁰ 49 C.F.R. § 379.3.

Records may be maintained by any technology that is immune to alteration, modification or erasure of the underlying data and will enable production of an accurate and unaltered paper copy.¹³¹

****Practice Pointer:** Send a spoliation letter as soon as possible to place the trucking company on notice as to the importance of maintaining and preserving all relevant documents.

K. Punitive Damages

Punitive damages are only warranted when the conduct of the trucking company amounts to more than just negligence and instead demonstrates recklessness or a want of care for the consequences of its actions.¹³² In many jurisdictions, a plaintiff can recover punitive damages against a company when the driver's actions are reckless or wanton under the same guidelines for imputing responsibility for a driver's negligence.¹³³ In these jurisdictions, the motor carrier is liable for any award of punitive damages based on the driver's misconduct, i.e., when the driver operates a vehicle under the influence of alcohol or drugs or drives a vehicle with known mechanical problems.¹³⁴ The trucking company may be held directly liable for punitive damages if the driver's history is so egregious as to make the hiring or retention of the driver amount to reckless conduct on behalf of the company.¹³⁵ The company can also be held directly responsible for punitive damages if it has a common practice of ignoring federal regulations or failing to monitor its drivers,¹³⁶ or if it destroys documents to hide any potential violations.¹³⁷

****Practice Pointer:** Retain a qualified expert to determine if the trucking company is complying with its obligations to monitor drivers under the federal regulations.

III. Federal Regulations Governing Driver Qualifications

A. Pre-Employment Screening

Federal regulations require an interstate motor carrier to obtain certain background information on a driver before hiring him.¹³⁸ Most jurisdictions, through rules issued by a state Public Service Commission or a similar entity, have adopted the federal regulations as guidelines for intrastate carriers to complete the same background

¹³¹ 49 C.F.R. § 379.7(a).

¹³² See O.C.G.A. § 51-12-5.1.

¹³³ Phillips v. Dallas Carrier Corp., 766 F.Supp. 416 (M.D.N.C. 1991).

¹³⁴ Id. at 419-420.

¹³⁵ Smith v. Tommy Roberts Trucking Co., 435 S.E.2d 54 (Ga. 1993).

¹³⁶ Torres v. North American Van Lines, Inc., 658 P.2d 835 (Ariz. 1982).

¹³⁷ J.B. Hunt Transport, Inc. v. Bentley, 427 S.E.2d 429 (Ga. 1993).

¹³⁸ 49 C.F.R. § 391 et. seq.

checks.¹³⁹ Under the federal regulatory scheme, a driver applying for employment with a trucking company must complete a comprehensive application listing any moving violations or accidents for the three-year period prior to the date of the application and identifying each motor carrier for whom the driver has worked for the past ten years.¹⁴⁰ (Driver's Application, Appendix of Forms, X-2) Within thirty days of hiring a driver, the trucking company must make inquiries with the driver's prior employers for the three-year period prior to the date of his employment and must obtain a moving violations report ("MVR") from any state issuing a license to the driver for the preceding three-year period.¹⁴¹ Federal regulations specifically require motor carriers to obtain from prior employers: (1) employment verification, (2) a list of any accidents, and (3) violations of alcohol or controlled substances regulations and test results.¹⁴² The prior employers are required to provide this information to the prospective employer.¹⁴³ The motor carrier must verify that the driver is physically able to operate a commercial vehicle by obtaining a medical examiner's certificate to this effect.¹⁴⁴

The company must either give the driver a road test to determine his ability to operate a commercial vehicle or confirm that he has a commercial driver's license ("CDL") issued from a jurisdiction that requires the driver to pass a road test as part of its licensing procedure.¹⁴⁵ (Road Test, Appendix of Forms, X-3) If the driver is given a road test, he must be tested on his skill in (1) performing pre-trip inspections, (2) coupling and uncoupling of units, (3) placing a commercial vehicle in operation, (4) using controls and emergency equipment, (5) operating a commercial vehicle in traffic, (6) turning the vehicle, (7) braking and slowing the vehicle, and (8) backing and parking the vehicle.¹⁴⁶ A company is also required to make sure that the driver is knowledgeable of the proper manner of securing cargo before allowing him to operate a commercial vehicle.¹⁴⁷ These regulations provide only a minimum standard, and a motor carrier can adopt more stringent requirements for its drivers.¹⁴⁸

****Practice Pointer:** Verify that the trucking company actually contacted the driver's prior employers and examine closely any gaps in a driver's employment history.

B. Federal Minimum Standards for Driver Qualifications

The federal regulations provide a minimum standard for determining the qualifications of a driver.¹⁴⁹ According to these regulations, a driver is qualified to operate a commercial vehicle if he (1) is at least 21 years old; (2) can read and understand

¹³⁹ For example, See Transportation Rules of the Georgia Public Service Commission 4-1-391 et. seq.

¹⁴⁰ 49 C.F.R. § 391.21.

¹⁴¹ 49 C.F.R. § 391.23.

¹⁴² 49 C.F.R. § 391.23.

¹⁴³ 49 C.F.R. § 391.23(g).

¹⁴⁴ 49 C.F.R. § 391.41 & 391.43.

¹⁴⁵ 49 C.F.R. § 391.31 & 391.33.

¹⁴⁶ 49 C.F.R. § 391.31(c).

¹⁴⁷ 49 C.F.R. § 391.13.

¹⁴⁸ Cassara v. DAC Services, Inc., 2002 WL 59687 (10th Cir. 2002).

¹⁴⁹ 49 C.F.R. § 391.1.

the English language sufficient to complete necessary reports, converse with the public and understand traffic signs; (3) can by reason of experience and/or training operate safely a commercial vehicle; (4) is physically qualified to operate a commercial vehicle; (5) has a valid CDL; (6) has completed the driver's application for employment and has provided the company with the required list of prior moving violations and accidents; (7) is not disqualified under any federal regulation; and (8) has successfully completed a road test or has a CDL from a jurisdiction that requires the driver to pass a road test as part of its licensing procedure.¹⁵⁰

In addition to these specific qualifications, commercial drivers are also required to have the requisite skill and knowledge to operate a commercial vehicle safely.¹⁵¹ Drivers must have knowledge of (1) safety regulations, (2) commercial motor vehicle safety control systems, (3) safe vehicle operations and control, (4) the relationship of cargo to vehicle control, (5) vehicle inspection procedures, (6) minimal hazardous materials knowledge, and (7) air brake operations and control.¹⁵² A driver must be familiar with the proper manner of securing cargo and be able to secure properly any cargo transported by him.¹⁵³

C. Entry Level Drivers

An entry level driver is a driver with a CDL with less than one year of experience operating a commercial motor vehicle in interstate commerce.¹⁵⁴ Entry level drivers must receive training from the motor carrier on (1) driver qualifications, (2) hours of service, (3) driver wellness, and (4) whistleblower protection.¹⁵⁵ A carrier must ensure that each entry level driver has a training certificate as proof that he received his entry level training.¹⁵⁶ A copy of the driver's training certificate must be kept in the driver's qualification file.¹⁵⁷ The regulations governing entry level drivers have been held to be constitutional although critics claim that the rules do not contain enough substantive training requirements.¹⁵⁸

D. Driver Disqualification

Effective January 29, 2003, the federal regulations governing driver disqualifications have been amended to provide for disqualification for commercial vehicle drivers for various lengths of time for serious traffic violations.¹⁵⁹ Under this comprehensive scheme, drivers are disqualified from operating a commercial vehicle for 60 days for any second conviction within a three year period of any combination of any

¹⁵⁰ 49 C.F.R. § 391.11.

¹⁵¹ 49 C.F.R. § 383.110.

¹⁵² 49 C.F.R. § 383.111.

¹⁵³ 49 C.F.R. § 391.13.

¹⁵⁴ 49 C.F.R. § 380.502.

¹⁵⁵ 49 C.F.R. § 380.503.

¹⁵⁶ 49 C.F.R. § 380.505.

¹⁵⁷ 49 C.F.R. § 380.509.

¹⁵⁸ Advocates for Highway & Auto Safety v. FMCSA, 429 F.3d 1136 (D.C. 2005).

¹⁵⁹ 49 C.F.R. § 383.51.

offense committed in a commercial vehicle of (1) speeding in excess of 15 mph over the speed limit, (2) driving recklessly, (3) making improper or erratic lane changes, (4) following the vehicle ahead too closely, (5) violating any motor vehicle traffic control law arising in connection with a fatal accident, or (6) driving without a commercial driver's license.¹⁶⁰ (MVR with Disqualifications, Appendix of Forms, X-9) A driver is disqualified for one year for driving under the influence of alcohol or controlled substances or leaving the scene of an accident, whether the offense occurs in a commercial vehicle or a non-commercial vehicle, and for causing a fatality as a result of the negligent operation of a commercial vehicle.¹⁶¹ A driver is also disqualified for a year if he continues to operate a commercial vehicle after having been disqualified.¹⁶² Drivers are also subject to disqualification for in excess of 60 days for violations of railroad crossing regulations and for violations of out-of-service orders.¹⁶³ The penalties increase for multiple offenses or repeat violations of the same offense.¹⁶⁴ A motor carrier has an obligation to make sure that a disqualified driver does not operate a commercial vehicle.¹⁶⁵

****Practice Pointer:** Request copies of any records of disqualifications or out-of-service citations concerning the driver.

E. Commercial Driver's Licenses

A driver may not operate a commercial vehicle unless the driver has obtained a valid commercial driver's license ("CDL").¹⁶⁶ A driver may have only one CDL at any time.¹⁶⁷ CDLs are divided into three separate motor vehicle groups. Group A is for the operation of any combination of vehicles with a gross vehicle weight rating ("GVWR") in excess of 26,000 lbs. provided the GVWR of the vehicle(s) being towed is in excess of 10,000 lbs.¹⁶⁸ Group B is for the operation of any single vehicle with a GVWR in excess of 26,000 lbs. or any vehicle towing a vehicle not in excess of 10,000 lbs.¹⁶⁹ Group C is for the operation of any vehicles not covered in Group A or B which is designed to transport 16 or more passengers or is used in transporting hazardous materials.¹⁷⁰ The requirement for a CDL may be waived by State law in regards to farmers, firefighters, emergency response vehicles, drivers removing ice and snow and the fireworks industry.¹⁷¹

¹⁶⁰ 49 C.F.R. § 383.51.

¹⁶¹ 49 C.F.R. § 383.51.

¹⁶² 49 C.F.R. § 383.51.

¹⁶³ 49 C.F.R. § 383.51.

¹⁶⁴ 49 C.F.R. § 383.51.

¹⁶⁵ 49 C.F.R. § 383.51(a).

¹⁶⁶ 49 U.S.C. § 31302.

¹⁶⁷ 49 U.S.C. § 31302; 49 C.F.R. § 383.21.

¹⁶⁸ 49 C.F.R. § 383.91(a).

¹⁶⁹ 49 C.F.R. § 383.91(a).

¹⁷⁰ 49 C.F.R. § 383.91(a).

¹⁷¹ 49 C.F.R. § 383.3.

****Practice Pointer:** Make sure the driver is not hiding prior violations by maintaining more than one CDL.

F. Endorsements to CDL

Special endorsements to a CDL are required in order for a driver to operate certain commercial vehicles such as double/triple trailers, passenger vehicles, tankers or vehicles transporting hazardous materials.¹⁷² A driver must demonstrate special knowledge about coupling and uncoupling double/triple trailers to obtain a double/triple trailer endorsement.¹⁷³ In order to have a passenger endorsement, a driver must have knowledge about proper procedures for unloading/loading passengers, use of emergency exits, proper responses to emergency situations such as fires or unruly passengers, proper procedures at railroad crossings and drawbridges, and appropriate braking procedures.¹⁷⁴ A driver with a tank vehicle endorsement must understand (1) causes, prevention and effects of cargo surge on motor vehicle handling, (2) proper braking procedures when the tank is empty, full and partially full, (3) differences in handling baffled/ compartmental tank interiors versus non-baffled ones, (4) differences in cargo surge for each kind of liquid, (5) effects of road grade and curvature on motor vehicle handling, (6) proper use of emergency systems, and (7) retest and marking requirements.¹⁷⁵ In order to obtain a hazardous materials endorsement, a driver must demonstrate that he has knowledge of hazardous materials regulations, hazardous materials handling, operation of safety equipment, and emergency response procedures.¹⁷⁶ School bus drivers must demonstrate the ability to deal with passengers and skills in loading and unloading children to obtain an endorsement.¹⁷⁷

G. Physical Requirements

A driver is not physically qualified to operate a motor vehicle if he (1) has lost a foot, leg, hand or arm or has an impairment of his foot, leg, hand or arm which interferes with his ability to drive; (2) has diabetes mellitus requiring insulin for control; (3) has a serious heart condition; (4) has a history of respiratory dysfunction; (5) has high blood pressure or joint or muscular problems which interfere with his ability to drive; (6) has epilepsy or any other condition which might cause a loss of consciousness; (7) has a mental or psychiatric disorder which interferes with his ability to drive; (8) has less than 20/40 vision with corrective lenses; (9) has significant hearing loss; (10) takes a controlled substance which interferes with the ability to drive; or (11) has a clinical diagnosis of alcoholism.¹⁷⁸ The driver's physical exam must be repeated every two years or whenever a physical or mental injury or disease impairs his ability to perform his normal duties.¹⁷⁹ If a driver is determined by a medical examiner not to be qualified to

¹⁷² 49 C.F.R. § 383.93.

¹⁷³ 49 C.F.R. § 383.115.

¹⁷⁴ 49 C.F.R. § 383.117.

¹⁷⁵ 49 C.F.R. § 383.119.

¹⁷⁶ 49 C.F.R. § 383.121.

¹⁷⁷ 49 C.F.R. § 383.123.

¹⁷⁸ 49 C.F.R. § 391.41.

¹⁷⁹ 49 C.F.R. § 391.45.

drive and the driver locates another physician to dispute the finding, the driver may apply to the Director of Office of Motor Carrier Research and Standards to resolve the conflict in medical evaluations.¹⁸⁰ A driver may also apply for a waiver of certain physical defects which would otherwise result in disqualification.¹⁸¹

****Practice Pointer:** Request copies of the driver's medical records to determine his physical qualifications.

H. Annual Review of Driving Record

During the course of a driver's employment, the trucking company must perform an annual review of the driver at least every twelve months to determine if the driver is still qualified to operate a commercial vehicle.¹⁸² (Annual Review, Appendix of Forms, X-4) In conjunction with this review, the driver must provide a certified list of all moving violations and accidents for the preceding twelve-month period.¹⁸³ The company is required to run an MVR on the driver to verify this information.¹⁸⁴ The company must then consider the driver's accident record and driving history in deciding if the driver is still qualified to operate a commercial vehicle.¹⁸⁵ The trucking company must give great weight to violations that indicate that the driver has exhibited a disregard for the safety of the public, such as speeding, reckless driving, or operating a vehicle while under the influence of alcohol or drugs.¹⁸⁶

****Practice Pointer:** Make sure the trucking company conducted an annual review of the driver and actually considered whether he was qualified to continue operating a vehicle.

I. Maintenance of Driver's Qualification File

The trucking company is required to maintain a driver's qualification file on each driver.¹⁸⁷ The driver's qualification file must contain: (1) the driver's application for employment; (2) a written record of inquiries to prior employers and any responses received from them; (3) the pre-employment MVR on the driver; (4) results of any road test or a copy of the driver's CDL; (5) the driver's annual review; (6) the MVR on the driver related to the annual review; (7) the driver's certified list of moving violations and accidents provided in conjunction with the annual review; and (8) the medical examiner's certificate of physical qualification.¹⁸⁸ The documents in the driver's qualification file must be kept by the company for as long as the driver is employed by the company and for an additional three-year period, except that documents related to the annual review may be discarded following a subsequent annual review and the medical examiner's

¹⁸⁰ 49 C.F.R. § 391.47.

¹⁸¹ 49 C.F.R. § 391.49.

¹⁸² 49 C.F.R. § 391.25.

¹⁸³ 49 C.F.R. § 391.27.

¹⁸⁴ 49 C.F.R. § 391.25.

¹⁸⁵ 49 C.F.R. § 391.25(b)(2).

¹⁸⁶ 49 C.F.R. § 391.25(b)(2).

¹⁸⁷ 49 C.F.R. § 391.51(a).

¹⁸⁸ 49 C.F.R. § 391.51(b).

certificate may be discarded every two years following the replacement with a new certificate.¹⁸⁹ A motor carrier does not have to maintain a driver's qualification file on any driver who is not regularly employed by the carrier if the driver is employed regularly by another carrier and the other carrier certifies in writing that the driver is fully qualified to operate a commercial vehicle.¹⁹⁰

****Practice Pointer:** Request the entire driver's qualification file.

J. Driver's Duty to Notify His Employer of Violations

Within one business day after the date of the action, a driver must notify the trucking company if his driver's license is revoked, suspended or canceled, if he loses the right to operate a commercial vehicle for any reason or if he is disqualified from operating a commercial vehicle.¹⁹¹ A driver must notify the company of any violation of any State or local law concerning motor vehicle traffic control within thirty days after the date the driver is found to have committed the violation.¹⁹² A motor carrier may not allow a driver to operate a commercial vehicle if the driver's license has been revoked, suspended, or canceled or the driver has more than one driver's license.¹⁹³ The Surface Transportation Board maintains a database on the licensing, identification and disqualification of commercial drivers.¹⁹⁴

IV. Alcohol and Controlled Substance Testing

Federal regulations establish strict guidelines for alcohol and controlled substance use by drivers and testing by carriers.¹⁹⁵ These guidelines apply to every person who operates a commercial motor vehicle in commerce in any state if he is subject to the commercial driver's license requirements in the United States, Mexico or Canada.¹⁹⁶ Federal law preempts state law in regards to drug and alcohol testing of drivers to the extent that compliance with both the state and federal requirements is not possible or compliance with the state law is an obstacle to the accomplishment and execution of the federal law.¹⁹⁷ Pursuant to this preemption provision, state and local governments may not attempt to regulate the time and manner of a motor carrier's drug testing program.¹⁹⁸

A. Use of Alcohol While On Duty

¹⁸⁹ 49 C.F.R. § 391.51(c).

¹⁹⁰ 49 C.F.R. § 391.65.

¹⁹¹ 49 U.S.C. § 31303(b); 49 C.F.R. § 383.33.

¹⁹² 49 U.S.C. § 31303(a); 49 C.F.R. § 383.31.

¹⁹³ 49 U.S.C. § 31304; 49 C.F.R. § 383.37(a)&(b).

¹⁹⁴ 49 U.S.C. § 31309.

¹⁹⁵ 49 C.F.R. § 382 *et. seq.*

¹⁹⁶ 49 C.F.R. § 382.103(a).

¹⁹⁷ 49 C.F.R. § 382.109(a).

¹⁹⁸ Visnovec v. Yellow Freight System, Inc., 754 F.Supp. 142 (D.Minn. 1990); Yellow Freight System, Inc. v. Amestoy, 736 F.Supp. 44 (D.Vermont 1990).

A driver cannot use alcohol within 4 hours of going on duty or being physically in control of or operating a commercial vehicle.¹⁹⁹ A driver may not possess wine, beer or distilled spirits while on duty or operating a commercial vehicle.²⁰⁰ A motor carrier cannot permit a driver to operate a commercial vehicle if it appears by his conduct or appearance that he has consumed alcohol within 4 hours.²⁰¹ Any driver who appears to have consumed alcohol within 4 hours of going on duty or operating a commercial vehicle must be placed out-of-service for a 24-hour period.²⁰²

A driver also cannot use alcohol while performing a safety sensitive function²⁰³ and cannot report for duty or remain on duty requiring the performance of a safety-sensitive function while having an alcohol concentration of 0.04 or greater.²⁰⁴ A safety-sensitive function includes operating a commercial vehicle, being present in a commercial vehicle except time spent resting in a sleeper berth, waiting at a terminal, facility or other property for dispatch unless the driver has been relieved by his employer, inspecting, servicing or conditioning a commercial vehicle, loading or unloading a vehicle or assisting in the loading or unloading process, or repairing or attending to a disabled vehicle.²⁰⁵ A trucking company is prohibited from allowing a driver who has used alcohol within 4 hours,²⁰⁶ is using alcohol,²⁰⁷ or has an alcohol concentration of 0.04 or greater²⁰⁸ to perform or continue to perform a safety sensitive function. A driver who is found to have an alcohol concentration of greater than 0.02 but less than 0.04 cannot perform or continue to perform safety-sensitive functions until at least 24 hours after the alcohol test.²⁰⁹ A jury issue exists as to whether an intoxicated driver acts outside the scope of his employment with the trucking company when the company's policies forbid alcohol use.²¹⁰

****Practice Pointer:** Request copies of all alcohol tests performed on the driver and correspondence with prior employers about alcohol use.

B. Use of Controlled Substances While On Duty

A driver cannot use a controlled substance when reporting for or remaining on duty requiring the performance of a safety-sensitive function unless the use of the controlled substance is pursuant to the instructions of a physician who has advised the driver that the substance will not adversely affect his ability to safely operate a commercial vehicle.²¹¹ A motor carrier may require a driver to disclose any therapeutic

¹⁹⁹ 49 C.F.R. § 392.5(a)(1).

²⁰⁰ 49 C.F.R. § 392.5(a).

²⁰¹ 49 C.F.R. § 392.5(b).

²⁰² 49 C.F.R. § 392.5(c).

²⁰³ 49 C.F.R. § 382.205.

²⁰⁴ 49 C.F.R. § 382.201.

²⁰⁵ 49 C.F.R. § 382.107.

²⁰⁶ 49 C.F.R. § 382.207.

²⁰⁷ 49 C.F.R. § 382.205.

²⁰⁸ 49 C.F.R. § 382.201.

²⁰⁹ 49 C.F.R. § 382.505(a).

²¹⁰ Minter v. Great American Insurance Co. of NY, 423 F.3d 460 (5th Cir. 2005).

²¹¹ 49 C.F.R. § 382.213(a).

drug use related to a medical condition.²¹² A driver cannot report for duty, remain on duty or perform a safety sensitive function if he tests positive for controlled substances.²¹³ An employer is prohibited from allowing a driver who has used controlled substances²¹⁴ or tests positive for a controlled substance²¹⁵ to perform or continue to perform a safety sensitive function.

****Practice Pointer:** Request copies of all controlled substances tests performed on the driver and correspondence with prior employers about drug use.

C. Pre-Employment Alcohol & Drug Screening

A trucking company must provide its drivers with educational material explaining its policies and procedures and federal guidelines concerning alcohol and controlled substance testing prior to conducting a pre-employment alcohol and controlled substances screen.²¹⁶ A motor carrier must complete a pre-employment screen of a driver for alcohol and controlled substances before the driver performs his first safety-sensitive function for the carrier.²¹⁷ A carrier may not allow a driver to perform a safety-sensitive function until the driver has undergone an alcohol test with a result indicating an alcohol concentration less than 0.04 and has undergone a controlled substances test with a negative result.²¹⁸ A carrier does not have to perform a pre-employment alcohol test if the driver has been tested in the last six months with a result of less than 0.04, and the carrier ensures that the driver's prior employer has no record of a violation of the alcohol use prohibition within the last six months.²¹⁹

A pre-employment controlled substance test is not necessary if the driver was tested for controlled substances within the past six months or was involved in a random testing program for the past twelve months AND the carrier contacts the driver's prior employer to ensure that the driver did not violate any prohibitions within the past six months.²²⁰ A carrier who does not conduct a pre-employment screen under the aforementioned exceptions must obtain a copy of the driver's alcohol and/or drug testing records from his prior testing program.²²¹ A carrier who does not employ a driver but uses him more than once a year must obtain the driver's alcohol and controlled substance testing records from his primary employer every six months or must conduct its own testing of the driver.²²²

²¹² 49 C.F.R. § 382.213(c).

²¹³ 49 C.F.R. § 382.215.

²¹⁴ 49 C.F.R. § 382.213(b).

²¹⁵ 49 C.F.R. § 382.215.

²¹⁶ 49 C.F.R. § 382.601(a).

²¹⁷ 49 C.F.R. § 382.301(a).

²¹⁸ 49 C.F.R. § 382.301(a).

²¹⁹ 49 C.F.R. § 382.301(b).

²²⁰ 49 C.F.R. § 382.301(c).

²²¹ 49 C.F.R. § 382.301(d)(1).

²²² 49 C.F.R. § 382.301(d)(2).

A carrier must also request all alcohol test results greater than 0.04, all positive controlled substances results, and all refusals to be tested from a driver's prior employers for the two-year period preceding the application for employment.²²³ This information must be reviewed by a carrier no later than 14 days after the first time a driver performs a safety-sensitive function.²²⁴ If a carrier cannot obtain these records after making a good faith effort, the carrier must document in the driver's qualification file the efforts made to obtain the records.²²⁵ A carrier who obtains information that a driver has violated the alcohol or controlled substances requirements may not employ the driver until the carrier has obtained information on subsequent compliance with the referral and rehabilitation requirements.²²⁶

****Practice Pointer:** Request all pre-employment drug and alcohol screens and any information provided to drivers about drug and alcohol testing.

D. Reasonable Suspicion Testing

If a motor carrier has a reasonable suspicion that a driver has violated the alcohol use prohibitions, the carrier must require the driver to submit to testing.²²⁷ This reasonable suspicion must be based on the appearance, behavior, speech or body odor of the driver.²²⁸ A supervisor or company official who has received specific training regarding the use of alcohol shall make the determination that a reasonable suspicion to conduct testing exists.²²⁹ Carriers are required to provide these supervisors with at least one hour of alcohol misuse training and one hour of controlled substances training in order to identify violators.²³⁰ The supervisor must witness the alleged violation during, just preceding or just after the period of the workday.²³¹ The supervisor making the determination is prohibited from conducting the alcohol test on the driver.²³² If the alcohol test is not performed within two hours of the determination of a reasonable suspicion, the carrier must prepare and maintain a record stating the reasons the test was not completed in a timely fashion.²³³ If the carrier fails to conduct a test within eight hours, the carrier shall cease any attempts to complete the test.²³⁴ After a determination that a reasonable suspicion exists for a violation, a carrier may not allow a driver to report for duty or remain on duty requiring the performance of safety-sensitive functions until an alcohol test is completed with a result of less than 0.02 blood alcohol concentration, or twenty-four hours has elapsed since the alleged violation.²³⁵

²²³ 49 C.F.R. § 382.413(a)(1).

²²⁴ 49 C.F.R. § 382.413(b).

²²⁵ 49 C.F.R. § 382.413(c).

²²⁶ 49 C.F.R. § 382.413(g).

²²⁷ 49 C.F.R. § 382.307(a).

²²⁸ 49 C.F.R. § 382.307.

²²⁹ 49 C.F.R. § 382.307(c).

²³⁰ 49 C.F.R. § 382.603.

²³¹ 49 C.F.R. § 382.307(d).

²³² 49 C.F.R. § 382.307(c).

²³³ 49 C.F.R. § 382.307(e)(1).

²³⁴ 49 C.F.R. § 382.307(e)(1).

²³⁵ 49 C.F.R. § 382.307(e)(4).

A carrier must also conduct a controlled substance test if the carrier has a reasonable suspicion that a driver has used a controlled substance.²³⁶ The carrier's reasonable suspicion must be based on the behavior, speech and body odor of the driver especially any indications of chronic or withdrawal effects of controlled substance use.²³⁷ A supervisor or company official who has received specific training regarding the use of controlled substances shall make the determination that a reasonable suspicion to conduct testing exists.²³⁸ The supervisor must make a written record of the observations leading to the controlled substance testing within twenty-four hours of the occurrence or before the results of the test are released, whichever is earlier.²³⁹

E. Random Drug & Alcohol Testing

A carrier must also conduct random alcohol and drug testing on a certain percentage of its drivers per year regardless of their conduct.²⁴⁰ The testing must be unannounced and the dates for administering the tests must be spread reasonably throughout the calendar year.²⁴¹

F. Post-Accident Testing

A trucking company must perform a drug and alcohol test on a driver whenever he is involved in an automobile accident resulting in a fatality.²⁴² Testing is also required when the investigating officer issues a citation to the driver involved in the accident and the accident causes bodily injury requiring immediate treatment away from the accident scene or the accident causes disabling damage to any motor vehicle which must be towed from the scene.²⁴³ Disabling damage does not include damage which can be remedied at the scene without special tools or parts, tire damage without any other damage, headlight or taillight damage, or damage to turn signals, horn or windshield wipers.²⁴⁴ The post-accident testing should occur as soon as practicable after the accident.²⁴⁵ A motor carrier's cancellation of a scheduled post-accident test is admissible as evidence tending to show that the carrier was trying to conceal the driver's potential use of alcohol or controlled substances.²⁴⁶

If the alcohol test cannot be administered within two hours of the accident, the carrier must maintain on file a record indicating the reason the test was not promptly administered.²⁴⁷ If the alcohol test cannot be completed within eight hours, the carrier

²³⁶ 49 C.F.R. § 382.307(b).

²³⁷ 49 C.F.R. § 382.307(b).

²³⁸ 49 C.F.R. § 382.307(c).

²³⁹ 49 C.F.R. § 382.307(f).

²⁴⁰ 49 C.F.R. § 382.305.

²⁴¹ 49 C.F.R. § 382.305(k).

²⁴² 49 C.F.R. § 382.303(a)(1).

²⁴³ 49 C.F.R. § 382.303(a)(2).

²⁴⁴ 49 C.F.R. § 382.107.

²⁴⁵ 49 C.F.R. § 382.303(a).

²⁴⁶ Wanke v. Lynn's Transportation Co., 836 F.Supp. 587 (N.D. Ind. 1993).

²⁴⁷ 49 C.F.R. § 382.303(b).

shall cease attempts to conduct the test.²⁴⁸ The controlled substance test must be performed within 32 hours following an accident, and if not completed within this time frame, the carrier shall cease attempts to conduct the test and shall maintain a record stating the reasons the test was not promptly administered.²⁴⁹ A carrier does not have to conduct an alcohol or controlled substance test if Federal, State or local officials have already conducted a breath or blood test for alcohol and a urine test for controlled substances.²⁵⁰ A carrier must provide a driver with the necessary information to complete the post-accident testing, and a driver must take all reasonable steps to comply with the testing procedures.²⁵¹ The requirement for post-accident testing does not apply to an occurrence involving boarding or exiting a stationary vehicle, the unloading or loading of cargo, or the operation of a passenger vehicle not for hire.²⁵² A driver may not use alcohol for eight hours after an accident if he is required to take a post-accident alcohol test.²⁵³

****Practice Pointer:** Request all post-accident drug and alcohol test results and notations about the failure to perform post-accident testing.

G. Refusal to Submit to Testing

Any person who holds a commercial driver's license or drives a commercial vehicle is deemed to have consented to alcohol and controlled substances testing as required by federal regulations.²⁵⁴ A trucking company is prohibited from allowing a driver who refuses to submit to testing to perform or continue to perform a safety sensitive function.²⁵⁵ Refusal to submit means that the driver (1) fails to provide adequate breath upon request for an alcohol test without a valid medical explanation, (2) fails to provide an adequate urine sample upon request for controlled substance testing or (3) engages in conduct that clearly obstructs the testing process.²⁵⁶

H. Alcohol & Controlled Substance Testing Policies and Procedures

Alcohol and controlled substance testing must comply with federal regulations dictating the proper methods of taking and preserving samples and performing the tests.²⁵⁷ A driver may be terminated for failure to pass a drug or alcohol test²⁵⁸ as long as the motor carrier's drug testing program meets federal specifications.²⁵⁹ A carrier may retain an independent agency to perform the actual testing on the drivers. If the agency

²⁴⁸ 49 C.F.R. § 382.303(b).

²⁴⁹ 49 C.F.R. § 382.303(b)(4).

²⁵⁰ 49 C.F.R. § 382.303(e).

²⁵¹ 49 C.F.R. § 382.303(c)-(d).

²⁵² 49 C.F.R. § 382.303(f).

²⁵³ 49 C.F.R. § 382.209.

²⁵⁴ 49 C.F.R. § 383.72.

²⁵⁵ 49 C.F.R. § 382.211.

²⁵⁶ 49 C.F.R. § 382.107.

²⁵⁷ 49 C.F.R. § 382.105.

²⁵⁸ *Exxon Corporation v. Esso Workers' Union, Inc.*, 118 F.3d 841 (1997).

²⁵⁹ *Reames v. Department of Public Works*, 707 A.2d 1377 (N.J. Super. 1998).

fails to conduct the testing in an appropriate manner, the carrier cannot be held liable for the agency's actions.²⁶⁰ A motor carrier may also enforce alcohol and controlled substances policies and procedures that are more stringent than the guidelines contained in the federal regulations.²⁶¹

I. Rehabilitation

A trucking company must inform a driver who violates the alcohol or controlled substances prohibitions of the resources available to assist him in evaluating and resolving problems associated with alcohol and controlled substances abuse.²⁶² The driver must then be evaluated by a substance abuse professional to determine the kind of assistance needed for his rehabilitation.²⁶³ A carrier must ensure that a driver who is in need of assistance in resolving problems associated with alcohol misuse and/or use of controlled substances is subject to unannounced follow up testing as directed by a substance abuse professional.²⁶⁴ The driver shall also be routinely evaluated by a substance abuse professional to make sure the driver complies with his treatment plan.²⁶⁵ Before a driver who has violated the alcohol prohibitions can return to duty requiring the performance of a safety-sensitive function, the driver must be given an alcohol test with a result less than 0.02 blood alcohol concentration.²⁶⁶ A driver must take a controlled substances test indicating a verified negative result for controlled substances use before he can return to work after a violation of the controlled substance guidelines.²⁶⁷ The carrier does not have to provide referral, evaluation, and rehabilitation services to a driver if the violation is discovered as a result of pre-employment testing.²⁶⁸

J. Retention & Disclosure of Records

A motor carrier must retain for five years: (1) driver alcohol test results indicating an alcohol concentration of 0.02 or greater; (2) any verified positive controlled substance test results; (3) documentation of refusals to submit to alcohol or controlled substance testing; and (4) evaluations and referrals to rehabilitation specialists.²⁶⁹ The carrier must retain for one year any records of negative and canceled controlled substances test results and alcohol test results with a result of less than 0.02.²⁷⁰ All records regarding the training of drivers and supervisors must be maintained during the time of their employment and for an additional two years.²⁷¹ Carriers are also required generally to maintain any documents (1) related to random drug testing, (2) generated in connection

²⁶⁰ Carroll v. Federal Express Corporation, 113 F.3d 163 (9th Cir. 1997).

²⁶¹ 49 C.F.R. § 382.111.

²⁶² 49 C.F.R. § 382.605(a).

²⁶³ 49 C.F.R. § 382.605(b).

²⁶⁴ 49 C.F.R. § 382.311(a).

²⁶⁵ 49 C.F.R. § 382.605(c)(2).

²⁶⁶ 49 C.F.R. § 382.309(a).

²⁶⁷ 49 C.F.R. § 382.309(b).

²⁶⁸ 49 C.F.R. § 382.605(f).

²⁶⁹ 49 C.F.R. § 382.401(b)(1).

²⁷⁰ 49 C.F.R. § 382.401(b)(3).

²⁷¹ 49 C.F.R. § 382.401(b)(4).

with decisions to administer reasonable suspicion alcohol or controlled substances tests, (3) generated in connection with post-accident tests, (4) related to a refusal to submit to testing, (5) generated in connection with verifications of a driver's testing from prior employers, (6) related to a driver's evaluation and consultation with a substance abuse professional and (7) related to educational or training materials provided to drivers including the carrier's testing policies and procedures.²⁷² A trucking company must prepare and maintain a summary of its alcohol and controlled substances testing results for the previous calendar year when requested by the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the company or its drivers.²⁷³ Documents regarding testing of a driver may only be released by consent of the driver, by request of the National Transportation Safety Board, by request of a subsequent employer with the consent of the driver, by request of Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the carrier or its drivers or in conjunction with an action for benefits sought by a driver.²⁷⁴

V. Hours of Service Regulations

A. Changes to Hours of Service Regulations

On April 28, 2003, the FMCSA issued the first significant revision to the Hours of Service regulations in more than 60 years. The new regulations took effect on January 4, 2004. On July 16, 2004, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the new regulations were unconstitutional because the agency had not taken appropriate steps to determine the effect of the regulations on the health of commercial drivers.²⁷⁵ Congress subsequently provided through the Surface Transportation Extension Act of 2004 that the new regulations would remain in effect until a final rule could be instituted addressing the District of Columbia Court's concerns.²⁷⁶ In adherence with the court's ruling, the FMCSA conducted extensive research concerning the new hours of service regulations and adopted a final rule identical to the 2003 regulations. The regulations passed in April of 2003 are still currently in effect.²⁷⁷

B. Maximum Hours of Service

Based on the new regulations, a driver carrying property cannot drive more than 11 hours following 10 consecutive hours off-duty.²⁷⁸ A driver cannot operate a commercial vehicle for any period after having been on duty 14 hours following 10 consecutive hours off-duty.²⁷⁹ A driver carrying passengers cannot drive more than 10 hours following 8 consecutive hours off-duty or operate a commercial vehicle for any

²⁷² 49 C.F.R. § 382.401(c).

²⁷³ 49 C.F.R. § 382.403.

²⁷⁴ 49 C.F.R. § 382.405.

²⁷⁵ *Public Citizens v. FMCSA*, 374 F.3d 1209 (D.C. 2004).

²⁷⁶ Pub. L. 108-310, 118 Stat. 1144.

²⁷⁷ Pub. L. 109-59, August 10, 2005, 119 Stat. 1144.

²⁷⁸ 49 C.F.R. § 395.3(a).

²⁷⁹ 49 C.F.R. § 395.3(a).

period after having been on duty 15 hours following 8 consecutive hours off-duty.²⁸⁰ A driver cannot operate a commercial vehicle after having been on duty 60 hours in any 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week and cannot operate a commercial vehicle after having been on duty 70 hours in any consecutive 8 days if the employing motor carrier operates commercial vehicles every day.²⁸¹

On duty time means all time from the time a driver begins to work or is required to be in readiness to work until the driver is relieved from work including: (1) all time at a plant, terminal, facility or other property waiting to be dispatched, unless the driver has been relieved of duty by the carrier; (2) all time inspecting, servicing, or conditioning any commercial vehicle; (3) all time spent at the driving controls of a commercial vehicle in operation; (4) all time in or upon a commercial vehicle, except in the sleeper berth; (5) all time loading or unloading a commercial vehicle, supervising or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the commercial vehicle or in giving or receiving receipts for shipments loaded or unloaded; (6) all time repairing, obtaining assistance or remaining in attendance upon a disabled vehicle; (7) all time spent providing a breath or urine sample, including travel time, to perform a test required by federal regulations; (8) all time performing any work on behalf of the motor carrier and (9) all time performing compensated work for any person or entity.²⁸² When a driver at the direction of the motor carrier is traveling, but not driving or assuming any other responsibility to the carrier, such time shall be counted as on duty time unless the driver is afforded at least 10 consecutive hours off duty when arriving at his destination, in which case he shall be considered off duty for the entire period.²⁸³ A motor carrier may not permit a driver to operate a commercial vehicle in violation of the maximum hours of service.²⁸⁴

****Practice Pointer:** Retain a qualified expert to examine the steps taken by the trucking company to monitor a driver's hours of service.

C. Exceptions to Hours of Service Requirements

A driver who encounters adverse driving conditions and cannot safely complete his run within the required maximum driving time may drive an additional 2 hours to complete the run or reach a place of safety.²⁸⁵ In case of an emergency, a driver may also complete his run without being in violation of the maximum hours of service if the driver could have reasonably completed the run absent the emergency.²⁸⁶ The maximum hours of service requirements do not apply to a driver-salesperson who drives less than 40 hours in any period of 7 consecutive days.²⁸⁷ The regulations also do not apply to drivers

²⁸⁰ 49 C.F.R. § 395.5(a).

²⁸¹ 49 C.F.R. § 395.3(b) & 395.5(b).

²⁸² 49 C.F.R. § 395.2.

²⁸³ 49 C.F.R. § 395.1(j).

²⁸⁴ 49 C.F.R. § 395.3.

²⁸⁵ 49 C.F.R. § 395.1(b)(1).

²⁸⁶ 49 C.F.R. § 395.1(b)(2).

²⁸⁷ 49 C.F.R. § 395.1(c).

of commercial vehicles engaged solely in making local deliveries to the ultimate consumer during the Christmas holidays from December 10th to 25th,²⁸⁸ and the transportation of agricultural commodities within a 100 mile radius during planting or harvesting seasons.²⁸⁹

****Practice Pointer:** Exempt employees are required to keep information about their hours of service although they do not have to keep driver's logs.

D. Driver's Logs

A driver must record his duty status on a daily log grid for each 24-hour period.²⁹⁰ (Driver's Log, Appendix of Forms, X-5) The driver's duty status must be recorded as (1) "Off duty" or "Off", (2) "Sleeper Berth" or "SB", (3) "Driving" or "D", (4) "On-duty not driving" or "On."²⁹¹ The driver must identify the city, town or place where any change of status occurs.²⁹² In addition to completing the grid, the driver must identify the total miles driven per day and the total hours on duty.²⁹³ The driver must complete all entries legibly and in his own handwriting.²⁹⁴ The daily log must be forwarded to the trucking company within 13 days following completion of the form.²⁹⁵ The requirement for keeping daily logs does not apply to drivers who operate within a 100-mile radius of the normal work reporting location if the driver is released from work within 12 consecutive hours, has at least 10 hours off-duty time, does not exceed 11 hours maximum driving time, and the trucking company maintains accurate and true time records of the driver's work for a period of six months.²⁹⁶

A motor carrier, when using a driver for the first time, must obtain a signed statement from the driver giving the total time on duty during the immediately preceding 7 days.²⁹⁷ When a driver works for more than one carrier, he must submit his daily logs to each carrier with entries indicating both his status and the carrier he served during that period.²⁹⁸ A motor carrier must maintain records of duty status and all supporting documents for each driver it employs for a period of six months from the date of receipt.²⁹⁹ A driver must retain a copy of each record of duty status for the previous 7 consecutive days which shall be in his possession and available for inspection while on duty.³⁰⁰

²⁸⁸ 49 C.F.R. § 395.1(f).

²⁸⁹ 49 C.F.R. § 395.1(k).

²⁹⁰ 49 C.F.R. § 395.8(a)(1).

²⁹¹ 49 C.F.R. § 395.8(b).

²⁹² 49 C.F.R. § 395.8(c).

²⁹³ 49 C.F.R. § 395.8(d).

²⁹⁴ 49 C.F.R. § 395.8(e).

²⁹⁵ 49 C.F.R. § 395.8(i).

²⁹⁶ 49 C.F.R. § 395.1(e).

²⁹⁷ 49 C.F.R. § 395.8(j)(2).

²⁹⁸ 49 C.F.R. § 395.8(j)(1).

²⁹⁹ 49 C.F.R. § 395.8(k)(1).

³⁰⁰ 49 C.F.R. § 395.8(k)(2).

A driver may use an automatic on-board recording device in lieu of handwritten logs provided the information is retrievable on demand.³⁰¹ A motor carrier must monitor its drivers to ensure compliance with the provisions regarding recording his duty status time.³⁰² A carrier's destruction of driver's logs or related documents may give rise to a presumption that the evidence was not preserved because it was unfavorable to the carrier and, therefore, that the driver must have violated the federal regulations.³⁰³ A driver cannot be forced to testify about his violation of the hours of service regulations over a Fifth Amendment objection since he would be subject to prosecution for any violation.³⁰⁴ However, driver's logs are not documents protected by the 5th Amendment privilege since the driver is required by law to maintain the logs.³⁰⁵

****Practice Pointer:** Request not only the eight days of driver's logs from before the accident but also any bills of lading, weight tickets, hotel receipts and other similar documents needed to verify the accuracy of the driver's logs.

E. Violations of Hours of Service Provisions

A driver will be declared out of service if he drives after being on duty in excess of the maximum periods or if he fails to have a record of duty status current on the day of examination and for the prior 7 consecutive days.³⁰⁶ A carrier may not allow a driver who has been declared out of service for violating the maximum hours regulations to operate a motor vehicle until he may lawfully do so under the rules.³⁰⁷ A driver who has been declared out of service for failure to prepare a record of duty status cannot operate a commercial vehicle until he has been off duty for 10 consecutive hours.³⁰⁸ A driver must notify the carrier within 24 hours of being placed out of service for such a violation.³⁰⁹

****Practice Pointer:** Request information about prior violations of hours of service regulations by the motor carrier and its drivers.

VI. Federal Motor Carrier Safety Regulations

The Federal Motor Carrier Safety Regulations ("FMCSR") are applicable to all employers, employees, and commercial motor vehicles which transport property or passengers in interstate commerce.³¹⁰ Whether transportation is interstate or intrastate is determined by the essential character of the commerce, manifested by a shipper's fixed and persisting intent at the time of the shipment which is ascertainable from all the facts

³⁰¹ 49 C.F.R. § 395.15.

³⁰² 49 C.F.R. § 395.8(a).

³⁰³ J.B. Hunt Transport, Inc. v. Bentley, 427 S.E.2d 499 (Ga. 1993).

³⁰⁴ Thomas v. Tyler, 841 F.Supp. 1119 (D.Kansas 1993).

³⁰⁵ Id.

³⁰⁶ 49 C.F.R. § 395.13(b).

³⁰⁷ 49 C.F.R. § 395.13(c)(1).

³⁰⁸ 49 C.F.R. § 395.13(c)(1).

³⁰⁹ 49 C.F.R. § 395.13(d)(3).

³¹⁰ 49 C.F.R. § 390.3(a).

and circumstances surrounding the transportation scheme.³¹¹ The central focus in this inquiry is whether or not the ultimate destination of the shipment is identified as a location outside the state at the time the transportation is arranged.³¹² By statute, a State may require carriers involved in intrastate transportation or hauling exempt commodities to comply with the FMCSR.³¹³

The FMCSR are minimum standards for commercial vehicles.³¹⁴ Every interstate motor carrier and driver must be familiar with and comply with the standards contained in the FMCSR.³¹⁵ A motor carrier cannot allow a vehicle to be operated unless it meets the minimum standards set forth in the FMCSR.³¹⁶ Motor carriers are required to make sure all drivers comply with the provisions of the FMCSR.³¹⁷ No one can aid, abet, encourage or require a motor carrier or driver to violate the FMCSR.³¹⁸

****Practice Pointer:** If the trucking company operates as an intrastate carrier, review state law to determine if the state has adopted the FMCSR as applicable to all operations in the state.

A. Exemptions to the FMCSR

The FMCSR do not apply to (1) motor vehicles transporting only school children and teachers to or from school, (2) motor vehicles providing taxicab services, (3) motor vehicles operated by or for a hotel to transport hotel patrons between the hotel and a local station, (4) motor vehicles controlled and operated by a farmer and transporting the farmer's agricultural products or supplies to the farm, (5) transportation of ordinary livestock, agricultural or horticultural commodities, (6) motor vehicles used to distribute newspapers, (7) transportation of passengers or property incidental to transportation by aircraft or transportation of property by motor carrier because of adverse weather conditions or mechanical failure of the aircraft, (8) the operation of a motor vehicle in a national park or monument, (9) motor vehicles carrying less than 15 passengers to and from work, (10) transportation of used pallets and empty shipping containers, (11) transportation of natural, crushed or vesicular rock to be used for decorative purposes, wood chips, or broken, crushed or powdered glass, (12) transportation entirely within a municipality or in a commercial zone adjacent to a municipality unless part of a continuous carriage from outside the municipality or zone, (13) transportation by motor vehicle provided casually, occasionally, or reciprocally but not as a regular occupation or business.³¹⁹ An entity engaged in a business other than transportation for hire does not

³¹¹ Progressive Casualty Insurance Co. v. Hoover, 768 A.2d 1157 (Penn. 2001); Southern Pacific Transportation Co. v. Interstate Commerce Commission, 565 F.2d 615 (9th Cir. 1977).

³¹² Pittsburgh-Johnston-Altoona Express, Inc. v. Pennsylvania Public Utility Commission, 554 A.2d 137 (Penn. 1989); Progressive Casualty Insurance Co. v. Hoover, 768 A.2d 1157 (Penn. 2001).

³¹³ Schmidt v. Royer, 574 N.W.2d 618 (S.D. 1998).

³¹⁴ 49 C.F.R. § 393.1(a).

³¹⁵ 49 C.F.R. § 393.1(b).

³¹⁶ 49 C.F.R. § 393.1(b).

³¹⁷ 49 C.F.R. § 390.11.

³¹⁸ 49 C.F.R. § 390.13.

³¹⁹ 49 U.S.C. § 13506; 49 C.F.R. § 372.101.

have to comply with the FMCSR.³²⁰ The FMCSR do not apply to a company that hires an independent contractor to transport goods when the company is not in the transportation business.³²¹

B. Non-Exempt Commodities

Although agricultural products are generally exempt from the FMCSR, by statute, the transportation of the following products are NOT exempt from the FMCSR: animal fats, butter, canned fruits and vegetables, carnuaba wax, charcoal, cheese, coal, cocoa beans, coffee beans, cotton yarn, diatomaceous earth, frozen dinners, alfalfa pellets, certain feeds, fertilizer, fish, flagstone, flour, forest resin products such as turpentine, certain fruits and berries, popped popcorn, precooked rice, wheat germ, gravel, any product of a slaughtered animal, hay sweetened with molasses, hemp fiber, green and salted hides, insecticides, limestone, monkeys, race horses, show horses, zoo animals, lumber (rough sawed or plain), maple syrup, certain meals, meat and meat products (fresh, frozen, or canned), milk and cream (condensed or sterilized in hermetically sealed cans), chocolate, molasses, roasted or boiled peanuts, certain oils, racing pigeons, beet pulp, sugar cane pulp, rock (except to be used for decorative purposes), rubber, sand, potting soil, top soil, frozen soup, sugar, cane syrup, maple syrup, tea, cigars and cigarettes, smoking tobacco, french fried potatoes, and wool products.³²²

C. Compliance with State Law

According to the provisions of the FMCSR, every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the State or jurisdiction in which it is being operated unless the FHWA imposes a higher standard of care in which case the federal regulation must be complied with.³²³ States cannot pass any law, rule or regulation relating to rates, routes or services of any motor carrier³²⁴ except that state government may impose highway route controls or limitations based on the size or weight of a motor vehicle or the hazardous nature of cargo³²⁵ and may also mandate minimum amounts of insurance in order to operate on state highways.³²⁶

D. Designating Unsafe Vehicles as Out-of-Service

A vehicle cannot be operated in such a manner as to likely cause an accident or breakdown of the vehicle except that a vehicle discovered in an unsafe condition may be driven to the nearest place where repairs can safely be performed.³²⁷ The FHWA routinely inspects commercial vehicles and will declare out-of-service any vehicle which by reason of its mechanical condition or loading would likely cause an accident or a

³²⁰ 49 U.S.C. § 13505.

³²¹ Ek v. Herrington, 939 F.2d 839 (9th Cir. 1991).

³²² 49 C.F.R. § 372.115.

³²³ 49 C.F.R. § 392.2.

³²⁴ 49 U.S.C. § 14501(c).

³²⁵ 49 U.S.C. § 14501.

³²⁶ 49 U.S.C. § 14501.

³²⁷ 49 C.F.R. § 396.7.

breakdown of the vehicle.³²⁸ FHWA inspectors must record the results of any Driver Equipment Compliance Check³²⁹ and place an out-of-service sticker on any vehicle which fails an inspection.³³⁰ A vehicle marked out-of-service may not be operated until all repairs required by the out-of-service notice have been satisfactorily completed.³³¹ No person may remove an out-of-service sticker prior to completion of the repairs required by the out-of-service notice.³³² A driver must deliver an inspection report at his next stop at the carrier's terminal or facility.³³³ If the driver is not scheduled to stop at a terminal or facility within 24 hours of receipt of an inspection report, then the driver must immediately mail a copy of the report to the motor carrier.³³⁴ A carrier must certify to the FHWA within 15 days of the inspection that all violations noted in the report have been corrected and retain a copy of the report for one year from the date of the inspection.³³⁵

E. Unsafe Dispatch

A motor carrier cannot schedule a run or require the operation of a commercial vehicle between points in such period of time as would necessitate the vehicle being operated at speeds greater than those prescribed by the jurisdictions in or through which the vehicle is being operated.³³⁶

****Practice Pointer:** Compare bills of lading and driver logs to determine the average speed of the driver on his runs.

F. Pre-Trip Inspections & End of Day Reports

A driver cannot operate a commercial motor vehicle until he has inspected the following parts and satisfied himself that the parts are in good working order: (1) Service brakes including trailer brake connections, (2) Parking brakes, (3) Steering mechanism, (4) Lighting devices and reflectors, (5) Tires, (6) Horn, (7) Windshield wipers, (8) Rear vision mirrors, and (9) Coupling devices.³³⁷ A driver must also inspect and be satisfied that all emergency equipment is working properly.³³⁸ Before operating a vehicle, a driver must be satisfied that the vehicle is in safe operating condition, review the last driver vehicle inspection report, and if defects were noted and repaired, sign the report.³³⁹

³²⁸ 49 C.F.R. § 396.9(c).

³²⁹ 49 C.F.R. § 396.9(b).

³³⁰ 49 C.F.R. § 396.9(c)(1).

³³¹ 49 C.F.R. § 396.9(c).

³³² 49 C.F.R. § 396.9(c)(3).

³³³ 49 C.F.R. § 396.9(d).

³³⁴ 49 C.F.R. § 396.9(d).

³³⁵ 49 C.F.R. § 396.9(3).

³³⁶ 49 C.F.R. § 392.6.

³³⁷ 49 C.F.R. § 392.7.

³³⁸ 49 C.F.R. § 392.8.

³³⁹ 49 C.F.R. § 396.13.

Every driver must prepare a report in writing at the completion of each day on each vehicle operated by the driver concerning the condition of the same parts and accessories examined during the pre-trip inspection.³⁴⁰ (Daily Inspection Report, Appendix of Forms, X-6) The report must identify the vehicle and list any defect which would affect the safe operation of the vehicle or result in its mechanical breakdown.³⁴¹ The driver must sign the report and must complete a report for each vehicle operated during the workday.³⁴² Prior to requiring or permitting a driver to operate a vehicle, the motor carrier must examine the driver's report and repair any defect which would likely affect the safe operation of the vehicle.³⁴³ The original driver inspection report and the certification of any repairs performed to correct the defects identified in the report must be retained for three months from the date the report was prepared.³⁴⁴

****Practice Pointer:** Request copies of all daily inspection reports for the three-month period preceding the accident.

G. Annual Inspections

A commercial vehicle must undergo an annual inspection at least once during the preceding 12-month period, and an annual inspection report must be kept with the vehicle.³⁴⁵ (Annual Inspection, Appendix of Forms, X-7) The trucking company may perform the inspection itself or choose to have a commercial garage, leasing company, truck stop, or other similar commercial business perform the inspection.³⁴⁶ A periodic inspection performed by an FHWA agent may substitute for the annual inspection as long as the FHWA inspection meets the minimum standards for annual inspections.³⁴⁷ A motor carrier must insure that any work performed on the brakes of a commercial vehicle, including all inspections, maintenance, service or repairs to the brakes, is completed by a qualified brake inspector who has completed an apprenticeship program and has brake-related experience and training of at least one year.³⁴⁸

****Practice Pointer:** Request a copy of the annual inspection report covering the date of the accident.

H. Accident Register

For accidents that occur after April 29, 2003, trucking companies are required to maintain an accident register listing information about each accident involving its drivers for a three year period.³⁴⁹ The accident register must contain the following information

³⁴⁰ 49 C.F.R. § 396.11(a).

³⁴¹ 49 C.F.R. § 396.11(b).

³⁴² 49 C.F.R. § 396.11(b).

³⁴³ 49 C.F.R. § 396.11(c).

³⁴⁴ 49 C.F.R. § 396.11(c)(2).

³⁴⁵ 49 C.F.R. § 396.17(c).

³⁴⁶ 49 C.F.R. § 396.17(d)-(e).

³⁴⁷ 49 C.F.R. § 396.23.

³⁴⁸ 49 C.F.R. § 396.25.

³⁴⁹ 49 C.F.R. § 390.15(b).

for each accident: (1) the date of the accident, (2) the city and state where the accident occurred, (3) the driver's name, (4) the number of injuries, (5) the number of fatalities, and (6) the involvement of hazardous materials.³⁵⁰ The company must also keep copies of all accident reports generated by or on behalf of State or other governmental entities or insurers for each accident listed on the accident register.³⁵¹

****Practice Pointer:** Request a copy of the accident register for the three year period preceding the accident and any related documentation.

I. Loading Procedures

Commercial vehicles must be loaded in such a manner as to prevent its cargo from leaking, spilling, blowing or falling from the vehicle.³⁵² The cargo must be immobilized or secured to prevent shifting to the extent that the vehicle's stability or maneuverability is affected.³⁵³ All vehicle structures, systems, parts and components used to secure cargo must be in proper working order with no damaged or weakened components that will adversely affect their performance.³⁵⁴ Cargo must be firmly immobilized or secured on or within a vehicle by structures of adequate strength, dunnage or dunnage bags, shoring bars, tiedowns or a combination of these.³⁵⁵ Articles of cargo that are likely to roll must be restrained by chocks, wedges, a cradle or equivalent means to prevent rolling.³⁵⁶ Federal regulations provide for specific means of securing logs,³⁵⁷ building products,³⁵⁸ metal coils,³⁵⁹ paper rolls,³⁶⁰ concrete pipes,³⁶¹ intermodal containers,³⁶² automobiles,³⁶³ heavy equipment,³⁶⁴ crushed vehicles,³⁶⁵ and boulders.³⁶⁶ Cargo must be secured so that when a vehicle decelerates at a rate of 20 feet per second, the cargo will remain on the vehicle and will not penetrate the vehicle's front-end structure.³⁶⁷ Any vehicle having a load or component which extends beyond the sides more than 4 inches or more than 4 feet beyond the rear must have the extremities marked with a red or orange fluorescent warning flag.³⁶⁸ If the projecting load is 2 feet in width or less, then only one flag is required at the extreme rear of the load.³⁶⁹ If the projecting

³⁵⁰ 49 C.F.R. § 390.15(b).

³⁵¹ 49 C.F.R. § 390.15(b).

³⁵² 49 C.F.R. § 393.100(b).

³⁵³ 49 C.F.R. § 393.100(c).

³⁵⁴ 49 C.F.R. § 393.104(b).

³⁵⁵ 49 C.F.R. § 393.106(b).

³⁵⁶ 49 C.F.R. § 393.106(c).

³⁵⁷ 49 C.F.R. § 393.116.

³⁵⁸ 49 C.F.R. § 393.118.

³⁵⁹ 49 C.F.R. § 393.120.

³⁶⁰ 49 C.F.R. § 393.122.

³⁶¹ 49 C.F.R. § 393.124.

³⁶² 49 C.F.R. § 393.126.

³⁶³ 49 C.F.R. § 393.128.

³⁶⁴ 49 C.F.R. § 393.130.

³⁶⁵ 49 C.F.R. § 393.132.

³⁶⁶ 49 C.F.R. § 393.136.

³⁶⁷ 49 C.F.R. § 393.114(d).

³⁶⁸ 49 C.F.R. § 393.87.

³⁶⁹ 49 C.F.R. § 393.87(b).

load is greater than 2 feet in width, two flags must be used at the extreme width and length on each side of the load.³⁷⁰

J. Responsibilities for Proper Loading

A driver cannot operate a commercial vehicle unless (1) the cargo is properly distributed and adequately secured, (2) the means of fastening the cargo is secured, and (3) the cargo does not obscure the driver's view or interfere with the movement of his arms or legs.³⁷¹ A driver must assure himself that the load is adequately secured before he drives the vehicle and must examine the cargo and its load-securing devices within the first 50 miles after beginning a trip and adjust the load-securing devices as needed.³⁷² The driver must also reexamine the cargo and its securing devices when he makes a change of his duty status, after the vehicle has been driven for three hours, or after the vehicle has been driven 150 miles whichever comes first.³⁷³ The load inspection procedures do not apply to a sealed trailer when the driver has been ordered not to open it or to a trailer that has been loaded in a manner that makes inspection of the cargo impracticable.³⁷⁴

If a member of the public is injured because of improperly loaded cargo, both the shipper who loaded the cargo and the carrier may be held liable for the injury.³⁷⁵ A shipper that assumes responsibility for loading the vehicle can be held liable for improperly securing a load under a common law theory of negligence, and federal regulations will provide evidence of the proper standard of care to be utilized by the shipper in loading the vehicle.³⁷⁶ When the driver himself is injured in an accident, the shipper cannot be held liable for the improper loading of the vehicle unless the loading defects are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier.³⁷⁷ In determining if the defect in loading is patent and should have been discovered by the driver, a court will take into consideration the experience of the driver³⁷⁸ and whether the driver is given assurances by the shipper's employees that there is no defect in the loading of the cargo.³⁷⁹ A motor carrier cannot be held liable for improperly loading a sealed trailer since the driver does not have the opportunity to inspect the load.³⁸⁰ When a person is injured during the loading or unloading process at the shipper or consignee's facility, the trucking company's liability will be determined

³⁷⁰ 49 C.F.R. § 393.87(b).

³⁷¹ 49 C.F.R. § 392.9(a).

³⁷² 49 C.F.R. § 392.9(b)(2).

³⁷³ 49 C.F.R. § 392.9(b)(3).

³⁷⁴ 49 C.F.R. § 392.9(b)(4).

³⁷⁵ Burke v. J.F. Allen Company, 182 F.3d 907 (W.Va. 1999); Skeie v. Mercer Trucking Co., Inc., 61 P.3d 1207 (Wash. 2003).

³⁷⁶ Reed v. Ace Doran Hauling & Rigging Co., 1997 WL 177849 (N.D. Ill. 1997); Symington v. Great Western Trucking Co., Inc., 668 F.Supp. 1278 (S.D. Iowa 1987); Locicero v. Interpace Corp., 266 N.W.2d 423 (Wis. 1978).

³⁷⁷ Decker v. New England Public Warehouse, Inc., 749 A.2d 762 (Maine 2000); Fontanne v. Federal Paper Board Co., Inc., 434 N.E.2d 331 (Ill. 1982).

³⁷⁸ Alitalia v. Arrow Trucking Co., 977 F.Supp. 973 (D.Ariz. 1997).

³⁷⁹ Franklin Stainless Corp. v. Marlo Transportation Corp., 748 F.2d 865 (4th Cir. 1984); Ebasco Services, Inc. v. Pacific Intermountain Express Co., 398 F.Supp. 565 (S.D.N.Y. 1975).

³⁸⁰ Miller v. Rollins Leasing Corp., 1999 WL 739539 (Ohio 1999).

according to the rules applicable to the facility owner, and the company will be subject to the same liability or freedom from liability as the owner.³⁸¹

****Practice Pointer:** Consider a cause of action against the entity that loaded the vehicle in addition to the trucking company.

K. Warning Devices for Stopped Vehicles

A vehicle must be equipped with three bi-directional emergency reflective triangles or at least 6 fuseses or 3 liquid-burning flares.³⁸² Liquid-burning flares, fusees, oil lanterns, or any signal produced by a flame shall not be carried on a commercial vehicle transporting hazardous materials, flammable gas, or flammable liquid whether loaded or empty.³⁸³ Whenever a commercial vehicle is stopped upon the traveled portion of a highway or the shoulder of a highway, the driver of the stopped vehicle shall immediately activate the hazard warning flashers and continue the flashing until the driver places warning devices next to the unit.³⁸⁴

The driver must place warning devices as soon as possible after stopping his vehicle, but in any case no less than 10 minutes, at the following points: (1) 10 feet away from the vehicle in the direction of approaching traffic, (2) 100 feet away from the vehicle in the center of the traffic lane or the shoulder of the road occupied by the vehicle in the direction of approaching traffic, and (3) 100 feet away from the vehicle in the direction away from approaching traffic.³⁸⁵ The placement of warning devices is not required within the business or residential district of a municipality except at night or times when highway lighting is insufficient to make a vehicle discernable at a distance of 500 feet.³⁸⁶ If a vehicle is stopped within 500 feet of a curve, crest of a hill or other obstruction to view, the driver shall place a warning signal up to 500 feet in the direction of the obstruction to give ample warning to other drivers.³⁸⁷ If the vehicle is stopped on a divided or one-way highway, the driver must place one warning device at a distance of 200 feet and one warning device at a distance of 100 feet in a direction toward approaching traffic and one warning device within 10 feet of the rear of the vehicle.³⁸⁸

If gasoline or other flammable liquid leaks from a stopped vehicle, no emergency signal producing a flame shall be lighted or placed except at such a distance as will assure the prevention of a fire or explosion.³⁸⁹ A lighted fusee or other flame-producing emergency signal cannot be attached to any part of the commercial vehicle.³⁹⁰ Flame

³⁸¹ Zuniga v. Pay Less Drug Stores, N.W., Inc., 917 P.2d 584 (Wash. 1996); Taylor v. Duke, 713 N.E.2d 877 (Ind. 1999).

³⁸² 49 C.F.R. § 393.95(f)(2).

³⁸³ 49 C.F.R. § 393.95(g).

³⁸⁴ 49 C.F.R. § 392.22(a).

³⁸⁵ 49 C.F.R. § 392.22(b)(1).

³⁸⁶ 49 C.F.R. § 392.22(b)(2).

³⁸⁷ 49 C.F.R. § 392.22(b)(2).

³⁸⁸ 49 C.F.R. § 392.22(b)(2).

³⁸⁹ 49 C.F.R. § 392.22(b)(2).

³⁹⁰ 49 C.F.R. § 392.24.

producing emergency signals cannot be used for any commercial vehicle transporting explosive material, any cargo tank vehicle used for the transportation of flammable, explosive or poisonous material (whether loaded or empty), and instead a driver must use emergency reflective triangles, red electric lanterns or red emergency reflectors.³⁹¹

When an injured party's vehicle collides with a stopped tractor-trailer which has no warning signals or devices in place, the federal regulations requiring the placement of warning signals near the vehicle can be used to establish the carrier's negligence.³⁹² A carrier can be held liable for an accident involving a stopped commercial vehicle if the driver fails to place warning markers next to a stopped vehicle, even if the vehicle has been stopped for less than 10 minutes, since regulations require the driver to place the signals as soon as possible.³⁹³ A failure to place warning signs after remaining stopped in the roadway for more than 10 minutes may subject a carrier to punitive damages on the basis that the failure to comply with this guideline demonstrates a conscious indifference to public safety.³⁹⁴ A driver can be held liable for stopping in an emergency lane on the shoulder of the roadway at night near lanes of high traffic because of the probability that his vehicle will not be seen by other drivers and the availability of safer resting spots.³⁹⁵

****Practice Pointer:** Determine if the tractor was equipped with emergency warning devices if the driver did not place them out before the accident.

L. Lights, Reflectors & Retroreflective Sheeting

Headlights must be capable of steady burning at all times.³⁹⁶ All lighting devices required on vehicles must be capable of being operated at all times.³⁹⁷ Guidelines for the color and positioning of lights on commercial vehicle are located in 49 C.F.R. § 393.11. Lights and reflectors on the vehicle must meet visibility requirements under nighttime conditions.³⁹⁸ Reflectors must be applied to the side and rear of the trailer.³⁹⁹ The required lamps and reflectors may not be obscured by the tailboard, by any part of the load, by dirt or otherwise.⁴⁰⁰

Retroreflective sheeting must be applied to each side of a trailer from as close to the front and rear as practicable.⁴⁰¹ The rear of each trailer must be equipped with retroreflective sheeting across the full width of the trailer and must have two pairs of white strips at the top corners of the trailer.⁴⁰² Every vehicle must be equipped with a

³⁹¹ 49 C.F.R. § 392.25.

³⁹² Kimberlin v. PM Transport, Inc., 563 S.E.2d 665 (Va. 2002); Hageman v. TSI, Inc., 786 P.2d 452 (Col. 1989); Brandes v. Burbank, 613 F.3d 658 (7th Cir. 1980); Bruno v. Jackson, 2005 WL 1240979 (M.D. Pa.).

³⁹³ Johnson v. Gmeinder, 2000 WL 246585 (D.Kan. 2000); Wallace v. Ener, 521 F.2d 215 (5th Cir. 1975).

³⁹⁴ Fowler v. Smith, 516 S.E.2d 845 (Ga. 1999); Alfonso v. Robinson, 514 S.E.2d 615 (Va. 1999).

³⁹⁵ Heatherly v. Alexander, 421 F.3d 638 (8th Cir. 2005).

³⁹⁶ 49 C.F.R. § 393.24.

³⁹⁷ 49 C.F.R. § 393.9.

³⁹⁸ 49 C.F.R. § 393.25.

³⁹⁹ 49 C.F.R. § 393.13(d).

⁴⁰⁰ 49 C.F.R. § 392.33 & 393.9(b).

⁴⁰¹ 49 C.F.R. § 393.13(c).

⁴⁰² 49 C.F.R. § 393.13(c)(2)-(3).

hazard warning signal that will cause all turn signals to flash simultaneously as a hazard warning when necessary.⁴⁰³ The wiring for the electrical system must comply with all applicable engineering standards.⁴⁰⁴ If a claimant collides with the rear of a trailer in nighttime conditions, then the carrier can be held liable if the reflectors and lights are not operating properly or if there is no retroreflective sheeting on the trailer.⁴⁰⁵

****Practice Pointer:** Retain a conspicuity expert to demonstrate the problems caused by lack of reflectors on a trailer.

M. Brakes

A commercial vehicle or combination of vehicles must have brakes adequate to control the movements of the vehicle or combination of vehicles and to stop and hold the vehicle.⁴⁰⁶ Each vehicle must meet applicable service, parking and emergency brake system requirements.⁴⁰⁷ Every commercial vehicle, except an agricultural commodity trailer or pulpwood trailer, must be equipped with a parking brake system adequate to hold the vehicle under any condition of loading.⁴⁰⁸ The driver of an agricultural commodity trailer or pulpwood trailer must carry chocking blocks sufficient to prevent movement when the trailer is parked.⁴⁰⁹ Every commercial vehicle must have brakes on all wheels⁴¹⁰ and have an emergency braking system sufficient to stop a breakaway trailer independent of brake air, hydraulics and other pressure and controls.⁴¹¹

Brake tubing and hosing must be installed in such a manner that insures proper and continued function of the tubing or hosing and must be secured against chafing, kinking, or other mechanical damage.⁴¹² All connections for air, vacuum or hydraulic braking must be secure and free of leaks, constrictions or other defects.⁴¹³ Brake lining must be installed on the brakes in such a manner as to prevent fading and grabbing and must be of adequate thickness to provide safe and reliable stopping of the vehicle.⁴¹⁴ The pushrod travel cannot exceed 80% of the rated stroke listed by the chamber manufacturer.⁴¹⁵ The reservoirs in the braking system must maintain adequate air pressure.⁴¹⁶ All brakes must be capable of operating at all times.⁴¹⁷ A vehicle must be equipped with a pressure gauge for the brake system, and a signal that provides a warning

⁴⁰³ 49 C.F.R. § 393.19.

⁴⁰⁴ 49 C.F.R. § 393.28.

⁴⁰⁵ Quay v. Crawford, 788 So.2d 76 (Miss. 2001).

⁴⁰⁶ 49 C.F.R. § 393.40(a).

⁴⁰⁷ 49 C.F.R. § 393.40(a).

⁴⁰⁸ 49 C.F.R. § 393.41(a).

⁴⁰⁹ 49 C.F.R. § 393.41(a).

⁴¹⁰ 49 C.F.R. § 393.42.

⁴¹¹ 49 C.F.R. § 393.43.

⁴¹² 49 C.F.R. § 393.45.

⁴¹³ 49 C.F.R. § 393.45(d).

⁴¹⁴ 49 C.F.R. § 393.47.

⁴¹⁵ 49 C.F.R. § 393.47(e).

⁴¹⁶ 49 C.F.R. § 393.50.

⁴¹⁷ 49 C.F.R. § 393.48(a).

to the driver when a failure occurs in the vehicle's service brake system.⁴¹⁸ Automatic adjusting brakes are required to have an out-of-adjustment indicator light which activates if the brakes are out of adjustment.⁴¹⁹ The service brakes must be capable of generating a percentage of braking force and stopping distance in relation to the weight of the vehicle.⁴²⁰

A carrier can be held liable for an accident which occurs because a vehicle's brakes have not been properly maintained⁴²¹ or because the brakes do not meet the minimum braking force requirements.⁴²² A carrier can be held liable for punitive damages if the driver fails to conduct a pre-trip inspection and as a result fails to discover and correct problems with the vehicle's brakes.⁴²³ A maintenance facility cannot be held liable for negligent maintenance of a vehicle's brakes if the driver fails to conduct the necessary pre-trip inspection to determine the condition of the brakes prior to the vehicle's operation and the driver operates the vehicle despite the brakes feeling funny.⁴²⁴

****Practice Pointer:** Trailer brakes are usually manually adjusted, and the slack adjusters are often outside of federal minimum limits. Retain a trucking expert to inspect the unit to determine if the brakes are properly adjusted.

N. Rear Guards

Every trailer must have a rear impact guard to protect against a vehicle going under the trailer during a rear impact collision with the exception of pole trailers, pulpwood trailers, low-chassis vehicles, special purpose vehicles and wheels back vehicles.⁴²⁵ For trailers manufactured after January 26, 1998, the outermost surfaces of the horizontal member of the guard must extend within 4 inches of the side extremities of the trailer,⁴²⁶ and the bottom edge of the guard must be less than 22 inches from the ground⁴²⁷ with the guard itself within 12 inches of the rear extremity of the trailer.⁴²⁸ For trailers manufactured after December 31, 1952, the guard must be within 18 inches of the side extremities of the trailer, 30 inches from the ground, and within 24 inches of the rear extremity of the trailer.⁴²⁹ The rear impact guard must be substantially constructed and attached by means of bolts, welding, or other comparable means.⁴³⁰ If the rear impact guard breaks in a rear-end collision, then the carrier can be held liable for improper

⁴¹⁸ 49 C.F.R. § 393.51(a).

⁴¹⁹ 49 C.F.R. § 393.53.

⁴²⁰ 49 C.F.R. § 393.52.

⁴²¹ Brannan v. Nevada Rock & Sand Co., 823 P.2d 291 (Nev. 1992).

⁴²² Schmidt v. Royer, 574 N.W.2d 618 (S.D. 1998).

⁴²³ Burrows v. Core-Mark International, Inc., 54 F.3d 785 (9th Cir. 1995).

⁴²⁴ Id.

⁴²⁵ 49 C.F.R. § 393.86.

⁴²⁶ 49 C.F.R. § 393.86(a)(2).

⁴²⁷ 49 C.F.R. § 393.86(a)(3).

⁴²⁸ 49 C.F.R. § 393.86(a)(4).

⁴²⁹ 49 C.F.R. § 393.86(b)(1).

⁴³⁰ 49 C.F.R. § 393.86(b)(2).

welding and attachment of the guard and aggravation of the claimant's injuries resulting from the vehicle going under the trailer.⁴³¹

Although the FMCSR only apply to carriers, a manufacturer can also be held liable for a trailer that fails to meet federal guidelines requiring rear guards since this failure is evidence that a jury can consider in determining if the trailer is a defective product.⁴³² Federal regulations require a rear bumper or guard designed to provide protection during rear-end collisions with the trailer, and a trailer without a bumper or guard does not comply with this provision even though the trailer is less than the minimum height from the ground.⁴³³ A manufacturer can be held liable for a defective rear guard, even if it conforms to minimum federal standards, if the claimant can prove that the industry standard required stricter guidelines than the federal rules or that the guard was still unreasonably dangerous despite compliance with the federal guidelines.⁴³⁴

****Practice Pointer:** If the accident involves crush damage from riding under the rear of a trailer, consider a cause of action based on a defective rear guard. Preserve the rear guard, if present, and consider filing an action against both the trucking company and manufacturer.

O. Windows & Mirrors

Windows and windshields may be tinted as long as the tinted glazing is not less than 70 percent of the light at normal incidence.⁴³⁵ No device may be mounted on the windshield lower than 6 inches below the upper edge of the windshield.⁴³⁶ Decals must be placed within 4 inches of the bottom of the windshield.⁴³⁷

Every commercial vehicle must be equipped with a windshield wiping system with at least two windshield wiper blades.⁴³⁸ The vehicle must be equipped with a method to remove ice, snow or frost on the outside of the windshield and condensation on the inside of the windshield from the driver's view.⁴³⁹ Every vehicle must be equipped with two rear-vision mirrors, one at each side, firmly attached to the outside of the vehicle, and the mirrors must reflect to the driver a view of the highway to the rear and along both sides of the vehicle.⁴⁴⁰

P. Fuel Systems

⁴³¹ Quay v. Crawford, 788 So.2d 76 (Miss. 2001).

⁴³² Hagan v. Gemstate Manufacturing, Inc., 982 P.2d 1108 (Or. 1998).

⁴³³ Id.

⁴³⁴ Detillier v. Sullivan, 714 So.2d 244 (La. 1998); Rapp v. Singh, 152 F.Supp.2d 694 (E.D. Pa. 2001); Garcia v. Rivera, 160 A.D.2d 274 (N.Y. 1990).

⁴³⁵ 49 C.F.R. § 393.60(d).

⁴³⁶ 49 C.F.R. § 393.60(e)(1).

⁴³⁷ 49 C.F.R. § 393.60(e)(2).

⁴³⁸ 49 C.F.R. § 393.78(a).

⁴³⁹ 49 C.F.R. § 393.79.

⁴⁴⁰ 49 C.F.R. § 393.80(a).

Liquid fuel tanks must comply with construction guidelines and meet pressure and performance requirements.⁴⁴¹ The fuel system must be located within the width of the motor vehicle, and the fuel line must be flexible and secured against chafing, kinking or other causes of mechanical damage.⁴⁴² No driver or employee of a motor carrier may smoke or use an open flame in the vicinity of a motor vehicle being fueled or fuel a vehicle with the engine running, except when necessary.⁴⁴³ When fueling a vehicle, the nozzle of the fuel hose must be in continuous contact with the intake pipe of the fuel tank, and the driver may not permit any person to engage in such activities as would be likely to result in fire or explosion.⁴⁴⁴ No person shall dispatch or drive a commercial vehicle where an occupant has been affected by carbon monoxide, where carbon monoxide has been detected in the interior of the vehicle, or when a mechanical condition of the vehicle is discovered which would be likely to produce a hazard to the occupants by reason of carbon monoxide.⁴⁴⁵

Q. Frames, Axles & Steering Systems

The frame of any commercial vehicle cannot be cracked, loose, sagging or broken.⁴⁴⁶ Bolts or brackets securing the cab or the body of the vehicle to the frame cannot be loose, broken or missing.⁴⁴⁷ The cab compartment doors or door parts used as an entrance or exit cannot be missing or broken or wired shut.⁴⁴⁸ The hood must be securely fastened and the front bumper cannot be missing, loosely attached or protruding beyond the confines of the vehicle so as to create a hazard.⁴⁴⁹ Wheels and rims cannot be cracked or broken and no nuts or bolts may be missing or loose.⁴⁵⁰ No axle positioning part can be cracked, broken, loose, missing or out of alignment.⁴⁵¹ Adjustable axle assemblies cannot have locking pins missing or disengaged and the leaf springs, coil springs and torsion bars cannot be cracked, broken, or out of position.⁴⁵² The air pressure regulator valve cannot allow air into the suspension system until at least 55 psi is in the braking system, and air leakage shall not be greater than 3 psi in a 5 minute time period when the air gauge shows normal pressure.⁴⁵³ A carrier can be held liable for the rear axle separating from the chassis and striking another vehicle without proof of negligence since the separation of the axle would not have happened without the negligence of the driver in failing to properly maintain the chassis and axles.⁴⁵⁴

⁴⁴¹ 49 C.F.R. § 393.67.

⁴⁴² 49 C.F.R. § 393.65.

⁴⁴³ 49 C.F.R. § 392.50.

⁴⁴⁴ 49 C.F.R. § 392.50.

⁴⁴⁵ 49 C.F.R. § 392.66(a).

⁴⁴⁶ 49 C.F.R. § 393.201(a).

⁴⁴⁷ 49 C.F.R. § 393.201(b).

⁴⁴⁸ 49 C.F.R. § 393.203(a).

⁴⁴⁹ 49 C.F.R. § 393.203(c) & (e).

⁴⁵⁰ 49 C.F.R. § 393.205.

⁴⁵¹ 49 C.F.R. § 393.207(a).

⁴⁵² 49 C.F.R. § 393.207(b)-(e).

⁴⁵³ 49 C.F.R. § 393.207(f).

⁴⁵⁴ Gautreaux v. W.W. Rowland Trucking Co., Inc., 757 So.2d 87 (La. 2000).

The steering wheel must be secured and cannot have any spokes cracked through or missing.⁴⁵⁵ The steering column must be securely fastened and universal joints cannot be worn, faulty or repaired by welding.⁴⁵⁶ All components of the power steering system must be in operating condition and have sufficient fluid in the reservoir.⁴⁵⁷

R. Towing Devices

Coupling devices connecting vehicles must be designed, constructed, and installed so that when the combination is operated in a straight line the path of the towed vehicle will not deviate more than 3 inches to either side of the path of the vehicle that tows it.⁴⁵⁸ The fifth wheel is the device on the back of the tractor that locks onto the kingpin on the trailer to connect the tractor to the trailer. Every fifth wheel must have a locking mechanism to prevent separation of the upper and lower half of the fifth wheel assembly.⁴⁵⁹ A trailer must be connected with a tow-bar that is structurally adequate for the weight being drawn and is properly and securely mounted with a locking device that prevents accidental separation of the trailer.⁴⁶⁰ A trailer must be connected to the towing vehicle by a safety device to prevent the trailer from breaking loose in the event the tow-bar fails or is disconnected.⁴⁶¹

****Practice Pointer:** If the accident involves detachment of a trailer, consider a cause of action based on a defective tow bar. Remember to preserve the tow bar, if present, and consider filing an action against both the trucking company and manufacturer.

S. Tires

No commercial motor vehicle may be operated on any tire that (1) has body ply or belt material exposed through the tread or sidewall, (2) has any tread or sidewall separation, (3) is flat or has an audible leak, or (4) has a cut to the extent that the ply or belt material is exposed.⁴⁶² Any tire on the front wheels of a bus, truck, or truck tractor must have a tread groove pattern depth of at least 4/32 of an inch at any point in a major tread groove.⁴⁶³ All other tires must have a tread groove pattern depth of at least 2/32 of an inch when measured in a major tread groove.⁴⁶⁴ Motor vehicles cannot be operated with loads that exceed a weight greater than the tire's capacity.⁴⁶⁵

⁴⁵⁵ 49 C.F.R. § 393.209(a).

⁴⁵⁶ 49 C.F.R. § 393.209(c) & (d).

⁴⁵⁷ 49 C.F.R. § 393.209(e).

⁴⁵⁸ 49 C.F.R. § 393.70(a).

⁴⁵⁹ 49 C.F.R. § 393.70(b).

⁴⁶⁰ 49 C.F.R. § 393.70(c).

⁴⁶¹ 49 C.F.R. § 393.70(d).

⁴⁶² 49 C.F.R. § 393.75(a).

⁴⁶³ 49 C.F.R. § 393.75(b).

⁴⁶⁴ 49 C.F.R. § 393.75(c).

⁴⁶⁵ 49 C.F.R. § 393.75(f).

****Practice Pointer:** In dry weather, tires with less tread depth actually stop a vehicle faster than tires with more tread depth. The lack of tread depth is only a factor in an accident involving wet conditions.

T. Speedometer & Radar Detectors

Every vehicle must be equipped with a speedometer indicating vehicle speed in miles per hour and operating within 5 mph of the actual speed.⁴⁶⁶ A carrier can be held liable for its failure to have an operating speedometer in a vehicle if speed is a contributing factor in the collision.⁴⁶⁷ No driver shall use a radar detector in a commercial vehicle or operate a commercial vehicle that is equipped with or contains any radar detector.⁴⁶⁸ No motor carrier shall allow a driver to operate a motor vehicle that is equipped with a radar detector.⁴⁶⁹

****Practice Pointer:** The use of a radar device is strictly forbidden by the federal regulations and provides an aggravating circumstance that usually allows the imposition of punitive damages.

U. Miscellaneous Equipment & Accessories

A sleeper berth must be equipped with a means of preventing ejection of the occupant of the sleeper berth during deceleration of the vehicle.⁴⁷⁰ Every vehicle must be equipped with a horn in such a condition as to give an adequate and reliable warning signal.⁴⁷¹ Any exhaust system must be designed where its location will not result in burning, charring or damaging the electrical wiring, the fuel supply, or any combustible part of the motor vehicle.⁴⁷² The flooring of all vehicles must be substantially constructed so as to be free of unnecessary holes and openings to minimize the entrance of fumes, exhaust gases or fire.⁴⁷³

Any television viewer or screen must be placed in the vehicle in such a position that it is not visible to the driver while he is operating the vehicle and cannot be operated by the driver from his seat.⁴⁷⁴ The noise level within the interior of the vehicle cannot exceed 90 decibels.⁴⁷⁵ Every power unit must be equipped with a fire extinguisher that is properly filled and located so that it is readily accessible for use.⁴⁷⁶ Each commercial vehicle must be equipped with a seatbelt.⁴⁷⁷ A driver must be properly restrained with a

⁴⁶⁶ 49 C.F.R. § 393.82.

⁴⁶⁷ Greist v. Phillips, 906 P.2d 789 (Or. 1995).

⁴⁶⁸ 49 C.F.R. § 392.71(a).

⁴⁶⁹ 49 C.F.R. § 392.71(b).

⁴⁷⁰ 49 C.F.R. § 393.76(h).

⁴⁷¹ 49 C.F.R. § 393.81.

⁴⁷² 49 C.F.R. § 393.83(a).

⁴⁷³ 49 C.F.R. § 393.84.

⁴⁷⁴ 49 C.F.R. § 393.88.

⁴⁷⁵ 49 C.F.R. § 393.94(b).

⁴⁷⁶ 49 C.F.R. § 393.95(a).

⁴⁷⁷ 49 C.F.R. § 393.93.

seat belt when operating a commercial vehicle.⁴⁷⁸ No open flame heater may be used while the vehicle is in motion.⁴⁷⁹ Every motor vehicle must be properly lubricated and free of oil and grease leaks.⁴⁸⁰

V. Crossing Railroad Tracks

A driver may not shift gears while crossing railroad tracks.⁴⁸¹ A driver must stop within 50 feet and not closer than 15 feet from a railroad crossing and listen and look for an oncoming train before crossing the tracks if he is operating (1) a bus transporting passengers, (2) a commercial vehicle transporting flammable, explosive or poisonous materials, (3) a cargo tank motor vehicle, whether loaded or empty, used for the transportation of any hazardous material, or (4) a cargo tank motor vehicle loaded with an exempt commodity or a commodity which has a temperature above its flashpoint at the time of loading.⁴⁸² A stop is not necessary at a streetcar crossing or railroad tracks used exclusively for switching purposes, at a railroad crossing when an officer or flagman directs traffic, at a crossing where a functioning traffic signal is transmitting a green light, at an abandoned railroad crossing, or at a spur line railroad grade crossing marked with a sign reading "Exempt."⁴⁸³ In every other situation, a commercial vehicle approaching a railroad crossing must be driven at a rate of speed which will permit the vehicle to be stopped before reaching the nearest rail of such crossing and cannot be driven over such crossing until due caution has been taken to ascertain that the course is clear.⁴⁸⁴

W. Adverse Weather Conditions

A driver must exercise extreme caution when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust or smoke, adversely affect visibility or traction.⁴⁸⁵ Speed must be reduced when such conditions exist, and the operation of the vehicle must be discontinued if conditions become sufficiently dangerous.⁴⁸⁶ When stopping a vehicle in adverse weather conditions endangers passengers, then the vehicle may be operated to the nearest point at which the safety of passengers is assured.⁴⁸⁷ Federal regulations governing driving in adverse weather conditions set the standard of care for a commercial driver.⁴⁸⁸ A driver who is involved in an accident during a snow flurry is held to the standard of extreme care because of the regulations governing driving in adverse weather conditions.⁴⁸⁹

⁴⁷⁸ 49 C.F.R. § 392.16.

⁴⁷⁹ 49 C.F.R. § 392.67.

⁴⁸⁰ 49 C.F.R. § 396.5.

⁴⁸¹ 49 C.F.R. § 392.10(a).

⁴⁸² 49 C.F.R. § 392.10(a).

⁴⁸³ 49 C.F.R. § 392.10(b).

⁴⁸⁴ 49 C.F.R. § 392.11.

⁴⁸⁵ 49 C.F.R. § 392.14.

⁴⁸⁶ 49 C.F.R. § 392.14.

⁴⁸⁷ 49 C.F.R. § 392.14.

⁴⁸⁸ *Weaver v. Chavez*, 35 Cal.Rptr. 514 (2005).

⁴⁸⁹ *Crooks v. Sammons Trucking, Inc.*, 2001 WL 1654986 (Cal. 2001); *Kimberlin v. PM Transport, Inc.*, 563 S.E.2d 665 (Va. 2002).

****Practice Pointer:** A strong argument can be made that a commercial driver must use extreme care rather than ordinary care when driving in adverse weather conditions based on the federal regulations.

X. Unauthorized Passengers

Unless specifically authorized in writing by the motor carrier, no driver shall transport any person or permit any person to be transported on any commercial vehicle other than a bus.⁴⁹⁰ No written authorization shall be necessary for the transportation of employees or other persons assigned to a vehicle by the motor carrier, any person transported when aid is being rendered in case of an accident or emergency, or an attendant delegated to care for livestock.⁴⁹¹ A carrier cannot be held liable for an accident based solely on the presence of an unauthorized passenger in a tractor-trailer absent evidence that the passenger caused the accident.⁴⁹²

****Practice Pointer:** An unauthorized passenger can distract a driver causing an accident and may also void insurance coverage.

Y. Hazardous Materials Transportation

Every motor vehicle transporting hazardous materials must be driven and parked in compliance with the laws, ordinances, and regulations of the State or jurisdiction in which it is being operated unless the Department of Transportation requires a more stringent obligation or restraint.⁴⁹³ A vehicle transporting hazardous materials of any kind cannot be operated near an open fire unless the driver has first taken precautions to ascertain that the vehicle can pass safely without stopping.⁴⁹⁴ A vehicle transporting hazardous materials cannot be parked within 300 feet of an open fire.⁴⁹⁵ No person may smoke or carry a lighted cigarette within 25 feet of a motor vehicle containing flammable or explosive materials.⁴⁹⁶ When a vehicle transporting hazardous materials is being fueled, its engine must be turned off and a person must be in control of the fueling process while the fuel tank is filled.⁴⁹⁷

A driver transporting hazardous materials must examine the tires at the beginning of the trip and each time the vehicle is parked.⁴⁹⁸ If a tire is flat, leaking or improperly inflated, the driver must cause the tire to be repaired, replaced or properly inflated before the vehicle is driven, except the vehicle may be driven to the nearest safe place.⁴⁹⁹ If a

⁴⁹⁰ 49 C.F.R. § 392.60(a).

⁴⁹¹ 49 C.F.R. § 392.60(a).

⁴⁹² Fox v. Lyte, 143 A.D.2d 390 (N.Y. 1988).

⁴⁹³ 49 C.F.R. § 397.3.

⁴⁹⁴ 49 C.F.R. § 397.11.

⁴⁹⁵ 49 C.F.R. § 397.11.

⁴⁹⁶ 49 C.F.R. § 397.13.

⁴⁹⁷ 49 C.F.R. § 397.15.

⁴⁹⁸ 49 C.F.R. § 397.17(a).

⁴⁹⁹ 49 C.F.R. § 397.17(b).

tire is found to be overheated, the driver shall immediately remove the overheated tire and discontinue operation of the vehicle until the cause of the overheating is corrected.⁵⁰⁰

A motor carrier that transports hazardous materials must provide its drivers with instructions concerning the federal regulations governing hazardous materials and procedures to be followed in the event of an accident or delay.⁵⁰¹ States may designate certain routes for the transportation of non-radioactive hazardous material (NRHM)⁵⁰² and carriers shall comply with the State designations in transporting NRHM loads.⁵⁰³

A vehicle transporting explosive hazardous material must be attended by its driver or a qualified representative at all times unless the vehicle is located on the property of the carrier, shipper or consignee.⁵⁰⁴ The vehicle may not be parked (1) within 5 feet of a traveled portion of a public street or highway, (2) on private property without the knowledge and consent of the person in charge of the property and who is aware of the hazardous nature of the materials, or (3) within 300 feet of a bridge, tunnel, dwelling or place where people work, congregate or assemble except for brief periods when the necessities of operation require the vehicle to be parked in such a manner.⁵⁰⁵

A vehicle containing hazardous materials other than explosive materials must be attended by its driver while located on a public street, highway or shoulder of a public highway.⁵⁰⁶ The motor vehicle is considered to be attended if the person in charge of the vehicle is awake on the vehicle or within 100 feet of the vehicle with an unobstructed view.⁵⁰⁷ The vehicle cannot be parked within 5 feet of the travel portion of a public street or highway except for brief periods when the necessities of operation require the vehicle to be parked in such a manner.⁵⁰⁸

Z. Buses

Every bus shall have a 2 inch wide line drawn at the rear of the driver's seat indicating that passengers may not occupy a space forward of the line.⁵⁰⁹ A sign shall be posted near the front of the bus stating that it is a violation of the Federal Highway Administration's regulations for a bus to be operated with persons occupying the prohibited area.⁵¹⁰ Buses may not have any seat that is not securely fastened to the vehicle.⁵¹¹ A bus may not be operated unless (1) all standees are rearward of the standee line, (2) all aisle seats conform to federal requirements, and (3) baggage and freight on

⁵⁰⁰ 49 C.F.R. § 397.17(c).

⁵⁰¹ 49 C.F.R. § 397.19.

⁵⁰² 49 C.F.R. § 397.71.

⁵⁰³ 49 C.F.R. § 397.67.

⁵⁰⁴ 49 C.F.R. § 397.5(a) & (b).

⁵⁰⁵ 49 C.F.R. § 397.7(a).

⁵⁰⁶ 49 C.F.R. § 397.5(c).

⁵⁰⁷ 49 C.F.R. § 397.5(d).

⁵⁰⁸ 49 C.F.R. § 397.7(b).

⁵⁰⁹ 49 C.F.R. § 393.90.

⁵¹⁰ 49 C.F.R. § 393.90.

⁵¹¹ 49 C.F.R. § 393.91.

the bus is stowed and secured in a manner which assures unrestricted freedom of movement to the driver and his proper operation of the bus, unobstructed access to all exits by any occupant of the bus, and protection of occupants of the bus against injury resulting from the falling or displacement of articles transported in the bus.⁵¹²

Buses are required to have push-out windows or emergency exits.⁵¹³ Emergency exits on a bus must be clearly marked with the words “Emergency Door” or “Emergency Exit” and operating instructions on how to open the door.⁵¹⁴ These provisions do not apply to the transportation of prisoners.⁵¹⁵

VII. Insurance Coverage

A. Minimum Insurance Requirements

Federal regulations require a motor carrier of non-hazardous property to have an insurance policy or surety bond in place in the amount of \$750,000 to cover liability for injuries to the public.⁵¹⁶ A carrier of certain hazardous materials must have insurance or a bond in the amount of \$5 million dollars in liability coverage.⁵¹⁷ Whenever an insurance policy and a governing statute requiring minimum insurance are in conflict, the statute controls and the policy is automatically amended by operation of law to conform the statutory minimum.⁵¹⁸ The minimum insurance requirements do not apply to reform excess or umbrella insurance policies.⁵¹⁹

B. The MCS-90 Endorsement

The MCS-90 endorsement is part of any insurance policy issued to a motor carrier in order to comply with federal minimum insurance requirements.⁵²⁰ The endorsement states:

“In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of the liability described herein, any final judgment recovered against the insured for public liability resulting from the negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere. Such insurance as is

⁵¹² 49 C.F.R. § 392.62.

⁵¹³ 49 C.F.R. § 393.62.

⁵¹⁴ 49 C.F.R. § 393.62(e).

⁵¹⁵ 49 C.F.R. § 393.62(f).

⁵¹⁶ 49 C.F.R. § 387.9.

⁵¹⁷ 49 C.F.R. § 387.9.

⁵¹⁸ Sonoco Products Co., Ins. v. Fire & Casualty Ins. Co. of Connecticut, 767 A.2d 1018 (N.J. 2001).

⁵¹⁹ Id.

⁵²⁰ 49 C.F.R. § 387.15.

afforded, for public liability, does not apply to injury to or death of the insured's employees while engaged in the course of their employment, or property transported by the insured, designated as cargo. It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement... The limits of the company's liability for the amount prescribed in this endorsement apply separately to each accident and any payment under this policy because of any one accident shall not operate to reduce the liability of the company for the payment of final judgments resulting from any other accident."⁵²¹

The MCS-90 endorsement requires the insurer to act as a surety for any injury to the public caused by the carrier during interstate transportation and to be responsible for a judgment against the carrier even though no coverage may exist under the policy issued by the insurer.⁵²² The primary purpose of the MCS-90 endorsement is to assure that injured members of the public are able to satisfy a judgment from negligent interstate carriers.⁵²³ The MCS-90 endorsement does not create coverage where it did not formerly exist but only imposes a reimbursable obligation as to final judgments rendered against the named insured.⁵²⁴ Pursuant to the terms of the endorsement, an insurer is required to satisfy a judgment against the motor carrier even if the vehicle involved in the accident is not listed as a scheduled auto.⁵²⁵

When the policy is issued to the trucking company operating the vehicle, the MCS-90 endorsement traditionally only applies to judgments against the named insured and not to permissive users⁵²⁶ or drivers even if the drivers are employees of the carrier.⁵²⁷ However, the MCS-90 endorsement has been expanded to collect a judgment against a corporation when the policy is issued to the corporation's sole shareholder and the plaintiff pierces the corporate veil.⁵²⁸ When the policy is issued to the trailer owner,

⁵²¹ 49 C.F.R. § 387.15.

⁵²² Canal Insurance Co. v. Carolina Casualty Insurance Co., 59 F.3d 281 (1st Cir. 1995); T.H.E. Insurance Co. v. Larsen Intermodal Services, Inc., 242 F.3d 667 (5th Cir. 2001).

⁵²³ Adams v. Royal Indemnity Co., 99 F.3d 964 (10th Cir. 1996).

⁵²⁴ Harco National Insurance Co. v. Bobac Trucking, Inc., 107 F.3d 733 (9th Cir. 1997).

⁵²⁵ John Deere Insurance Co. v. Nueva, 229 F.3d 853 (9th Cir. 2000); Adams v. Royal Indemnity Co., 99 F.3d 964 (10th Cir. 1996).

⁵²⁶ Del Real v. U.S. Fire Insurance Crum & Forster, 64 F.Supp.2d 958 (E.D. Cal. 1998).

⁵²⁷ Perry v. Harco National Insurance Co., 129 F.3d 1072 (9th Cir. 1997).

⁵²⁸ Miller v. Harco Insurance Co., 522 S.E.2d 848 (Ga. 2001).

the MCS-90 endorsement has also been expanded to modify the definition of insured and require the insurer to indemnify both the driver and the owner of the tractor.⁵²⁹

In 2005, the FMCSA issued an advisory opinion attempting to limit the scope of the MCS-90 endorsement.⁵³⁰ The advisory opinion states as follows:

Q: Does the term “insured,” as used on Form MCS-90, Endorsement for Motor Carrier Policies of Insurance for Public Liability, or “Principal”, as used on Form MCS-82, Motor Carrier Liability Surety Bond, mean the motor carrier named in the endorsement or surety bond?

A: Yes. Under 49 C.F.R. 387.5, “insured and principal” is defined as “the motor carrier named in the policy of insurance, surety bond, endorsement, or notice of cancellation, and also the fiduciary of such motor carrier.” Form MCS-90 and Form MCS-82 are not intended, and do not purport, to require a motor carrier’s insurer or surety to satisfy a judgment against any party other than the carrier named in the endorsement or surety bond or its fiduciary.

The effect of the advisory opinion has not yet been addressed by any reported appellate decisions.

The MCS-90 endorsement does not apply to shipments in intrastate commerce even if transported by a carrier with interstate authority,⁵³¹ but does apply to the transportation of an exempt commodity in interstate commerce.⁵³² The endorsement does not control disputes among multiple insurers over which insurer should bear the ultimate financial burden for the loss, and the terms of the policies will control the issue of which policy provides primary coverage.⁵³³ An insurer cannot in good faith refuse to pay a judgment against a trucking company when the MCS-90 endorsement is part of the policy.⁵³⁴

A State Public Service Commission may adopt regulations requiring an endorsement similar to the MCS-90 for insurance policies for intrastate carriers, and this endorsement will require an insurer to be responsible for a judgment against a carrier regardless of whether the vehicle involved in the accident is a scheduled auto.⁵³⁵ State

⁵²⁹ Lynch v. Yob, 768 N.E.2d 1158 (Ohio 2002).

⁵³⁰ 70 FR 58065-01.

⁵³¹ Progressive Casualty Insurance Co. v. Hoover, 768 A.2d 1157 (Penn. 2001); QBE Insurance Co. v. P & F Container Services, Inc., 828 A.2d 935 (N.J. 2003).

⁵³² Royal Indemnity Co. v. Jacobsen, 863 F.Supp. 1537 (D.Utah 1994); Century Indemnity Co. v. Carlson, 133 F.3d 591 (8th Cir. 1998).

⁵³³ Canal Insurance Co. v. First General Insurance Co., 889 F.2d 604 (5th Cir. 1989); Occidental Fire & Casualty Co. of N.C. v. International Insurance Co., 804 F.2d 983 (7th Cir. 1986); John Deere Insurance Co. v. Truckin’ USA, 122 F.3d 270 (5th Cir. 1997).

⁵³⁴ Canal Insurance Co. v. Distribution Services, Inc., 176 F.Supp.2d 559 (E.D. Va. 2001).

⁵³⁵ Ross v. Stephens, 496 S.E.2d 705 (Ga. 1998).

regulations also make an insurer liable for a loss to the extent of the minimum limits of required insurance coverage regardless of the actual policy limit.⁵³⁶

****Practice Pointer:** If the amount of coverage is an issue, try to utilize the MCS-90 endorsement to pursue a recovery from the trailer's insurer.

C. Cancellation of a Policy

The MCS-90 endorsement must specify that: "Cancellation of this endorsement may be effected by the company or the insured by giving (1) 35 days notice in writing to the other party (said 35 days notice to commence from the date the notice is mailed, proof of mailing shall be sufficient proof of notice), and (2) if the insured is subject to the FMCSA's jurisdiction by providing 30 days notice to the FMCSA (said 30 days notice to commence from the date the notice is received by the FMCSA at its office in Washington, D.C.)."⁵³⁷

Federal regulations require that certificates of insurance cannot be canceled or withdrawn until 30 days after written notice has been given to the Board by the insurance company, surety or sureties, motor carrier, broker or other party which period of 30 days shall commence to run from the date such notice on the prescribed form is actually received by the Board.⁵³⁸ Certificates of insurance or surety bonds may be replaced by other certificates of insurance, surety bonds or other security and the liability of the retiring insurer or surety under such certificates of insurance or surety bonds is terminated as of the effective date of the replacement certificate of insurance provided the policy is acceptable to the Commission under the rules and regulations of this part.⁵³⁹

An insurer must also comply with state law regarding notice provisions before canceling a policy on file with a State Public Service Commission and a failure to give the notice required by State law can create continuous coverage despite the intent of the insurer to cancel the policy and the availability of other coverage.⁵⁴⁰ If the insured is engaged solely in intrastate commerce or the insured tells the insurer that it is not engaged in interstate commerce after such information is requested by the insurer, the insurer does not have to comply with federal regulations and only needs to meet the state law requirements.⁵⁴¹ However, a failure to cancel a policy in accordance with federal or state law provisions does not necessarily mean that the predecessor insurer's policy provides primary coverage in a dispute between insurers.⁵⁴²

****Practice Pointer:** If the amount of coverage is an issue, review filings with state agencies to make sure all predecessor policies were properly cancelled. If a former

⁵³⁶ Id.

⁵³⁷ 49 C.F.R. § 387.15.

⁵³⁸ 49 C.F.R. § 387.313(d).

⁵³⁹ 49 C.F.R. § 387.313(e).

⁵⁴⁰ DeHart v. Liberty Mutual Insurance Co., 169 F.3d 727 (11th Cir. 1999).

⁵⁴¹ Howard v. Quality Xpress, Inc., 989 P.2d 896 (N.M. 1999).

⁵⁴² Canal Insurance Co. v. Insurance Co. of North America, 424 So.2d 749 (Fla. 1982).

insurer failed to properly notify the state agency of the cancellation, the policy may still be in effect.

D. Passenger Exclusions

An exclusion of coverage for passengers in a commercial vehicle is valid and enforceable, but a policy with such an exclusion will still be conformed to provide the minimum amounts of coverage for commercial vehicles required by federal and state law when a passenger is injured in an accident.⁵⁴³

E. Direct Action against Insurer

Some jurisdictions allow a cause of action to be maintained against the insurer of a trucking company as a named party defendant whenever an accident occurs.⁵⁴⁴ The rationale for allowing a direct action against the insurer is that the insurer acts as the surety of the trucking company for the benefit of the public since the trucking company could not obtain authority to operate in interstate commerce without filing its proof of insurance.⁵⁴⁵ (Proof of Insurance, Appendix of Forms, X-10)

****Practice Pointer:** If your jurisdiction has a direct action statute, always name the insurer as a party defendant.

VIII. Handling a Trucking Case

A. Accident Investigation

The first step in properly handling a trucking case is to retain an accident reconstructionist to investigate the accident scene, photograph and document the physical evidence and discover as much information as possible from the investigating officers. Skid marks and other physical evidence begin to fade and disappear within days after the accident depending on the weather conditions. If you can retain a qualified reconstructionist and have him at the scene within 48 hours of an accident, you have a strong likelihood of being able to independently document skid mark lengths and measurements and other physical evidence. After this time period has expired, your reconstructionist will have to rely on the painted marks left at the scene by the investigating officers and the measurements obtained during their investigation as a basis for estimating speeds and movements of vehicles. You should make every attempt to have a reconstructionist examine the accident scene as soon as possible.

When a commercial vehicle is involved in a serious accident, the DOT, PSC or FHWA will usually conduct a post-accident inspection of the tractor and trailer. This inspection will document any problems with the unit, especially any problems with the braking system or tires. However, the purpose of the governmental post-accident

⁵⁴³ Guinn Transport, Inc. v. Canal Insurance Co., 507 S.E.2d 144 (Ga. 1998).

⁵⁴⁴ See O.C.G.A. § 46-7-12.1.

⁵⁴⁵ Jackson v. Sluder, 569 S.E.2d 893 (Ga. 2002).

inspection is to determine the extent of any mechanical problems with the vehicle and decide whether or not to place it out-of-service. The safety inspector is not trying to determine the cause of the accident. In order to further understand the cause of the accident, your reconstructionist, or a separate trucking expert depending on the reconstructionist's qualifications, will need to inspect the vehicles involved in the accident and document the results of his inspection.

B. Preservation of Evidence

You should send a spoliation letter to the trucking company and its insurer listing all documents and physical evidence to be preserved and maintained after the accident. The letter must state that the company keep all documents related to the unit and driver for the one-year period prior to the accident and outline the importance of these documents to your client's cause of action. It is crucial in cases alleging a manufacturing defect that the rear guard, tow bar, or other allegedly defective parts are kept and maintained. You should also request that the company remove the electronic control module ("ECM") from the tractor and preserve it for later examination. The ECM controls the systems on the tractor unit, and electronically records data concerning the operation of the tractor including speeds, brake system operations and engine controls. This information can be downloaded by the manufacturer and could be vital in determining the mechanical condition and performance of the unit at the time of the accident. Manufacturers began routinely using electronically controlled systems on tractors starting in the mid-1990's, and most units currently on the road have an ECM. In addition to sending a spoliation letter, you should contact the appropriate state agency to obtain copies of any filings and certificates concerning the trucking company.

C. The Complaint

Before filing your complaint against the trucking company, you should analyze the possibility of also bringing a products liability action against the manufacturer of the tractor, trailer or any component part within the unit. You should analyze the viability of a claim against the broker or shipper and the possibility of bringing an action against the insurance company for negligent hiring of the driver if a small trucking company is involved. If your jurisdiction has a direct action statute, you should name the insurer as a party defendant in addition to the trucking company. You should include in your complaint all applicable theories of liability including: (1) Negligent hiring, entrustment or retention, (2) Negligent inspection, maintenance or repairs, (3) Violations of the FMCSR, (4) Driver fatigue, and (5) Punitive damages.

D. Discovery

During the course of discovery, you should serve requests for the following documents: (1) Driver's qualification file; (2) Driver's logs for at least the eight day period preceding the accident; (3) Daily inspection reports for the three month period preceding the accident, (4) Annual inspection report covering the date of the accident, (5) Inspection, maintenance and repair records for the one year period preceding the accident

and the six month period subsequent to the accident, (6) Printouts or data from on-board recording devices, (7) Downloadable data from the ECM, (8) Post-accident drug and alcohol tests, (9) Accident register for the time period preceding the accident, (10) Bills of lading, weight tickets, hotel receipts and similar documents for the eight day period preceding the accident, (11) Policy and procedure manuals, and (12) Training documents. You should take the deposition of the safety director, who is the person designated by the trucking company to be in charge of its safety program. The safety director should be questioned at length about the company's hiring criteria in general and as it applies to the driver involved in the accident, the company's safety records, its safety policies and procedures and its methods of monitoring its drivers.

E. Trucking Experts

You will inevitably need at least one trucking expert to assist you in prosecuting your case. The key is determining the issues presented by the facts of your case, and then retaining the most qualified expert on each issue. At bare minimum, you will need an accident reconstructionist to help you recreate the accident and the speeds and movements of the vehicles. You can also expect to retain a trucking expert for issues of conspicuity, mechanical failures, defective parts, driver fatigue, negligent hiring and retention, and compliance with federal regulations.

X. Appendix of Forms

X-1. Sample Spoliation Letter

X-2. Driver Application

X-3. Road Test

X-4. Annual Review of Driving Record

X-5. Driver's Log

X-6. Daily Inspection Report

X-7. Annual Inspection

X-8. Bill of Lading

X-9 MVR with Disqualification

X-10 Certificate of Insurance

IX. The Trucking Claims Checklist

A. Investigation of Accident

1. Retain Reconstruction Expert to Investigate Accident and Photograph Scene
2. Retain Trucking Expert to Inspect Vehicle
3. Obtain Post-Accident PSC, DOT or FHWA Inspection Reports

B. Preservation of Evidence

1. Obtain Motor Carrier Certificates and Filings from State Agencies
2. Send Spoliation Letter to Trucking Company and its Insurer
3. Request ECM Data

C. Complaint

1. File Direct Action Against Insurer if allowed under State Law
2. Determine Product Liability Claims against Manufacturer
3. Examine Potential Claims against Broker or Shipper
4. Find out if Insurer Screened Drivers
5. Determine Theories of Liability against Trucking Company
 - a. Negligent Hiring, Entrustment or Retention
 - b. Negligent Inspection, Maintenance or Repair
 - c. Violations of FMCSR

- d. Driver Fatigue
- e. Punitive Damages

D. Discovery

1. Request all Documents Required by Federal Regulations
 - a. Driver's Qualification File
 - b. Driver's Logs
 - c. Daily Inspection Reports
 - d. Annual Inspections
 - e. Maintenance and Repair Records
 - f. On-board Recording Devices
 - g. Downloadable Data from ECM
 - h. Post-Accident Drug and Alcohol Testing
 - i. Accident Register
 - j. Bills of Lading, Weight Tickets, Hotel Receipts
 - k. Policy and Procedure Manuals
 - l. Training Documents
2. Take the Safety Director's Deposition

E. Trucking Experts: What Issues are in My Case?

1. Industry Standards and Common Practices
2. Operation of Commercial Vehicles
3. Driver Fatigue/ Driver's Logs
4. Compliance with Federal Regulations
5. Negligent Hiring and Retention
6. Inadequate Maintenance or Repairs
7. Defective Parts or Mechanical Failures

