

DOT/FMCSA - Noteworthy Updates

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The Federal Motor Carrier Safety Administration's (FMCSA) Compliance, Safety, Accountability (CSA) and Behavioral Analysis and Safety Improvement Categories (BASICS) data and algorithms for identifying high-risk carriers is currently under review by a National Academy of Sciences' (Academy) panel of 12 researchers. The Academy's study of the accuracy and reliability of the CSA and BASICS scores was mandated under the Fixing America's Surface Transportation (FAST) Act and is currently undergoing peer review before being made public. The deadline for completion of the study was June 2017.

In response to the Academy's study, on 3/22/17, the FMCSA announced that it was withdrawing its proposed safety fitness determination rule pending the outcome of the Academy's study on the CSA program. A Supplemental Notice of Proposed Rulemaking is expected once the Academy study is released.

On 6/12/2017, the Supreme Court announced that it will not hear the Owner-Operator Independent Drivers Association's (OOIDA) request for rejection of the electronic logging device (ELD) mandate, which is set to take effect on 12/18/17. The OOIDA argued that the ELD mandate subjects drivers to warrantless searches, which are prohibited by the Fourth Amendment. The appeal for review was previously denied by the 7th Circuit Court of Appeals. This effectively ends the OOIDA's challenge of the ELD mandate in the courts, but the group vows to continue its efforts in Congress.

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Industrial Commission Increases Efforts to Identify and Prosecute Uninsured Employers - Part 2

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Glidewell



Surles

The March 2017 issue of this newsletter contained the first of a two-part installment about the North Carolina Industrial Commission's efforts during the past couple of years to deter employers subject to the Workers' Compensation Act from failing to carry workers' compensation insurance. This second and final installment of the series further explores the issue and information presented in the first installment and explains the effects of the Commission's efforts on North Carolina businesses, including those in the trucking and transportation industry.

Historically, the Industrial Commission acted somewhat passively in its enforcement of N.C. Gen. Stat. 97-93(a)(1)(3), which requires employers with three or more employees to carry workers' compensation insurance or apply for a self-insured license.

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The Camera Doesn't Lie

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Stein

"In-Cab" or "dash-cam" cameras are becoming a more and more popular way for trucking companies to use technology to lower their costs and improve the safety of their drivers. The relatively low cost of a dash-cam system compared to the high price of insurance, fuel costs, and possible litigation make them an economically feasible risk management solution for most trucking companies.

In 2015 the National Transportation Safety Board analyzed the use of dash-cam video and made a recommendation to the American Trucking Associations to develop written guidance to the installation and long-term maintenance of onboard video systems and encourage members to use onboard video systems. [NTSB Safety Report 15](#), March 3, 2015. Studies have also shown that when truck drivers and bus drivers know that their driving is under the watchful eye of a camera, they are generally more careful on the road.

Most of these systems activate a video recording when there is an "event," such as hard braking or a collision, and records for 10 to 30 seconds before and after the event. The video feed is uploaded to a centralized computer, and each event is analyzed and scored based on the severity of the event. Fleet managers can review these events regularly, coach drivers, and reinforce good driving habits. These systems are generally designed for larger fleets who have a dedicated safety manager. Pricing of various systems are generally between \$400 to \$600 per truck.



The intended benefit of the dash-cam systems is to enhance driver safety and serve a tool to accurately document and record the circumstances leading to "event." A recent study from the Virginia Tech Transportation Institute shows that the use of dash-cam video systems can reduce trucking accidents by up to 34 percent. [Trucking Accident Attorneys Roundtable](#), May 19, 2015. Additional benefits include improved fuel efficiency, lower insurance rates due to fraudulent claims, and security or theft control.

Although dash-cam video systems have a positive effect from the perspective of risk management, not all drivers are comfortable with them. Many drivers, and the unions representing them, argue that the cameras violate a transit employee's privacy and will lead to increasingly strict and unfair disciplinary policies. In March 2016 the Owner-Operator Independent Drivers Association (OOIDA) challenged federal requirements that they start electronically logging their hours on the road arguing the electronic tracking of their time amounted to an illegal monitoring of their private activity by the government. [Wall Street Journal](#), "Independent Truckers Tell Court E-Logs Violate Constitutional Rights" (March 31, 2016). Currently, there are no federal regulations requiring the use of dash-cam video, but those who oppose the use of technology to monitor drivers argue the research does not prove that the costs of mandating technology improvements are justified.

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Specifically, the Commission would typically address the issue if brought to its attention in the context of a specific claim against an uninsured employer by a specific employee for a specific injury. However, in the past couple of years, the Commission has taken a more active role in enforcing N.C. Gen. Stat. 97-93(a) (1)(3), as reflected by the 2014 establishment of "The Non-Compliant Employer Targeting System" (NETS) and at the direction of former Governor Pat McCrory, via Executive Order No. 83.

NETS, a fraud alerting tool established by the Commission in 2014 and made possible by the Government Data Analytics Center, allows authorized users to search information from other state agencies that might prove useful in investigating whether an employer has complied with the Workers' Compensation Act. From the data obtained, NETS produces a list of potentially non-compliant employers and ranks them in terms of noncompliance. The use of NETS has resulted in the prosecution of violators of the Act without the Commission being alerted by a Workers' Compensation claim. According to a report released by the NCIC, 18 criminal charges were filed against non-compliant employers in 2013-2014, whereas that figure increased to 100 charges in 2014-2015. Based on the same report, the Commission collected \$341,922 in Compliance/Fraud penalties and fees in 2014, well below the \$1,495,963 collected in 2016. According to the report, the Commission has brought more than 1,300 businesses into compliance with the Act using NETS.

As explained in the previous installment, former Governor Pat McCrory enacted Executive Order No. 83 (hereafter "Order") in an effort to minimize misclassification of employees by employers trying to avoid certain obligations imposed on them by state and federal law. The Order established an Employee Classification Section within the Industrial Commission. According to the Industrial Commission's website, this Section serves as part of the "Compliance and Fraud Investigative Division," which identifies and prosecutes employers that do not comply with the Workers' Compensation Act. Prior to the Order, the Division had two units: (1) the Compliance Unit and 2) the Fraud Investigative Unit. The Compliance Unit handles civil cases involving employers who fail to comply with the Act by conducting investigations and holding penalty hearings in conjunction with workers' compensation hearings. The Compliance Unit also works alongside the Attorney General's Office to enforce and collect penalties. The Fraud Investigative Unit is a law enforcement agency responsible for conducting criminal investigations of uninsured employers for use in criminal proceedings.

As a result of the Order, the Division has a third unit, the Employee Classification Section, which is designed to collaborate with other state agencies to identify businesses that misclassify employees as independent contractors or otherwise violate agency operating statutes. The difference between the previously established units and the Employee Classification Section is that the Employee Classification Section proactively identifies noncompliant businesses as opposed to reacting to a noncompliant business in the context of a claim for a specific injury.

The Employee Classification Section also serves as the primary point of contact for businesses and citizens to report suspected instances of misclassification of employees. Upon receipt of such report, the Section, led by Director Bradley Hicks, will investigate to determine whether the suspected non-compliant employer violated any provision of the Workers' Compensation Act.

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Where Is the Awareness Campaign for the Trucking Industry?

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Hedrick

Recently I was making the trip from Raleigh to Charlotte for work when I noticed a passenger vehicle quickly merge in front of a tractor trailer then quickly change lanes yet again. I am a protective person. It is a trait that serves me and, more importantly, my clients well in my work as a civil defense attorney. I immediately felt for the truck driver. Fortunately, he was able to avoid an accident, but we all know that is not always the case in these situations as the stopping capability for the tractor trailer is different from that of the small vehicle that totally cut off the trucker. As I continued to travel down Interstate 85, I observed multiple vehicles repeat this same thing, quickly merging directly in front of tractor trailers, sometimes as traffic was coming to a halt. The experience brought me back to a recurring thought that has bothered me for years, "Why is there not an awareness campaign for the trucking industry?"

"Share The Road." "See Me, Save Me." Just seeing these bicycle and motorcycle awareness campaign slogans bring images to mind. There are t-shirts with these phrases, commercials, billboards, posts shared on social media, all geared towards making others aware of the unique dangers that come when motor vehicles, bicycles and motorcycles share the roadway. Where is the campaign for the trucking industry? I decided to start asking this question to others so that maybe it is a step towards something actually changing to help educate all drivers about the unique dangers that exist when vehicles and commercial motor vehicles share the roadway. As with other aspects of operating any type of vehicle, the need to be mindful of the other drivers on the road helps keep us all safe. It is also important for the general public to better understand what it is like for a truck driver in certain scenarios and to be able to sympathize with some of the impact on a trucker, particularly when the resulting accident is unavoidable. Just like bikers want the general public to "see them," we need the general public to "see" you.

You may own a trucking company, drive a large truck, or have some other connection to the trucking industry. I encourage you to communicate to any organization you are associated with to explore a media awareness campaign for the trucking industry. Why? One reason is the importance of the general public better understanding the unique dangers of certain maneuvers on the roadway around larger trucks so that, hopefully, there will be a decrease in accidents. You know better than anyone that the scenario I witnessed and described above can end badly. Accidents between large trucks and passenger vehicles are different. With the increase in drivers texting while operating vehicles, the potential for accidents is on the rise. This leads me to a second reason an awareness campaign has been on my mind for years.

I want you to imagine that it was your driver or you personally in the tractor in the scenario described above. I want you to imagine that you were unable to avoid the accident because the passenger vehicle cut directly in front of you as you both were cresting a hill and traffic on the other side of the hill is stopped. Imagine the frantic attempt to avoid the accident and the fear of what might happen, the complete inability to change the probable outcome. Then, what you feared happens. Fast forward to you or your company have been sued. If your case is going to be decided by twelve strangers, do you not want images coming to mind of how dangerous that situation was, how unlikely it was that anyone in your position could have done something differently to avoid the accident? Your attorneys will do their best to make sure these points are made. Going back to the campaigns described above, based on my trial experience, there are some biases attorneys face in selecting juries when the case involves bicycles and motorcycles.

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Awareness Campaign *cont. from page 4*

The awareness campaigns for bikers can play a role in minimizing any negative bias and, potentially, work in the favor of the biker because now the potential juror sees the personal side of the biker's perspective and can better put any negative bias aside to be more open to listen to the evidence and be fair to all sides. There can be a negative bias towards the trucking industry. My hope is by making the public more aware of what you experience and the unique dangers that exist in certain scenarios, should you find yourself in the unfortunate situation of needing a jury to decide your case, it might increase the chances of a jury putting any preconceived negative bias that might exist towards you or your company aside.

If you know of anyone working on such a campaign or would like to discuss any ideas you may have about such a campaign, I invite you to contact me at (919) 719-3718 so we may discuss it further. If you think such a campaign is of value to you, your company or the trucking industry, I again encourage you to reach out to individuals and organizations you feel may be in the best position to make an awareness campaign for the trucking industry a reality.

Industrial Commission Increases Efforts - Part 2 *cont. from page 3*

Significantly, Mr. Hicks will send all reports of suspected non-compliance to three other government agencies – The North Carolina Department of Labor; North Carolina Department of Commerce – Division of Employment Security; and the North Carolina Department of Revenue. Similarly, if a potential misclassification is reported to one of the aforementioned agencies, that agency will send the report to the Industrial Commission. Each of these agencies will conduct its own independent investigation to identify violations of its operating statutes. Therefore, an employer that misclassifies its employees may be in violation of multiple laws, which would likely result in the assessment of more substantial penalties and fees.

On August 31, 2016, the NC Industrial Commission entered into an Agreement with the Wage and Hour Division of the United States Department of Labor designed to protect the rights of employees and lawful businesses. The three-year Memorandum of Understanding Agreement cites several objectives, including reducing worker misclassification, reducing questionable workers' compensation practices, and creating educational and outreach materials offering guidance to employers and employees on these issues.

Members and participants in the trucking industry routinely undertake the identification of truck drivers, in particular, as employees versus independent contractors. Now, more than ever, proper identification is imperative to avoiding civil penalties and even criminal charges. Employers are not alone with this issue; the NC Court of Appeals has even found a broker liable for injuries to a driver, concluding the broker was a contractor for purposes of N.C. Gen. Stat. 97-19.1. See *Atiapo v. Goree Logistics, Inc.*, 770 S.E.2d 684 (2015).

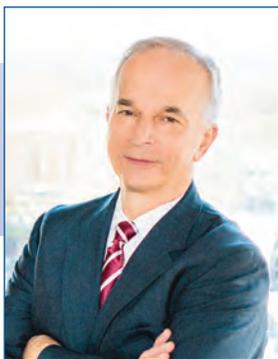
As evidenced by the more proactive approach increasingly employed by the North Carolina State Government in recent years, a specific injury or claim is no longer necessary to the discovery and prosecution of non-compliance with the Workers' Compensation Act and other labor laws on these issues. If you have questions about any of these issues or compliance with the law, please reach out to the lawyers in our firm's Trucking and Transportation Practice Group – we are glad to help!

On 5/18/17, Senator John Thune (R-S.D.), chairman of the Commerce Committee, along with other committee members, wrote a letter to Health and Human Services (HHS) Secretary Tom Price requesting that regulators expedite standards for hair-test drug screening. The FAST Act mandated that the guidelines be issued by 12/4/2016, which has come and gone without the mandated rules.

The House Transportation Committee has approved the Active Duty Voluntary Acquisition of Necessary Credentials for Employment (ADVANCE) Act, which will now head to the House floor for a vote. The ADVANCE Act sets commercial driver's license (CDL) testing standards and exemptions for active service members and reservists on par with those for veterans. The bill is expected to assist current service members to pursue a post-military career by giving them credit for the training received in the armed services.

On 6/6/17, the FMCSA announced a pilot program to study the question of whether sleeper berth time affects driver safety performance and fatigue levels. The study will consist of approximately 200 commercial drivers who use their sleeper berth regularly. Currently, drivers who utilize the sleeper berth for off-duty time must have at least 8 consecutive hours in the sleeper berth with an additional 2 consecutive hours in the sleeper berth, off-duty, or a combination of the two.

On 6/9/17, the FMCSA published two notices of proposed rulemaking to help ease the driver shortage problem facing the transportation industry. The first allows states to waive the CDL knowledge test for qualified veterans and active duty service members and reservists. The FMCSA has permitted states to waive the skills test since 2012, which has resulted in more than 18,800 former service members transitioning into commercial truck and bus driving. The second proposal allows States to issue 1-year CDL learner's permits, which is an increase from the current 6-month term. This rule is expected to reduce expense for states and drivers, who petition for an additional 6-month permit. The comment period on these proposals will close in August 2017.



Attorney Spotlight: Paul Lawerance

Paul serves as the managing partner of the firm and practices in the Charlotte office. His practice focuses in the areas of civil litigation, including professional negligence and premises liability, employment law, and workers' compensation.

Q: Why did you become a lawyer?

PCL: I became a lawyer because I loved the intellectual pursuit of the law. As I became further along in my pursuit of being a lawyer I also embraced the problem solving aspect of being a lawyer.

Q: What is your proudest moment?

PCL: My proudest moment was my wedding day. I still can't believe my wife would be with me.

Q: What keeps you busy on the weekends?

PCL: I enjoy spending time with my family. I am also a dog lover and like to spend time with my two dogs. I also like to enjoy gardening and take great pride in seeing things grow that I planted. Unfortunately one of the dogs likes to dig up what I plant so we have an interesting struggle going on right now between the dog and gardening passions.

Q: What is your favorite vacation destination?

PCL: I like to scuba dive. My favorite place to go for vacation would be anywhere in the Caribbean.

Q: What motivates you?

PCL: My motivation comes from a sense of duty to honor my parents. They provided me opportunities they never had. I also get motivation from obtaining a successful result for a client and trying to be creative in approach to client problem solving.

The Camera Doesn't Lie *cont. from page 2*

This dynamic between the attempts to use technology to improve driver safety versus the potential invasion of privacy for the drivers was studied in 2011 by Michael Litshi at the Mineta Transportation Institute at San Jose State University. ["Video-Based Driver Risk Management Systems: Evaluating Effectiveness at Improving Transit Safety"](#) (June 2011). The results of his research confirmed that safety is improved and the chances of traffic accident are decreased because video-based risk management tends to limit unsafe or risky driving behaviors. The research also shows dash-cam type video is a great deal less intrusive compared to video surveillance at banks, hotels, and department stores. Since the camera is only activated by some type of g-force event, drivers are not monitored continuously and possible not ever. While Mr. Litshi cites the potentially high startup cost of installing dash-cam cameras, he notes that ongoing the maintenance of them is very minimal.¹

In summary, dash-cam technology is becoming more prevalent as installation costs are coming down and anecdotal and qualitative research shows it lowers unsafe driving behaviors and reduced the chances of an accident. Independent truckers may be leery of the video's potential to invade privacy; however, dash-cam video is not as intrusive as other forms of surveillance. As technology continues to progress, it is more and more likely fleet carriers will employ it to increase safety, and reduce other costs.

¹Mr. Litshi's research article was published in June 2011, when presumably the acquisition and installation costs of this technology were higher than they are today.

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