

## Understanding Motor Carrier Claims

The Law Firm of Fried 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.frg-law.com>

In 2003, we used our extensive experience and knowledge in this field to publish the first version of *Understanding Motor Carrier Claims*. In 2005, we published the second edition. The Third Edition of our publication includes updated federal regulations and case law and reflects new theories and doctrines we have applied to our cases. We have also added numerous documents and photographs to better explain the concepts contained in our book. Our main goal in publishing this guide is to provide an in-depth analysis of 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.thetruckingattorneys.com> and invite you to visit our site for additional resources on motor carrier law.

Joseph A. Fried

Brian “Buck” Rogers

Michael L. Goldberg

Fried Rogers Goldberg LLC  
3399 Peachtree Road, NE  
Suite 325  
Atlanta, Georgia 30326

Tel: 404.591.1800  
877.591.1801  
Fax: 404.591.1801

E:mail [michael@frg-law.com](mailto:michael@frg-law.com)

## Table of Contents

- I. The Basics of Interstate Motor Carriers
- II. Theories of Liability
- III. Driver Qualifications
- IV. Alcohol and Controlled Substances Testing
- V. Hours of Service Regulations
- VI. Federal Motor Carrier Safety Regulations
- VII. Insurance Coverage
- VIII. Types of Trucking Cases
- IX. Handling a Trucking Case
- X. The Trucking Claims Checklist
- XI. Appendix
- XII. Index

## 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 Transportation<sup>1</sup> while an intrastate carrier has its operations entirely within one state and does not affect interstate commerce.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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 (5<sup>th</sup> 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.<sup>5</sup> The motor carrier then must file a MCS-150 identification report with the FMCSA<sup>6</sup> and mark each commercial motor vehicle with the name of the motor carrier and the USDOT number.<sup>7</sup> 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, duties of employers and employees, and safety fitness requirements imposed by the Secretary, and (3) the minimum financial responsibility requirements.<sup>8</sup>

For numerous years, interstate carriers followed a Single State Registration System (“SSRS”) and were required to register and pay filing fees to a single participating State as its registration state, sometimes referred to as its “Home State.”<sup>9</sup> On August 10, 2005, the President signed into law the “Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users” otherwise known as SAFETEA-LU.<sup>10</sup> This legislation went into effect on January 1, 2007. As part of SAFETEA-LU, the SSRS was repealed and Uniform Carrier Registration System (“UCRS”) was adopted in its place.<sup>11</sup> Under the UCRS, the motor carrier still designates as its “Base State” the State where it maintains its principal place of business.<sup>12</sup> The motor carrier registers with the UCR through its Base State and must pay a standard fee to the UCR as set out by the UCR agreement rather than being subject to the fees and registration outlined by individual states.<sup>13</sup> If the motor carrier is registered as an interstate carrier, a State can not require the motor carrier to obtain intrastate authority or require the motor carrier to make any insurance filings.<sup>14</sup>

As part of the federal registration scheme, each motor carrier must designate a registered agent for service of process in each state that the carrier operates.<sup>15</sup> A registered agent may be canceled only by designating a substitute agent.<sup>16</sup> A form for the designation of a registered agent must be filed with the FMCSA.<sup>17</sup>

In 2004, a safety permit program was instituted for the registration of all carriers

---

<sup>5</sup> 49 C.F.R. § 385.301.

<sup>6</sup> 49 C.F.R. § 390.19.

<sup>7</sup> 49 C.F.R. § 390.21.

<sup>8</sup> 49 U.S.C. § 13902.

<sup>9</sup> 49 C.F.R. § 367.3(a).

<sup>10</sup> Pub. L. 109-59, August 10, 2005, 119 Stat. 1144.

<sup>11</sup> 49 U.S.C. § 14504a.

<sup>12</sup> 49 U.S.C. § 14504a(a)(2).

<sup>13</sup> 49 U.S.C. § 14504a(f).

<sup>14</sup> 49 U.S.C. § 14504a(c)(1)(D).

<sup>15</sup> 49 C.F.R. § 366.3 & 366.4(a).

<sup>16</sup> 49 C.F.R. § 366.6.

<sup>17</sup> 49 C.F.R. § 366.2.

of hazardous materials.<sup>18</sup> The safety permit program applies to both intrastate and interstate carriers.<sup>19</sup> The FMCSA will not issue a safety permit to any carrier that is in the top 30% of the national crash average as indicated in the Motor Carrier Management Information System (MCMIS).<sup>20</sup> As required by the program, intrastate carriers of hazardous materials must apply for a USDOT number and be subject to a compliance review but are not subject to additional federal safety regulations.<sup>21</sup> 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.<sup>22</sup>

**\*\*Practice Pointer:** A list of registered agents for a motor carrier can be found on [www.saferys.org](http://www.saferys.org) and may provide a beneficial venue for a lawsuit.

## B. Safety Fitness Ratings

An interstate carrier is required to meet minimum safety fitness standards.<sup>23</sup> 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.<sup>24</sup> The Federal Highway Administration ("FHWA") performs an annual compliance review on each carrier and assigns it a safety rating.<sup>25</sup> 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.<sup>26</sup>

The FMCSA provides notice to the carrier of its safety rating and reports a list of compliance deficiencies which the motor carrier must correct.<sup>27</sup> A "satisfactory" rating means that the motor carrier has in place adequate safety management controls to meet the safety fitness standards.<sup>28</sup> A "conditional" or "unsatisfactory" rating means a motor carrier does not have adequate safety management controls in place.<sup>29</sup> A carrier rated

---

18 49 C.F.R. § 385.401.

19 49 C.F.R. § 385.403.

20 49 C.F.R. § 385.407.

21 49 C.F.R. § 385.403.

22 49 C.F.R. § 390.3.

23 49 C.F.R. § 385.1.

24 49 C.F.R. § 385.5.

25 49 C.F.R. § 385.9.

26 49 C.F.R. § 385.7.

27 49 C.F.R. § 385.11.

28 49 C.F.R. § 385.3.

29 49 C.F.R. § 385.3.

“unsatisfactory” is prohibited from operating commercial vehicles.<sup>30</sup> 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.<sup>31</sup> Motor carriers domiciled in Mexico are subject to intensified monitoring by frequent safety audits and inspections.<sup>32</sup> The safety rating and other information for each registered interstate carrier is available at the website: [www.safersys.org](http://www.safersys.org).<sup>33</sup>

[www.safersys.org](http://www.safersys.org)

[INSERT PICTURE OF SAFERSYS (In Website File)]

You can look up information on a company by clicking on the company snapshot link at the bottom of the page.

**\*\*Practice Pointer:** Review the carrier’s rating profile on [www.safersys.org](http://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.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup> A carrier cannot be held vicariously liable for the rape of a hitchhiker by a long haul driver since his actions are not in furtherance of the interests of his employer and are clearly outside

---

<sup>30</sup> 49 C.F.R. § 385.13(a).

<sup>31</sup> 49 C.F.R. § 385.17.

<sup>32</sup> 49 C.F.R. § 385.103.

<sup>33</sup> 49 C.F.R. § 385.19.

<sup>34</sup> *Warner Trucking, Inc. v. Carolina Casualty Insurance Co.*, 686 N.E.2d 102 (Ind. 1997).

<sup>35</sup> *Id.* at 105.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 106.

<sup>38</sup> *Wright v. Transus, Inc.*, 434 S.E.2d 786 (Ga. 1993).

<sup>39</sup> *Parker v. Erixon*, 473 S.E.2d 421 (N.C. 1996).

the scope of his employment.<sup>40</sup> 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.<sup>41</sup>

**\*\*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.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup>

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.<sup>48</sup> 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 the parties to the lease.<sup>49</sup> If the trucking company terminates the lease and attempts to

---

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

41 Rabon v. Guardsmark, Inc., 571 F.2d 1277 (4<sup>th</sup> 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).

42 49 C.F.R. § 376.12(c).

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

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

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

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

47 Rodriguez v. Ager, 705 F.2d 1229 (10<sup>th</sup> Cir. 1983).

48 49 C.F.R. § 376.12(c).

49 Jackson v. O'Shields, 101 F.3d 1083 (5<sup>th</sup> Cir. 1996).

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.<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup>

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.<sup>54</sup> 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.<sup>55</sup>

#### Owner/Operator Lease

[INSERT PICTURE OF OWNER/OPERATOR LEASE: Need to Scan from Copeland]

The entire lease is usually 4 to 5 pages and outlines responsibilities for insurance, maintenance and control of the vehicle and driver.

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.<sup>56</sup> Some jurisdictions hold that a trucking company is always responsible for a driver's operation of a leased vehicle

---

<sup>50</sup> Jackson v. O'Shields, 101 F.3d 1083 (5<sup>th</sup> Cir. 1996); Graham v. Malone Freight Lines, Inc., 948 F.Supp. 1124 (D.Mass. 1996).

<sup>51</sup> Williamson v. Steco Sales, Inc., 530 N.W.2d 412 (Wis. 1995); Davis v. Rajbar, 266 A.D.2d 828 (N.Y. 1999).

<sup>52</sup> Simmons v. King, 478 F.2d 857 (5<sup>th</sup> Cir. 1973); Laux v. Juillerat, 680 F.Supp. 1131 (S.D. Ohio 1987); Zamalloa v. Hart, 31 F.3d 911 (9<sup>th</sup> Cir. 1994).

<sup>53</sup> Indiana Refrigerator Lines, Inc. v. Dalton, 516 F.2d 795 (6<sup>th</sup> Cir. 1975).

<sup>54</sup> 49 U.S.C. § 14102(a).

<sup>55</sup> 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 (9<sup>th</sup> Cir. 1994).

<sup>56</sup> Parker v. Erixon, 473 S.E.2d 421 (N.C. 1996).

for the duration of the lease.<sup>57</sup> Other jurisdictions hold that a rebuttable presumption of 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.<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup> Applying a narrow interpretation of lease liability, a district court in Arkansas held that the owner of a tractor-trailer who contracted with a separate company to drive the owner's vehicles using the owner's placards and interstate authority is not the statutory employer of the driver because the company was the statutory employer of the driver and the owner did not exercise any control over the him.<sup>61</sup>

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.<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup>

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.<sup>65</sup> 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.<sup>66</sup> 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

---

<sup>57</sup> 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 (9<sup>th</sup> Cir. 1987); Harvey v. F-B Truck Line Co., 767 P.2d 254 (Id. 1987); Rodriguez v. Ager, 705 F.2d 1229 (10<sup>th</sup> Cir. 1983); Schedler v. Rowley Interstate Transportation Co., Inc., 368 N.E.2d 1287 (Ill. 1977); Simmons v. King, 478 F.2d 857 (5<sup>th</sup> Cir. 1973).

<sup>58</sup> 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); Saullo v. Douglas, 957 So.2d 80 (Fla. 2007).

<sup>59</sup> Hiltgen v. Sumrall, 47 F.3d 695 (5<sup>th</sup> Cir. 1995).

<sup>60</sup> Thi v. Schneider National Carriers, Inc., 2005 WL 1703116 (W.D.Mo.).

<sup>61</sup> Brown v. Truck Connections International, Inc., 526 F.Supp.2d 920 (E.D.Ark. 2007).

<sup>62</sup> Price v. Westmoreland, 727 F.2d 494 (5<sup>th</sup> Cir. 1984); Powers v. Meyers, 655 N.E.2d 1358 (Ohio 1995).

<sup>63</sup> Proctor v. Colonial Refrigerated Transport, Inc., 494 F.2d 89 (4<sup>th</sup> Cir. 1974); Johnson v. S.O.S. Transport, Inc., 926 F.2d 516 (6<sup>th</sup> Cir. 1991); Smith v. Johnson, 862 F.Supp. 1287 (N.D.Pa. 1994).

<sup>64</sup> White v. Excalibur Insurance Co., 599 F.2d 50 (5<sup>th</sup> 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); Coleman v. B-H Transfer Co., 659 S.E.2d 880 (Ga. 2008).

<sup>65</sup> LaPlant v. Cutlip, 258 A.2d 769 (N.Y. 1999).

<sup>66</sup> Brown v. Pettinari, 994 P.2d 1231 (Or. 2000); Kahrs v. Conley, 729 N.E.2d 191 (Ind. 2000).

outside of the lease agreement.<sup>67</sup> 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.<sup>68</sup>

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

### C. Negligent Hiring, Entrustment or Retention

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.<sup>69</sup> 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.<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup> If the trucking company fails to

---

<sup>67</sup> Zimprich v. Broekel, 519 N.W.2d 588 (N.D. 1994).

<sup>68</sup> Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc., 96 S.Ct. 229, 423 U.S. 28, 46 L.Ed.2d 169 (1975).

<sup>69</sup> Guidry v. National Freight, Inc., 944 S.W.2d 807 (Tx. 1997).

<sup>70</sup> Wallen v. Allen, 343 S.E.2d 73 (Va. 1986).

<sup>71</sup> Lakes v. Minor, 620 N.E.2d 1015 (Ohio 1993); TXI Transportation Co. v. Hughes, 224 S.W.3d 970 (Tx. 2007).

<sup>72</sup> Boyd v. L.G. DeWitt Trucking Co., Inc., 405 S.E.2d 914 (N.C. 1991).

<sup>73</sup> Morris v. JTM Materials, Inc., 78 S.W.3d 28 (Tx. 2002).

<sup>74</sup> Boyd v. L.G. DeWitt Trucking Co., Inc., 405 S.E.2d 914 (N.C. 1991).

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.<sup>75</sup> 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.<sup>76</sup> There are numerous services that provide background checks on drivers but most companies run a DAC report to find out the driving history and/or criminal history of applicants.

### DAC Report

[INSERT PICTURE OF DAC REPORT]

The DAC Report may include a driving history, criminal background check and employment history.

A commercial vehicle driver is disqualified for various lengths of time for serious traffic violations.<sup>77</sup> 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.<sup>78</sup>

### MVR with Disqualifications

INSERT MVR with DISQUALIFICATIONS

In this case, we discovered that the defendant driver's license was suspended at the time of the accident because of his prior traffic violations.

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.<sup>79</sup> A driver is also disqualified for a year if he continues to operate a commercial vehicle after having been disqualified.<sup>80</sup> Motor carriers have an obligation to monitor their drivers for any disqualifying offenses,<sup>81</sup> and these new provisions should give additional grounds for negligent hiring and retention claims.

---

<sup>75</sup> *Smith v. Tommy Roberts Trucking Co.*, 435 S.E.2d 54, 57 (1993).

<sup>76</sup> *Id.* at 57.

<sup>77</sup> 49 C.F.R. § 383.51.

<sup>78</sup> 49 C.F.R. § 383.51.

<sup>79</sup> 49 C.F.R. § 383.51.

<sup>80</sup> 49 C.F.R. § 383.51.

<sup>81</sup> 49 C.F.R. § 383.51(a).

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.<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup> In this situation, evidence of negligent hiring and retention can be presented to the jury as a basis for an award of punitive damages.<sup>87</sup>

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.<sup>88</sup> Because 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.<sup>89</sup> 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.<sup>90</sup> Accordingly, a trucking company cannot usually be held responsible under a negligent hiring or retention theory for an intentional assault inflicted by a driver.<sup>91</sup>

**\*\*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

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

83 Morris at 14.

84 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); McHaffie v. Bunch, 891 S.W.3d 822 Mo. 1995); Lee v. J.B. Hunt Transport, Inc., 308 F.Supp.2d 310 (S.D.N.Y. 2004).

85 Bartja at 361.

86 Smith at 57.

87 Id. at 57.

88 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).

89 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).

90 C.C. at 924.

91 Id.

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.<sup>92</sup>

**\*\*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

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.<sup>93</sup> 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.<sup>94</sup> Because the broker is not the employer of the driver, it cannot be held liable under a theory of agency or vicarious liability.<sup>95</sup> 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.<sup>96</sup> 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.<sup>97</sup> A failure to properly evaluate a carrier's safety record will subject the broker to liability for negligent hiring.<sup>98</sup>

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

---

<sup>92</sup> Oswski v. Smith, 586 S.E.2d 71 (Ga. 2003).

<sup>93</sup> 49 U.S.C. § 13102(2).

<sup>94</sup> Graham v. Malone Freight Lines, Inc., 314 F.3d 7 (1st Cir. 1999).

<sup>95</sup> Schramm v. Foster, 341 F.Supp.2d 536, 545 (Md. 2004).

<sup>96</sup> Id. at 551.

<sup>97</sup> Id.

<sup>98</sup> Id.

## 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.<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup> 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.<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup> Even the prior owner of a tractor trailer who sells the vehicle to another trucking company can be held responsible for negligent maintenance of the vehicle in violation of the FMCSR resulting in an accident.<sup>105</sup>

**\*\*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 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.<sup>106</sup> Every driver and employee must be instructed regarding compliance with the FMCSR.<sup>107</sup> Equipment and accessories required by the regulations must be maintained in compliance with all applicable performance and design criteria.<sup>108</sup> No person may aid, abet, encourage or require a motor carrier or its drivers to violate any safety regulation.<sup>109</sup> A trucking company can be held liable for any

---

<sup>99</sup> 49 C.F.R. § 396.3(a).

<sup>100</sup> 49 C.F.R. § 396.3(a)(1).

<sup>101</sup> 49 C.F.R. § 396.3(b).

<sup>102</sup> 49 C.F.R. § 396.3(c).

<sup>103</sup> 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).

<sup>104</sup> Indian Trucking v. Harber, 752 N.E.2d 168 (Ind. 2001).

<sup>105</sup> Bailey v. Lewis Farm, Inc., 171 P.3d 336 (Ore. 2007).

<sup>106</sup> 49 C.F.R. § 390.3(e)(1).

<sup>107</sup> 49 C.F.R. § 390.3(e)(2).

<sup>108</sup> 49 C.F.R. § 390.3(e)(3).

<sup>109</sup> 49 C.F.R. § 390.13.

injury resulting from its violation an applicable provision of the FMCSR.<sup>110</sup> 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.<sup>111</sup> 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.<sup>112</sup>

**\*\*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.<sup>113</sup> Although the basis of recovery is common law negligence, the FMCSR provides evidence of the applicable standard of care.<sup>114</sup> If the trailer is sealed before it is picked up by the motor carrier, it is presumed that the shipper participated in the loading process.<sup>115</sup>

The shipper may also be held liable for the driver's conduct if the shipper retains control over the transportation process.<sup>116</sup> If the motor carrier is an independent contractor with the shipper, the shipper can be held responsible for negligent hiring if the shipper fails to investigate the minimum qualifications of the motor carrier on the issues of licensing, registration and insurance.<sup>117</sup> A shipper is not liable for a driver's actions simply by obtaining an oversized load permit for the shipment.<sup>118</sup>

**\*\*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

---

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

<sup>111</sup> 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).

<sup>112</sup> See Transportation Rules of the Georgia Public Service Commission.

<sup>113</sup> 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).

<sup>114</sup> 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).

<sup>115</sup> Miller v. Rollins Leasing Corp., 1999 WL 739539 (Ohio 1999).

<sup>116</sup> Detrick v. Midwest Pipe & Steel, Inc., 598 N.E.2d 1074 (Ind. 1992).

<sup>117</sup> Puckrein v. ATI Transport, Inc., 897 A.2d 1034 (N.J. 2006).

<sup>118</sup> Fike v. Peace, 964 So.2d 651 (Ala. 2007).

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.<sup>119</sup> 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.<sup>120</sup>

### Driver's Log

[INSERT PICTURE OF Driver's Log]

The Driver's Log must be kept in one time zone which is usually the home state of the driver.

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.<sup>121</sup> 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.<sup>122</sup> 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.<sup>123</sup>

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

### J. Commercial Driver's License ("CDL") Manual

Each state has its own CDL Manual that outlines the proper manner in which to drive a commercial vehicle. These manuals are remarkably similar from state to state. A commercial driver should be familiar with the requirements contained in the CDL Manual of the state in which he has his license. These manuals establish industry standards for the truck driver and company. There are usually sections on basic truck safety such as Space Management, Controlling Speed, and Seeing Hazards and sections tailored to specific circumstances like Night Driving, Driving in Fog and Skid Control and Recovery. The driver will be in violation of industry standards if he violated any of the provisions contained in the CDL Manual.

### Georgia CDL Manual

[INSERT PICTURE OF CDL MANUAL]

We have used the Georgia CDL Manual at trial to cross-examine a commercial driver on improper maneuvers.

---

119 49 C.F.R. § 392.3.

120 49 C.F.R. § 395 *et. seq.*

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

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

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

## K. Spoliation of Evidence

Federal regulations require interstate carriers to maintain and preserve records for various lengths of time.<sup>124</sup> 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.<sup>125</sup> 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 tampered with the evidence.<sup>126</sup> 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.<sup>127</sup> A few jurisdictions even recognize a separate cause of action for spoliation of evidence.<sup>128</sup> 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.<sup>129</sup>

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. A sample spoliation letter can be found in the Appendix, XI-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

---

124 49 C.F.R. Pt. 379, App. A.

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

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

127 Id. at 783.

128 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).

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

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.<sup>130</sup> 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.<sup>131</sup> States and other governmental entities may prescribe longer retention periods for any category of records.<sup>132</sup> A carrier may destroy any records at its discretion after the required retention period expires.<sup>133</sup> 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.<sup>134</sup>

**\*\*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.

#### L. 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.<sup>135</sup> 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.<sup>136</sup> 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.<sup>137</sup> 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.<sup>138</sup> 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,<sup>139</sup> or if it destroys documents to hide any potential violations.<sup>140</sup>

**\*\*Practice Pointer:** Retain a qualified expert to determine if the trucking company is

---

130 49 C.F.R. § 379 *et. seq.*

131 49 C.F.R. Pt. 379, App. A, Note A.

132 49 C.F.R. § 379.3.

133 49 C.F.R. § 379.3.

134 49 C.F.R. § 379.7(a).

135 See *O.C.G.A.* § 51-12-5.1.

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

137 *Id.* at 419-420.

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

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

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

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.<sup>141</sup> 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 checks.<sup>142</sup> 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.<sup>143</sup>

#### Driver's Application

**INSERT PICTURE of Driver's Application**

A Driver's Application is usually 4 to 5 pages and may include additional handouts which must be signed by the driver.

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.<sup>144</sup> 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.<sup>145</sup> The prior employers are required to provide this information to the prospective employer.<sup>146</sup> 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.<sup>147</sup>

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.<sup>148</sup>

---

141 49 C.F.R. § 391 *et. seq.*

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

143 49 C.F.R. § 391.21.

144 49 C.F.R. § 391.23.

145 49 C.F.R. § 391.23.

146 49 C.F.R. § 391.23(g).

147 49 C.F.R. § 391.41 & 391.43.

148 49 C.F.R. § 391.31 & 391.33.

## Road Test

### INSERT PICTURE OF Road Test

We have handled cases in the past where a driver failed his road test multiple times but was still hired by the company.

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.<sup>149</sup> 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.<sup>150</sup> These regulations provide only a minimum standard, and a motor carrier can adopt more stringent requirements for its drivers.<sup>151</sup>

**\*\*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.<sup>152</sup> 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 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.<sup>153</sup>

In addition to these specific qualifications, commercial drivers are also required to have the requisite skill and knowledge to operate a commercial vehicle safely.<sup>154</sup> 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.<sup>155</sup> A driver must be familiar with the

---

149 49 C.F.R. § 391.31(c).

150 49 C.F.R. § 391.13.

151 *Cassara v. DAC Services, Inc.*, 2002 WL 59687 (10<sup>th</sup> Cir. 2002).

152 49 C.F.R. § 391.1.

153 49 C.F.R. § 391.11.

154 49 C.F.R. § 383.110.

155 49 C.F.R. § 383.111.

proper manner of securing cargo and be able to secure properly any cargo transported by him.<sup>156</sup>

### 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.<sup>157</sup> 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.<sup>158</sup> A carrier must ensure that each entry level driver has a training certificate as proof that he received his entry level training.<sup>159</sup> A copy of the driver's training certificate must be kept in the driver's qualification file.<sup>160</sup> 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.<sup>161</sup>

### D. Driver Disqualification

Commercial drivers are disqualified for various lengths of time for serious traffic violations.<sup>162</sup> 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.<sup>163</sup> 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.<sup>164</sup> A driver is also disqualified for a year if he continues to operate a commercial vehicle after having been disqualified.<sup>165</sup> 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.<sup>166</sup> The penalties increase for multiple offenses or repeat violations of the same offense.<sup>167</sup> A motor carrier has an obligation to make sure that a disqualified driver does not operate a commercial vehicle.<sup>168</sup>

---

156 49 C.F.R. § 391.13.

157 49 C.F.R. § 380.502.

158 49 C.F.R. § 380.503.

159 49 C.F.R. § 380.505.

160 49 C.F.R. § 380.509.

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

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.

166 49 C.F.R. § 383.51.

167 49 C.F.R. § 383.51.

168 49 C.F.R. § 383.51(a).

**\*\*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").<sup>169</sup> A driver may have only one CDL at any time.<sup>170</sup> 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.<sup>171</sup> 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.<sup>172</sup> 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.<sup>173</sup> 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.<sup>174</sup>

**\*\*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.<sup>175</sup> A driver must demonstrate special knowledge about coupling and uncoupling double/triple trailers to obtain a double/triple trailer endorsement.<sup>176</sup> 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.<sup>177</sup> 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.<sup>178</sup> In order to obtain a hazardous materials endorsement, a driver must demonstrate that he has knowledge of

---

<sup>169</sup> 49 U.S.C. § 31302.

<sup>170</sup> 49 U.S.C. § 31302; 49 C.F.R. § 383.21.

<sup>171</sup> 49 C.F.R. § 383.91(a).

<sup>172</sup> 49 C.F.R. § 383.91(a).

<sup>173</sup> 49 C.F.R. § 383.91(a).

<sup>174</sup> 49 C.F.R. § 383.3.

<sup>175</sup> 49 C.F.R. § 383.93.

<sup>176</sup> 49 C.F.R. § 383.115.

<sup>177</sup> 49 C.F.R. § 383.117.

<sup>178</sup> 49 C.F.R. § 383.119.

hazardous materials regulations, hazardous materials handling, operation of safety equipment, and emergency response procedures.<sup>179</sup> School bus drivers must demonstrate the ability to deal with passengers and skills in loading and unloading children to obtain an endorsement.<sup>180</sup>

### 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.<sup>181</sup> As part of SAFETEA-LU, the FMCSA must grant an exemption to insulin dependent diabetics who have demonstrated that they have control over their diabetes for at least 2 months if Type I diabetes and at least 1 month if Type II Diabetes until the regulations are amended to remove the disqualification for insulin dependent diabetes.<sup>182</sup>

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.<sup>183</sup> Currently, the medical exam can be performed by any state licensed provider of medicine including doctors of medicine, doctors of osteopathy, physician assistants, advanced practice nurses and doctors of chiropractic.<sup>184</sup> As part of SAFETEA-LU, medical examiners will eventually have to be certified by a federal agency in order to perform examinations.<sup>185</sup>

### Medical Card

#### INSERT PICTURE OF MEDICAL CARD

An accident can be the result of a driver having a medical condition such as sleep apnea, seizures or diabetes.

If a driver is determined by a medical examiner not to be qualified to 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

---

179 49 C.F.R. § 383.121.

180 49 C.F.R. § 383.123.

181 49 C.F.R. § 391.41.

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

183 49 C.F.R. § 391.45.

184 49 C.F.R. § 391.43.

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

evaluations.<sup>186</sup> A driver may also apply for a waiver of certain physical defects which would otherwise result in disqualification.<sup>187</sup>

**\*\*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.<sup>188</sup>

##### Annual Review

##### INSERT PICTURE OF Annual Review

The company must continually monitor the performance of the driver in order to avoid a negligent retention claim.

In conjunction with this review, the driver must provide a certified list of all moving violations and accidents for the preceding twelve-month period.<sup>189</sup> The company is required to run an MVR on the driver to verify this information.<sup>190</sup> 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.<sup>191</sup> 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.<sup>192</sup>

**\*\*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.<sup>193</sup> 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

---

186 49 C.F.R. § 391.47.

187 49 C.F.R. § 391.49.

188 49 C.F.R. § 391.25.

189 49 C.F.R. § 391.27.

190 49 C.F.R. § 391.25.

191 49 C.F.R. § 391.25(b)(2).

192 49 C.F.R. § 391.25(b)(2).

193 49 C.F.R. § 391.51(a).

accidents provided in conjunction with the annual review; and (8) the medical examiner's certificate of physical qualification.<sup>194</sup> 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 certificate may be discarded every two years following the replacement with a new certificate.<sup>195</sup> 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.<sup>196</sup>

**\*\*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.<sup>197</sup> 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.<sup>198</sup> 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.<sup>199</sup> The Surface Transportation Board maintains a database on the licensing, identification and disqualification of commercial drivers.<sup>200</sup>

### IV. Alcohol and Controlled Substance Testing

Federal regulations establish strict guidelines for alcohol and controlled substance use by drivers and testing by carriers.<sup>201</sup> 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.<sup>202</sup> 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.<sup>203</sup> Pursuant to this preemption provision, state and local governments may

---

194 49 C.F.R. § 391.51(b).

195 49 C.F.R. § 391.51(c).

196 49 C.F.R. § 391.65.

197 49 U.S.C. § 31303(b); 49 C.F.R. § 383.33.

198 49 U.S.C. § 31303(a); 49 C.F.R. § 383.31.

199 49 U.S.C. § 31304; 49 C.F.R. § 383.37(a)&(b).

200 49 U.S.C. § 31309.

201 49 C.F.R. § 382 *et. seq.*

202 49 C.F.R. § 382.103(a).

203 49 C.F.R. § 382.109(a).

not attempt to regulate the time and manner of a motor carrier's drug testing program.<sup>204</sup>

#### A. Use of Alcohol While On Duty

A driver cannot use alcohol within 4 hours of going on duty or being physically in control of or operating a commercial vehicle.<sup>205</sup> A driver may not possess wine, beer or distilled spirits while on duty or operating a commercial vehicle.<sup>206</sup> 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.<sup>207</sup> 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.<sup>208</sup>

A driver also cannot use alcohol while performing a safety sensitive function<sup>209</sup> 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.<sup>210</sup> 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.<sup>211</sup> A trucking company is prohibited from allowing a driver who has used alcohol within 4 hours,<sup>212</sup> is using alcohol,<sup>213</sup> or has an alcohol concentration of 0.04 or greater<sup>214</sup> 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.<sup>215</sup> 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.<sup>216</sup>

**\*\*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

---

204 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).

205 49 C.F.R. § 392.5(a)(1).

206 49 C.F.R. § 392.5(a).

207 49 C.F.R. § 392.5(b).

208 49 C.F.R. § 392.5(c).

209 49 C.F.R. § 382.205.

210 49 C.F.R. § 382.201.

211 49 C.F.R. § 382.107.

212 49 C.F.R. § 382.207.

213 49 C.F.R. § 382.205.

214 49 C.F.R. § 382.201.

215 49 C.F.R. § 382.505(a).

216 Minter v. Great American Insurance Co. of NY, 423 F.3d 460 (5<sup>th</sup> Cir. 2005).

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.<sup>217</sup> A motor carrier may require a driver to disclose any therapeutic drug use related to a medical condition.<sup>218</sup> A driver cannot report for duty, remain on duty or perform a safety sensitive function if he tests positive for controlled substances.<sup>219</sup> An employer is prohibited from allowing a driver who has used controlled substances<sup>220</sup> or tests positive for a controlled substance<sup>221</sup> 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.<sup>222</sup> 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.<sup>223</sup> 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.<sup>224</sup> 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.<sup>225</sup>

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.<sup>226</sup> 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.<sup>227</sup> 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

---

217 49 C.F.R. § 382.213(a).

218 49 C.F.R. § 382.213(c).

219 49 C.F.R. § 382.215.

220 49 C.F.R. § 382.213(b).

221 49 C.F.R. § 382.215.

222 49 C.F.R. § 382.601(a).

223 49 C.F.R. § 382.301(a).

224 49 C.F.R. § 382.301(a).

225 49 C.F.R. § 382.301(b).

226 49 C.F.R. § 382.301(c).

227 49 C.F.R. § 382.301(d)(1).

testing records from his primary employer every six months or must conduct its own testing of the driver.<sup>228</sup>

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.<sup>229</sup> This information must be reviewed by a carrier no later than 14 days after the first time a driver performs a safety-sensitive function.<sup>230</sup> 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.<sup>231</sup> 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.<sup>232</sup>

**\*\*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.<sup>233</sup> This reasonable suspicion must be based on the appearance, behavior, speech or body odor of the driver.<sup>234</sup> 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.<sup>235</sup> 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.<sup>236</sup> The supervisor must witness the alleged violation during, just preceding or just after the period of the workday.<sup>237</sup> The supervisor making the determination is prohibited from conducting the alcohol test on the driver.<sup>238</sup> 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.<sup>239</sup> If the carrier fails to conduct a test within eight hours, the carrier shall cease any attempts to complete the test.<sup>240</sup> 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

---

228 49 C.F.R. § 382.301(d)(2).

229 49 C.F.R. § 382.413(a)(1).

230 49 C.F.R. § 382.413(b).

231 49 C.F.R. § 382.413(c).

232 49 C.F.R. § 382.413(g).

233 49 C.F.R. § 382.307(a).

234 49 C.F.R. § 382.307.

235 49 C.F.R. § 382.307(c).

236 49 C.F.R. § 382.603.

237 49 C.F.R. § 382.307(d).

238 49 C.F.R. § 382.307(c).

239 49 C.F.R. § 382.307(e)(1).

240 49 C.F.R. § 382.307(e)(1).

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.<sup>241</sup>

A carrier must also conduct a controlled substance test if the carrier has a reasonable suspicion that a driver has used a controlled substance.<sup>242</sup> 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.<sup>243</sup> 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.<sup>244</sup> 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.<sup>245</sup>

**\*\*Practice Pointer:** If drug or alcohol use by a driver is an issue, make sure that a supervisor had training in reasonable suspicion testing to detect the driver's use before it became a problem.

#### 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.<sup>246</sup> The testing must be unannounced and the dates for administering the tests must be spread reasonably throughout the calendar year.<sup>247</sup>

#### 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.<sup>248</sup> 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.<sup>249</sup> 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.<sup>250</sup> The post-accident testing should occur as soon as practicable after the accident.<sup>251</sup> 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

---

241 49 C.F.R. § 382.307(e)(4).

242 49 C.F.R. § 382.307(b).

243 49 C.F.R. § 382.307(b).

244 49 C.F.R. § 382.307(c).

245 49 C.F.R. § 382.307(f).

246 49 C.F.R. § 382.305.

247 49 C.F.R. § 382.305(k).

248 49 C.F.R. § 382.303(a)(1).

249 49 C.F.R. § 382.303(a)(2).

250 49 C.F.R. § 382.107.

251 49 C.F.R. § 382.303(a).

substances.<sup>252</sup>

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.<sup>253</sup> If the alcohol test cannot be completed within eight hours, the carrier shall cease attempts to conduct the test.<sup>254</sup> 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.<sup>255</sup> 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.<sup>256</sup> 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.<sup>257</sup> 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.<sup>258</sup> A driver may not use alcohol for eight hours after an accident if he is required to take a post-accident alcohol test.<sup>259</sup>

#### Post-Accident Drug Test Paperwork

#### INSERT PICTURE OF POST ACCIDENT DRUG TEST

In this case, the driver tested positive for cocaine after the accident. This document shows the chain of custody of the specimen and the results.

**\*\*Practice Pointer:** Request all post-accident drug and alcohol test results and notations about the failure to perform post-accident testing. A court order is necessary to obtain the results.

#### 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.<sup>260</sup> 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.<sup>261</sup> 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)

---

<sup>252</sup> Wanke v. Lynn's Transportation Co, 836 F.Supp. 587 (N.D. Ind. 1993).

<sup>253</sup> 49 C.F.R. § 382.303(b).

<sup>254</sup> 49 C.F.R. § 382.303(b).

<sup>255</sup> 49 C.F.R. § 382.303(b)(4).

<sup>256</sup> 49 C.F.R. § 382.303(e).

<sup>257</sup> 49 C.F.R. § 382.303(c)-(d).

<sup>258</sup> 49 C.F.R. § 382.303(f).

<sup>259</sup> 49 C.F.R. § 382.209.

<sup>260</sup> 49 C.F.R. § 383.72.

<sup>261</sup> 49 C.F.R. § 382.211.

engages in conduct that clearly obstructs the testing process.<sup>262</sup>

## 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.<sup>263</sup> A driver may be terminated for failure to pass a drug or alcohol test<sup>264</sup> as long as the motor carrier's drug testing program meets federal specifications.<sup>265</sup> A carrier may retain an independent agency to perform the actual testing on the drivers. If the agency fails to conduct the testing in an appropriate manner, the carrier cannot be held liable for the agency's actions.<sup>266</sup> 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.<sup>267</sup>

## 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.<sup>268</sup> The driver must then be evaluated by a substance abuse professional to determine the kind of assistance needed for his rehabilitation.<sup>269</sup> 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.<sup>270</sup> The driver shall also be routinely evaluated by a substance abuse professional to make sure the driver complies with his treatment plan.<sup>271</sup> 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.<sup>272</sup> 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.<sup>273</sup> 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.<sup>274</sup>

## J. Retention & Disclosure of Records

---

<sup>262</sup> 49 C.F.R. § 382.107.

<sup>263</sup> 49 C.F.R. § 382.105.

<sup>264</sup> Exxon Corporation v. Esso Workers' Union, Inc., 118 F.3d 841 (1997).

<sup>265</sup> Reames v. Department of Public Works, 707 A.2d 1377 (N.J. Super. 1998).

<sup>266</sup> Carroll v. Federal Express Corporation, 113 F.3d 163 (9<sup>th</sup> Cir. 1997).

<sup>267</sup> 49 C.F.R. § 382.111.

<sup>268</sup> 49 C.F.R. § 382.605(a).

<sup>269</sup> 49 C.F.R. § 382.605(b).

<sup>270</sup> 49 C.F.R. § 382.311(a).

<sup>271</sup> 49 C.F.R. § 382.605(c)(2).

<sup>272</sup> 49 C.F.R. § 382.309(a).

<sup>273</sup> 49 C.F.R. § 382.309(b).

<sup>274</sup> 49 C.F.R. § 382.605(f).

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.<sup>275</sup> 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.<sup>276</sup> All records regarding the training of drivers and supervisors must be maintained during the time of their employment and for an additional two years.<sup>277</sup> Carriers are also required generally to maintain any documents (1) related to random drug testing, (2) generated in connection 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.<sup>278</sup> 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.<sup>279</sup>

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.<sup>280</sup> In a civil action, the results of a drug or alcohol test can only be released if the driver consents to production or if a court of competent jurisdiction determines the information sought is relevant and issues an order directing the company to produce the results.<sup>281</sup> The results may only be released with a binding stipulation that the documentation will only be made available to the parties to the litigation.<sup>282</sup>

## **V. Hours of Service Regulations**

### **A. 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

---

<sup>275</sup> 49 C.F.R. § 382.401(b)(1).

<sup>276</sup> 49 C.F.R. § 382.401(b)(3).

<sup>277</sup> 49 C.F.R. § 382.401(b)(4).

<sup>278</sup> 49 C.F.R. § 382.401(c).

<sup>279</sup> 49 C.F.R. § 382.403.

<sup>280</sup> 49 C.F.R. § 382.405.

<sup>281</sup> 49 C.F.R. § 40.323(a).

<sup>282</sup> 49 C.F.R. § 40.323(b).

drivers.<sup>283</sup> 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.<sup>284</sup> 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 and rescinded the old rules.<sup>285</sup> The new rules are currently in effect.<sup>286</sup>

## 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.<sup>287</sup> A driver cannot operate a commercial vehicle for any period after having been on duty 14 hours following 10 consecutive hours off-duty.<sup>288</sup> A driver carrying passengers cannot drive more than 10 hours following 8 consecutive hours off-duty or operate a commercial vehicle for any period after having been on duty 15 hours following 8 consecutive hours off-duty.<sup>289</sup> 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.<sup>290</sup> Any period of 34 consecutive off duty hours will reset the 7 or 8 consecutive days.<sup>291</sup> A driver with a sleeper berth in his vehicle must have at least 10 consecutive hours either in his sleeper berth or off duty or some combination of the two before beginning to drive.<sup>292</sup>

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

---

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

284 Pub. L. 108-310, 118 Stat. 1144.

285 49 C.F.R. § 395.0.

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

287 49 C.F.R. § 395.3(a).

288 49 C.F.R. § 395.3(a).

289 49 C.F.R. § 395.5(a).

290 49 C.F.R. § 395.3(b) & 395.5(b).

291 49 C.F.R. § 395.3(c).

292 49 C.F.R. § 395.1(g).

person or entity.<sup>293</sup> 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.<sup>294</sup> A motor carrier may not permit a driver to operate a commercial vehicle in violation of the maximum hours of service.<sup>295</sup>

**\*\*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.<sup>296</sup> 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.<sup>297</sup> 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.<sup>298</sup> The regulations also do not apply to drivers of commercial vehicles engaged solely in making local deliveries to the ultimate consumer during the Christmas holidays from December 10<sup>th</sup> to 25<sup>th</sup>,<sup>299</sup> and the transportation of agricultural commodities within a 100 mile radius during planting or harvesting seasons.<sup>300</sup>

**\*\*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.<sup>301</sup>

#### Driver's Log

**INSERT PICTURE OF DRIVERS LOG**

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."<sup>302</sup> The driver must

---

293 49 C.F.R. § 395.2.

294 49 C.F.R. § 395.1(j).

295 49 C.F.R. § 395.3.

296 49 C.F.R. § 395.1(b)(1).

297 49 C.F.R. § 395.1(b)(2).

298 49 C.F.R. § 395.1(c).

299 49 C.F.R. § 395.1(f).

300 49 C.F.R. § 395.1(k).

301 49 C.F.R. § 395.8(a)(1).

302 49 C.F.R. § 395.8(b).

identify the city, town or place where any change of status occurs.<sup>303</sup> In addition to completing the grid, the driver must identify the total miles driven per day and the total hours on duty.<sup>304</sup> The driver must complete all entries legibly and in his own handwriting.<sup>305</sup> The daily log must be forwarded to the trucking company within 13 days following completion of the form.<sup>306</sup> 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.<sup>307</sup>

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.<sup>308</sup> 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.<sup>309</sup> 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.<sup>310</sup> 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.<sup>311</sup>

A driver may use an automatic on-board recording device in lieu of handwritten logs provided the information is retrievable on demand.<sup>312</sup> A motor carrier must monitor its drivers to ensure compliance with the provisions regarding recording his duty status time.<sup>313</sup> 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.<sup>314</sup> 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.<sup>315</sup> However, driver's logs are not documents protected by the 5<sup>th</sup> Amendment privilege since the driver is required by law to maintain the logs.<sup>316</sup>

### Bill of Lading

---

303 49 C.F.R. § 395.8(c).

304 49 C.F.R. § 395.8(d).

305 49 C.F.R. § 395.8(e).

306 49 C.F.R. § 395.8(i).

307 49 C.F.R. § 395.1(e).

308 49 C.F.R. § 395.8(j)(2).

309 49 C.F.R. § 395.8(j)(1).

310 49 C.F.R. § 395.8(k)(1).

311 49 C.F.R. § 395.8(k)(2).

312 49 C.F.R. § 395.15.

313 49 C.F.R. § 395.8(a).

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

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

316 Id.

## INSERT BILL OF LADING PICTURE

We have used bills of lading to show that a driver's logs are inaccurate because the logs do not match the bills of lading.

**\*\*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.<sup>317</sup> 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.<sup>318</sup> 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.<sup>319</sup> A driver must notify the carrier within 24 hours of being placed out of service for such a violation.<sup>320</sup>

**\*\*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 FMCSR are applicable to all employers, employees, and commercial motor vehicles which transport property or passengers in interstate commerce.<sup>321</sup> 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 and circumstances surrounding the transportation scheme.<sup>322</sup> 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.<sup>323</sup> By statute, a State may require carriers involved in intrastate transportation or hauling exempt commodities to comply with the FMCSR.<sup>324</sup>

The FMCSR are minimum standards for commercial vehicles.<sup>325</sup> Every interstate motor carrier and driver must be familiar with and comply with the standards contained

---

317 49 C.F.R. § 395.13(b).

318 49 C.F.R. § 395.13(c)(1).

319 49 C.F.R. § 395.13(c)(1).

320 49 C.F.R. § 395.13(d)(3).

321 49 C.F.R. § 390.3(a).

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

323 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).

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

325 49 C.F.R. § 393.1(a).

in the FMCSR.<sup>326</sup> A motor carrier cannot allow a vehicle to be operated unless it meets the minimum standards set forth in the FMCSR.<sup>327</sup> Motor carriers are required to make sure all drivers comply with the provisions of the FMCSR.<sup>328</sup> No one can aid, abet, encourage or require a motor carrier or driver to violate the FMCSR.<sup>329</sup>

**\*\*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.<sup>330</sup> An entity engaged in a business other than transportation for hire does not have to comply with the FMCSR.<sup>331</sup> 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.<sup>332</sup>

#### 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, caruaba 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

---

326 49 C.F.R. § 393.1(b).

327 49 C.F.R. § 393.1(b).

328 49 C.F.R. § 390.11.

329 49 C.F.R. § 390.13.

330 49 U.S.C. § 13506; 49 C.F.R. § 372.101.

331 49 U.S.C. § 13505.

332 Ek v. Herrington, 939 F.2d 839 (9<sup>th</sup> Cir. 1991).

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.<sup>333</sup>

### 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.<sup>334</sup> States cannot pass any law, rule or regulation relating to rates, routes or services of any motor carrier<sup>335</sup> 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 cargo<sup>336</sup> and may also mandate minimum amounts of insurance in order to operate on state highways.<sup>337</sup>

### 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.<sup>338</sup> 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 breakdown of the vehicle.<sup>339</sup>

#### DOT Post-Accident Inspection

#### **INSERT DOT INSPECTION FORM**

In this case, the driver's brakes failed because they were out of adjustment.

FHWA inspectors must record the results of any Driver Equipment Compliance Check<sup>340</sup> and place an out-of-service sticker on any vehicle which fails an inspection.<sup>341</sup> A vehicle marked out-of-service may not be operated until all repairs required by the out-

---

333 49 C.F.R. § 372.115.

334 49 C.F.R. § 392.2.

335 49 U.S.C. § 14501(c).

336 49 U.S.C. § 14501.

337 49 U.S.C. § 14501.

338 49 C.F.R. § 396.7.

339 49 C.F.R. § 396.9(c).

340 49 C.F.R. § 396.9(b).

341 49 C.F.R. § 396.9(c)(1).

of-service notice have been satisfactorily completed.<sup>342</sup> No person may remove an out-of-service sticker prior to completion of the repairs required by the out-of-service notice.<sup>343</sup> A driver must deliver an inspection report at his next stop at the carrier's terminal or facility.<sup>344</sup> 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.<sup>345</sup> 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.<sup>346</sup>

#### 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.<sup>347</sup>

**\*\*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.<sup>348</sup> A driver must also inspect and be satisfied that all emergency equipment is working properly.<sup>349</sup> 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.<sup>350</sup>

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.<sup>351</sup>

#### Daily Inspection Report

**INSERT PICTURE Daily Inspection Report**

---

342 49 C.F.R. § 396.9(c).

343 49 C.F.R. § 396.9(c)(3).

344 49 C.F.R. § 396.9(d).

345 49 C.F.R. § 396.9(d).

346 49 C.F.R. § 396.9(3).

347 49 C.F.R. § 392.6.

348 49 C.F.R. § 392.7.

349 49 C.F.R. § 392.8.

350 49 C.F.R. § 396.13.

351 49 C.F.R. § 396.11(a).

The Daily Inspection Report is usually on the back of the Driver's Log in the logbook.

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.<sup>352</sup> The driver must sign the report and must complete a report for each vehicle operated during the workday.<sup>353</sup> 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.<sup>354</sup> 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.<sup>355</sup>

**\*\*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.<sup>356</sup>

##### Annual Inspection

##### **INSERT PICTURE Annual Inspection**

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.<sup>357</sup> 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.<sup>358</sup> 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.<sup>359</sup>

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

#### H. Accident Register

---

352 49 C.F.R. § 396.11(b).

353 49 C.F.R. § 396.11(b).

354 49 C.F.R. § 396.11(c).

355 49 C.F.R. § 396.11(c)(2).

356 49 C.F.R. § 396.17(c).

357 49 C.F.R. § 396.17(d)-(e).

358 49 C.F.R. § 396.23.

359 49 C.F.R. § 396.25.

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.<sup>360</sup> The accident register must contain the following information 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.<sup>361</sup> 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.<sup>362</sup>

**\*\*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.<sup>363</sup> The cargo must be immobilized or secured to prevent shifting to the extent that the vehicle's stability or maneuverability is affected.<sup>364</sup> 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.<sup>365</sup> 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.<sup>366</sup> Articles of cargo that are likely to roll must be restrained by chocks, wedges, a cradle or equivalent means to prevent rolling.<sup>367</sup> Federal regulations provide for specific means of securing logs,<sup>368</sup> building products,<sup>369</sup> metal coils,<sup>370</sup> paper rolls,<sup>371</sup> concrete pipes,<sup>372</sup> intermodal containers,<sup>373</sup> automobiles,<sup>374</sup> heavy equipment,<sup>375</sup> crushed vehicles,<sup>376</sup> and boulders.<sup>377</sup> 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.<sup>378</sup> 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

---

360 49 C.F.R. § 390.15(b).

361 49 C.F.R. § 390.15(b).

362 49 C.F.R. § 390.15(b).

363 49 C.F.R. § 393.100(b).

364 49 C.F.R. § 393.100(c).

365 49 C.F.R. § 393.104(b).

366 49 C.F.R. § 393.106(b).

367 49 C.F.R. § 393.106(c).

368 49 C.F.R. § 393.116.

369 49 C.F.R. § 393.118.

370 49 C.F.R. § 393.120.

371 49 C.F.R. § 393.122.

372 49 C.F.R. § 393.124.

373 49 C.F.R. § 393.126.

374 49 C.F.R. § 393.128.

375 49 C.F.R. § 393.130.

376 49 C.F.R. § 393.132.

377 49 C.F.R. § 393.136.

378 49 C.F.R. § 393.114(d).

with a red or orange fluorescent warning flag.<sup>379</sup> If the projecting load is 2 feet in width or less, then only one flag is required at the extreme rear of the load.<sup>380</sup> If the projecting 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.<sup>381</sup>

## 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.<sup>382</sup> 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.<sup>383</sup> 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.<sup>384</sup> 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.<sup>385</sup>

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.<sup>386</sup> 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.<sup>387</sup> 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.<sup>388</sup> 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 driver<sup>389</sup> and whether the driver is given assurances by the shipper's employees that there is no defect in the loading of the cargo.<sup>390</sup> A motor carrier cannot be held liable for improperly loading a sealed trailer since the driver does not have the opportunity to

---

379 49 C.F.R. § 393.87.

380 49 C.F.R. § 393.87(b).

381 49 C.F.R. § 393.87(b).

382 49 C.F.R. § 392.9(a).

383 49 C.F.R. § 392.9(b)(2).

384 49 C.F.R. § 392.9(b)(3).

385 49 C.F.R. § 392.9(b)(4).

386 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).

387 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).

388 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).

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

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

inspect the load.<sup>391</sup> 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 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.<sup>392</sup>

**\*\*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.<sup>393</sup> Liquid-burning flares, fuseses, 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.<sup>394</sup> 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.<sup>395</sup>

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.<sup>396</sup> 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.<sup>397</sup> 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.<sup>398</sup> 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.<sup>399</sup> The requirements for activating flashers and placing warning markers is not applicable to business and residential districts during daylight hours.<sup>400</sup>

### Warning Triangles

---

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

392 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).

393 49 C.F.R. § 393.95(f)(2).

394 49 C.F.R. § 393.95(g).

395 49 C.F.R. § 392.22(a).

396 49 C.F.R. § 392.22(b)(1).

397 49 C.F.R. § 392.22(b)(2).

398 49 C.F.R. § 392.22(b)(2).

399 49 C.F.R. § 392.22(b)(2).

400 Merzigan v. Sunbury Transport, Ltd., 523 F.Supp.2d 116 (D.Mass. 2007).

## INSERT PICTURE OF WARNING DEVICES

Most truck drivers use warning triangles to alert a motorist approaching from the rear.

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.<sup>401</sup> A lighted fusee or other flame-producing emergency signal cannot be attached to any part of the commercial vehicle.<sup>402</sup> Flame 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.<sup>403</sup>

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.<sup>404</sup> 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.<sup>405</sup> 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.<sup>406</sup> 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.<sup>407</sup>

**\*\*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.<sup>408</sup> All lighting devices required on vehicles must be capable of being operated at all times.<sup>409</sup> 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

---

401 49 C.F.R. § 392.22(b)(2).

402 49 C.F.R. § 392.24.

403 49 C.F.R. § 392.25.

404 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 (7<sup>th</sup> Cir. 1980); Bruno v. Jackson, 2005 WL 1240979 (M.D. Pa.).

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

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

407 Heatherly v. Alexander, 421 F.3d 638 (8<sup>th</sup> Cir. 2005).

408 49 C.F.R. § 393.24.

409 49 C.F.R. § 393.9.

conditions.<sup>410</sup> Reflectors must be applied to the side and rear of the trailer.<sup>411</sup> The required lamps and reflectors may not be obscured by the tailboard, by any part of the load, by dirt or otherwise.<sup>412</sup>

Retroreflective sheeting must be applied to each side of a trailer from as close to the front and rear as practicable.<sup>413</sup> 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.<sup>414</sup> Every vehicle must be equipped with a hazard warning signal that will cause all turn signals to flash simultaneously as a hazard warning when necessary.<sup>415</sup> The wiring for the electrical system must comply with all applicable engineering standards.<sup>416</sup> 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.<sup>417</sup>

### Retroreflective Taping

#### INSERT RETROREFLECTIVE TAPING

Retroreflective taping is supposed to reflect headlights to warn approaching motorists of the trailer in the roadway.

**\*\*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.<sup>418</sup> Each vehicle must meet applicable service, parking and emergency brake system requirements.<sup>419</sup> 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.<sup>420</sup> The driver of an agricultural commodity trailer or pulpwood trailer must carry chocking blocks sufficient to prevent movement when the trailer is parked.<sup>421</sup> Every commercial vehicle must have brakes on all wheels<sup>422</sup> and have an emergency braking system sufficient to stop a breakaway trailer

---

410 49 C.F.R. § 393.25.

411 49 C.F.R. § 393.13(d).

412 49 C.F.R. § 392.33 & 393.9(b).

413 49 C.F.R. § 393.13(c).

414 49 C.F.R. § 393.13(c)(2)-(3).

415 49 C.F.R. § 393.19.

416 49 C.F.R. § 393.28.

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

418 49 C.F.R. § 393.40(a).

419 49 C.F.R. § 393.40(a).

420 49 C.F.R. § 393.41(a).

421 49 C.F.R. § 393.41(a).

422 49 C.F.R. § 393.42.

independent of brake air, hydraulics and other pressure and controls.<sup>423</sup>

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.<sup>424</sup> All connections for air, vacuum or hydraulic braking must be secure and free of leaks, constrictions or other defects.<sup>425</sup> 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.<sup>426</sup> The pushrod travel cannot exceed 80% of the rated stroke listed by the chamber manufacturer.<sup>427</sup> The reservoirs in the braking system must maintain adequate air pressure.<sup>428</sup> All brakes must be capable of operating at all times.<sup>429</sup> A vehicle must be equipped with a pressure gauge for the brake system, and a signal that provides a warning to the driver when a failure occurs in the vehicle's service brake system.<sup>430</sup> Automatic adjusting brakes are required to have an out-of-adjustment indicator light which activates if the brakes are out of adjustment.<sup>431</sup> The service brakes must be capable of generating a percentage of braking force and stopping distance in relation to the weight of the vehicle.<sup>432</sup>

A carrier can be held liable for an accident which occurs because a vehicle's brakes have not been properly maintained<sup>433</sup> or because the brakes do not meet the minimum braking force requirements.<sup>434</sup> 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.<sup>435</sup> 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.<sup>436</sup>

**\*\*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

---

423 49 C.F.R. § 393.43.

424 49 C.F.R. § 393.45.

425 49 C.F.R. § 393.45(d).

426 49 C.F.R. § 393.47.

427 49 C.F.R. § 393.47(e).

428 49 C.F.R. § 393.50.

429 49 C.F.R. § 393.48(a).

430 49 C.F.R. § 393.51(a).

431 49 C.F.R. § 393.53.

432 49 C.F.R. § 393.52.

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

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

435 Burrows v. Core-Mark International, Inc., 54 F.3d 785 (9<sup>th</sup> Cir. 1995).

436 Id.

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.<sup>437</sup> 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,<sup>438</sup> and the bottom edge of the guard must be less than 22 inches from the ground<sup>439</sup> with the guard itself within 12 inches of the rear extremity of the trailer.<sup>440</sup> 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.<sup>441</sup> The rear impact guard must be substantially constructed and attached by means of bolts, welding, or other comparable means.<sup>442</sup> If the rear impact guard breaks in a rear-end collision, then the carrier can be held liable for improper welding and attachment of the guard and aggravation of the claimant's injuries resulting from the vehicle going under the trailer.<sup>443</sup>

### Rear Guard

**INSERT PICTURE OF REAR GUARD from Internet**

The rear guard is designed to keep a vehicle from traveling under the trailer in a rear end collision.

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.<sup>444</sup> 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.<sup>445</sup> 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.<sup>446</sup>

**\*\*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.

---

437 49 C.F.R. § 393.86.

438 49 C.F.R. § 393.86(a)(2).

439 49 C.F.R. § 393.86(a)(3).

440 49 C.F.R. § 393.86(a)(4).

441 49 C.F.R. § 393.86(b)(1).

442 49 C.F.R. § 393.86(b)(2).

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

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

445 *Id.*

446 *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).

## 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.<sup>447</sup> No device may be mounted on the windshield lower than 6 inches below the upper edge of the windshield.<sup>448</sup> Decals must be placed within 4 inches of the bottom of the windshield.<sup>449</sup>

Every commercial vehicle must be equipped with a windshield wiping system with at least two windshield wiper blades.<sup>450</sup> 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.<sup>451</sup> 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.<sup>452</sup>

## P. Fuel Systems

Liquid fuel tanks must comply with construction guidelines and meet pressure and performance requirements.<sup>453</sup> 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.<sup>454</sup> 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.<sup>455</sup> 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.<sup>456</sup> 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.<sup>457</sup>

## Q. Frames, Axles & Steering Systems

The frame of any commercial vehicle cannot be cracked, loose, sagging or broken.<sup>458</sup> Bolts or brackets securing the cab or the body of the vehicle to the frame

---

447 49 C.F.R. § 393.60(d).

448 49 C.F.R. § 393.60(e)(1).

449 49 C.F.R. § 393.60(e)(2).

450 49 C.F.R. § 393.78(a).

451 49 C.F.R. § 393.79.

452 49 C.F.R. § 393.80(a).

453 49 C.F.R. § 393.67.

454 49 C.F.R. § 393.65.

455 49 C.F.R. § 392.50.

456 49 C.F.R. § 392.50.

457 49 C.F.R. § 392.66(a).

458 49 C.F.R. § 393.201(a).

cannot be loose, broken or missing.<sup>459</sup> The cab compartment doors or door parts used as an entrance or exit cannot be missing or broken or wired shut.<sup>460</sup> 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.<sup>461</sup> Wheels and rims cannot be cracked or broken and no nuts or bolts may be missing or loose.<sup>462</sup> No axle positioning part can be cracked, broken, loose, missing or out of alignment.<sup>463</sup> 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.<sup>464</sup> 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.<sup>465</sup> 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.<sup>466</sup>

The steering wheel must be secured and cannot have any spokes cracked through or missing.<sup>467</sup> The steering column must be securely fastened and universal joints cannot be worn, faulty or repaired by welding.<sup>468</sup> All components of the power steering system must be in operating condition and have sufficient fluid in the reservoir.<sup>469</sup>

## 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.<sup>470</sup> 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.<sup>471</sup> 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.<sup>472</sup> 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.<sup>473</sup>

---

459 49 C.F.R. § 393.201(b).

460 49 C.F.R. § 393.203(a).

461 49 C.F.R. § 393.203(c) & (e).

462 49 C.F.R. § 393.205.

463 49 C.F.R. § 393.207(a).

464 49 C.F.R. § 393.207(b)-(e).

465 49 C.F.R. § 393.207(f).

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

467 49 C.F.R. § 393.209(a).

468 49 C.F.R. § 393.209(c) & (d).

469 49 C.F.R. § 393.209(e).

470 49 C.F.R. § 393.70(a).

471 49 C.F.R. § 393.70(b).

472 49 C.F.R. § 393.70(c).

473 49 C.F.R. § 393.70(d).

**\*\*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.<sup>474</sup> 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.<sup>475</sup> 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.<sup>476</sup> Motor vehicles cannot be operated with loads that exceed a weight greater than the tire's capacity.<sup>477</sup>

**\*\*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.<sup>478</sup> 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.<sup>479</sup> 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.<sup>480</sup> No motor carrier shall allow a driver to operate a motor vehicle that is equipped with a radar detector.<sup>481</sup>

**\*\*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.<sup>482</sup> Every vehicle must be equipped with a horn in such a condition as to give an adequate and reliable warning

---

474 49 C.F.R. § 393.75(a).

475 49 C.F.R. § 393.75(b).

476 49 C.F.R. § 393.75(c).

477 49 C.F.R. § 393.75(f).

478 49 C.F.R. § 393.82.

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

480 49 C.F.R. § 392.71(a).

481 49 C.F.R. § 392.71(b).

482 49 C.F.R. § 393.76(h).

signal.<sup>483</sup> 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.<sup>484</sup> 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.<sup>485</sup>

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.<sup>486</sup> The noise level within the interior of the vehicle cannot exceed 90 decibels.<sup>487</sup> Every power unit must be equipped with a fire extinguisher that is properly filled and located so that it is readily accessible for use.<sup>488</sup> Each commercial vehicle must be equipped with a seatbelt.<sup>489</sup> A driver must be properly restrained with a seat belt when operating a commercial vehicle.<sup>490</sup> No open flame heater may be used while the vehicle is in motion.<sup>491</sup> Every motor vehicle must be properly lubricated and free of oil and grease leaks.<sup>492</sup>

## V. Crossing Railroad Tracks

A driver may not shift gears while crossing railroad tracks.<sup>493</sup> 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.<sup>494</sup> 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."<sup>495</sup> 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.<sup>496</sup>

---

483 49 C.F.R. § 393.81.

484 49 C.F.R. § 393.83(a).

485 49 C.F.R. § 393.84.

486 49 C.F.R. § 393.88.

487 49 C.F.R. § 393.94(b).

488 49 C.F.R. § 393.95(a).

489 49 C.F.R. § 393.93.

490 49 C.F.R. § 392.16.

491 49 C.F.R. § 392.67.

492 49 C.F.R. § 396.5.

493 49 C.F.R. § 392.10(a).

494 49 C.F.R. § 392.10(a).

495 49 C.F.R. § 392.10(b).

496 49 C.F.R. § 392.11.

## 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.<sup>497</sup> Speed must be reduced when such conditions exist, and the operation of the vehicle must be discontinued if conditions become sufficiently dangerous.<sup>498</sup> 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.<sup>499</sup> Federal regulations governing driving in adverse weather conditions set the standard of care for a commercial driver.<sup>500</sup> A driver who is involved in an accident during inclement weather is held to the standard of extreme care because of the regulations governing driving in adverse weather conditions.<sup>501</sup>

**\*\*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.<sup>502</sup> 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.<sup>503</sup> 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.<sup>504</sup>

**\*\*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.<sup>505</sup> A vehicle transporting hazardous materials of any kind cannot be operated near an open fire unless the driver has first taken precautions to

---

497 49 C.F.R. § 392.14.

498 49 C.F.R. § 392.14.

499 49 C.F.R. § 392.14.

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

501 Crooks v. Sammons Trucking, Inc., 2001 WL 1654986 (Cal. 2001); Kimberlin v. PM Transport, Inc., 563 S.E.2d 665 (Va. 2002); Fisher v. Swift Transportation Co., Inc., 181 P.3d 601 (Mt. 2008).

502 49 C.F.R. § 392.60(a).

503 49 C.F.R. § 392.60(a).

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

505 49 C.F.R. § 397.3.

ascertain that the vehicle can pass safely without stopping.<sup>506</sup> A vehicle transporting hazardous materials cannot be parked within 300 feet of an open fire.<sup>507</sup> No person may smoke or carry a lighted cigarette within 25 feet of a motor vehicle containing flammable or explosive materials.<sup>508</sup> 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.<sup>509</sup>

A driver transporting hazardous materials must examine the tires at the beginning of the trip and each time the vehicle is parked.<sup>510</sup> 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.<sup>511</sup> If a 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.<sup>512</sup>

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.<sup>513</sup> States may designate certain routes for the transportation of non-radioactive hazardous material (NRHM)<sup>514</sup> and carriers shall comply with the State designations in transporting NRHM loads.<sup>515</sup>

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.<sup>516</sup> 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.<sup>517</sup>

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.<sup>518</sup> 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.<sup>519</sup> The vehicle cannot be parked within 5 feet of the travel portion of a public street

---

506 49 C.F.R. § 397.11.

507 49 C.F.R. § 397.11.

508 49 C.F.R. § 397.13.

509 49 C.F.R. § 397.15.

510 49 C.F.R. § 397.17(a).

511 49 C.F.R. § 397.17(b).

512 49 C.F.R. § 397.17(c).

513 49 C.F.R. § 397.19.

514 49 C.F.R. § 397.71.

515 49 C.F.R. § 397.67.

516 49 C.F.R. § 397.5(a) & (b).

517 49 C.F.R. § 397.7(a).

518 49 C.F.R. § 397.5(c).

519 49 C.F.R. § 397.5(d).

or highway except for brief periods when the necessities of operation require the vehicle to be parked in such a manner.<sup>520</sup>

## 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.<sup>521</sup> 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.<sup>522</sup> Buses may not have any seat that is not securely fastened to the vehicle.<sup>523</sup> 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 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.<sup>524</sup>

Buses are required to have push-out windows or emergency exits.<sup>525</sup> 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.<sup>526</sup> These provisions do not apply to the transportation of prisoners.<sup>527</sup>

## 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.<sup>528</sup> A carrier of certain hazardous materials must have insurance or a bond in the amount of \$5 million dollars in liability coverage.<sup>529</sup> 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.<sup>530</sup> The minimum insurance requirements do not apply to reform excess or umbrella insurance policies.<sup>531</sup>

---

<sup>520</sup> 49 C.F.R. § 397.7(b).

<sup>521</sup> 49 C.F.R. § 393.90.

<sup>522</sup> 49 C.F.R. § 393.90.

<sup>523</sup> 49 C.F.R. § 393.91.

<sup>524</sup> 49 C.F.R. § 392.62.

<sup>525</sup> 49 C.F.R. § 393.62.

<sup>526</sup> 49 C.F.R. § 393.62(e).

<sup>527</sup> 49 C.F.R. § 393.62(f).

<sup>528</sup> 49 C.F.R. § 387.9.

<sup>529</sup> 49 C.F.R. § 387.9.

<sup>530</sup> Sonoco Products Co., Ins. v. Fire & Casualty Ins. Co. of Connecticut, 767 A.2d 1018 (N.J. 2001).

<sup>531</sup> Id.

## B. The MCS-90 Endorsement

The MCS-90 endorsement is required to be part of any insurance policy issued to a motor carrier in order to comply with federal minimum insurance requirements.<sup>532</sup> 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 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.”<sup>533</sup>

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.<sup>534</sup> 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.<sup>535</sup> 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.<sup>536</sup> 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

---

<sup>532</sup> 49 C.F.R. § 387.15.

<sup>533</sup> 49 C.F.R. § 387.15.

<sup>534</sup> Canal Insurance Co. v. Carolina Casualty Insurance Co., 59 F.3d 281 (1<sup>st</sup> Cir. 1995); T.H.E. Insurance Co. v. Larsen Intermodal Services, Inc., 242 F.3d 667 (5<sup>th</sup> Cir. 2001).

<sup>535</sup> Adams v. Royal Indemnity Co., 99 F.3d 964 (10<sup>th</sup> Cir. 1996).

<sup>536</sup> Harco National Insurance Co. v. Bobac Trucking, Inc., 107 F.3d 733 (9<sup>th</sup> Cir. 1997).

not listed as a scheduled auto.<sup>537</sup> The responsibility is on the motor carrier, and not the insurer, to obtain the endorsement, and the insurance contract cannot be reformed to include the MCS-90 if the motor carrier did not request it.<sup>538</sup>

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 users<sup>539</sup> or drivers even if the drivers are employees of the carrier.<sup>540</sup> 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.<sup>541</sup>

In 2005, the FMCSA issued an advisory opinion attempting to limit the scope of the MCS-90 endorsement.<sup>542</sup> 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,<sup>543</sup> but does apply to the transportation of an exempt commodity in interstate commerce.<sup>544</sup> 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.<sup>545</sup> An insurer cannot in good faith refuse to pay a

---

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

538 Illinois Central Railroad Co. v. DuPont, 326 F.3d 665 (5<sup>th</sup> Cir. 2003).

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

540 Perry v. Harco National Insurance Co., 129 F.3d 1072 (9<sup>th</sup> Cir. 1997).

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

542 70 FR 58065-01.

543 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).

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

545 Canal Insurance Co. v. First General Insurance Co., 889 F.2d 604 (5<sup>th</sup> Cir. 1989); Occidental Fire & Casualty Co. of N.C. v. International Insurance Co., 804 F.2d 983 (7<sup>th</sup> Cir. 1986); John Deere Insurance Co.

judgment against a trucking company when the MCS-90 endorsement is part of the policy.<sup>546</sup>

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.<sup>547</sup> State 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.<sup>548</sup>

**\*\*Practice Pointer:** If there are any coverage defenses, try to utilize the MCS-90 endorsement to pursue a recovery.

### 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.).”<sup>549</sup> A failure to follow this procedure will result in the policy remaining in effect despite the insurer’s intent to cancel the policy.<sup>550</sup>

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.<sup>551</sup> 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.<sup>552</sup>

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.<sup>553</sup> If the insured is engaged solely in intrastate commerce or the insured tells the insurer that it is not

v. Truckin’ USA, 122 F.3d 270 (5<sup>th</sup> Cir. 1997).

<sup>546</sup> Canal Insurance Co. v. Distribution Services, Inc., 176 F.Supp.2d 559 (E.D. Va. 2001).

<sup>547</sup> Ross v. Stephens, 496 S.E.2d 705 (Ga. 1998).

<sup>548</sup> Id.

<sup>549</sup> 49 C.F.R. § 387.15.

<sup>550</sup> Luizzi v. Pro Transport, Inc., 548 F.Supp.2d 1 (E.D.N.Y. 2008).

<sup>551</sup> 49 C.F.R. § 387.313(d).

<sup>552</sup> 49 C.F.R. § 387.313(e).

<sup>553</sup> DeHart v. Liberty Mutual Insurance Co., 169 F.3d 727 (11<sup>th</sup> Cir. 1999).

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.<sup>554</sup> 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.<sup>555</sup>

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

#### D. Trailer Policies

The owner of a trailer may have a policy of liability insurance providing coverage to a driver as a permissive user.<sup>556</sup> Even if the tractor and trailer are insured under the same policy, there may be separate limits of coverage for both the tractor and trailer (i.e. \$1 million of coverage on each for a total of \$2 million).<sup>557</sup> When the trailer owner is different than the tractor owner, the MCS-90 endorsement on a liability policy covering the trailer may be used to create an additional recovery up to the federal statutory minimum including an expansion of the definition of a permissive user found in the policy to include both the driver and the owner of the tractor.<sup>558</sup>

**\*\*Practice Pointer:** If there is an issue about the amount of coverage, review the trailer policy to determine if it provides extra coverage.

#### E. Lessor's Insurance

The lessor/owner of a tractor-trailer may purchase liability insurance to cover its vehicles even though the vehicles are leased to and operated by another company. The policy issued to the lessor/owner may provide coverage to a permissive driver as an additional insured under the policy even though the lessor/owner has no role in the transportation process and is not vicariously liable for the driver's conduct.<sup>559</sup> Depending on the situation, the lease agreement may limit the amount of coverage provided to the driver.<sup>560</sup>

#### F. Non-Trucking/Bobtail Policies

An owner of a tractor may purchase non-trucking/bobtail coverage. This

---

<sup>554</sup> Howard v. Quality Xpress, Inc., 989 P.2d 896 (N.M. 1999).

<sup>555</sup> Canal Insurance Co. v. Insurance Co. of North America, 424 So.2d 749 (Fla. 1982).

<sup>556</sup> Wilshire Insurance Co. v. Sentry Select Insurance Co., 124 Cal.App.4th (2004); LaFleur v. AFTCO Enterprises, Inc., 927 So.2d 1200 (La. 2006).

<sup>557</sup> Auto-Owners Insurance Co. v. Anderson, 756 So.2d 29 (Fla. 2000). But See Canal Insurance Co. v. Blankenship, 129 F.Supp.2d 950 (S.D.W.Va. 2001).

<sup>558</sup> Lynch v. Yob, 768 N.E.2d 1158 (Ohio 2002).

<sup>559</sup> LaFleur v. AFTCO Enterprises, Inc., 927 So.2d 1200 (La. 2006); Stan Koch & Sons Trucking, Inc. v. Great West Casualty Co., 517 F.3d 1032 (8th Cir. 2008).

<sup>560</sup> Cotton v. Commodore Express, Inc., 459 F.3d 862 (8th Cir. 2006).

coverage is intended to provide insurance when the tractor is not being operated in the business of or under dispatch from a trucking company, and the policy usually contains an exclusion to this effect. Most courts have upheld this exclusion as valid.<sup>561</sup> The reason that the exclusion does not violate public policy is because the federal scheme does not allow the driver to drive in an out of coverage. The trucking liability policy covers the driver when he is driving on the business of a trucking company and the non-trucking/bobtail coverage provides coverage in all other circumstances. There is no gap in coverage. At least one jurisdiction has found that the exclusion violates public policy but limits the amount of coverage to the state statutory minimum.<sup>562</sup> Most courts take a very expansive view of the phrase “in the business of” and hold that a truck is in the business of the trucking company until (1) returns to the place where the haul originated; (2) returns to the terminal from which the haul was dispatched, or (3) returns to the terminal from which the driver customarily is assigned hauls.<sup>563</sup> As such, non-trucking/bobtail policies rarely provide coverage for a loss.

#### G. Commercial General Liability Policies

Commercial General Liability (“CGL”) policies are generally obtained by businesses to insure against injuries occurring on a business premises. The CGL policy typically has an exclusion for any injuries related to automobiles, including the unloading and loading of vehicles. Because of the auto exclusion, CGL policies usually do not provide coverage for a tractor-trailer accident even if it occurs on a business premises.<sup>564</sup> Even if negligent hiring or retention is alleged, the auto exclusion will exclude coverage for the loss.<sup>565</sup>

#### H. 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.<sup>566</sup>

#### I. 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.<sup>567</sup> 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

<sup>561</sup> Integral Insurance Co. v. Maersk Container Service Co., 520 N.W.2d 656 (Mich. 1994); Connecticut Indemnity Co. v. Podeszwa, 921 A.2d 458 (N.J. 2007).

<sup>562</sup> Connecticut Indemnity Co. v. Hines, 40 A.D.3d 903 (N.Y. 2007).

<sup>563</sup> St. Paul Fire & Marine Ins. v. Frankhart, 370 N.E.2d 1058 (Ill. 1977); Auto-Owners Insurance Co. v. Redland Insurance Co., 522 F.Supp.2d 891 (W.D.Mich. 2007).

<sup>564</sup> Strickland v. Auto-Owners Insurance Co., 615 S.E.2d 808 (Ga. 2005); Federal Insurance Co. v. New Coal Co., Inc., 415 F.Supp.2d 647 (W.D.Va. 2006).

<sup>565</sup> Howell v. Ferry Transportation, Inc., 929 So.2d 226 (La. 2006).

<sup>566</sup> Guinn Transport, Inc. v. Canal Insurance Co., 507 S.E.2d 144 (Ga. 1998).

<sup>567</sup> See O.C.G.A. § 46-7-12.1.

could not obtain authority to operate in interstate commerce without filing its proof of insurance.<sup>568</sup>

### Certificate of Insurance

### INSERT PICTURE PROOF OF INSURANCE

This form is filed with the federal or state government as proof of financial responsibility.

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

## VIII. Types of Trucking Cases

Each trucking case, like each automobile collision, is different. But trucking cases can be categorized into certain types that have similar issues. There are six general types of trucking cases: (1) Left Turns; (2) Underrides; (3) Stopped Trucks; (4) Rear End Collisions; (5) Improper Manuevers; and (6) Cargo Shifts.

### A. Left Turns

When a truck turns left in front of a passenger vehicle, the truck driver must have ample time to complete the turn without the passenger vehicle having to slam on brakes to avoid a collision. Because of the size and length of the tractor trailer and the heavily trafficked areas where deliveries are made, the truck driver must be patient and cautious before making a left turn. Many times drivers are in a hurry and attempt a left turn when they know the only way the turn can be safely made is if the approaching driver slows down and stops to avoid a collision. This kind of maneuver often leads to catastrophic results.

In left turn cases, driver fatigue is usually not an issue. The driver may have been distracted or inattentive but the fact that he was actually making a maneuver at the time of the accident is indicative that he was not asleep. Similarly, there are rarely problems with maintenance or repair of the vehicle since braking is not an issue. Instead, the driver will be subject to heavy cross-examination on the appropriateness of his maneuver given the instructions contained in the CDL Manual. There also may be issues of negligent hiring and retention if the driver has a history of improper maneuvers or accidents.

### B. Underrides

When a tractor-trailer makes a turn or a maneuver which causes the trailer to block the roadway, there is always the potential that the driver of a passenger vehicle will not see the trailer in time to stop and will ride under the trailer. These collisions are usually fatal as the driver is decapitated by the side of the trailer.

---

<sup>568</sup> Jackson v. Sluder, 569 S.E.2d 893 (Ga. 2002).

## Underride Accident

### INSERT UNDERRIDE PICTURE

In this case, our client was catastrophically injured when a trailer was left across a roadway in heavy fog.

The most important issue in an underride case is the visibility of the trailer. The inquiry should focus on the lighting and weather conditions at the time of the accident and the lights, reflectors and retroreflective taping on the side of the trailer. It is important to photograph and perform an inspection of the trailer as soon as possible. Many times the trailer will have retroreflective taping on the side but there will be dirt or other material obscuring the taping. Conspicuity issues include the ability of the trailer to blend into the surroundings so that the approaching driver does not recognize the trailer across the roadway and instead believes he is seeing the bridge or overpass that is normally in that area.

### Conspicuity Issues

### INSERT BRIDGE PICTURE

A driver may fail to recognize a trailer in the roadway in the dark because it looks like the bridges or overpasses in the area that are familiar to the driver.

## C. Stopped Trucks

A tractor-trailer that is stopped in or on the side of the roadway is always a potential hazard. Motorists approaching from the rear often fail to see the vehicle until it is too late to avoid a collision. Federal regulations require drivers to place warning markers behind their stopped vehicle to alert motorists of the tractor-trailer's presence in order to alleviate the risk of running into the rear of the stopped trailer.

### Warning Triangles

### INSERT WARNING MARKERS PICTURE

We have handled many cases where the truck driver's failure to place warning markers contributed to a motorist colliding with the rear of the trailer.

The issue in colliding with a stopped truck case is how long the vehicle had been stopped and whether the markers had been placed appropriately. Under the FMCSR, the driver should immediately activate his hazard lights and then place caution markers behind his vehicle once he is stopped. The driver will inevitably claim he had just stopped his vehicle prior to the collision and did not have time to place the warning markers. It is important to obtain cellphone records, 911 call reports and Qualcomm messages to

determine how long the driver was stopped in the roadway.

#### D. Rear End Collisions

The most prevalent type of truck case is where the tractor-trailer rear ends a stopped or slowing passenger vehicle. In this situation, the lawyer is faced with a multitude of potential issues. The truck driver may have fallen asleep or been fatigued so his drivers logs must reviewed for potential hours of service violations. The tractor-trailer may have been overweight. The truck driver's weight tickets must be obtained to see if the weight of the vehicle played any role in the accident and his prior history of overweight citations must be looked at to see any pattern of abuse. The tractor-trailer's brakes may have failed or may have been out of adjustment so the vehicle needs to be inspected and repair and maintenance records must be reviewed. The truck driver may have been speeding and ECM data or a good accident reconstructionist can show whether speed was a contributing cause to the collision.

#### E. Improper Manuevers

Many accidents occur when the truck driver makes an improper lane change, fails to obey a stop light or stop sign or fails to maintain his lane. These cases often involve driver fatigue issues, and the lawyer needs to explore any potential hours of service violations. The driver may have a history of traffic violations and erratic maneuvers which will lead to a claim for negligent hiring or retention. The lawyer will need to retain an accident reconstructionist to examine the scene and inspect the vehicles to make sure the evidence is preserved to prove how the accident occurred.

#### F. Cargo Shifts

When a vehicle is improperly loaded, the load may shift causing the tractor-trailer to jackknife or overturn. The truck driver will usually tell the investigating officer that something unusual with the load caused the vehicle to behave strangely leading to the accident. In such a situation, the lawyer should consider a claim against both the motor carrier and the shipper. It is important to preserve through photographs and otherwise any evidence about how the load was secured.

### **IX. 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 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. A sample spoliation letter is contained in the Appendix, XI-1. 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.

#### ECM Downloaded Data

#### **INSERT PICTURE OF ECM Data**

When there is a hard braking event, the ECM will record speeds for 1 to 2 minutes prior to the braking, and this data can be downloaded by an expert.

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. Qualcomm Messages

The larger trucking companies have Qualcomm or similar systems to send and receive messages from drivers. The Qualcomm system automatically saves data for a period of time. Most data, such as messages, vehicle performance data, SensorTrac data and routing information is saved for one to three months or less.

#### Qualcomm Messages

**INSERT PICTURE OF DATA from Scan**

In this case, we obtained messages from the Qualcomm system entered by the dispatcher.

Other data such driver and vehicle information, bills of lading and shipping receipts and electronic logs are kept for much longer.

## Qualcomm Driver Information

### **INSERT DRIVER INFORMATION from Scan**

The system will retain information about the driver and vehicle for many months or years.

It is important to know and understand how the Qualcomm system works and what types of data are saved by the system.

#### F. 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.

## **XI. Appendix of Forms**

### XI-1. Sample Spoliation Letter

## **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. Qualcomm and 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

