

# Commercial Drivers' Licenses: A Prosecutor's Guide to the Basics of Commercial Motor Vehicle Licensing and Violations



SECOND EDITION



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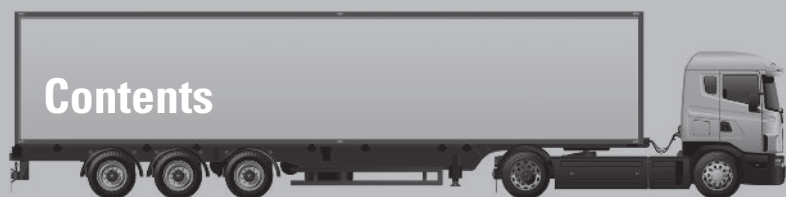
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**Conscientious prosecutors who handle  
CDL cases can have a significantly  
positive effect on traffic safety in their  
communities...**



## Foreword

**ON SEPTEMBER 13, 1899**, a man named Henry H. Bliss became the first American in recorded history to die in a motor vehicle collision when he stepped from a trolley in New York City and was struck and killed by a passing taxi. For the first time, a prosecutor decided that a traffic “accident” merited criminal prosecution. The taxi driver was arrested and charged in the death of Mr. Bliss. The driver claimed that a large truck was blocking his lane, and this circumstance caused him to strike Mr. Bliss. The taxi driver was acquitted of manslaughter.<sup>1</sup>

This traffic fatality is the first example of society responding through the criminal justice system to the safety problems that arise when cars, pickup trucks, motorcycles, bicycles, buses and commercial vehicles all share the country’s roadways.

Over one hundred years later, law enforcement officers, traffic prosecutors and courts across the country must now regularly respond to the consequences of crashes that, too often, involve large commercial vehicles that share the roads with the traveling public.

Commercial vehicles play a critical role in the nation’s economy. Large trucks move billions of tons of goods each year.<sup>2</sup> Motor coaches transport passengers across the nation, and school buses carry America’s children safely to and from school each day. Millions of Americans work with CMV’s in various aspects of the transportation industry,

and as of December, 2015, approximately 6 million people drove large trucks and buses, or were involved in the transportation of hazardous materials.<sup>3</sup>

The majority of these drivers and the companies they work for are committed to the safe operation of their vehicles. These carriers and their drivers are professionals, who do their best to follow state and federal safety regulations. These professionals expect and deserve a level playing field where they can compete with others who also follow these rules.

Unfortunately, as in any field, some participants refuse to “play by the rules.” Some motor carriers cut cor-



<sup>1</sup> *Fatally Hurt by Automobile*, N.Y. Times, Sept. 14, 1899.

<sup>2</sup> [https://www.rita.dot.gov/bts/press\\_releases/bts055\\_13](https://www.rita.dot.gov/bts/press_releases/bts055_13).

<sup>3</sup> “2016 Pocket Guide to Large Truck and Bus Statistics”, United States Department of Transportation, Federal Motor Carrier Safety Administration (May, 2016), page 6.

ners and ignore safety standards and regulations, and some drivers engage in impaired, reckless, aggressive or negligent driving. These carriers and drivers place themselves and the rest of the traveling public at risk.

Every year, commercial trucks and buses log millions of miles on U.S. roadways and each year, unfortunately, thousands of these vehicles are involved in crashes causing property damage, injury, and all too often, death. Occupants of other vehicles involved in crashes with CMV's are especially vulnerable to injury and death. In 2015, when a fatal CMV crash occurred, 74% of the people killed were occupants of the other vehicle(s) involved, and 10% of those fatalities were "non-occupants" (pedestrians, cyclists, or others). That same year, when a CMV crash resulted in injury (but no fatality occurred), 74% of those injured were occupants of the other vehicle(s) involved, and 4% were non-occupants.<sup>4</sup> A significant portion of these crashes are the fault of non-commercial, "personal" drivers, but many are caused by CMV operators who are operating unsafe vehicles or who are committing traffic violations.

To effectively promote traffic safety the participants in the criminal justice system must develop a working knowledge of commercial driver licensing laws. The laws, regulations, and terminology which govern this area of traffic safety may be unfamiliar or even intimidating, but understanding basic information about CMV's and commercial driver's licenses (CDL's) is fundamental to effective enforcement, prosecution, and adjudication of these cases.

In order for safety regulations to be effective, they must be understood by law enforcement and prosecutors. Regulations concerning commercial motor vehicles and commercial driver's licenses are not commonly known to law enforcement officers or prosecutors. Effective enforcement and prosecution make life saving regulations effective.

Conscientious prosecutors who handle CDL cases

can have a significantly positive effect on traffic safety in their communities, and can also positively support the national effort to enforce CDL laws, by making certain that traffic and other "convictions"<sup>5</sup> are reported and become part of a driver's history.

This monograph is designed to explain the basics of CDL law. It is intended to present the essential federally mandated elements of how commercial drivers are licensed, to underscore the significance of prosecuting traffic violations committed by CDL holders, and to explain the sanctions which apply to CDL holders who are convicted of offenses. The monograph focuses on federal regulations. Readers are cautioned that whenever there is a discrepancy between a regulation and the way the regulation may be characterized in this monograph, the language of the regulation controls.

Readers are also cautioned that de-regulation and regulatory changes may occur in this area of the law, so the most recent version of a given regulation should always be consulted. Updated regulations are available at <https://www.ecfr.gov/cgi-bin/ECFR? page=browse>

In addition to understanding the federal regulations, it is important to remember that those regulations are minimum standards for CDL holders and CMV carriers. Each state may create additional and potentially more stringent rules, and prosecutors should be aware of any special rules which affect CDL holders or CMV carriers in their jurisdiction.

Commercial motor vehicles are fundamental to the nation's economy. The daily uninterrupted flow of goods, services and passengers throughout the country is made possible by the efficient and safe delivery of those goods, services and passengers. The safety rules which govern the industry help protect the people who work in the industry as well as the general traveling public.

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<sup>4</sup> National Center for Statistics and Analysis. (2017, February.) *Large trucks: 2015 data. (Traffic Safety Facts.* Report No. DOT HS 812 373). Washington, D.C.: National Highway Traffic Safety Administration. The statistics do not include buses.

<sup>5</sup> "Conviction" has a special definition in CDL law, as explained at page 44.



## A BRIEF HISTORY

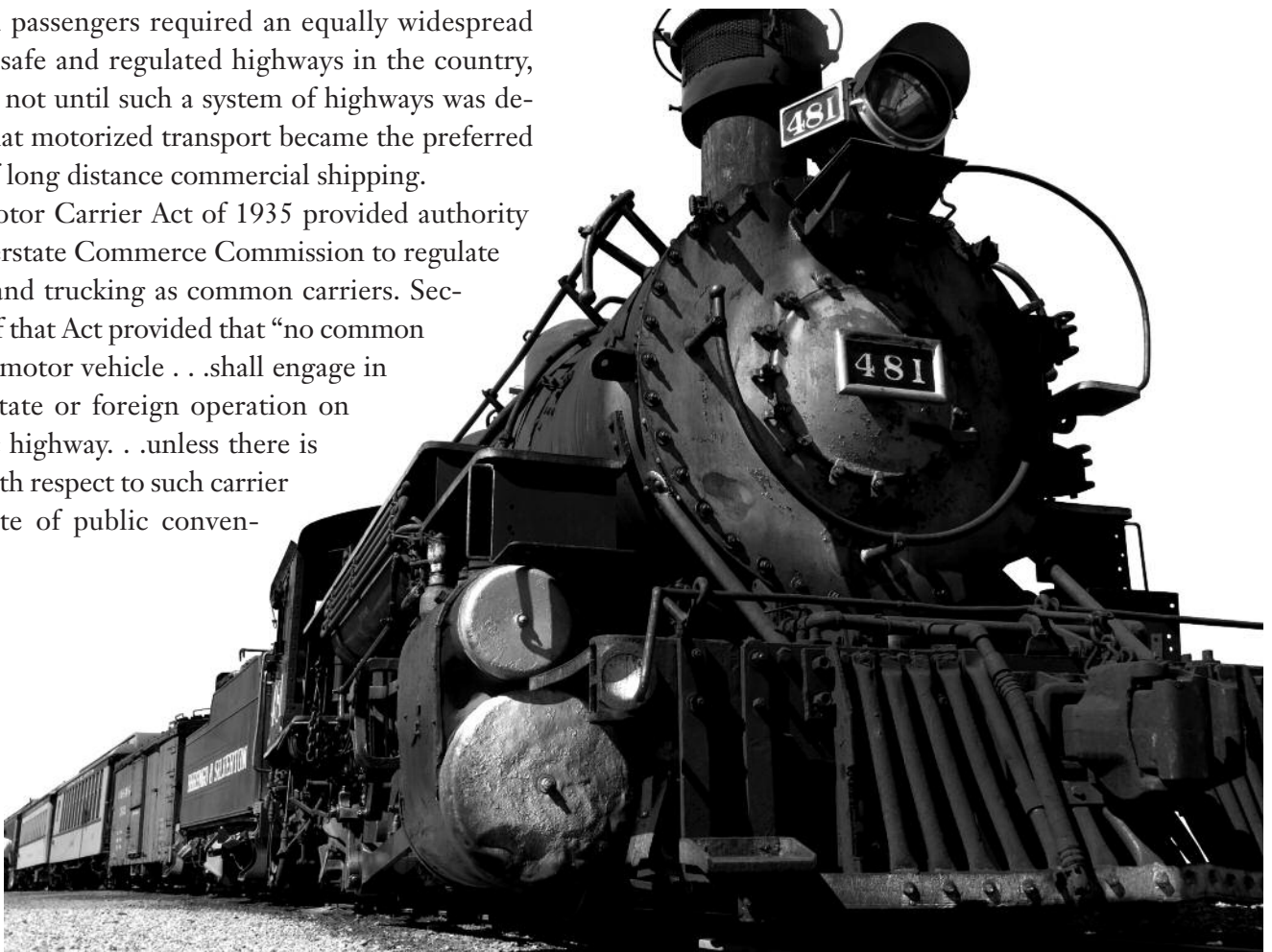
Commercial transportation in the United States has evolved from reliance on human power, horse power, and oxen power (as well as wind, water and steam power) to move goods and passengers along roadways and canals, to an increasing dependence in the 19th Century upon railroads to move goods and passengers, to the introduction of the motor vehicle in the early 20th Century and the country's subsequent (and current) reliance on motor vehicles.

The widespread use of motor vehicles to transport goods and passengers required an equally widespread system of safe and regulated highways in the country, and it was not until such a system of highways was developed that motorized transport became the preferred method of long distance commercial shipping.

The Motor Carrier Act of 1935 provided authority to the Interstate Commerce Commission to regulate bus lines and trucking as common carriers. Section 206 of that Act provided that “no common carrier by motor vehicle . . . shall engage in any interstate or foreign operation on any public highway. . . unless there is in force with respect to such carrier a certificate of public conven-

ience and necessity issued by the commission authorizing such operation.<sup>6</sup>”

The Federal-Aid Highway Act of 1956<sup>7</sup> developed a national ground transportation system of four lane highways. The Act created the Interstate Highway System and provided that the federal government had authority over the highways themselves, as well as the authority to regulate the transportation of goods and services on those highways. This legislation and the interstate highways it authorized spurred the growth of the modern commercial trucking industry.



<sup>6</sup> Interstate Commerce Act: Part II (Motor Carrier Act, 1935) as amended November 1, 1954, with legislative history, plus related statutes. United States reprints from the collection of the University of Michigan.

<sup>7</sup> This statute is also known as the National Interstate and Defense Highways Act (Public Law 84-626). The legislation was signed into law by President Dwight Eisenhower on June 29, 1954.



Despite this federal authority, however, before 1986 there was little effective federal legislation which governed the operators of large trucks and buses on the interstate highways. Individual states determined their own methods of testing and qualifying drivers. Drivers could obtain licenses in multiple states, and state licensing authorities had no centralized mechanism to share information about a driver's fitness. This patchwork of regulation and licensing resulted in a system where drivers with little or no training or qualifications (or drivers with multiple traffic convictions) were regularly operating CMV's throughout the country.

Crash data reflects the safety problems resulting from the lack of federal regulation and the need for it. Statistics on crashes involving large trucks show that in 1975, there were 4.58 fatal crashes for every 100 million vehicle miles traveled by large trucks. In 2015, of the 32,166 fatal crashes on the Nation's roadways, 3,838 (11.9 percent) involved at least one large truck or bus. In addition, there were an estimated 6,263,000 nonfatal crashes, 476,000 (7.6 percent) of which involved at least one large truck or bus.

To improve CMV safety, in 1986 Congress enacted the Commercial Motor Vehicle Safety Act (CMVSA), intended to improve highway safety by removing unsafe CMV's and unqualified and unsafe drivers from the roads. The CMVSA standardized the minimum requirements for obtaining and retaining a commercial driver's license (CDL) and prohibited drivers from holding more than one CDL. The CMVSA reserved to the states their authority to issue CDL's and sanction CDL holders in their respective jurisdictions.

In 1999, Congress passed the Motor Carrier Safety Improvement Act and created the Federal Motor Carrier

Safety Administration (FMCSA). The FMCSA is a separate administration within the U.S. Department of Transportation, with a mission to "reduce crashes, injuries and fatalities involving large trucks and buses."<sup>8</sup>

The FMCSA safety efforts are reflected in the statistics. As noted earlier, in 1980 large trucks were involved in 5.5 fatal crashes for every 100 million vehicle miles traveled. In 2015, the number of fatal crashes involving large trucks increased by 1.7 percent, from the previous year to total 0.140 for every 100 million vehicle miles travelled.<sup>9</sup>

The FMCSA employs over 1,000 individuals, maintains four regional offices, and has a presence in all 50 states, the District of Columbia, and the U.S. Territories. Its headquarters is in Washington, D.C.

To carry out its safety mandate to reduce crashes, injuries, and fatalities involving large trucks and buses, the FMCSA:

- Develops and enforces data-driven regulations that balance motor carrier (truck and bus companies) safety with efficiency;
- Harnesses safety information systems to focus on higher risk carriers in enforcing the safety regulations
- Targets educational messages to carriers, commercial drivers, and the public; and
- Partners with stakeholders including Federal, State, and local law enforcement agencies, the motor carrier industry, safety groups, and organized labor on efforts to reduce bus and truck-related crashes.<sup>10</sup>

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<sup>08</sup> FMCSA mission statement, <https://www.fmcsa.dot.gov/mission> (accessed April 14, 2017).

<sup>9</sup> FMCSA mission statement, <https://www.fmcsa.dot.gov/mission> (accessed April 14, 2017).

<sup>10</sup> FMCSA strategy statement, <https://www.fmcsa.dot.gov/mission> (accessed April 14, 2017).

## CDL Basics

# The Commercial Motor Vehicle Safety Act (CMVSA)

**BEFORE** the Commercial Motor Vehicle Safety Act (CMVSA) was passed in 1986, state governments exercised exclusive authority to license drivers of commercial motor vehicles. Each state established its own standards for the skills and qualifications needed to receive a license. No minimum federal standards existed to make certain that a driver licensed in one state would, in fact, be considered safe and qualified to drive in another state. This lack of a national standard made it difficult for law enforcement officers to make even the basic

determination of whether a driver with an out-of-state license was properly qualified to operate a CMV. In addition, before the CMVSA, many drivers carried more than one driver's license which they could display when stopped by law enforcement.

Regulations adopted under the authority of the CMVSA address and correct these problems. The regulations address the need for uniformity in the industry and establish minimum knowledge and skill standards for issuing commercial driver's licenses (CDLs). States

retain the authority to issue CDLs, but drivers may have only one driver's license at a time<sup>11</sup> and states must require that an applicant demonstrate minimum knowledge and skills before being issued a CDL.<sup>12</sup> This process works to ensure there is only one license and one record per driver.

A CDL must prominently display the name of the issuing state as well as important descriptors and identifying information for the driver. The



<sup>11</sup> 49 CFR 383.21 (2017).

<sup>12</sup> 49 CFR 383.23 (2017).

CDL must contain the driver's full name, mailing or residence address, signature, date of birth, and a physical description of the driver. The CDL must display a photograph of the driver, the driver's CDL number from the issuing state, the date that the license was issued and the date of its expiration.<sup>13</sup> The CDL must also indicate the "class" of vehicle the driver is authorized to operate as well as any endorsements or restrictions.<sup>14</sup>

## COMMERCIAL DRIVER'S LICENSE INFORMATION SYSTEM (CDLIS)

In addition to establishing uniform minimum standards for CDLs, the CMVSA also addressed the need to maintain comprehensive driver records. To enforce the "one state-issued CDL per driver" requirement<sup>15</sup> it was important to establish a mechanism for states to communicate with each other, to make certain that no driver was issued more than one CDL and to ensure that an out-of-state conviction entered against a driver would become a part of that driver's record.

The CMVSA created the Commercial Driver's License Information System (CDLIS) as an interactive information system which allows licensing authorities in each state to communicate with each other. The CDLIS allows licensing agencies to make certain that CDL applicants do not hold multiple licenses and are not under any license sanctions, and also to make certain that information concerning convictions entered against an out-of-state driver can be transmitted to the state of licensure.<sup>16</sup>

The CDLIS facilitates state-to-state communication and information sharing, but CDLIS does not authorize the federal government to issue CDLs. States, acting through their respective state licensing agency, retain the authority to issue CDLs.

## SITUATIONS REQUIRING A CDL

Generally, "every person who operates a commercial motor vehicle (CMV) in interstate, foreign, or intrastate commerce" needs a CDL,<sup>17</sup> but both federal and state regulations contain exceptions to the general rule. Federal regulations exempt "certain military drivers" from holding a CDL, and states may decide to exempt certain "farmers, firefighters, emergency response vehicle drivers, and drivers removing snow and ice."<sup>18</sup>

## LICENSING REQUIREMENTS

Licensing for operation of CMV's is specialized because the safe operation of these vehicles requires specialized knowledge and skills.

For CDL purposes, a CMV is defined as "a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property" and which possess one or more of several specific characteristics.<sup>19</sup> These characteristics are tied to weight, type of load (a vehicle of any size which is "used in the transportation of hazardous materials" is considered a CMV), or in the case of buses, the number of people who can be accommodated by the bus—capable of carrying 16 or more people, including the driver. If a vehicle meets the definition and has one or more of the specific characteristics, its driver will need to hold a state CDL issued in compliance with federal regulations.<sup>20</sup>

A CDL is necessary to "help reduce or prevent truck and bus accidents, fatalities, and injuries by requiring drivers to have a single commercial motor vehicle driver's license and by disqualifying drivers who operate commercial motor vehicles in an unsafe manner."<sup>21</sup> The regulations for licensing CMV operators place respon-

<sup>13</sup> 49 CFR 383.153 (2017).

<sup>14</sup> See below at page 6 for a discussion of CMV "classes" and at pages 6–8 for a discussion of endorsements and restrictions.

<sup>15</sup> The only exception to the "one license" rule is a foreign driver who may qualify for and receive a "non-domiciled" CDL but who is permitted to retain a foreign driver's license. See 49 CFR 383.71 (2017); see also footnote #22, on page 3.

<sup>16</sup> 49 CFR 384.105, 49 CFR 384.107, and 49 CFR 384.225 (2017).

<sup>17</sup> 49 CFR 383.3 (2017).

<sup>18</sup> *Id.* State driver's licensing agencies can assist law enforcement officers and prosecutors in determining which, if any, exceptions apply in a state.

<sup>19</sup> 49 CFR 383.5 (2017) provides that a vehicle is a CMV for purposes of driver licensing "if the motor vehicle is a (1) Combination Vehicle (Group A)—having a gross combination weight rating or gross combination weight of 11,794 kilograms or more (26,001 pounds or more), whichever is greater, inclusive of a towed unit(s) with a gross vehicle weight rating or gross vehicle weight of more than 4,536 kilograms (10,000 pounds), whichever is



sibilities on drivers and their employers, the motor carrier companies. Drivers are required to inform current and prospective employers of their employment history and of specified convictions which have implications for their CDL status. Motor carriers may only allow drivers with valid CDLs to operate their CMV's. The regulations ensure that safety is the paramount concern for drivers and the vehicles they operate.

The regulations recognize the training, licensing and safety requirements for issuance of Canadian and Mexican CDLs (which are issued by their respective countries for drivers who operate in the United States). Canadian CDLs, issued by Canadian Provinces and Ter-

ritories, and Mexican CDLs, ("Licencias Federales de Conductor") issued by the United Mexican States are valid in the United States of America.<sup>22</sup>

Federal regulations set the minimum requirements an applicant must possess for a state to issue a CDL. Individual states may craft legislation that is more stringent than the federal rules, and prosecutors should always check both the federal regulations and their own state code to determine actual legal requirements which apply in a given case. Even in the absence of more stringent state rules, however, the federal regulations make it possible for the traveling public to be confident that drivers licensed in any state have the same minimum level of



greater; or (2) Heavy Straight Vehicle (Group B)—having a gross vehicle weight rating or gross vehicle weight of 11,794 or more kilograms (26,001 pounds or more), whichever is greater; or (3) Small Vehicle (Group C) that does not meet Group A or B requirements but that either—(i) is designed to transport 16 or more passengers, including the driver; or (ii) is of any size and is used in the transportation of hazardous materials as defined in this section.”

<sup>20</sup> Exemptions to the CDL requirement are discussed at page 8.

<sup>21</sup> 49 CFR 383.1 (2017).

<sup>22</sup> 49 CFR 383.23(b) (2017). Canadian and Mexican CDLs are recognized in

the United States because the FMCSA Administrator has determined that the relevant jurisdiction “tests drivers and issues CDLs in accordance with, or under standards similar to” standards required for issuance of a CDL in the United States. *Id.* Any other foreign applicants must provide an unexpired employment authorization document or unexpired foreign passport and “an approved I-94 form documenting the applicant’s most recent admittance into the United States.” See 49 CFR 383.71 (2017). A person receiving a non-domiciled CDL or CLP under these circumstances “is not required to surrender his/her foreign license.” *Id.* Therefore, these operators are the only persons who may carry two licenses. See footnote #15.



knowledge, skills, and general qualifications to drive a large truck or bus.

### ***Skills/Knowledge Testing***

All persons who operate a CMV must possess the knowledge and skills necessary to operate safely<sup>23</sup> and successfully complete testing before being issued a CDL.<sup>24</sup> Applicants for CDLs must become familiar with the regulations which govern safe operation of the vehicle(s) the driver will be operating or anticipates operating, including vehicle safety control systems, the fundamentals of safe driving in different types of weather and terrain, emergency maneuvers, and the importance of inspections and repair. The driver must also be aware of the effects of alcohol and drugs, and the effects of fatigue, poor vision, hearing and general health issues on the safe operation of CMV's.<sup>25</sup>

Applicants must also pass skills tests, which include an ability to conduct pre-trip inspections (including a pre-trip inspection of a CMV's braking system), basic vehicle control skills, and basic on-the-road performance skills, including proper signaling, safe lane changes, proper turning and other basic safe operating skills.<sup>26</sup>

Skills required for licensing vary depending upon the type of vehicles the driver will be operating or the load being hauled—double or triple trailers, or tanks, or passenger vehicles/school buses, or if the driver will be hauling hazardous materials.<sup>27</sup>

### ***Medical Qualification***

In addition to demonstrating basic proficiency in operating a CMV, a CDL applicant must be in good health and free from any mental or physical condition that would make the applicant unable to safely operate the vehicle.<sup>28</sup> Loss of limb(s), epilepsy, insulin-dependent diabetes, cardiovascular or respiratory problems, “mental,

nervous, organic, or functional disease or psychiatric disorder likely to interfere with his/her ability to drive a commercial motor vehicle safely,” and hearing or vision limitations are among the conditions which could make an applicant unqualified.<sup>29</sup>

Applicants demonstrate good health by means of a medical certificate issued by a licensed medical examiner.<sup>30</sup> Historically, drivers were required to have possession of a physical copy of the medical certificate when on duty, but that requirement is being phased out. Current rules outline a schedule which, when fully implemented by June 22, 2018, will eliminate the need to carry a physical copy of the certificate, because a digital version of the certificate will become a part of the driver's permanent CDLIS record.<sup>31</sup>

Medical certificates generally are valid for 24 months from the date of issuance, although re-evaluation is required at any time for “any driver whose ability to perform his/her normal duties has been impaired by a physical or mental injury or disease.”<sup>32</sup>

### ***Drug & Alcohol Testing***

Employers are responsible for drug and alcohol testing. Employers must screen drivers for drugs and alcohol before the driver is hired.<sup>33</sup> Employers must also conduct random testing of employees, based upon a percentage of the average number of driving positions in a given company,<sup>34</sup> and must conduct testing after crashes which resulted in a human fatality, bodily injury with medical attention administered away from the scene of the crash, or when the crash resulted in damage which required a tow to any vehicle involved.<sup>35</sup>

Drivers may not operate a CMV with an alcohol concentration of .04 or more, and may not consume alcohol within 4 hours of reporting to duty. Drivers may not consume alcohol while on duty, and may not consume

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<sup>23</sup> 49 CFR 383.110 (2017).

<sup>24</sup> 49 CFR 384.201 (2017) requires that issuing states “adopt and administer a program for testing and ensuring the fitness of persons to operate commercial motor vehicles.”

<sup>25</sup> 49 CFR 383.111(a) (2017).

<sup>26</sup> 49 CFR 383.113 (2017).

<sup>27</sup> Requirements for each of these specialties are at 49 CFR 383.115 through 49 CFR 383.123. (2017).

<sup>28</sup> 49 CFR 391.41 (2017) Medical variances may be granted by the FMCSA; if a variance is granted, drivers must always have documentation of the variance while on duty. 49 CFR 391.41(a)(1)(ii) (2017).

<sup>29</sup> *Id.*

<sup>30</sup> 49 CFR 391.43 (2017). Medical examiners must be “listed on the National Registry of Certified Medical Examiners”; see 49 CFR 390, subpart D (2017).

<sup>31</sup> 49 CFR 391.41(a)(2). But see footnote #28 on FMCSA-issued variances.

<sup>32</sup> 49 CFR 391.45(b) and (c) (2017).

<sup>33</sup> 49 CFR 382.301(a) (2017) Exceptions to this requirement are for persons in a drug testing program or persons who have been tested in the recent past. 49 CFR 382.301(b) (2017).

<sup>34</sup> 49 CFR 382.205 (2017).

<sup>35</sup> 49 CFR 382.303 (2017). (Note the table incorporated into the regulation.)

## Drivers must pass knowledge-based testing regarding the proper operation of a large truck or bus and the use of its safety systems...



alcohol within 8 hours following a crash, unless post-crash testing has already occurred. Drivers may not refuse to submit to authorized testing for alcohol or controlled substances.<sup>36</sup> Drivers may not report for or remain on duty when the driver uses Schedule I drugs or certain other non-Schedule I<sup>37</sup> drugs. Finally, the regulations prohibit employers from allowing a drug or alcohol violation to occur.<sup>38</sup>

### **Background Check**

States must check the driving history of CDL applicants (as well as CDL holders who seek a renewal or an upgrade) to screen for a conviction that would disqualify a driver or would otherwise require a licensing limitation or other sanction.<sup>39</sup> Applicants must provide the names of all states where the applicant had previously been licensed so the licensing state may make a CDLIS inquiry

<sup>36</sup> See 49 CFR 382 Subpart B, regulations 382.201 to 382.217 (2017). These regulations are short and concise, and should be carefully reviewed whenever drug or alcohol use is suspected in a case.

<sup>37</sup> Controlled substances fall into one of five “schedules” as defined by the Controlled Substances Act of 1970 (PL 95-103) as administered by the Food and Drug Administration and the Drug Enforcement Administration. “Schedule I” controlled substances are those substances which have a high potential for abuse, have no currently accepted medical use for treatment in the United States, and for which there is no “safety for use. . .under medical supervision.” See 21 U.S.C. § 812 (2017).

<sup>38</sup> 49 CFR 382 Subpart B, regulations 382.201 to 382.217 (2017) are the regulations governing drug or alcohol use. Some of the regulations hold an employer accountable if the employer has “knowledge” of a driver’s violation; other regulations require that an employer has “actual knowledge” of a driver’s violation.

<sup>39</sup> 49 CFR 384.206 (2017).

*Continued on page 6*

and request record checks in other states.<sup>40</sup>

## CLASSES/GROUPS OF CMV'S AND CDL'S

Commercial motor vehicles are divided into groups or “classes”<sup>41</sup>, and the CMV designation determines the type of CDL needed to operate those vehicles. Classifications are generally based on the weight rating of the vehicle, the type of vehicle, and the type of load or number of passengers a vehicle is designed to carry. The regulations contain an “vehicle group illustration” which shows “typical vehicles within each of the vehicle groups.”<sup>42</sup>

Each group/class of commercial motor vehicle demands specialized knowledge and a specialized skill set; both knowledge and skills must be demonstrated before a CDL is issued. Once issued, a CDL is valid only for CMV's within the designated class or for any lower classification, assuming that the CDL holder has the proper endorsements for the vehicles operated.

There are three basic CDL classifications: “A”, “B”, and “C”.

**A Class “A”** CDL requires the most skill and knowledge testing, and receipt of a Class “A” license permits a holder with the proper endorsements to drive Class “A” CMV's and vehicles in the two lower classifications.

**A Class “B”** license permits a holder with the proper endorsements to drive both Class “B” vehicles and Class “C” vehicles.

**A Class “C”** license permits the holder with the proper endorsements to drive Class “C” vehicles.

## Endorsements

In addition to the three classes of CDLs, operators must also obtain special “endorsements” to operate specialized CMV's or transport hazardous materials. Applicants seeking endorsements must undergo additional testing, and those applicants who seek an endorsement to transport hazardous materials must undergo a more extensive background check.<sup>43</sup>

If granted, an endorsement will appear on the CDL itself, designated as follows:<sup>44</sup>

“T”—the driver may haul double or triple trailers

“P”—the driver may operate passenger CMV's

“N”—the driver may operate tank vehicles

“H”—the driver may haul hazardous material

“X”—a driver with this endorsement has combined “H” and “N” designations, and may operate tank vehicles which contain hazardous materials

“S”—the driver may operate a school bus

## Restrictions

A CDL may also be issued with restrictions. An applicant will be restricted to operation of the type of vehicle the applicant drove while being tested. For example, an applicant may successfully pass CDL testing in a vehicle without air brakes. The applicant will receive a CDL, but will be restricted from operating a CMV equipped with air brakes. Other restrictions are also possible. An applicant who passed testing on a CMV with an automatic transmission will be restricted from operating a CMV with a manual transmission. An applicant who passed testing using a particular class of passenger CMV will be restricted to operating that class of

<sup>40</sup> *Id.* See also discussion of CDLIS at pages 2 and 44. See also discussion of reporting of state court convictions to state licensing agencies at 43 and the prohibition against the masking of convictions, at page 30.

<sup>41</sup> CDLs are identified by “class” and CMV's themselves are identified by “vehicle group” and the term “vehicle group” is defined as “a class or type of vehicle with certain operating characteristics.” 49 CFR 383.5 (2017). CMV “groups” are identified as “(1) Combination vehicle (Group A)—Any combination of vehicles with a gross combination weight rating (GCWR) of 11,794 kilograms or more (26,001 pounds or more) provided the GVWR of the vehicle(s) being towed is in excess of 4,536 kilograms (10,000 pounds). (2) Heavy Straight Vehicle (Group B)—Any single vehicle with a GVWR of 11,794 kilograms or more (26,001 pounds or more), or any such vehicle towing a vehicle not in excess of 4,536 kilograms (10,000 pounds) GVWR. (3) Small Vehicle (Group C)—Any single vehicle, or combination

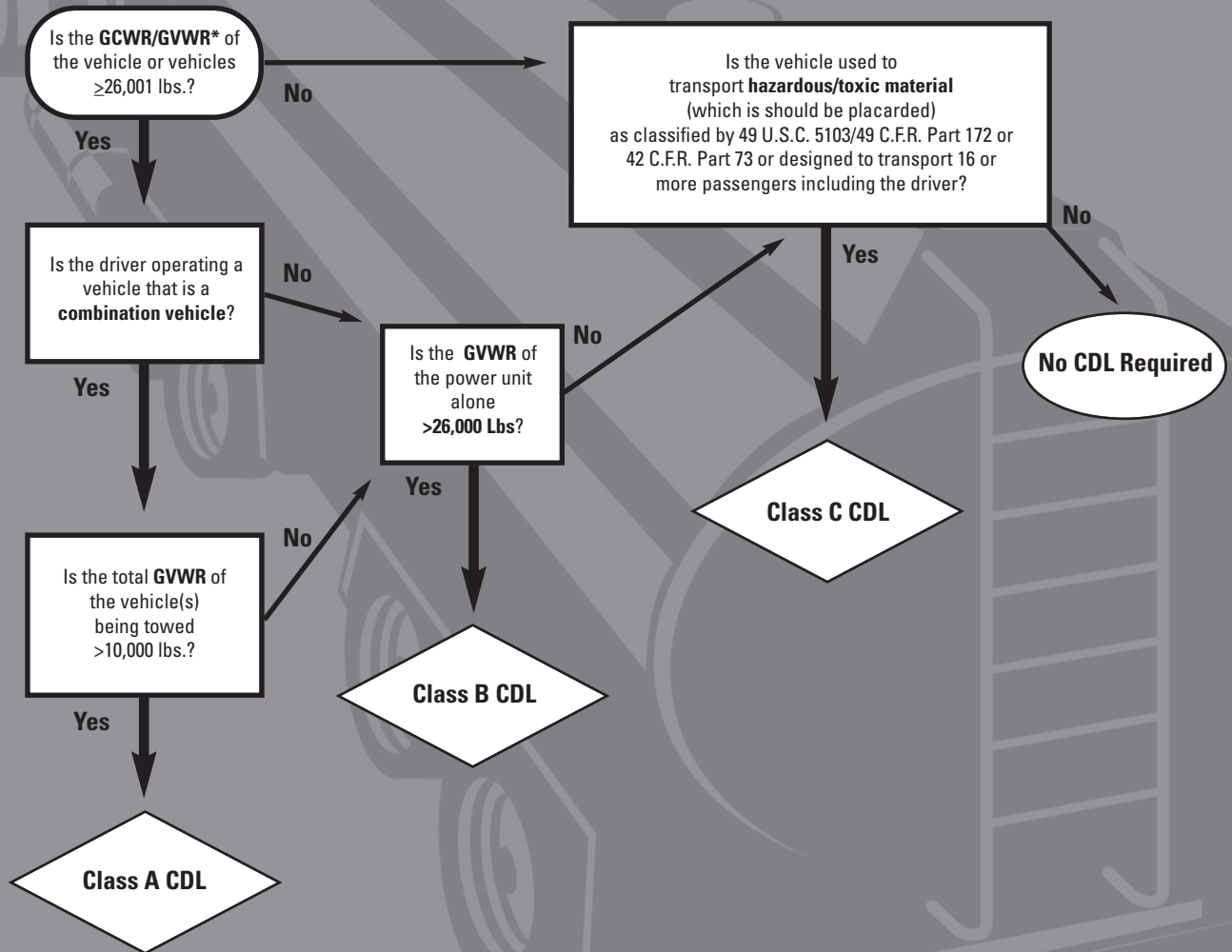
of vehicles, that meets neither the definition of Group A nor that of Group B as contained in this section, but that either is designed to transport 16 or more passengers including the driver, or is used in the transportation of hazardous materials as defined in §383.5.” 49 CFR 383.91 (2017).

<sup>42</sup> *Id.*

<sup>43</sup> 49 CFR 383.93 (2017).

<sup>44</sup> 49 CFR 383.153 (2017). Holders of commercial learner's permits (“CLP's”—see at page 8) may have only three endorsement designations. See 49 CFR 383.93(a)(2) (2017).

## DOES THE DRIVER NEED A CDL?







passenger CMV.<sup>45</sup>

In addition, states may issue restricted CDLs in certain industries or under certain circumstances. The regulations allow issuance of restricted CDLs for agriculture-related industries which permit operation only within 150 miles of “the place of business or farm being served” and only during certain periods of the year.<sup>46</sup> Other restricted CDLs may be issued to persons in “the pyrotechnic industry”, and one such restricted CDL is valid only between June 30 and July 6 “or a lesser period as defined by the State of licensure.”<sup>47</sup> The State of Alaska has special authority to issue certain restricted CDLs.<sup>48</sup>

In all cases where restricted CDLs may be issued, however, states are prohibited from issuing those restricted CDLs to inexperienced drivers or to drivers who lack a “good driving record.”<sup>49</sup>

### **Commercial Learner’s Permit (CLP)**

No one may be issued a CDL unless the person has first obtained a commercial learners’ permit (CLP), which is “considered a valid CDL for purposes of behind-the-wheel training on public roads or highways.”<sup>50</sup> A driver with a valid “regular” state-issued driver’s license may be eligible for a CLP.

A CLP allows operation of a CMV only for purposes of training, and only when accompanied by a validly licensed CDL holder who “must at all times be physically present in the front seat of the vehicle next to the CLP holder or, in the case of a passenger vehicle, directly behind or in the first row behind the driver and must have the CLP holder under direct observation and supervision.”<sup>51</sup>

### **Exemptions**

Some vehicles—even very large vehicles—do not require that operators hold CDLs. For example, vehicles used for recreational or non-business purposes do not require that the driver hold a CDL (although states may require the license.) As discussed earlier, there are also exemptions in the federal regulations for “certain military drivers”, and states have authority to exempt certain “farmers, firefighters, emergency response vehicle drivers, and drivers removing snow and ice.”<sup>52</sup>



<sup>45</sup> See the restrictions at 49 CFR 383.95 (2017) and note that a medical variance is considered a “restriction” and must be noted on the CDL.

<sup>46</sup> 49 CFR 383.3(f) (2017).

<sup>47</sup> 49 CFR 383.3(g) (2017).

<sup>48</sup> 49 CFR 383.3(e) (2017).

<sup>49</sup> 49 CFR 383.3(i) (2017) defines a “good driving record” as one which, among other things, shows no convictions for certain offenses within the preceding two years.

<sup>50</sup> 49 CFR 383.25(a) (2017).

<sup>51</sup> *Id.*

<sup>52</sup> 49 CFR 383.3 (2017). As noted earlier, state driver’s licensing agencies can assist officers and prosecutors in determining which, if any, exemptions apply in a state.



## Driver Responsibilities



### Health, Alcohol, and Drugs (Including Zero Tolerance for Marijuana and Other Schedule I Controlled Substances)



**CDL HOLDERS** have a continuing duty to make sure that they—and the vehicles they operate—are fit for safe operation. They must maintain a current medical certificate,<sup>53</sup> and must not drive if they are ill or fatigued.<sup>54</sup>

Drivers may not use alcohol while on duty, and may not have been under the influence of alcohol within 4 hours of going on duty.<sup>55</sup>

The regulations prohibit the use of any Schedule I controlled substance, including marijuana, and also restrict other controlled substances. A person using so called “medical marijuana” cannot qualify for a CDL.<sup>56</sup> A regulation specifically provides:

(a) No driver shall be on duty and possess, be under the influence of, or use, any of the following drugs or other substances:

- (1) Any 21 CFR 1308.11 Schedule I substance;
- (2) An amphetamine or any formulation thereof (including, but not limited, to “pep pills,” and “bennies”);
- (3) A narcotic drug or any derivative thereof; or
- (4) Any other substance, to a degree which renders the driver incapable of safely operating a motor vehicle.

(b) No motor carrier shall require or permit a driver to violate paragraph (a) of this section.

(c) Paragraphs (a) (2), (3), and (4) do not apply to the possession or use of a substance adminis-

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<sup>53</sup> 49 CFR 391.41 (2017).

<sup>54</sup> 49 CFR 392.3 (2017).

<sup>55</sup> 49 CFR 392.5 (2017).

<sup>56</sup> See FMCSA FAQ Page <https://www.fmcsa.dot.gov/faq/can-driver-be-qualified-if-taking-prescribed-medical-marijuana>, last visited June 1, 2017.

tered to a driver by or under the instructions of a licensed medical practitioner, as defined in §382.107 of this subchapter, who has advised the driver that the substance will not affect the driver's ability to safely operate a motor vehicle.

(d) As used in this section, "possession" does not include possession of a substance which is manifested and transported as part of a shipment.<sup>57</sup>

### **Safety Inspections**

Drivers also have responsibility for the CMV they operate. They may not drive unless satisfied that the CMV's parts and accessories are in good working order, and that emergency equipment is "in place and ready for use."<sup>58</sup>

Drivers must inspect their CMV's before driving to satisfy themselves that the CMV is in safe operating condition. This inspection includes a required review of the preceding driver's inspection report, and a requirement that the driver "sign the report, only if defects or deficiencies were noted by the driver who prepared the report, to acknowledge that the driver has reviewed it and that there is a certification that the required repairs have been performed."<sup>59</sup>

Drivers must conduct a second inspection at the completion of each work day. This inspection must cover at least the following parts and accessories: service brakes (including trailer brake connections), the parking brake, the steering mechanism, lights and reflectors, tires, the horn, windshield wipers, rear vision mirrors, coupling devices, wheels and rims, and emergency equipment. If any defects or problems are noted, the driver must prepare a report in writing and sign the report, and the motor carrier is then required to repair any defect or deficiency "that would be likely to affect the safety of op-

eration of the vehicle" and certify that the repair had been completed (or that it was unnecessary) before the vehicle is operated again.<sup>60</sup>

Operators of passenger-carrying CMV's must also conduct a second inspection at the completion of the work day. These operators must prepare and submit a report "even if no defect or deficiency is discovered by or reported to the driver."<sup>61</sup>

### **Records**

Drivers are also responsible for maintaining many different records relating to their CMV, the load they are carrying, their CDL privileges and their hours of service—documentation of how long they have been on the road.

### **Hours-of-Service**

Generally, commercial motor vehicle drivers operating in interstate commerce are subject to Hours-of-Service (HOS) regulations set forth in 49 CFR Part 395. These rules govern when and how long CMV drivers may drive.

Hours-of-Service regulations are some of the most comprehensive rules governing commercial motor vehicle carriers, CMV's and CDL holders. They are also some of the most controversial. Therefore, the most current version of these regulations should always be consulted.<sup>62</sup>

The HOS regulations are intended to promote the health and safety of CDL holders by limiting the length of time a holder can operate a CMV (or can be required to operate a CMV by a motor vehicle carrier). The regulations also promote the safety of the traveling public by removing overtired or physically exhausted CMV op-

<sup>57</sup> 49 CFR 392.4 (2015).

<sup>58</sup> 49 CFR 392.7 and 49 CFR 392.8 (2017).

<sup>59</sup> 49 CFR 396.13 (2017).

<sup>60</sup> 49 CFR 396.11 (2017).

<sup>61</sup> *Id.*

<sup>62</sup> Because the regulations are complex, they are subject to regular review and occasional changes. Readers should review the most recent rules available at <http://gpo.gov/>.

<sup>63</sup> 49 CFR 395.1(a) (1) (2017).

<sup>64</sup> 49 CFR 395.1(h) (2017) (rules for Alaska); 49 CFR 395.1(i) (2017) (rules for Hawaii).

<sup>65</sup> 49 CFR 395.1(e).

<sup>66</sup> 49 CFR 395.1(d) (2017) for oilfield operations; 49 CFR 395.1(f) (2017) for retail store deliveries "during the period from December 10 to December 25, both exclusive, of each year"; 49 CFR 395.1(k) (2017) for certain agricultural operations when the rules "shall not apply during planting and harvesting periods, as determined by each State"; 49 CFR 395.1(l) (2017) for "ground water drilling operations"; 49 CFR 395.1(m) (2017) for transportation of construction materials and equipment; 49 CFR 395.1(n) (2017) for utility service vehicles; 49 CFR 395.1(p) (2017) for CMV transportation "to or from a motion picture production site"; 48 CFR 395.1(q) (2017) for operators who "are on duty at all times" attending explosives; and 49 CFR 395.1(r) (2017) for railroad signal employees who are "installing, repairing,

## HOURS-OF-SERVICE RULES<sup>70</sup>

PROPERTY-CARRYING DRIVERS	PASSENGER-CARRYING DRIVERS
<p><b>11-Hour Driving Limit</b> May drive a maximum of 11 hours after 10 consecutive hours off duty.</p>	<p><b>10-Hour Driving Limit</b> May drive a maximum of 10 hours after 8 consecutive hours off duty.</p>
<p><b>14-Hour Limit</b> May not drive beyond the 14th consecutive hour after coming on duty, following 10 consecutive hours off duty. Off-duty time does not extend the 14-hour period.</p>	<p><b>15-Hour Limit</b> May not drive after having been on duty for 15 hours, following 8 consecutive hours off duty. Off-duty time is not included in the 15-hour period.</p>
<p><b>Rest Breaks</b> May drive only if 8 hours or less have passed since end of driver's last off-duty or sleeper berth period of at least 30 minutes. Does not apply to drivers using either of the short-haul exceptions in 395.1(e). [49 CFR 397.5 mandatory "in attendance" time may be included in break if no other duties performed]</p>	<p><b>60/70-Hour Limit</b> May not drive after 60/70 hours on duty in 7/8 consecutive days.</p>
<p><b>60/70-Hour On-Duty Limit</b> 60/70-Hour Limit May not drive after 60/70 hours on duty in 7/8 consecutive days. A driver may restart a 7/8 consecutive day period after taking 34 or more consecutive hours off duty.</p> <p>Must include two periods from 1 a.m. to 5 a.m. home terminal time, and may only be used once per week of 168 hours, measured from the beginning of the previous restart.</p> <p><b>NOTICE: The Consolidated and Further Continuing Appropriations Act of 2015 was enacted on December 16, 2014, suspending enforcement of new requirements for use of the 34-hour restart, pending a study. Based on the findings from the study, the 34-hour restart rule in operational effect on June 30, 2013, is restored to full force and effect. The requirement for two off-duty periods of 1:00 a.m. to 5:00 a.m. in section 395.3(c) of the Agency's hours-of-service rules will not be enforced, nor will the once-per-week limit on use of the restart in 395.3(d)..</b></p>	<p><b>Sleeper Berth Provision</b> Drivers using a sleeper berth must take at least 8 hours in the sleeper berth, and may split the sleeper berth time into two periods provided neither is less than 2 hours.</p>
<p><b>Sleeper Berth Provision</b> Drivers using the sleeper berth provision must take at least 8 consecutive hours in the sleeper berth, plus a separate 2 consecutive hours either in the sleeper berth, off duty, or any combination of the two.</p>	

or maintaining signal systems."

<sup>67</sup> 49 CFR 395.3(a) and 49 CFR 395.5(a) (2017). Drivers and motor carriers who flout the hours of service and logbook requirements potentially face criminal prosecution as well as administrative sanctions. See, e.g., *United States v. Sandhu*, 286 Fed. Appx 163 (3rd Cir., 2008, unpublished) (driver involved in multiple fatality crash entered guilty pleas to 42 counts of making false statements in his logbook; no finding of causation for the crash tied to the logbook statements nor evidence of fatigue or of violating the 10 hour rule); see also *United States v. McCord, Inc.*, 143 F.3d 1095 (8th Cir. 1998) (carrier and owner of carrier which systematically falsified log books, even hiring workers to fill out log books for drivers which created the false impression that two drivers had sharing driving duties when in fact, only

one driver was working; owner sentenced to 12 months in prison and a \$1500 fine and carrier sentenced to a \$100,000 fine).

<sup>68</sup> 49 CFR 395.3 (2010).

<sup>69</sup> 49 CFR 395.5 (2010).

<sup>70</sup> The chart provided shows general HOS principles. HOS rules are subject to change. Prosecutors should check state and federal statutes or regulatory authority to determine current prevailing HOS rules. See FMCSA Summary of Hours of Service Regulations, <https://www.fmcsa.dot.gov/regulations/hours-service/summary-hours-service-regulations> (accessed September 13, 2017).

erators from the roads.

Hours-of-Service regulations generally apply to “all motor carriers and drivers”<sup>63</sup> with several specific exceptions (i.e.; special rules for the states of Alaska and Hawaii,<sup>64</sup> special rules for “short-haul operators,”<sup>65</sup> and special rules for the type of commerce involved.<sup>66</sup>

Rules for both property-carrying and passenger-carrying CMV's apply to both the motor vehicle carrier and the CDL holder/operator of the CMV. The rules make it clear that “no motor carrier shall permit or require any driver ... (to drive) ... nor shall make any such driver drive ...”<sup>67</sup> in excess of the permitted hours of service.

Many states have enacted similar or identical regulations for allowable HOS for drivers operating in intrastate commerce. The rules governing hours of service differ slightly depending on whether a driver is hauling a load of materials<sup>68</sup> or carrying passengers.<sup>69</sup> Factors such as consecutive days of service and rest periods are also considered in determining which drivers are too fatigued to operate a CMV safely. The FMCSA provides the following table of hours-of-service guidelines.

It is important to look at the multiple exceptions to hours-of-service limitations allowed in the federal and state regulations. Severe weather, emergency conditions, the content or the load, or a short-haul operating radius may all provide exemptions to HOS statutes.<sup>71</sup> Each driver and situation must be examined on a case-by-case basis. Drivers required to abide by HOS statutes must keep accurate log books in their vehicles for inspection by law enforcement officers.<sup>72</sup>

### **Documenting Hours-of-Service**

Motor carriers “must require each driver . . . to record the driver’s duty status. . .”<sup>73</sup> With few exceptions<sup>74</sup> by December 18, 2017 these records will be maintained

through the use of electronic logging devices (ELD’s).<sup>75</sup> If a CMV currently uses an older, “compliant” automatic recording device, that device may be used until December 18, 2019, at which time an ELD must be installed on the CMV.<sup>76</sup>

When manually documenting hours of service, operators must use a “specified grid”<sup>77</sup> and, in addition to using the grid, record the following information:

Date, hours driven on that day, the identification number of truck/tractor and trailer, name of the carrier, the driver’s signature and certification, the “24 hour period starting time”, the carrier’s main office address, remarks, name of co-driver if any, total hours driven, and shipping document numbers (or the name of the shipper and the commodity).<sup>78</sup>

The entries are to be current for the day, month and year of the beginning of the 24 hour period recorded, must be in the driver’s own, legible handwriting, and must include the total number of hours driven that day.<sup>79</sup> Drivers must maintain (and within 13 days submit to the motor carrier) any supporting documents that corroborate the duty status.<sup>80</sup> The motor carrier must retain those documents for at least 6 months.<sup>81</sup>

Records maintained and generated by ELD’s and other automatic on-board recording devices must be accessible for inspection, and the driver must be able to produce, “upon demand, a driver’s hours of service chart, electronic display, or printout showing the time and sequence of duty status changes including the driver’s starting time at the beginning of each day.”<sup>82</sup> In addition, “(t)he driver shall have in his/her possession records of duty status for the previous 7 consecutive days available for inspection while on duty. These records shall consist of information stored in and retrievable from the automatic on-board recording device, handwritten records,

<sup>71</sup> 49 CFR 395.1 (2010).

<sup>72</sup> 49 CFR 395.8 (2010).

<sup>73</sup> 49 CFR 395.8(a)(1) (2017).

<sup>74</sup> For “driveaway-towaway” operations, for those who drive 8 or fewer days in a 30-day period, and for CMV’s manufactured before the model year 2000, see 49 CFR 395.8(a)(1)(iii) (2017).

<sup>75</sup> For specifications and technical details of ELD requirements, see 49 CFR 395.20 et. seq. and appendices (2017) at 49 CFR 395 Subpart B—Electronic Logging Devices (2017).

<sup>76</sup> 49 CFR 395.8(a)(1)(i), 395.8(a)(1)(ii) and 395.8(a)(1)(iv) (2017).

<sup>77</sup> 49 CFR 395.8(g) (2017).

<sup>78</sup> 49 CFR 395.8(d) (2017).

<sup>79</sup> 49 CFR 395.8(d)(3) (2017).

<sup>80</sup> 49 CFR 395.11 (2017).

<sup>81</sup> 49 CFR 395.8(k) (2017) . See *United States v. Gunther*, 1998 U.S. App. LEXIS 1231 (4th Cir., 1998, unpublished) (convictions for perjury, making false statements, and conspiracy to falsify records; claimed that logs were lost when in fact they were systematically destroyed; an inspector conducting an analysis of existing logs and other documents concluded that 73% of the company logs which had been maintained were false; owner sentenced to 30 months in prison and the carrier was fined \$170,000).



computer generated records, or any combination thereof.”<sup>83</sup>

Failure to maintain accurate and up-to-date duty logs is one basis for being declared “out of service” by a commercial motor vehicle inspector. Drivers must have complete and accurate duty logs for the preceding 7 days (although a driver whose duty logs are completed for the preceding 6 days “will be given the opportunity to make the duty status record current” for the day of the inspection).<sup>84</sup>

Drivers also can be declared out of service for being on duty in excess of the hours permitted.<sup>85</sup> Drivers who have been declared out of service may not drive (and may not be required or permitted to drive by the motor carrier) until lawfully entitled to do so under the regulations.<sup>86</sup>

### ***Out-of-Service Orders***

If a safety inspection or other investigation reveals a serious issue with a vehicle or its driver, the inspector may issue an out-of-service order. Officers with special training or others specially designated by FMCSA have the authority to issue out-of-service orders.<sup>87</sup> Although local and state law enforcement officers who are not so desig-

nated may and should cite CMV drivers for standard traffic violations (such as speeding or failure to obey traffic control devices), suspected violations of federal regulations should be referred to a commercial motor vehicle specialist or FMCSA-designated officer.

A driver who fails to maintain duty status logs may be issued an out-of-service order,<sup>88</sup> and a CMV may be subject to an out-of-service order. Out of service orders for CMV’s are issued if a safety inspection reveals a critical mechanical or loading flaw exists which could cause a crash or breakdown.<sup>89</sup> There are even circumstances where an entire carrier may be placed out of service for failure to perform critical maintenance with fleet trucks.<sup>90</sup>

A person who drives a CMV while the driver is subject to an out-of-service order (or a person who drives a CMV which is itself subject to an out-of-service order) will be disqualified for a period of 180 days to one year. In the event the vehicle is transporting hazardous materials or is designed to carry 16 or more passengers, the disqualification will be for a period of 180 days to two years. Penalties increase for second, third, and subsequent offenses.<sup>91</sup>



<sup>82</sup> 49 CFR 395.15(b) (2017).

<sup>83</sup> 49 CFR 395.15(b)(4) (2017).

<sup>84</sup> 49 CFR 395.13(a) and (b) (2017).

<sup>85</sup> *Id.*

<sup>86</sup> 49 CFR 395.13(c) and (d) (2017).

<sup>87</sup> 49 CFR 395.13 (2017).

<sup>88</sup> 49 CFR 395.13 (2017).

<sup>89</sup> 49 CFR 396.9 (2017).

<sup>90</sup> 49 CFR 389.13 (2017).

<sup>91</sup> See Table 4 to 49 CFR 383.51 (2017).



## Responsibilities of Carriers (Owners/Employers)



**INTERSTATE CARRIERS** must register with FMCSA and receive authority to operate. Carriers are required to know and follow federal regulations<sup>92</sup> and may not “allow, require or permit” a driver to operate a CMV if that driver’s CDL has been suspended, revoked, or cancelled, or if that driver (or the driver’s CMV) is subject to an out-of-service order.<sup>93</sup> Carriers may not allow a driver who holds a CDL or a commercial learner’s permit (CLP) to operate without the proper endorsements or to operate an improper class of CMV. Carriers may not allow operation by a driver who holds more than one CDL or CLP. In addition, carriers may not allow a driver to violate a federal, state, or local law “pertaining to railroad-highway grade crossings.”<sup>94</sup>

Carriers must make certain that their vehicles are regularly inspected and properly maintained<sup>95</sup> and carriers are responsible for all drug and alcohol testing.<sup>96</sup>

In addition, a carrier must keep detailed records of its drivers’ crashes and of the carrier’s compliance with state and federal regulations, and a carrier must cooperate and assist in any FMCSA investigation or special study.<sup>97</sup>

Carriers are specifically forbidden from coercing a driver to operate a vehicle in violation of several regulations, including regulations governing the transportation of hazardous materials and other safety issues.<sup>98</sup>

Finally, CMV drivers who refuse to operate a CMV because they have “a reasonable apprehension of serious injury to the employee or the public because of (a) vehicle’s hazardous safety or security condition” or who refuse to operate a CMV because such operation would violate “a regulation, standard, or order of the United States related to commercial motor vehicle safety, health or security” are protected by a federal whistleblower statute against discharge, discipline or discrimination “regarding pay, terms, or privileges of employment.”<sup>99</sup>

<sup>92</sup> 49 CFR 390.3(e) (2017).

<sup>93</sup> 49 CFR 383.37 (2017).

<sup>94</sup> *Id.*

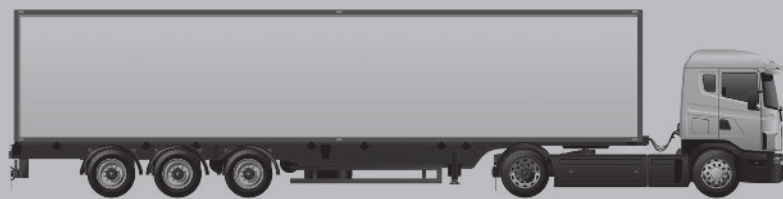
<sup>95</sup> 49 CFR 396.3 (2017).

<sup>96</sup> 49 CFR 382 Subpart C (2017).

<sup>97</sup> 49 CFR 390.15 and 49 CFR 396.3(b) (2017).

<sup>98</sup> 49 CFR 390.6 (2017) The prohibition of coercion specifically applies to 49 CFR parts 171-173, 177-180, 3880-383 or 390-399, 356, 360, 365-379, and 385.415 and 385.421 (2017).

<sup>99</sup> 49 USC § 31105 (2017).



## How CDL Law Affects the Public

*By Tim Barker*

**ON A SUNNY AFTERNOON** in June, Robert Haertsch was one of many people driving southbound on Interstate 83 in York County, Pennsylvania, heading towards Maryland. Robert was a 46-year old pharmacist. Robert and his wife Julie were parents to a 12-year-old son Isaac—Robert's pride and joy. Robert was fluent in several languages and loved travelling with his family. Robert was looking forward to a happy future with Julie and Isaac and was planning for an eventual retirement in Southport, North Carolina on land he and Julie had purchased.

Robert did not know his dreams would be dashed that afternoon. He did not know that traveling northbound on the same interstate was an illegally maintained and equipped commercial motor vehicle: a Beall Transliner tractor trailer owned by Paradise Products, Inc. of Schuylkill County, Pennsylvania. The CMV was unsafe. It should not have been on the highway.

The CMV's required vehicle inspection was not up to date—its inspection certificate had expired, and its braking system was seriously compromised. Three of the brakes were out of adjustment and there was an air pressure loss in the brake reserve system. In addition, one of the brass brake hose couplings was worn, and the brake linings were worn beyond allowable specifications.

Additionally, the truck had serious axle problems, including a loose axle securing bolt and a bearing seal leak on the left side of axle #5. But yet another axle defect proved the deadliest: the bearing on the right side of axle #5 had no lubrication.

Without lubrication on the right side of axle #5, the bearing failed, which caused the right rear wheel assembly to break away from the axle. When the wheel assembly broke off, it careened down I-83, bounced over a barrier, and landed on the roof of Robert's vehicle, crushing him and killing him instantly.

After killing Robert Haertsch, the wheel assembly continued down I-83. The wheel assembly bounced onto an

overpass and over the hood of another vehicle until it finally came to rest, over one thousand feet from where it had broken off the CMV. Meanwhile, the CMV operator continued to drive down the interstate, unaware that he had lost his right rear tire assembly and killed Robert Haertsch.

The tragic and senseless chain of events that took Robert Haertsch's life was entirely preventable. Had the owner, manager, or operator of the CMV simply followed the safety laws and regulations governing CMV's, Julie Haertsch would not be a widow and Isaac Haertsch would not be fatherless. In a single moment, the failure to follow the federal regulations governing CMV's ended Robert's life, his family's life with him, and their plans for a future together.

### ***Safety and Liability Issues***

Investigating and prosecuting the circumstances that led to the death of Robert Haertsch presented many challenges not present in most crashes involving a CMV. First and most obvious, because the CMV itself did not strike anything, the crash was not immediately known to the CMV operator. Despite losing a wheel assembly, the operator was not aware of the crash when it occurred, and continued driving on the interstate. The physical separation and distance between the CMV when the wheel assembly broke off and the damage it ultimately caused expanded the size of the crime scene, and presented collision dynamics which were more complex than those found in a crash between a CMV and another vehicle. The scene itself spanned a significant area of roadway.

In addition, as a consequence of the multiple CMV equipment violations and equipment failures, establishing the cause of the crash required the assistance of multiple experts. To address these challenges, the prosecution utilized not only the skills of a commercial motor vehicle specialist and a collision reconstructionist but also the



skills of an expert with specialized knowledge in the area of wheel bearing maintenance and failure.

During the investigation, police executed search warrants to locate and seize records relating to the CMV's maintenance and its driver's qualifications. Police also obtained documents and conducted interviews to determine the roles of various individuals working for the carrier to determine the person responsible for proper and routine maintenance of the CMV.

Ultimately, the investigation determined that charges should be filed against the CMV operator, against the motor vehicle carrier, Paradise Products, Inc., and against the corporation's secretary, the person responsible for CMV maintenance and repairs for Paradise Products.

The prosecution's charges were based on the theory that Robert Haertsch's death was recklessly caused by neglect and lack of maintenance to the Beall Transliner CMV and its component parts, including the bearing components of the right rear axle #5. All defendants admitted their responsibility and

pled guilty to recklessly causing Robert Haertsch's death.

Prosecution of the corporation and the corporation secretary was possible because federal and state regulations place specific safety requirements on motor carriers, and failure to abide by those requirements may make a corporation, members of its management, or both the corporation and its corporation officer(s) criminally liable for a CMV crash.

The prosecution of this case was successful due to the hard work and diligence of all officers, experts, and prosecutors in the case. However, the sad fact remains that Robert Haertsch would be alive today if Paradise Products, Inc. and the individual defendants had followed the rules, and put safety first.

The rules that govern CMV's are safety rules. Investigators and prosecutors who enforce CMV rules are working to keep our roadways safe.

The death of Robert Haertsch should serve as a graphic reminder of the importance of investigating and enforcing laws and regulations governing CMV's and CMV operators.

## Securing and Evaluating Evidence Needed for a Successful Prosecution

### ***Evidence from a Commercial Motor Vehicle Crash***

A commercial motor vehicle (CMV) crash is a complex event which often has far reaching ramifications. Passenger cars and CMV's differ in size, performance, and purpose. An 80,000 pound CMV tractor trailer is 25 times heavier than a 3200 pound passenger car.<sup>100</sup> A truck of that size, traveling at just 12 mph, has the same kinetic energy as a 3200 pound passenger car traveling at 60 mph. This disparity makes a crash between a CMV and a passenger car potentially much more severe for the passenger car and its occupants.

In addition, heavy trucks cannot be maneuvered as quickly as passenger cars, nor do they possess the same braking and stopping abilities. Air breaks do not perform as quickly and efficiently as hydraulic brake systems. Heavy truck tires are made of harder rubber compounds which provide better wear and longer life, but which generate less friction at the roadway interface than do passenger car tires. This decrease in friction results in a decreased ability to "grab" the road surface to assist the brakes in slowing the vehicle.

A crash involving a CMV likely will require an investigation involving more personnel than a crash involving only passenger vehicles or light trucks. Investigation of a CMV crash should be undertaken by a team which includes not only the initial responding patrol officer(s) and prosecutors, but also includes other persons with specialized knowledge, such as technical investigators, collision reconstructionists and commercial motor vehicle specialists.

All officers who potentially could respond to the scene of a CMV crash should receive basic training on issues

critical to these crashes, but because the vehicle and driver are subject to comprehensive federal and state regulations, a commercial motor vehicle specialist should always be asked to assist and to become part of the crash investigation team. The team must have a competent working knowledge of federal and state regulations that govern CMV's and CMV drivers, to enable the team to develop an accurate picture of the CMV crash and, if criminal behavior has occurred, to make prosecution possible.

The following discussion is an overview of potential sources of evidence from a CMV crash, and procedures law enforcement officers and prosecutors should consider in securing and obtaining that evidence.

### ***Scene***

The scene of a CMV crash will probably contain unique evidence that would not be found at a crash involving cars or light trucks. The roadway of a CMV crash scene may contain dual tire marks indicating heavy braking or any other condition that impeded the rotation of a dual wheel, or may contain tire marks indicating that a weight shift occurred, which resulted in a rollover. If a rollover did occur, the roadway may have circular sidewall scuff marks.

The scene may also contain evidence specific to the vehicle's load and the manner in which it was secured. If the security of the cargo was compromised during the crash or if there is a concern that the cargo had not been properly secured, the scene should be searched for items designed to secure cargo, including binders, chains, tie downs, and "dunnage" (non-cargo items such as cush-

<sup>100</sup> This discussion of evidence from a CMV crash is an overview of a very thorough crash investigation. The discussion identifies many technical issues and "to do" items which may or may not be appropriate for a given

crash. Prosecutors should work closely with commercial motor vehicle specialists, technical investigators and collision reconstructionists to identify and understand issues important in a given case.



ioning bags filled with air or other inexpensive, non-cargo material used to secure the cargo during transport).<sup>101</sup>

### ***Examining the Commercial Motor Vehicle in General***

The CMV tractor will likely be of particular evidentiary value, and this must be recognized by law enforcement at the very onset of the investigation. Responding officers must understand that to safeguard the evidence, they must 1) separate the driver from the CMV and secure the keys, to preserve electronic data which may be present in the CMV's engine control module (ECM); and 2) inform the heavy duty tow and recovery personnel assigned to tow a wrecked CMV to remove the power unit's drive shaft (again, to guard against the possible loss of electronic data) and to "cage" the brakes prior to towing. Law enforcement agencies and training academies should consider including this specific guidance in all basic traffic enforcement/crash response training programs.

Once a CMV is towed, it must be stored. Proper storage is critical not only to the initial investigation of the crash, but also (if criminal charges are being considered or have been filed), during the prosecution of the criminal charges. This is especially true if manslaughter, vehicular homicide or serious bodily injury is charged, so it will be possible for defense counsel and defense experts to inspect and examine the evidence. Proper storage forestalls due process challenges to the evidence and/or spoliation jury instructions<sup>102</sup> which may result if the prosecution releases a CMV from its custody before the defense has an opportunity to conduct an inspection. In addition, if a defense expert issues a report regarding the CMV, prosecution experts may determine from a review of the defense expert's report that further inspection of the CMV is necessary. Defense inspections and follow-up inspections by the prosecution may not be possible if the CMV is released from prosecution custody too early in the process.

Long-term storage of an impounded CMV can be a logistical challenge. Prosecutors and law enforcement officers should consider CMV storage issues before the need arises, and have plans on how to proceed in the event of a crash. The most obvious site for CMV storage is a secure, privately-owned heavy duty tow facility. Unfortunately, this option usually results in storage fees. For long term storage, it may be possible to store the CMV without cost at a secure, government-owned property, such as a road maintenance facility.

In evaluating the evidentiary value of the CMV, investigators should first consider the entire CMV as a single unit, and then consider the tractor and trailer portions individually. If feasible, investigators should have the entire CMV weighed in combination—the



<sup>101</sup> 49 CFR 383.11(a)(16), 49 CFR 391.13 and 49 CFR 392.9 (2017).

<sup>102</sup> A "spoliation jury instruction" is sometimes given to a jury when, for whatever reason, the evidence in a case has been destroyed, is no longer in existence, or is materially altered from its condition at the time of the

incident. In criminal cases, spoliation instructions advise a jury that the defense could not inspect or examine the evidence due to a failure by the State to preserve the evidence, and such instructions advise jury members that they may infer from the State's failure to preserve the evidence that the evidence would have been helpful to the defense.

tractor, trailer, and the load.

Assuming that the CMV tractor will be impounded and placed in storage, investigators should consider whether the CMV trailer and/or the cargo is of evidentiary value, and if so, whether either or both should be stored for purposes of further investigation. If the load is perishable, authorities should consider what steps can be taken to preserve the evidentiary value of the load while mitigating, as far as possible, the loss of the load or a reduction in its value.

In most cases, the CMV tractor will likely be the greatest source of evidence, therefore, impounding and storing only the CMV tractor will be appropriate. If the mechanical condition of the CMV trailer is relevant, or if it contains some pertinent evidence from the collision, authorities must determine whether the CMV trailer should be impounded and stored. Finally, unless the cargo has evidentiary value, it should be released to the carrier as soon as practicable. The carrier can make arrangements to off-load the cargo onto another CMV trailer even if the crash-involved CMV trailer remains impounded.

### ***Examining the Vehicle and Its Engine***

Before examining the vehicle, officers should seek search warrants to permit inspection of all electronic devices which are part of the CMV and/or personal electronic devices found in the CMV. It may also be appropriate to include in a warrant application a request to search the bedroom/sleeper portion of a CMV, to forestall argument that a driver's privacy interest in the bedroom/sleeper portion is greater than the driver's privacy interest in the seating portion of the CMV cab.

All modern, heavy commercial vehicles are equipped with Diesel engines with a computer (an engine control module—ECM) which monitors and manages the engine's performance. While the capabilities of ECM's vary according to manufacturer and the age of the motor, ECM's have the potential to contain valuable electronic

data which may include:

- setup and configuration parameters;
- fleet management tools (such as trip activity reports and/or monthly activity reports and engine life-to-date reports);
- various histograms (charts or graphs showing status and/or changes over time);
- vehicle over-speed and engine over-rev data;
- daily engine usage;
- maintenance logs; and
- diagnostic and fault codes.

Some ECM's also have event data recording (EDR) capability. Depending upon the manufacturer, these events may be referred to as a "hard brake incident", a "hard accel/decel incident," a "quick stop incident," or a similar name. An EDR "recordable incident" is triggered by an acceleration event which exceeds a pre-set parameter, generally 7 mph/second for a large truck.<sup>103</sup> Again, depending upon the manufacturer, an EDR will record over a certain time interval, commonly between one and two minutes, which will include drive time leading up to the triggering event and time after the triggering event occurs.

A recorded event will provide a second by second chronology of driver behavior and vehicle performance. Data may include:

- incident date and time;
- odometer reading at incident;
- a count-down time stamp;
- vehicle speed (in mph) and engine speed (in rpm);
- brake status (applied/released);
- clutch status (engaged/released);
- engine load and throttle percentages;
- cruise control status (on/off); and
- diagnostic trouble codes (DTC) associated with the event.

The ECM may also have a feature which recorded the

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<sup>103</sup> Investigators should be aware that "pre-set parameters" can sometimes be changed by unauthorized persons. This issue should be reviewed if other evidence from the crash suggests that the EDR data is not accurate.

CMV's last stop, to document when the engine was shut down or was idle for a period of time. This "last stop" data can easily be over-written if the vehicle speed sensor (VSS) at the tail shaft of the transmission detects motion and resets, and thereby creates a new "last stop". This creation of an artificial "last stop" could occur if the CMV is moved following the crash. It is for this reason that it is critical to secure the CMV's keys and, out of an abundance of caution, have the tow company remove the drive shaft and "cage" the brakes before towing the CMV.<sup>104</sup>

A collision that is preceded by a hard brake incident has the potential to have an associated recorded event that was triggered by the rapid deceleration. If this occurs, the recorded hard braking event becomes a valuable piece of evidence chronicling the driver behavior and CMV performance in the last moments leading up to the crash, as well as (potentially) during and after the crash event. If the ECM in vehicle involved in the crash has the feature to record the last stop, and the last stop is the crash event, then the last stop record may also provide pre-crash and post-crash data. A hard brake incident record and the last stop record may overlap and extend the time frame of the recorded data.

There are also scenarios where, either through driver inaction (i.e. no braking) or through mechanical inadequacies of the foundation brakes, the CMV never generates sufficient deceleration to meet the trigger threshold. In such a scenario, a hard brake incident recording would not be generated. However, if the ECM records the last stop, the data during the crash event may still be present in the last stop record. This illustrates just how important it is to preserve the last stop data and not allow this data to be over-written, and underscores the earlier observation that all officers who could potentially respond to a CMV crash should be provided training on procedures to preserve CMV crash evidence.

### **Vehicle ABS Electronic Control Units**

Other potential sources of electronic evidence are the

electronic control units of the tractor and/or the trailer anti-lock brake systems (ABS). These modules may contain incident and diagnostic trouble code data. The ABS electronic control module may also contain reports from the CMV's radar-based collision avoidance system.<sup>105</sup> Some of these systems also have the capability to serve as a fleet management tool which can send event data to a programmed email address or cell phone. The possible existence of this evidence should be considered and requested when seeking information from the motor carrier.

### **Fleet Management Systems**

There are numerous commercially available fleet management systems which provide logistical assistance to motor carriers, linking fleet managers with CMV operators using global positioning satellite data. Authorities should determine if the motor carrier uses such a system and seek information generated or recorded by the system.

For CMV crash investigation purposes, fleet management systems may have data in the form of notifications or reports generated when a triggering event occurs. The recorded data may be similar to that which can be recovered from an ECM hard brake event. Because the data is Global Positioning System (GPS) based, there may be location and travel data present as well. In addition, some fleet management systems can be manually triggered without the vehicle exceeding a pre-set threshold.

### **Miscellaneous Electronic Devices**

A CMV may contain navigational devices and GPS systems which may contain retrievable GPS based trip/speed/location data. Dash mounted video cameras are also becoming more widely used. The interior of the CMV may also contain commonly used electronic devices like cell phones,<sup>106</sup> laptops, and tablets, which are potential sources of distracted driving. In addition, these electronic devices may contain evidence which is rele-

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<sup>104</sup> See the suggestion for training of officers who may respond to a CMV crash at page 17.

<sup>105</sup> If the vehicle is equipped with such a system. Commercial examples of such systems include Bendix®, VORAD®, Wingman®, and Meritor OnGuard™ collision safety systems.

vant to the investigation, as a given device may have been used to generate and maintain electronic logbooks. Investigators should seek search warrants to allow the retrieval of information from these devices.

### ***Vehicle Search and Mechanical inspection***

In addition to securing available electronic data, investigators should conduct a thorough search of the CMV's interior (discussed at page 19.) and an inspection of the mechanical systems. The mechanical inspection should be conducted by a commercial motor vehicle specialist and a qualified inspection mechanic. These inspectors should observe, document, and photograph any collision-related damage, as well as damage that is not associated with the crash, as the collision reconstructionist must be able to identify and explain all observable damage. A failure to properly document damage unrelated to a crash may undermine or call into question conclusions about a cause or the circumstances of the crash.

Next, document the interior controls of the CMV. Examine the drive train and note the engine make, model, and serial number. Photograph any manufacturer plates. Also, document the make, model, and serial number of the transmission, and photograph the transmission manufacturer's plate, as this will be important if it becomes necessary to identify the gear ratios. If the vehicle speed sensor ring gear at the tail shaft of the transmission is exposed, count and document the number of teeth. This will be important when verifying speed if ECM data is obtained. Observe the drive axle and photograph the manufacturer's plate to document the axle's final drive gear ratio. Also examine the steering components and photograph anything that may be relevant.

Examine the air brake system.<sup>107</sup> The commercial motor vehicle specialist should perform a safety inspection of the brakes and document brake chamber size and push-rod stroke. This specialist should also complete a vehicle examination report.

The following data is also necessary:

- slack adjuster length;
- brake drum radius; and
- brake shoe friction rating (if available).

(This additional data will be necessary if, during the course of the collision reconstruction, brake force calculations need to be computed.)

Examine all component parts of the air brake system for evidence of wear (including slack adjusters) in cases where air brake system failure may be a causal factor in the CMV crash. Document all evidence of wear and separately maintain custody of the component parts for possible future testing and evidence preservation.

Examine the tires and wheels, and document tire size, overall condition and inflation pressure. Examine the suspension components and the axle ends, particularly the bearing seals, and document any wear and lubricant used. Examine the CMV coupling devices, the exhaust system, and lamps. Check manufacturer sources for any recall data. Document any damage or wear to these areas and separately maintain custody of any parts for possible future testing and evidence preservation.

Examine the cargo, and pay particular attention to how it was secured. Also note any special considerations for a given load, such as placarding for hazardous materials and special hauling permits for oversized loads. Make sure that the CMV load did not exceed the gross vehicle weight for the CMV.

Finally, carefully inspect the cab. In addition to the electronic devices mentioned previously, the cab should contain paper log books, receipts (fuel, meals, tolls etc.), manifests, bills of lading, and shipping papers. When seeking and examining log books, be aware that CMV's may contain "official logs" and "false logs." "False logs" may be kept in a standard log book, in a freeform note format, or in an electronic device. It is important to seize any evidence that relates to travel so the evidence may be examined by someone well versed in commercial driver logbook regulations.

Investigators should also be aware that the interior of

<sup>106</sup> CMV drivers are prohibited from using a hand-held phone or texting while driving. See 49 CFR 392.80 and 392.82 (2017). Authorities should seek a search warrant before attempting to access cell phones. CMV drivers are also prohibited from possessing or using radar detectors. 49 CFR 392.71 (2017).

<sup>107</sup> Brakes and required brake performance are detailed in 49 CFR 393 Subpart C – "Brakes" (2017).



the vehicle may contain medications or illegal drugs. All potential sources of impairment must be carefully documented and potentially seized and preserved as evidence.

### **Driver**

The CMV driver is required to be properly licensed for the class of CMV operated and possess the proper endorsement for the vehicle and the load.<sup>108</sup> The driver must have a current medical certification<sup>109</sup> and if, applicable, a skill performance evaluation.<sup>110</sup> All CMV drivers must possess the ability and knowledge necessary to properly operate, inspect and maintain a CMV as required by state and federal regulations.

Many CMV drivers are required to maintain a record of duty status,<sup>111</sup> (commonly called “log books”), and the record must be available for inspection while on duty. The CMV driver is also required to perform a pre-trip inspection of the CMV to be satisfied that the vehicle is in good working order.<sup>112</sup> The driver must also prepare a written report at the completion of each work day if a defect or deficiency is discovered or reported to the driver. (The driver of a passenger-carrying CMV must prepare the report even if no defects or deficiencies have been identified.)<sup>113</sup> These reports should be secured and examined by a crash investigator.

The driver’s medical history and the driver’s qualification file (available from the motor carrier<sup>114</sup>) may be relevant to the crash investigation. Investigators should interview the CMV driver to obtain any relevant medical history, including prescribed medications. When relevant, investigators should obtain any medical or pharmaceutical records of the CMV driver and should be prepared to seek a court order to secure this information if necessary. Expert medical testimony may be required

to establish or refute any medical condition of the driver as a causal factor in the crash. Driver medical issues are discussed at greater length at pages 4-5, 8-10, and 23-27.

### **The Motor Carrier**

The motor carrier—the trucking company—will likely be a source of valuable information for the investigation of a CMV crash. Federal regulations require the motor vehicle carrier to assist in investigations and special studies. The relevant regulation provides:

“Each motor carrier and intermodal equipment provider must do the following: (1) Make all records and information pertaining to an accident available to an authorized representative or special agent of the Federal Motor Carrier Safety Administration, an authorized State or local enforcement agency representative, or authorized third party representative within such time as the request or investigation may specify. (2) Give an authorized representative all reasonable assistance in the investigation of any accident, including providing a full, true, and correct response to any question of the inquiry.”<sup>115</sup>

The crash investigator should request several items from the motor carrier, including the driver qualification file. This file must include:<sup>116</sup>

- The driver's application for employment;
- A copy of the motor vehicle record received from each State pursuant to 49 CFR 391.23(a)(1) (2017);
- The certificate of the driver's road test, issued to the driver pursuant to 49 CFR 391.31(e) (2017), or a copy of the license or certificate which the motor carrier

<sup>108</sup> Endorsement means an authorization to an individual's CLP or CDL required to permit the individual to operate certain types of commercial motor vehicles. See 49 CFR 385.5 (2017). Types of endorsements are listed at 49 CFR 383.93 (2017); types of vehicles (“groups”) are listed at 49 CFR 383.91 (2017).

<sup>109</sup> 8449 CFR 391.45 (2017).

<sup>110</sup> 49 CFR 391.49 (2017).

<sup>111</sup> 49 CFR 395.8 (2017). Exceptions to this requirement are listed at 49 CFR 395.1 (2017).

<sup>112</sup> 49 CFR 396.13 (2017).

<sup>113</sup> 49 CFR 396.11 (2017).

<sup>114</sup> See text accompanying footnote # 117.

<sup>115</sup> 49 CFR 390.15(a) (2017).

<sup>116</sup> 9149 CFR 391.51 (2017).

accepted as equivalent to the driver's road test pursuant to 49 CFR 391.33 (2017);

- The motor vehicle record received from each State driver licensing agency pursuant to the annual driver record inquiry required by 49 CFR 391.25(a) (2017);
- Any note relating to the annual review of the driver's driving record as required by 49 CFR 391.25(c)(2) (2017);
- A list or certificate relating to violations of motor vehicle laws and ordinances required by 49 CFR 391.27 (2017);
- The medical examiner's certificate as required by 49 CFR 391.43(g) (2017) or a legible copy of the certificate (subject to exceptions listed at 49 CFR 391.51(b)(7)(i), (ii) and (iii) (2017), and at 49 CFR 391.51(b)(9)(i) and (ii) (2017)); and
- A Skill Performance Evaluation Certificate obtained from a Field Administrator, Division Administrator, or State Director issued in accordance with 49 CFR 391.49 (2017); or the Medical Exemption document, issued by a Federal medical program in accordance with part 49 CFR part 381 (2017).

The motor carrier should also be asked to provide copies of all applicable: (1) driver logs; (2) driver vehicle inspection reports; (3) CMV maintenance records, including but not limited to any and all repairs, inspections and replacement parts; and (4) communications between the driver/CMV and motor vehicle carrier, including but not limited to any recorded event generated as a result of a triggering threshold being met or a manually initiated incident, as well as any generated GPS data, emails, text messages, photographs, video recordings, or other evidence, including the results of the CMV driver's post-crash chemical tests.

## **Medical Evidence**

In this section, we examine the medical facts an investigator will want to consider when dealing with a CMV crash.<sup>117</sup>

Officers responding to a CMV crash must always consider whether the crash was the driver's fault and whether the driver was impaired, sleeping, or was distracted. An initial cursory evaluation of possible impairment of a driver involved in any crash should always be part of an officer's standard procedure, but officers should resist an impulse to assume without evidence that a CMV driver was intoxicated or sleeping. Any driver may have a medical condition which contributed to a crash, but an investigator examining a CMV crash has access to more medical information about a CMV operator than would be available about drivers in other crashes. An investigator evaluating a CMV crash may learn of a driver's pre-existing medical condition(s) which may have contributed to the crash.

All CDL license holders must meet required physical qualifications in order to operate a commercial motor vehicle<sup>118</sup> so investigators should obtain a copy of the driver's medical certificate. The certificate may be in the driver's possession,<sup>119</sup> but as the regulations progress to digital record keeping, the investigator may obtain a copy of the certificate from the state driver's licensing agency.<sup>120</sup> Commercial drivers can be disqualified from operating a CMV as a result of a number of physical impairments.<sup>121</sup> Drivers must be medically examined and certified at least once every 24 months.<sup>122</sup>

Medical certificates and their validity at the time of crash, should be considered in determining whether or not a CMV driver involved in a crash should be charged with a criminal offense. In many non-CMV criminal cases, defendants argue that existing health problems

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<sup>117</sup> Access to records may be restricted, but investigators seeking access to records should review 49 CFR 382.405(d) (2017) (access from a state drivers' licensing agency), 49 CFR 382.405(g)(2017) (access in civil or criminal actions, pursuant to 49 CFR 40.323(a)(2) (2017)). See also 49 CFR 40.323(a)(2) (2017), which requires a court order directing the employer to produce the information.

<sup>118</sup> 49 CFR 391.41 (2017).

<sup>119</sup> Before January 30, 2015 regulations required that drivers have a copy of the certificate with them. Current regulations remove this requirement for most drivers. See 49 CFR 391.41(a)(2) (2017).

<sup>120</sup> 49 CFR 383.71(h) (2017).

<sup>121</sup> 49 CFR 391.41(b) (2017).

<sup>122</sup> 49 CFR 391.45 (2017); also, note that some drivers must be examined and certified annually, 49 CFR 391.45(b)(2) and (c) (2017).

caused their conduct, but for a commercial motor vehicle driver, the driver's existing health problems may be tantamount to evidentiary admissions. Medical qualifications exist for CDL holders to ensure that they are physically capable of controlling the complex machinery they operate. If a driver operates a CMV despite the existence of a disqualifying condition, that information should be part of the determination of whether the driver should be subject to criminal prosecution.

Investigating the status of a driver's medical condition and securing a copy of the certificate may effectively prevent a medical defense from being relied upon by the defense at trial, and may impede the ability of the defense

to argue convincingly that a medical issue caused the defendant's conduct.

If a "medical emergency" defense is proffered by a driver and the prosecutor obtained the driver's medical certificate, the certificate could reveal possible impeachment evidence. The question being, whether the driver lied to the medical examiner about not having a medical condition, or whether a driver who is charged with a crime, now claims to have a medical condition as a defense at trial. Either possibility presents a problem for the driver.

The medical certificate is also important in cases involving drugged driving. Drivers are prohibited from



<sup>123</sup> 49 CFR 391.41(b)(12) and (13) (2017) which provide that a driver may be qualified if the person "(12)(i) Does not use any drug or substance identified in 21 CFR 1308.11 Schedule I, an amphetamine, a narcotic, or other habit-forming drug.; (ii) Does not use any non-Schedule I drug or substance that is identified in the other Schedules in 21 CFR part 1308 except when the use is prescribed by a licensed medical practitioner, as defined in §382.107, who is familiar with the driver's medical history and has advised the driver that the substance will not adversely affect the driver's ability to safely operate a commercial motor vehicle." and "(13) Has no current clinical diagnosis of alcoholism." See also footnote #37, on "scheduled" controlled substances.

<sup>124</sup> *Id.*

<sup>125</sup> The regulations contain forms for the medical evaluation and a medical certificate form at 49 CFR 391.43 (2017). Although prescribed medications would appear on the medical evaluation form, there is no indication of prescriptions on the medical certificate form. The question therefore is whether the statements being made about the "medical certificate" are accurate, and if not, whether the medical evaluation form would be available

taking any Schedule I controlled substances, as well as other habit forming drugs found in Schedules II, III, and IV, such as methadone.<sup>123</sup> Drivers should be aware that certain prescribed substances could potentially disqualify them from operating a CMV. A driver who has been prescribed such a substance must obtain assurances from the reviewing clinician that the substance use will not affect their ability to safely operate their commercial motor vehicle.<sup>124</sup> Medical certificates can establish whether a driver has been prescribed a specific medication for a significant medical condition, and whether a post-crash blood test should contain evidence that the prescribed medication was being taken.<sup>125</sup>

In addition, knowing a driver's medical conditions and prescriptions may help in determining whether the driver was impaired. For instance, a .03% blood alcohol content (an alcohol concentration that, standing alone, would not trigger any adverse consequences for a driver) can have a much more significant impact on one's ability to function when mixed with certain medications. Knowledge of a driver's medical condition is also important when evaluating the results of Standardized Field Sobriety Tests. A driver's claim at trial that a medical condition was responsible for a failed test may be rebutted through use of the medical certificate.

### ***Impairment by alcohol or other drugs***

It is beyond argument that driving while impaired is dangerous. Impaired drivers experience decreased perception, decreased reaction time, tunnel vision, loss of concentration, and a myriad of conditions that affect their reasoning and mental abilities, their emotions, their judgment, and their ability to control their bodies. Operation of any motor vehicle by a person impaired by alcohol or drugs under any circumstance poses an

enormous risk to public safety.

Operation of a commercial motor vehicle by a person impaired by alcohol or drugs poses even greater risks. Operators of CMV's must possess specialized knowledge and expertise to safely inspect, operate, and maintain records of their operation. The weight and force represented by a moving commercial motor vehicle increases the risk of serious, life-threatening crashes exponentially, and that risk (and the subsequent risk to public safety) is increased even further if a CMV driver is impaired.

An officer who suspects a CMV driver of operating while impaired should proceed in the same manner used for processing any impaired driver, with one major caveat: the officer must be aware that the maximum per se alcohol concentration for CMV operators while driving a CMV is an alcohol concentration of .04%, and not the .08% per se alcohol concentration for persons who do not hold CDL's.<sup>126</sup> Therefore, officers must consider that a CDL holder who exhibits more subtle signs of impairment than those normally observed in an impaired driving case may still be in violation of state law or federal regulations that applies to CDL holders, and be prepared to test CDL holders even though they may exhibit lesser or fewer signs of impairment. Finally, officers must be aware of any available charges or violations under relevant criminal statutes and administrative regulations, and appropriately charge those CDL holders who test .04% alcohol concentration or above.<sup>127</sup>

Crash investigators should also contact the motor carrier to obtain a driver's drug testing files. Employers are required to randomly test their drivers for drug and alcohol use,<sup>128</sup> and are also specifically required to test after a crash.<sup>129</sup> This post-crash testing can be particularly important if a forensic blood draw was not obtained under a state's impaired driving law.

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to investigators—at least as to whether it would be available from the driver or from the respective state licensing agency.

<sup>126</sup> 49 CFR 391.15(c)(2)(i) (2017).

<sup>127</sup> Some states treat a .04 violation as a criminal offense and others treat the test result as a license violation leading to administrative sanctions only. However, in all cases, the CDL holder will be disqualified for refusing properly requested test under a state's impaired driving law. 49 CFR 383.51 (table I) (2017).

<sup>128</sup> 49 CFR 382.305 (2017).

<sup>129</sup> 49 CFR 382.303 (2017).



Federal rules provide for the minimum amount of drug testing required for CDL holders.<sup>130</sup> Therefore investigators should check to be certain that the drug testing has been performed. In addition, investigators and prosecutors should also review any relevant state statutes to determine if additional CDL testing is required in the state.

Federal requirements do not require mandatory disqualification or a mandatory violation for prescription or illegal drug use<sup>131</sup> but this evidence can be extremely probative in a prosecution for impaired driving. The results of drug testing may allow an investigator to look for evidence of abused substances inside the vehicle as well as reveal prescriptions the driver uses. Drug testing, or the lack thereof, may also be important in a case against a motor carrier.

It is important that the investigator obtains access to the entire employee file, not just the drug testing results. Files can contain information indicating that a person should not have been deemed safe to drive a CMV. Prosecutors should consider whether evidence of this type would be admissible under the state rule or statute which corresponds to Federal Rule of Evidence 404(b).

A growing number of states use statewide prescription databases to track fraud and drug abuse by gathering prescription information from pharmacies. These programs typically require a physician to log prescriptions given to an individual, and require pharmacies to log and report drugs dispensed. When investigating a commercial motor vehicle crash, these databases can assist in charging decisions, as investigators can use information from these databases to determine whether required medications are being properly dispensed or whether multiple prescriptions are being written by a given physician, or by multiple physicians—or if prescriptions are being written for an illness or condition

that does not appear on a driver's medical certificate. Investigators may be able to determine the number of pills of a given medication which have been prescribed and the frequency of use provided for in the prescription. By comparing that information with the number of pills in the driver's possession, an investigator can identify those situations where a driver may have a valid prescription, but has been taking too many pills too often.

Of special interest are drivers who receive controlled substances from multiple doctors. This may be a sign of prescription medication abuse. Admissibility of this evidence may vary greatly between states, but at a minimum should always be considered as impeachment evidence for drivers who claim no substance use.

When seeking state-maintained prescription medicine information, investigators should consider checking for that information in the driver's home state as well as the state where the crash occurred, and may consider checking with any other state where the driver regularly operates. Investigators are encouraged to contact law enforcement agencies and prosecutors in the relevant states to determine what procedures must be followed to gain access to the information.

Finally, investigators and prosecutors need to be aware that, although some states have legalized the medical or recreational use of marijuana, CDL holders are prohibited from using any Schedule I substance—and marijuana is a Schedule I substance.<sup>132</sup>

## CHARGING CONSIDERATIONS—RECKLESSNESS

When a CMV crash occurs, investigators attempt to determine its causes, and decide whether any culpable behavior should result in the filing of criminal charges. This investigation is particularly important where a

<sup>130</sup> 49 CFR 382.305 (2017).

<sup>131</sup> But see 49 CFR 382.213, .215, and .217 (2017).

<sup>132</sup> 49 CFR 392.4 (2017).

<sup>133</sup> <sup>103</sup> 49 CFR 382.305 (2017).

<sup>134</sup> See, e.g., Iowa Code §707.6A(1) (2017).

<sup>135</sup> See, e.g., Tex. Penal Code §49.08 (2017), "intoxication manslaughter".

<sup>136</sup> Readers may note that the term "accident" appears in several CFRs referred to in this monograph. The National Traffic Law Center avoids use of the term and recommends that prosecutors and law enforcement offi-

cers adopt the term "crash" or the term "collision" to refer to traffic-related injuries or fatalities. The term "accident" implies that no party engaged in culpable behavior which caused the injury or fatality, and that no party can or should be held responsible for the results of that behavior. The terms "collision" and "crash" more accurately describe a traffic incident resulting in death or injury, without implying the presence or absence of a culpable mental state.

<sup>137</sup> In all cases, the State must also prove that the defendant's actions were a proximate cause of the result. For purposes of this discussion, it is assumed that a defendant's actions and mental state proximately caused the death

crash resulted in death or personal injuries. In rare instances, charges may be filed against a CMV carrier or the carrier's corporate officers for behavior or policies that led to the crash<sup>133</sup> but in most cases, the drivers involved and evidence from the scene of the crash will be the focus of the investigation.

Evidence from the scene and from the drivers must be collected, examined, and evaluated to allow investigators and prosecutors to determine whether criminal charges should be pursued and if so, what charges are appropriate. An analysis of the types of medical, physical and electronic evidence which may be available and should be investigated are presented at pages 17–21.

If a driver was impaired by alcohol or other substances, authorities will focus on the charging and proof issues inherent in DUI prosecutions and will consider how the state's vehicular homicide or manslaughter statutes fit with DUI cases. Many states have specific statutes for DUI vehicular homicide;<sup>134</sup> other states provide that DUI fatalities are prosecuted under manslaughter or other statutes.<sup>135</sup>

If the driver was not impaired, law enforcement officers and prosecutors are often faced with determining whether the evidence in a case would support a charge based upon "recklessness" and the need to prove the defendant's mental state as "reckless" at the time of the crash.

Criminal statutes are not written to punish the *result* of an action but rather to punish a person for acting with a culpable state of mind and causing that result. Therefore, not all traffic fatalities are the subject of a criminal prosecution<sup>136</sup> and not all traffic fatalities were caused<sup>137</sup> by culpable behavior.

In a prosecution of a motor vehicle fatality where impairment by drugs or alcohol is not an issue, the presence or absence of a particular culpable state of mind is

critical to determining whether a charge is supported by the evidence and if so, what charge is appropriate. Depending upon the state and the statutes involved, it may always be necessary to prove that the defendant acted "recklessly."<sup>138</sup> In other states, it may be possible to prosecute fatalities by proving "negligence" or "criminal negligence", two mental states which are less culpable than "recklessness."

In a 2017 case<sup>139</sup>, the Supreme Court of Wyoming affirmed a conviction for aggravated vehicular homicide based on recklessness, due to the conscious disregard of the need of the commercial driver to sleep. The Court noted, "It is difficult to define the precise line of demarcation between criminal negligence and recklessness in vehicular homicide cases in which the driver causing the accident fell asleep at the wheel. The relevant distinction between the offenses is whether the defendant consciously disregarded a substantial and unjustifiable risk, or whether he failed, through criminal negligence, to perceive that risk. Thus, what distinguishes the felony of aggravated vehicular homicide from the lesser offense of misdemeanor vehicular homicide is the level of awareness of a substantial and unjustifiable risk. The degree of conscious disregard or perception depends upon the facts of each case."

In a 1979 case<sup>140</sup>, the Colorado Court of Appeals discussed some of these issues in light of then-recent changes to Colorado's definitional statutes:

"Where driving under the influence is not involved, vehicular homicide requires proof of three elements: (1) That defendant operated a motor vehicle, (2) that this operation was performed in a reckless manner, and (3) that this conduct proximately caused the death of another person. . . The lesser included offense of

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or serious injury which resulted. "Proximate cause" is a discrete legal issue outside the scope of this discussion.

<sup>138</sup> In Iowa, all non-impaired driving traffic fatalities require proof of reckless conduct, either pursuant to the involuntary manslaughter statute (Iowa Code section 707.5 (2017)—and the case law interpreting that statute to require recklessness), or by proof of reckless driving, eluding, or drag racing (Iowa Code sections 707.6A(2) and (3) (2017)). It is difficult to define the precise line of demarcation between criminal negligence and recklessness in vehicular homicide cases in which the driver causing the accident fell asleep at the wheel. The relevant distinction between the offenses

is whether the defendant consciously disregarded a substantial and unjustifiable risk, or whether he failed, through criminal negligence, to perceive that risk. Thus, what distinguishes the felony of aggravated vehicular homicide from the lesser offense of misdemeanor vehicular homicide is the level of awareness of a substantial and unjustifiable risk. The degree of conscious disregard or perception depends upon the facts of each case. *People v. Bettis*, 43 Colo. App. 104, 105-106 (1979).

<sup>139</sup> *Barrowes v. State*, 2017 Wyo 23, 390 P. 3d 1126 (2017).

<sup>140</sup> *People v. Bettis*, 43 Colo. App. 104, 105-106 (1979).

criminally negligent homicide. . . is proven by showing: (1) That the defendant acted in a criminally negligent manner and (2) that this conduct caused the death of another person. The primary differences between the statutes are that the former applies only to the operation of a motor vehicle . . . and that the vehicular homicide statute uses the culpability standard of ‘recklessly’ while the standard applicable in the lesser offense is ‘criminally negligent.’ *People v. Calvaresi*, 188 Colo. 277, 534 P.2d 316 (1975), held that any distinction between the statutory terms ‘reckless’ and ‘criminally negligent’ was a ‘distinction without a significantly pragmatic difference.’ However, after *Calvaresi*, the General Assembly redefined these terms in 1975 and, we conclude, eliminated the overlap between these two standards. . .

“The definitions of the two terms now differ in that a person acts ‘recklessly’ when he ‘consciously disregards a risk’, while he is ‘criminally negligent’ when he ‘fails to perceive’ the risk through a ‘gross deviation’ from a reasonable standard of care. . . . Thus the distinction is between becoming aware of a risk yet consciously choosing to disregard it as opposed to negligently failing to become aware of the risk. Recklessness requires a higher degree of culpability than criminal negligence” (internal citations omitted).<sup>141</sup>

A 1989 case decided by the Alaska Court of Appeals<sup>142</sup> also discusses statutory definitions when describing the differences between “recklessness” (the requirement for a conviction under the state’s manslaughter statute), and the “criminal negligence” required under the state’s

criminally negligent homicide statute:

“Under the statutory definitions, recklessness and criminal negligence both require conduct that, with respect to a specified result or circumstance, creates ‘a substantial and unjustifiable risk that the result will occur or that the circumstance exists. . .’ . . .

“The sole distinction between recklessness and criminal negligence—and by extension, between manslaughter and criminally negligent homicide—lies in the accused’s awareness of the risk that is caused by the accused’s conduct. When the accused is ‘aware of and consciously disregards’ a substantial and unjustifiable risk that death will occur, the resulting death is manslaughter. . . When the accused merely ‘fails to perceive’ the same risk, then the resulting death is criminally negligent homicide” (citations omitted).

These distinctions are important because the provable mental state determines the level of the offense and whether or not a prosecution is even possible. “Reckless” driving, as defined by the respective state statute, will support a manslaughter or vehicular homicide charge in every state,<sup>143</sup> but if the evidence does not rise to the level of recklessness, law enforcement officers and prosecutors must consider whether charges which require less culpable conduct may be appropriate.

Many states have statutes which define the various culpable mental states. The Colorado and Alaska cases discussed above refer to and rely upon the respective definitional statutes to determine the proper level of culpability for the respective defendants. Other states also have “mental states” statutes to explain the meaning of

<sup>141</sup> The current Colorado definitional statute, C.R.S. § 18-1-501 retains this distinction between the two terms.

<sup>142</sup> *Panther v. State*, 789 P.2d 386, 389 (Alaska 1989).

<sup>143</sup> In some states, certain conduct has been identified as “per se” reckless driving. Connecticut provides that operating at a speed greater than 85 mph is reckless driving, (Conn.Gen.Stat. §14-222); Tennessee’s reckless driving law provides that driving a motorcycle with the front wheel off the ground is, in certain instances, reckless driving, as is ignoring barricades and warning signs and driving onto a flooded roadway, (Tenn. Code Ann.

§55-10-205); New Hampshire’s statute provides that speeding at 100 mph or greater is reckless driving (RSA 265:79). As of July 1, 2017 Iowa’s reckless driving vehicular homicide statute provides that texting “shall be prima facie evidence that the person was driving the motor vehicle in a reckless manner. . .” Iowa General Assembly, Senate File 444 (2017).

<sup>144</sup> See, e.g., ACA §5-2-202 (2017) (Arkansas); 11 Del. C. §231 (2017) (Delaware); RSA 626:2 (2017) (New Hampshire), and Main Revised Statutes Annotated, 17-A, Ch. 2, § 35 (2017).

<sup>145</sup> See, e.g., Colorado’s statute on criminally negligent homicide, CRS 18-3-

terms like “purposeful”, “knowingly” and other concepts used to categorize levels of criminal culpability.<sup>144</sup>

Obviously, law enforcement officers and prosecutors must know their state laws before making a charging decision. If there is insufficient evidence of recklessness, but there is a state law which prohibits “criminal negligence” when causing a death,<sup>145</sup> or “negligent homicide” when causing a death,<sup>146</sup> or “careless driving” causing death<sup>147</sup> (or a statute similar to the Delaware law “operation of a vehicle causing death; unclassified misdemeanor”<sup>148</sup>) prosecutors should examine all charging alternatives and proceed with a charge supported by the evidence.

Ultimately, charging decisions are driven by the evidence. If evidence does not support a criminal charge, no charge can be filed. If a charge should be filed, the evidence will determine whether recklessness was a cause of the fatality or injury, or whether some lesser mental state, and therefore, a lesser criminal charge, is appropriate.

## “CONVICTIONS” AND “MASKING”

The definition of the term “conviction” is much different under federal CDL regulations than the term is typically understood in criminal justice and traffic court systems.

Typically, the term “conviction” describes an instance in which a judgment of guilt is rendered against a person. The federal CDL definition is much broader, however. To promote the Congressional goal of “improved, more uniform commercial motor vehicle safety measures and strengthened enforcement [to] reduce the number of fatalities and injuries and the level of property damage related to commercial motor vehicle operations,”<sup>149</sup> the Federal Motor Carrier Safety Administration (FMCSA)

defines a “conviction” as follows:

*Conviction* means an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or by an authorized administrative tribunal, an unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court, a plea of guilty or nolo contendere accepted by the court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or prorated.<sup>150</sup>

This definition means that an offense must be reported as a “conviction” (and trigger any appropriate disqualifying action) in many circumstances, including some in which no criminal charge is filed.

Note that, “a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or by an authorized administrative tribunal” is a “conviction”. Therefore, if a CDL holder refuses chemical testing (or provides a “low” test for purposes of the state’s general per se impaired driving statute), and authorities decide that a DUI criminal prosecution is not appropriate, the finding that the driver refused for administrative license purposes must be reported to the licensing agency as a conviction.<sup>151</sup>

Further, a “conviction” of this type may stand independently of the outcome of any associated criminal DUI charge. Some state laws consider a bond forfeiture for failure to appear in a traffic case a conviction for the purpose of the individual’s driving record. Under federal regulations *all* states are required to report bond forfeitures in traffic cases as a *conviction* when the individual is a CDL holder.

Even where a plea of guilty or nolo contendere<sup>152</sup> results in a sentencing disposition that, if successfully completed, would not result in a “conviction” appearing on a driver’s record, federal regulations require that the out-

105 (2017) and Wyoming’s Wyo. Stat. §6-2-107 (2017), which prohibits “criminally negligent homicide.”

<sup>146</sup> See, e.g., Arkansas’ statute on negligent homicide, ACA §5-10-105 (2017).

<sup>147</sup> See, e.g., Colorado’s statute on careless driving, CRS 42-4-1402 (2017).

<sup>148</sup> 21 Del. C. §4176A (2017).

<sup>149</sup> 49 U.S.C. § 31131(b)(2) (2017).

<sup>150</sup> 49 C.F.R. § 383.5 (2017).

<sup>151</sup> See, e.g., *Burdine v. Arkansas Dept. of Finance & Admin.*, 379 S.W. 3d 47 6

(Ark. 2010); *Strup v. Director of Revenue*, 311 S.W. 3d 793 (Mo. banc 2010); *State v. Arterburn*, 751 N.W. 2d 157 (Neb. 2008); and *State v. Burnell*, 966 A. 2d 168 (Conn. 2009).

<sup>152</sup> A Latin phrase meaning “I do not contend”. It describes a legal procedure whereby a defendant acknowledges guilt (or the prosecution’s ability to prove guilt) without actually entering a guilty plea. A nolo contendere plea has the same effect as a guilty plea.



come be reported as a conviction for the purpose of the person's state CDL record and to become a part of the driver's CDLIS record.<sup>153</sup> If a court imposes any type of cost or fine (including a payment associated with a traffic safety school, or counseling, or even a "donation" to a cause such as Mothers' Against Drunk Driving) the action must be reported to the state licensing agency as a conviction. Finally, if a CDL holder violates the terms of a pre-trial release, a conviction on the underlying charge must be reported.<sup>154</sup>

The statutory prohibition of the masking of traffic offense convictions committed by CDL holders appears at 49 U.S.C. § 31311(a)(19) (2017). By passing this statute, Congress intended to prohibit

"both conviction masking and deferral programs by requiring every State to keep a complete driving record of all violations of traffic control laws (including CMV and non-CMV violations) by any individual to whom it has issued a CDL, and to make each such complete driving record available to all authorized persons and governmental entities having access to such record. This provision provides that a State may not allow information regarding such violations to be masked or withheld in any way from the record of a CDL holder."<sup>155</sup>

The regulation implementing this Congressional prohibition is at 49 C.F.R. § 384.226 (2017):

The State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CLP<sup>156</sup> or CDL holder's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (other than parking, vehicle weight, or vehicle defect violations) from ap-

pearing on the CDLIS driver record, whether the driver was convicted for an offense committed in the State where the driver is licensed or another State.

Congress has directed that a national, consistent CDL program is paramount by requiring states to follow or adopt the federal regulations (including the federal definition of "conviction" and the prohibition of masking) as a condition of both receiving Title 23 federal highway funding and maintaining state authority to issue CDL's.

The "conviction" and "masking" regulations apply only to CLP/CDL holders and not to licensed drivers in general. The regulations are intended to ensure that states prosecute violations committed by CDL holders and document convictions on a driver's CDLIS record.

Federal law also requires that states disqualify commercial drivers upon a first or second conviction for certain serious traffic offenses, such as driving under the influence,<sup>157</sup> and the masking prohibition precludes use of a diversion program that would allow a CDL holder to avoid having an offense reported as a conviction.

All states have statutes and/or regulations to ensure compliance with the regulations governing convictions and masking. Most states have passed legislation adopting the relevant parts and sections of Title 49 of the Code of Federal Regulations. With such a law, the State defines the term conviction as it appears in 49 C.F.R. part 383.5, and applies it to CLP/CDL holders or those driving a CMV.

A review of state procedures reveals that there are two typical ways states have acted to enforce the federal definition of convictions and the prohibition of masking. Some states have enacted legislation that prohibits a CLP/CDL holder (or anyone driving a CMV) from participating in a diversion or deferral program. Other

<sup>153</sup> CDLIS is discussed at page 2. Sentencing dispositions with this result are, simply stated, diversion programs, although the disposition may have a state-specific term. For example, in Illinois, this is called Court Supervision and in Massachusetts, Continued Without a Finding (CWAF).

<sup>154</sup> 49 C.F.R. § 383.5 (2017).

<sup>155</sup> 145 Cong. Rec. H. 12870-12874 (1999).

<sup>156</sup> Commercial Learner's Permit; see discussion at page 8.

<sup>157</sup> 49 C.F.R. § 383.51 (2017). See discussion of disqualifications at page 32, which identifies those offenses which lead to disqualification.

states allow the individual to participate in the diversion or deferral program, but by statute or regulation require that notice of a conviction be sent to the state driver's licensing agency for inclusion as a conviction on the driver's record.

Law enforcement, prosecutors, defense attorneys and judges should understand how their state's laws and regulations operate to ensure compliance with these regulations. If the offender is a CLP/CDL holder or was driving a CMV at the time of the offense, diversion or deferral should not be an available disposition, unless there is an accompanying statutory or regulatory mandate which requires that the disposition be treated as a conviction for the driver's CDL record.

Both approaches to prevent masking by diversion or deferred prosecution have been upheld by the courts. For example, Massachusetts has a disposition available to most traffic offenders called "Continued Without a Finding" (CWAF). In these cases, the defendant admits facts sufficient to warrant a finding of guilt, the judge accepts the admission, and the case is continued without the finding being entered. If the defendant successfully complies with probationary terms, the charge or charges are ultimately dismissed. If a defendant is a CDL holder or was driving a CMV at the time of the offense, the state driver's licensing agency treats a CWAF disposition as a conviction and disqualifies the defendant accordingly.

The Supreme Judicial Court of Massachusetts affirmed the state driver's licensing agency's treatment of CWAF's granted to CDL holders and upheld a disqualification imposed in *Tirado v. Board of Appeal on Motor Vehicle Liability Policies & Bonds*.<sup>158</sup> The Court found that a "Continued Without a Finding" disposition fell within the definition of the term "conviction" as applied to CDL holders and those driving a CMV. The Court noted that "the Legislature is clearly acting within its

powers when it defines a general term beyond its ordinary meaning for use in a particular piece of legislation."<sup>159</sup>

Similarly, a Wisconsin appellate court found that an Illinois disposition of court supervision was a conviction for purposes of CDL records and sanctions, as that disposition was "a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or an authorized administrative tribunal."<sup>160</sup>

Case law also supports state legislation which prohibits CDL/CLP holders or CMV drivers from participating in diversion programs. For example, the Oregon Supreme Court ruled that such prohibitions do not violate the Equal Protection Clause. In *State v. Orueta*,<sup>161</sup> a CDL holder was charged with driving under the influence and applied for the diversion program (which in Oregon would allow a first-time offender to have that charge dismissed if the defendant successfully completed certain requirements). Because the defendant was a CDL holder, the State objected to the defendant's request, arguing that to grant the request would violate Oregon law prohibiting diversion for CDL holders.

The Oregon Criminal Defense Lawyers Association filed an amicus brief on behalf of the defendant, arguing that the difference in treatment between CDL holders and non-CDL holders violated the Equal Protection Clause of the United States Constitution. Relying upon the United States Supreme Court decision in *Romer v. Evans*,<sup>162</sup> the Oregon Court found that the proper analysis for the equal protection challenge was to determine whether the CDL law "bears a rational relation to some legitimate end."<sup>163</sup>

"Preventing persons who are authorized to . . . drive heavier vehicles . . . from participating in diversion and subjecting them to harsher sanctions the first time that they drive under the influence gives them an incentive to avoid that behavior and thus increases traffic safety."<sup>164</sup>

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<sup>158</sup> 34 N.E.3d 334 (Mass. 2015).

<sup>159</sup> 34 N.E.3d 334 at 339.

<sup>160</sup> *State v. List*, 691 N.W.2d 366, 369 (Wis.Ct.App. 2004), rev. denied, 697 N.W.2d 472 (Wis. 2005).

<sup>161</sup> 164 P.3d 267 (Or. 2007).

<sup>162</sup> 517 U.S. 620 (1996).

<sup>163</sup> 517 U.S. at 631.

<sup>164</sup> *Id.*

A statute which bars a CDL holder from participating in a diversion program is rationally related to a legitimate governmental interest: protecting state citizens as they travel on the roadways. The U.S. Supreme Court has recognized “the peculiarly local nature of this subject of safety, and [has] upheld state statutes” regulating highway safety as a result.<sup>165</sup> Safety measures protecting the traveling public have “a strong presumption of validity when challenged in court,” even in light of alternative means to achieve this objective.<sup>166</sup>

Because CMV’s are disproportionately involved in motor vehicle crashes and fatalities every year, the state has a legitimate, compelling interest in regulating the drivers who operate these vehicles.<sup>167</sup> The state also has a heightened interest in having a complete and accurate driving history of CMV drivers who operate these heavy trucks and buses. For example, in the absence of a bar on CDL holders from applying for and being accepted to a diversion program, a school bus driver who has been arrested for DUI may have had an earlier DUI charge dismissed, and therefore the charge would not be part of the driver’s record. This type of “diversion”, if permitted, would deprive a community of the security of knowing that the people who are being hired to transport their children are safe and capable drivers.<sup>168</sup>

A court need not decide a CDL holder’s request for diversion in the face of a state law or regulation denying such a disposition by applying the rational basis test, however. The fact that CDL drivers are disqualified from applying for a diversion program does not implicate the Equal Protection Clause at all, because the *CDL holder is not similarly situated to others who may apply for diversion*.

A CDL is not a standard driver’s license. To be granted a CDL, an applicant must meet certain special requirements that do not apply to holders of “standard”

licenses.<sup>169</sup> As such, a CDL holder may be considered a “professional driver,” and by virtue of holding a CDL, the driver has special privileges to operate motor vehicles that are larger, longer, and carry heavier loads. If the driver possess additional qualifications, a CDL holder may have privileges to transport hazardous materials or drive a vehicle that holds a larger number of passengers. The general driving public of legally licensed drivers who do not hold CDL’s may not do any of these things. For the purposes of the diversion, therefore, a CDL holder is not “similarly situated” to the holder of a “standard” license.

There are a handful of other reported cases addressing Equal Protection claims from CDL holders attempting to avoid license suspensions through DUI diversion programs. Claims from CDL holders faced with DUI-related suspensions have failed in both Ohio<sup>170</sup> and Pennsylvania.<sup>171</sup> Courts in Connecticut,<sup>172</sup> Virginia,<sup>173</sup> and Washington,<sup>174</sup> have found that CDL holders are not a suspect class, are not exercising a fundamental right when they drive, and that legislatures are acting rationally to protect the public when they hold professional drivers to this higher standard.

## DISQUALIFICATION—HOW EFFECTIVE PROSECUTION REMOVES UNSAFE DRIVERS FROM THE ROAD

A person holding a CDL may be “disqualified” (and therefore, unable to operate a CMV) under three circumstances: the person’s CDL is suspended, revoked, or cancelled by the issuing State’s driver’s licensing agency,<sup>175</sup> the person’s “privileges to drive a CMV” are withdrawn for violating a State or local traffic control law or for committing certain felonies, or the Federal

<sup>165</sup> *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 523-24 (1959). (internal quotations and citations omitted). See also, *Berman v. Parker*, 348 U.S. 26, 32 (indicating that public safety is a legitimate state interest).

<sup>166</sup> *Berman v. Parker*, *id.*

<sup>167</sup> “Federal Motor Carrier Safety Administration, Large Truck and Bus Crash Facts 2015, page 11, published 2017.

<sup>168</sup> See, e.g. “Bus Driver Arrested for Drunk Driving Kids had Past DUI Charge: Police,” Fox CT, <http://foxct.com/2014/08/27/farmington-bus-driver-arrested-for-dui/> (August 27, 2014)(Site last visited April 4, 2017).

This news article reported that a school bus driver in Farmington, Connecticut was charged with driving under the influence, failure to drive right, and twenty counts of risk of injury to a minor after being pulled over for swerving off the pavement. The bus driver reportedly had been granted diversion for a DUI in Connecticut ten years earlier.

<sup>169</sup> See “Licensing Requirements” at page 2.

<sup>170</sup> *Solon v. Martin*, No. 89586, 2008 WL 519898 (Ohio Ct. App., Feb. 28, 2008).

<sup>171</sup> *Thorek v. Department of Transportation.*, 938 A.2d 505 (Pa. Comm. Ct.

Motor Carrier Safety Administration (FMCSA) determines that the person is not qualified to operate a CMV.<sup>176</sup>

Disqualification of these drivers serves the safety of the traveling public, and supports the policy and purpose behind licensing of professional truck and bus drivers—“to help reduce or prevent truck and bus accidents, fatalities, and injuries”.<sup>177</sup>

Disqualification and other sanctions can be imposed only if authorities know that a person holds a CDL. Law enforcement officers have the first opportunity to iden-

tify CDL holders by recording CDL status on citations and police reports.

Once a person is identified as holding a CDL, prosecutors and courts serve critical roles in making certain that disqualification occurs promptly and fairly if the CDL holder is convicted of a triggering offense. Prosecutors are responsible for properly charging CDL holders, and in the event of conviction, those convictions must be reported to the respective state driver’s licensing agency so that action can be taken to remove disqualified drivers from the road.



2007).

<sup>172</sup> *Cormier v. Commissioner of Motor Vehicles*, 938 A.2d 1258 (Conn. App. Ct. 2008).

<sup>173</sup> *Lockett v. Commonwealth*, 438 S.E.2d 497 (Ct. App. Va. 1993).

<sup>174</sup> *Mersael v. Department of Licensing*, 994 P.2d 262 (Wash. Ct. App. 2000).

<sup>175</sup> Persons with CDLs are subject to “the same” sanctions as non-CDL holders, in the sense that if a State licensing agency would impose a sanction upon a non-CDL holder’s license, those same circumstances would result in a sanction upon a CDL holder. In addition, due to the risk to the trav-

eling public posed by CMV’s, certain conduct or convictions which would have no effect upon a non-CDL holder’s license can lead to CDL sanctions.

<sup>176</sup> See definition of “disqualification” at 49 C.F.R. § 383.5 (2017); see also 49 C.F.R. § 391.11 (2017) and § 391.15 (2017); note that some of the offenses which lead to disqualification are not “traffic control” offenses, but rather, offenses in which a motor vehicle was used to further serious criminal activity. See discussion at page 40.

<sup>177</sup> 49 C.F.R. §383.1 (2017).





**PROSECUTORS** handling cases involving any defendant who holds a CDL should be aware that both state and federal laws may apply. These laws may affect CDL holders differently than non-CDL holders. This disparate treatment is warranted because CMV’s can potentially cause greater damage than smaller, non-commercial vehicles. Both criminal and administrative consequences can stem from certain traffic and felony convictions. It is important to note that the term “conviction” as intended by Title 49 of the Code of Federal Regulations may have a different meaning from state definitions of the same term as it relates to criminal code or procedure.

Federal CMV regulations define conviction<sup>178</sup> as “an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or by

an authorized administrative tribunal, an unvacated forfeiture of bail or collateral deposited to secure the person’s appearance in court, a plea of guilty or *nolo contendere* accepted by the court, the payment of a fine or court cost, or violation of condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated.”

### CDL VIOLATIONS AND CONSEQUENCES

Depending on the nature and severity of a traffic or criminal conviction, a defendant could become disqualified and barred from operating a CMV requiring a CDL. Federal regulations within FMCSR’s establish the definition of disqualification as:

1. the suspension, revocation, or cancellation of a CDL by the State or jurisdiction

#### Disqualification tables from 49 CFR 385.51(b), (c), (d) and (e) (2017)

**Table 1**

(b) *Disqualification for major offenses.* Table 1 to §383.51 contains a list of the offenses and periods for which a person who is required to have a CLP or CDL is disqualified, depending upon the type of vehicle the driver is operating at the time of the violation.

**Table 2**

(c) *Disqualification for serious traffic violations.* Table 2 to §383.51 contains a list of the offenses and the periods for which a person who is required to have a CLP or CDL is disqualified, depending upon the type of vehicle the driver is operating at the time of the violation

**Table 3**

(d) *Disqualification for railroad-highway grade crossing offenses.* Table 3 to §383.51 contains a list of the offenses and the periods for which a person who is required to have a CLP or CDL is disqualified, when the driver is operating a CMV at the time of the violation.

**Table 4**

(e) *Disqualification for violating out-of-service orders.* Table 4 to §383.51 contains a list of the offenses and periods for which a person who is required to have a CLP or CDL is disqualified when the driver is operating a CMV at the time of the violation.

<sup>178</sup> 49 CFR 383.5 (2010).

**TABLE 1 to §383.51 — DISQUALIFICATION FOR MAJOR OFFENSES**

<b>If a driver operates a motor vehicle and is convicted of:</b>	<b>For a first conviction or refusal to be tested while operating a CMV, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for</b>	<b>For a first conviction or refusal to be tested while operating a non-CMV, a CLP or CDL holder must be disqualified from operating a CMV for</b>	<b>For a first conviction or refusal to be tested while operating a CMV transporting hazardous materials as defined in §383.5, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for</b>	<b>For a second conviction or refusal to be tested in a separate incident of any combination of offenses in this Table while operating a CMV, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for</b>	<b>For a second conviction or refusal to be tested in a separate incident of any combination of offenses in this Table while operating a non-CMV, a CLP or CDL holder must be disqualified from operating a CMV for</b>
(1) Being under the influence of alcohol as prescribed by State law.	1 year.	1 year.	3 years.	Life.	Life.
(2) Being under the influence of a controlled substance.	1 year.	1 year.	3 years.	Life.	Life.
(3) Having an alcohol concentration of 0.04 or greater while operating a CMV.	1 year.	Not applicable.	3 years.	Life.	Not applicable.
(4) Refusing to take an alcohol test as required by a State or jurisdiction under its implied consent laws or regulations as defined in §383.72 of this part.	1 year.	1 year.	3 years.	Life.	Life.
(5) Leaving the scene of an accident.	1 year.	1 year.	3 years.	Life.	Life.
(6) Using the vehicle to commit a felony, other than a felony described in paragraph (b)(9) of this table.	1 year.	1 year.	3 years.	Life.	Life.
(7) Driving a CMV when, as a result of prior violations committed operating a CMV, the driver's CLP or CDL is revoked, suspended, or canceled, or the driver is disqualified from operating a CMV.	1 year.	Not applicable.	3 years.	Life.	Not applicable.
(8) Causing a fatality through the negligent operation of a CMV, including but not limited to the crimes of motor vehicle manslaughter, homicide by motor vehicle and negligent homicide.	1 year.	Not applicable.	3 years.	Life.	Not applicable.
(9) Using the vehicle in the commission of a felony involving manufacturing, distributing, or dispensing a controlled substance.	Life—not eligible for 10-year reinstatement.	Life—not eligible for 10-year reinstatement.	Life—not eligible for 10-year reinstatement.	Life—not eligible for 10-year reinstatement.	Life—not eligible for 10-year reinstatement.

**TABLE 2 to §383.51—DISQUALIFICATION FOR SERIOUS TRAFFIC VIOLATIONSS**

If the driver operates a motor vehicle and is convicted of:				
	For a second conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a CMV, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for	For a second conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a non-CMV, a CLP or CDL holder must be disqualified from operating a CMV, if the conviction results in the revocation, cancellation, or suspension of the CLP or CDL holder's license or non-CMV driving privileges, for	For a third or subsequent conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a CMV, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for	For a third or subsequent conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a non-CMV, a CLP or CDL holder must be disqualified from operating a CMV, if the conviction results in the revocation, cancellation, or suspension of the CLP or CDL holder's license or non-CMV driving privileges, for
(1) Speeding excessively, involving any speed of 24.1 kmph (15 mph) or more above the posted speed limit	60 days	60 days	120 days	120 days.
(2) driving recklessly, as defined by State or local law or regulation, including but, not limited to, offenses of driving a motor vehicle in willful or wanton disregard for the safety of persons or property	60 days	60 days	120 days	120 days.
(3) making improper or erratic traffic lane changes	60 days	60 days	120 days	120 days.
(4) following the vehicle ahead too closely	60 days	60 days	120 days	120 days.
(5) Violating State or local law relating to motor vehicle traffic control (other than a parking violation) arising in connection with a fatal accident	60 days	60 days	120 days	120 days.
(6) driving a CMV without obtaining a CLP or CDL	60 days	Not applicable	120 days	Not applicable.
(7) driving a CMV without a CLP or CDL in the driver's possession <sup>1</sup>	60 days	Not applicable	120 days	Not applicable.
(8) driving a CMV without the proper class of CLP or CDL and/or endorsements for the specific vehicle group being operated or for the passengers or type of cargo being transported	60 days	Not applicable	120 days	Not applicable.
(9) violating a state or local law or ordinance on motor vehicle traffic control prohibiting texting while driving a CM	60 days	Not applicable	120 days	Not applicable.
(10) Violating a State or local law or ordinance on motor vehicle traffic control restricting or prohibiting the use of a hand-held mobile telephone while driving a CMV. <sup>2</sup>	60 days	Not applicable	120 days	Not applicable.

<sup>1</sup> Any individual who provides proof to the enforcement authority that issued the citation, by the date the individual must appear in court or pay any fine for such a violation, that the individual held a valid CLP or CDL on the date the citation was issued shall not be guilty of this offense.

<sup>2</sup> *Driving, for the purpose of this disqualification*, means operating a commercial motor vehicle on a highway, including while temporarily stationary because of traffic, a traffic control device, or other momentary delays. Driving does not include operating a commercial motor vehicle when the driver has moved the vehicle to the side of, or off, a highway and has halted in a location where the vehicle can safely remain stationary.

- of issuance;
- 2. the withdrawal of a driver's privileges as the result of a violation of State or local law relating to motor vehicle traffic control (other than parking, vehicle weight, or vehicle defect violations); or
- 3. the determination by FMCSA that a driver is not qualified to operate a commercial motor vehicle under 49 CFR Part 391.<sup>179</sup> A disqualification renders the driver ineligible to obtain a CDL until that disqualification period terminates.

States are required to disqualify the CDL for these purposes but may impose disqualifications for other reasons. In many cases, the offense that led to the disqualification of the CDL privileges also requires a disqualification of all driving privileges (this is more commonly referred to as a suspension when regarding non-CDL licenses). Some states impose license suspension for non-driving offenses or actions such as a failure to pay child support or possession of illegal drugs. It is important to remember that a suspension of the underlying driving privileges also affects the CDL privileges even if the offense does not specifically require a suspension under federal regulations. Further, there are instances in which the federally-established minimum period of disqualification for the CDL exceeds the minimum period of suspension (according to state law) of the non-commercial privileges. Thus, a non-commercial suspension may be curable before the CDL disqualification is curable. In these instances, the state can reinstate the non-commercial privileges but cannot reinstate the CDL privileges. To evaluate the differences in these two suspension pe-

riods, one must examine the tables of disqualification<sup>180</sup> in the federal regulations (or the properly adopted CDL suspensions in state law) as compared to the minimum suspension periods for non-CDL privileges provided for in state law or regulation. A CDLIS status check is necessary to confirm the actual status of a driver's CDL.

No driver may operate a CMV when any driving privilege is suspended, revoked, disqualified, denied, or cancelled. Drivers may be disqualified from operating a CMV for up to one year for offenses committed while driving a non-CMV as well as while driving a CMV. These offenses include the first conviction of driving under the influence, driving with a BAC of .04% or more, refusing to submit to chemical testing at the direction of law enforcement (as required by jurisdictions DUI/DWI/implied consent laws), leaving the scene of an accident,<sup>181</sup> using a commercial vehicle in the commission of any felony, or causing a fatality through the negligent operation of a CMV.<sup>182</sup> If a CMV driver commits any of those violations while transporting hazardous materials that require a placard on the vehicle, that driver will be disqualified for three years. Subsequent violations for any of these offenses may result in CDL disqualification for life. To determine if it is a first or subsequent violation, convictions committed while driving both CMV's and, in some instances, non-CMV convictions will be counted.<sup>183</sup>

The CFR also mandates certain periods of CDL disqualification for serious moving violations. Under CDL standards, a serious moving traffic violation can include excessive speeding (15 mph or more above the posted speed limit), reckless driving (including driving a CMV with wanton, willful

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<sup>179</sup> Id.

<sup>180</sup> Tables 1-4 49 CFR 383.51(b) 2017.

<sup>181</sup> The term accident is used because that is the term given within the language of the CFR. Prosecutors should remember that only unforeseeable consequences to actions are truly accidental. It is usually more accurate to refer to a traffic incident as a collision, crash or wreck.

<sup>182</sup> 49 CFR 383.51 (2010).

<sup>183</sup> 49 CFR 383.51(a)(4) (2010).



**TABLE 3 to §383.51—CDL DISQUALIFICATION FOR RAILROAD-HIGHWAY GRADE CROSSING OFFENSES**

<b>If the driver is convicted of operating a CMV in violation of a Federal, state or local law because:</b>	<b>For a first conviction a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for</b>	<b>For a second conviction of any combination of offenses in this Table in a separate incident within a 3-year period, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for</b>	<b>For a third or subsequent conviction of any combination of offenses in this Table in a separate incident within a 3-year period, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for</b>
(1) The driver is not required to always stop, but fails to slow down and check that tracks are clear of an approaching train	No less than 60 days	No less than 120 days	No less than 1 year
(2) The driver is not required to always stop, but fails to stop before reaching the crossing, if the tracks are not clear	No less than 60 days	No less than 120 days	No less than 1 year
(3) The driver is always required to stop, but fails to stop before driving onto the crossing	No less than 60 days	No less than 120 days	No less than 1 year
(4) The driver fails to have sufficient space to drive completely through the crossing without stopping	No less than 60 days	No less than 120 days	No less than 1 year
(5) The driver fails to obey a traffic control device or the directions of an enforcement official at the crossing	No less than 60 days	No less than 120 days	No less than 1 year
(6) The driver fails to negotiate a crossing because of insufficient undercarriage clearance	No less than 60 days	No less than 120 days	No less than 1 year

**TABLE 4 to §383.51—DISQUALIFICATION FOR VIOLATING OUT-OF-SERVICE ORDERS**

<b>If a driver operates a CMV and is convicted of...</b>	<b>For a first conviction while operating a CMV, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for</b>	<b>For a second conviction in a separate incident within a 10-year period while operating a CMV, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for</b>	<b>For a third or subsequent conviction in a separate incident within a 10-year period while operating a CMV, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for</b>
(1) Violating a driver or vehicle out-of-service order while transporting non-hazardous materials	No less than 180 days or more than 1 year	No less than 2 years or more than 5 years	No less than 3 years or more than 5 years
(2) Violating a driver or vehicle out-of-service order while transporting hazardous materials as defined in §383.5, or while operating a vehicle designed to transport 16 or more passengers, including the driver	No less than 180 days or more than 2 years	No less than 3 years or more than 5 years	No less than 3 years or more than 5 years

**No driver may operate a CMV when any driving privilege is suspended, revoked, disqualified, denied, or cancelled.**



disregard for the safety of persons or property), improper or erratic lane changes, following too closely, or a violation connected to a fatal crash involving traffic control devices. Prosecutors can refer to 49 CFR 383.51 (also this monograph pages 29 and 31) to determine which offenses must occur in a CMV to cause disqualification and which may occur in either a CMV or non-commercial vehicle. Generally, two convictions for serious moving violations within three years will result in a 60-day disqualification. Three citations resulting in convictions within three years will receive in a 120-day disqualification. The three year time period should be measured from date of citation to date of next citation and not from the conviction dates.

Prosecutors should consult both state and federal regulations when prosecuting any CDL ticket because some states have adopted more stringent standards than required under the federal regulations. When reviewing a driver's status, a prosecutor should also review the criminal history to check for potentially disqualifying non-traffic related felony convictions. Felony convictions that would cause disqualification fall within the 'major offenses' framework. Other offenses are considered 'serious'

rather than 'major'. These offenses include speeding, improper lane change, or even driving a CMV without first obtaining a proper CDL. Serious offenses may still act to disqualify CDL holders for shorter periods of time as seen in the following chart.

There are also disqualifications for other violations of safety regulations. Drivers of CMV's are required to observe certain safety practices at railway crossing.

Also, drivers who disregard out-of-service orders relating to themselves or their vehicles will face mandatory penalties.

Regardless of the offense, reporting the conviction is mandatory. If the defendant is convicted of any violation of law that has potential CDL implications, it is imperative that the authorities in the state that holds the license are aware of the conviction so that they may take appropriate action on the license if required. The prosecutor should never assume this is being done; he should make sure it is done. The judgment documents should reflect when a felony or traffic-related offense is committed with any motor vehicle and clerks must forward those documents to the appropriate state licensing



authorities (see Criminal Charges section below). Prosecutors should be aware of the reporting procedures in their jurisdictions. They should be prepared to assist with the completion of the reporting documents (judgments, suspension orders, etc.). Finally, prosecutors must make sure that all convictions are reported as soon after the conviction as possible.

## CRIMINAL CHARGES

In addition to traffic citations involving commercial vehicles, prosecutors may also see crimes that directly or indirectly relate to CDL holders. Many states have, for instance, incorporated the .04% BAC limit for CMV drivers under the federal regulations into the state criminal code. CMV drivers, therefore, can be found guilty of a DUI, DWI or OWI offense at a much lower per se level than drivers of non-commercial vehicles. These differing standards may also apply to cases involving commercial vehicle crashes. Some jurisdictions consider commercial drivers to have a greater legal duty-of-care to the public and charge CMV operators who cause crashes with negligent or reckless driving. Finally, a national trend towards more focused traffic enforcement is leading to increased felony charges involving the use of a CMV to commit the crime. These felonies can include serious offenses such as transporting illegal substances (including drugs and stolen goods) or even trafficking human beings

across the country for various illegal purposes.

All prosecutors should be aware of the CDL implications of certain criminal convictions. A prosecutor handling drug cases, for instance, may find that by reporting convictions to the licensing authorities, he is able to disqualify a defendant from CMV operation and thus limit that defendant's ability to transport large quantities of drugs across the country. Many prosecutors are unaware that being convicted of any felony (kidnapping, felony assault, etc.) committed in any type of motor vehicle will disqualify a CDL holder for at least a year and possibly for life.<sup>184</sup> While the disqualification of a CDL does not automatically result in the revocation of the driver's non-commercial driving eligibility, some states will revoke a non-commercial license upon conviction for any felony committed with a motor vehicle.<sup>185</sup> Reducing the mobility of certain offenders may go a long way towards impeding their ability to commit new offenses. An understanding of CDL violations and penalties can become another tool for prosecutors handling serious offenses. Because traffic codes and the penalties for traffic violations vary by state, prosecutors should consult their own criminal codes regularly to determine how their states have adopted or included federal regulations. It is important to remember that as new research and traffic safety trends emerge, traffic safety codes may also be changing. Prosecutors should consult their state's code regularly to maintain an accurate understanding of the current applicable law.

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<sup>184</sup> 49 CFR 383.51 (2010).

<sup>185</sup> Tennessee mandates the year-long revocation of driving privileges for any driver conviction of a felony committed with a motor vehicle in T.C.A. §55-50-501(2009).



## Reporting Convictions

## State Courts and State Drivers' Licensing Agencies

**STATE COURTS** fulfill two distinct functions in cases involving commercial drivers: adjudicating court cases and reporting dispositions of those cases to the state's driver's licensing agency.

Federal regulations require that when a CDL holder is convicted of a traffic offense in a state court, the agency responsible for issuing driver's licenses in that state must promptly update the driver's record. If the driver is licensed in a different state, the state of where the conviction occurred must report the conviction to the state where the driver is licensed. That state must then update its own records.<sup>186</sup>

If a state driver's licensing agency does not learn of a conviction, or if the agency fails to properly record convictions of CDL holders licensed in that state, the federal regulatory system designed to protect the safety of the travelling public by ensuring professional and safe operation of commercial motor vehicles is compromised.

Similarly, the system is compromised if a state court or a state court system utilizes pre-conviction diversion programs to keep a driving record "clean", or utilizes legal procedures which hide or "mask" a state court traffic violation.<sup>187</sup>

Without a clear picture of a driver's history, a prosecutor, judge, or even a potential employer will be unable to determine the threat posed by that driver and what remedial actions should be taken to correct his poor driving. Driver's histories also are relevant to those handling impaired driving cases, as well as serious or fatal crashes caused by impaired or reckless driving. All parties involved in such cases need to be aware of an individual's driving history for decisions at both bond and

sentencing hearings. Clearly, state courts play a pivotal role in the effective enforcement of CDL law.

To that end, the Federal Motor Carrier Safety Administration provided funding to the National Center for State Courts (NCSC) to review and evaluate the role of state courts in CDL cases. That review revealed that, too often, state courts treat CDL cases as "just another traffic case" and fail to appreciate the risk and grave consequences that can result when CDL law is not followed.<sup>188</sup>

Commercial motor vehicle (CMV) law governs both the safety of the vehicle and the conduct of the driver. Improper or unsafe equipment increases the risk of CMV crashes, and the traveling public faces an even greater risk if a CMV driver has been inattentive, distracted, careless, reckless or impaired.

State courts are one of the stakeholders that protect the public from such CMV drivers. State courts can help identify those persons who should not be operating CMV's by timely and accurately reporting convictions of persons holding CDL's. State courts can also eliminate the use of procedures which have the effect of hiding or "masking" CDL violations that could disqualify a commercial driver.

Crashes involving CMV's all too often have fatal consequences. Therefore the rules which govern commercial drivers and commercial vehicles impose significant responsibilities for both CDL holders and state driver's licensing agencies. State driver's licensing agencies need the cooperation and assistance of state courts for those agencies to fulfill their duties under the federal regulations and thereby insure the state's continued receipt of

<sup>186</sup> 49 CFR 384.209(a) and (b) (2017); see also 49 CFR 3484.225(a)(1) (2017).

<sup>187</sup> See discussion of "masking" and diversion programs at page 29.

<sup>188</sup> Other "non-traffic" offenses which are committed by CDL holders may also lead to CDL disqualification. See discussion of "disqualification" above.



federal highway funds.<sup>189</sup>

### ***State court reporting of traffic convictions of CDL holders to state driver's licensing agencies***

State court judges adjudicate the facts of the case and apply the appropriate state law. If a judge finds that a CDL holder has committed an offense, the state court system transitions from an adjudicatory function to an administrative reporting function, a task typically performed by personnel in a clerk's office or a court administrator's office.

Reports of convictions of CDL holders must be sent to the state driver's licensing agency. Depending on the state or local jurisdiction, this may occur manually or via a centralized information system. In states lacking centralization, courts and state driver's licensing agencies must make individual arrangements to report dispositions. The driver's licensing agency will require specific information concerning a given conviction, and, in many cases, the agency will have promulgated a special reporting form for use by those courts which manually record and report information to the agency. In smaller jurisdictions, reporting CDL convictions may be a hands-on, paper intensive activity, using traditional mail to send paper dispositions to the state driver's licensing agency.

In some states, a centralized court administrative office manages an information system through which all courts in the state may report convictions. If the state driver's licensing agency collaborates with state court administration to take advantage of such a court information system, case disposition reports are likely to improve in timeliness and accuracy.

State court systems that currently use paper reporting forms can transition to electronic reporting from any

court case management system to any state driver's licensing agency information system by using an XML<sup>190</sup> data exchange, a system developed by the National Center for State Courts. The XML data exchange was developed with the participation of state driver's licensing agencies and state court representatives from seven states, law enforcement agencies, and other stakeholders.<sup>191</sup> Implementing the exchange may save state driver's licensing agencies and state courts up to 80% of the costs of developing a state specific system.<sup>192</sup>

The ability of a state court to report a conviction properly (or the ability of a state licensing agency to record a conviction properly) is dependent upon many factors, not the least of which is the accuracy of the information collected by officers at the roadside, and the information contained in the charging documents. All stakeholders involved in CDL cases, including law enforcement officers and prosecutors, must be aware of the importance of collecting and transmitting accurate information, and these stakeholders should collaborate to improve the process. As most CDL cases originate with a law enforcement officer writing a citation to a CDL holder, law enforcement agencies should strive to secure technology which allows officers to access CDL data at the roadside.

Officers who are able to use such technology when issuing a citation may also be able to transfer that data directly to a court through electronic filing. Law enforcement agencies that use this type of technology are able to reduce error and improve the efficiency of the adjudication process.

Similarly, prosecutors who charge more serious offenses (which, upon conviction, could result in CDL disqualification<sup>193</sup>) must have systems in place to identify defendants who are CDL holders and to notify court ad-

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<sup>189</sup> States which fail to perform according to the commercial vehicle safety plan approved for that state may lose up to 5% of its Motor Carrier Safety Assistance Program (MCSAP) funding for its first full fiscal year of non-compliance, up to 25% of the funding for the second full fiscal year of noncompliance, and up to 50% of the funding for the third and subsequent full fiscal year of noncompliance. See 49 CFR 350.215(e)(2) (2017).

<sup>190</sup> "Extensible Markup Language"; see <https://en.wikipedia.org/wiki/XML>. An XML data exchange allows data to be understood by both the sender and the recipient of the data.

<sup>191</sup> Participating stakeholders were the National District Attorneys Association, the National Criminal Justice Association, the American Association

of Motor Vehicle Administrators, and the Federal Motor Carrier Safety Administration.

<sup>192</sup> See Technical Brief (SEARCH, The National Consortium for Justice Information and Statistics) "Global Reference Architecture Service Specification Development Workshops: A Primer for Facilitators" by James Douglas (May, 2012).

<sup>193</sup> "Non-traffic" convictions which trigger disqualification include "transportation, possession, or unlawful use" of Schedule I controlled substances and other substances "while the driver is on duty" and any "felony involving the use of a commercial motor vehicle." See 49 CFR 391.15 (2017). Serious "traffic" offenses also listed in that regulation include

ministrative personnel when convictions for more serious offenses must be reported to the state driver's licensing agency.

### ***State driver's licensing agency reporting and recording of convictions***

State driver's licensing agencies are required to maintain CDL convictions for persons licensed in their state, and to report convictions of out of state CDL licensees to the appropriate state.<sup>194</sup> If the CDL conviction occurs in the state which issued the CDL, that state's driver's licensing agency can update the driver record and proceed with any appropriate sanction without delay. However, if the conviction is of a CDL holder *from another state*, the only way the state which issued the CDL will learn of the conviction is through proper reporting by the state of conviction.

Therefore, it is critical that *all* state driver's licensing agencies promptly report *all* convictions of CDL holders from *all* states so that an issuing state can learn of a conviction from another state and move forward with appropriate sanctions against its licensee. If any part of this process fails, a driver who has been convicted of an offense which, if reported, would result in disqualification (or would qualify as a first offense which could lead to disqualification on a second or third conviction) may avoid the appropriate license sanction, continue to drive, and continue to pose a risk to public safety.

A state driver's licensing agency is required to post a conviction to the driver's record within 10 days of the date of conviction (if the conviction occurred in the same state) or within 10 days of receiving the information from another state.<sup>195</sup> To comply with these requirements, state driver's licensing agencies must depend upon the cooperation of the state courts. At least one

state legislature has enacted a state law requiring courts to report convictions of commercial drivers within 5 business days<sup>196</sup> to ensure that the state driver's licensing agency is able to update a driver's record or send a conviction message to the appropriate state in a timely manner.

The timeliness of reporting and the rate of error of a state driver's licensing agency are monitored by the American Association of Motor Vehicle Administrators, and state agencies receive a monthly report which details the timeliness and accuracy of their reports.<sup>197</sup>

Timely reporting of convictions and timely administrative sanctions work to keep bad drivers from operating CMV's and improve traffic safety. Improvement in data collection, data sharing and reporting, and the collaboration and cooperation of all stakeholders will allow state courts and state driver's licensing agencies to ensure professional and safe operation of CMV's and help protect the safety of the traveling public.

### ***Assistance from the National Center for State Courts (NCSC)***

The National Center for State Courts can provide technical assistance on CDL issues to state justice partners and state driver's licensing agencies that seek to improve their ability to accurately and efficiently collect and process CDL data. The Center has identified numerous areas where processes can be problematic and can provide suggestions for improvement of those processes. Among the resources the Center can provide is a data exchange solution which is available for implementation. Information about this solution and other ways the Center can assist state justice partners is available on the Center's Commercial Driving Resource Center website.<sup>198</sup>

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DUI—under the influence of alcohol or other drugs as determined by state law and .04, and refusal to submit to testing—and leaving the scene. The regulations provide tables which list the respective offenses and the length of disqualification to be imposed for a given offense. See 49 CFR 383.51 (2017).

<sup>194</sup> 49 CFR 384.225 (2017).

<sup>195</sup> 49 CFR 384.225(c) (2017).

<sup>196</sup> See S.C.Code Ann. §56-7-30, effective January 1, 2017.

<sup>197</sup> The Commercial Driver's License Information System (CDLIS) (discussed at page 2) is operated by the American Association of Motor Ve-

hicle Administrators (AAMVA), which issues a state procedures manual to insure uniform reporting of convictions. See *United States v. Smith*, 510 Fed. Appx. 853 (5th Cir., 2013, unpublished) (discussing the relationships among the Federal Motor Carrier Safety Administration, CDLIS, AAMVA, and state driver's licensing agencies).

<sup>198</sup> National Center for State Courts, "Improving the Administration of Justice: Commercial Driving Cases and the State Courts," Holt, Johnson and Kasperek, 2016. See [www.ncsc.org/cdl](http://www.ncsc.org/cdl).



# Glossary

**Commerce:** (a) any trade, traffic or transportation within the jurisdiction of the United States between a place in a state and a place outside of such state, including a place outside of the United States and (b) trade, traffic, and transportation in the United States which affects any trade, traffic and transportation described in paragraph (a) of this definition.

**Commercial Driver's License (CDL):** a license issued by a state or other jurisdiction of domicile, in accordance with the standards contained in 49 CFR Part 383, which authorizes the individual to operate a certain class of a commercial motor vehicle.

**Commercial Driver's License Information System (CDLIS):** the information system established by the FMCSA pursuant to section 12007 of the Commercial Motor Vehicle Safety Act of 1986 and operated by the American Association of Motor Vehicle Administrators (AAMVA).

**Commercial Driver's License Information System (CDLIS) Driver Record:** the electronic record of an individual CDL driver's status and history, stored by the state-of-record as part of the CDLIS established under 49 U.S.C. § 31309.

**Commercial Learner's Permit (CLP):** a permit issued to an individual by a State or other jurisdiction of domicile, in accordance with the standards contained 49 CFR part 383, which, when carried with a valid driver's license issued by the same State or jurisdiction, authorizes the individual to operate a class of a commercial motor vehicle when accompanied by a holder of a valid CDL for purposes of behind-the-wheel training.

**Commercial Motor Vehicle (CMV):** a motor vehicle (or combination of motor vehicles) used in commerce to transport passengers or property if the motor vehicle (a) has a gross combination weight rating of 11,794 kilograms

or more (26,001 pounds or more) inclusive of a towed unit(s) with a gross vehicle weight rating of more than 4,536 kilograms (10,000 pounds); or (b) has a gross vehicle weight rating of 11,794 or more kilograms (26,001 pounds or more); or (c) is designed to transport 16 or more passengers, including the driver; or is used in the transportation of hazardous materials as defined in this glossary.

**Commercial Motor Vehicle Safety Act of 1986 (CMVSA):** a law passed by the United States Congress that requires all the individual states to comply with certain standards in regard to the licensing of (CMV) drivers.

**Conviction:** an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or by an authorized administrative tribunal, an unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court, a plea of guilty or nolo contendere accepted by the court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated.

**Disqualification:** a sanction imposed on a CDL holder as a result of (a) the suspension, revocation, or cancellation of the CDL by the state or jurisdiction of issuance; (b) a withdrawal of a person's privileges to drive a CMV by a state or other jurisdiction as the result of a violation of state or local law relating to motor vehicle traffic control (other than parking, vehicle weight, or vehicle defect violations); or (c) a determination by the FMCSA that a person is not qualified to operate a commercial motor vehicle.

**U.S. Department of Transportation (DOT):** established by Congress in October 1966 to oversee all facets of transportation in the United States; today its operating administrations and bureaus include, among others, the Federal Aviation Administration, the National Highway

Traffic Safety Administration, the Federal Highway Administration, and the Federal Motor Carrier Safety Administration.

**Endorsement:** a CDL authorization which allows the person to operate a certain type of CMV.

**Federal Highway Administration (FHWA):** an administration of the DOT tasked with ensuring the safety and technological modernity of America's roads and highways; the administration provides financial and technical support to state, local, and tribal governments for those governments' use in constructing and improving the nation's highway system.

**Federal Motor Carrier Safety Administration (FMCSA):** an administration within the DOT (established on January 1, 2000) tasked with improving the safety of CMV's and saving lives; the administration's primary mission is to reduce crashes, injuries and fatalities involving CMV's.

**Gross combination weight rating (GCWR):** the greater of: (1) the value specified by the manufacturer of the power unit, if such value is displayed on the Federal Motor Vehicle Safety Standard (FMVSS) certification label required by the National Highway Traffic Safety Administration, or (2) The sum of the gross vehicle weight ratings (GVWRs) or the gross vehicle weights (GVWs) of the power unit and the towed unit(s), or any combination thereof, that produces the highest value. Exception: The GCWR of the power unit will not be used to define a commercial motor vehicle when the power unit is not towing another vehicle.

**Gross vehicle weight rating (GVWR):** the value specified by the manufacturer as the loaded weight of a single vehicle.

**Hazardous materials:** any material designated as hazardous under 49 U.S.C. § 5103 and required to be

placarded under subpart F of 49 CFR part 172, or any quantity of a material listed as a select agent or toxin in 42 CFR part 73.

**Imminent Hazard:** the existence of any condition of vehicle, employee, or commercial motor vehicle operations that substantially increases the likelihood of serious injury or death if not discontinued immediately; or a condition relating to hazardous material that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion date of a formal proceeding begun to lessen the risk of that death, illness, injury or endangerment.

**Motor Carrier Act of 1935:** the law which first empowered the Interstate Commerce Commission to regulate drivers and motor carriers engaged in the business of interstate commerce; the act provided authority to control operating permits, approve trucking routes, and set tariff rates.

**Motor Carrier Safety Act of 1984 (MCSA):** legislation which directed the DOT to establish a procedure by which to determine how safely motor carriers operate.

**Motor Carrier Safety Assistance Program (MCSAP):** a federal program that provides financial assistance to states with the aim of reducing the number and severity of CMV-involved crashes and/or hazardous materials incidents.

**Motor Carrier Safety Improvement Act of 1999 (MCSIA):** created the FMCSA and worked to reduce the number and severity of large-truck-involved crashes through the use of CMV inspections, carrier compliance reviews, enforcement, and the implementation of more effective licensing standards.

**Out-of-service order:** a declaration by an authorized enforcement officer of a federal, state, Canadian, Mexican, or local jurisdiction that a driver, a CMV, or a motor carrier



operation may not operate for a certain period of time or until certain conditions are met, pursuant to 49 CFR 386.72 (2017), 49 CFR 392.5 (2017), 49 CFR 395.13 (2017), 49 CFR 369.9 (2017) or comparable laws, or pursuant to the North American Uniform Out-of-Service Criteria.

**Representative vehicle:** a motor vehicle which represents the type of motor vehicle that a driver applicant operates or expects to operate.

**School bus:** a CMV used to transport pre-primary, primary, or secondary school students from home to school, from school to home, or to and from school-sponsored events; “school bus” does not include operations of a for-hire motor carrier.

**State of Domicile:** that State where a person has his/her true, fixed, and permanent home and principal residence and to which he/she has the intention of returning whenever he/she is absent.

**Tank vehicle:** any CMV that is designed to transport any liquid or gaseous materials within a tank or tanks having an individual rated capacity of more than 119 gallons and an aggregate rated capacity of 1,000 gallons or more that is either permanently or temporarily attached to the vehicle or the chassis. A commercial motor vehicle transporting an empty storage container tank, not designed for transportation, with a rated capacity of 1,000 gallons or more that is temporarily attached to a flatbed trailer is not considered a tank vehicle.

**Vehicle group:** a class or type of vehicle with certain operating characteristics.

**Vehicle miles traveled (VMT):** the estimated number of vehicle miles traveled on designated roadways.



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