

Mark Your Calendars

"Drunk Driving. Over the Limit. Under Arrest"

Dec 16, 2009—Jan 3, 2010
National Crackdown

NDAA Capital Conference

Feb 8—10, 2010
Washington, DC

2010 Lifesavers Conference

April 11—13, 2010
Philadelphia, PA

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Between the Lines

Don't Give 'Em a Break!

By Daniel M. Fox*

It's 6:30 a.m. and you're driving down the highway when you notice the big rig with out-of-state plates closing fast on your rear bumper. You begin to wonder, "how much sleep did that driver get last night?" You walk your daughter to the school bus stop. The bus pulls up and the door opens. You catch a glimpse of the driver and reflexively ask yourself "is that guy using meth?" Think about it: you're a prosecutor, and you don't even know where to start to look for answers to these types of questions.

Commercial Motor Vehicle (CMV) drivers and companies are in the business of making money. So, how does one prevent a mass migration of drivers and companies to the jurisdiction with the lowest cost and least restrictive licensing, regulation and enforcement scheme? Meet FMCSA, the Federal Motor Carriers Safety Administration.

Created by Congress in 2000 as part of the Department of Transportation, the FMCSA is charged with improving public safety by reducing crashes, injuries, and fatalities involving large trucks and buses. FMCSA carries out this mandate by working with federal, state and local governments as well as the motor carrier industry and labor interests to develop and enforce rational safety standards. If the vehicle in question weighs more than thirteen tons, carries hazardous materials, or conveys more than sixteen passengers, then the vehicle, the driver and the company most likely fall under FMCSA regulatory standards. The FMCSA only sets minimum standards

and the states are free to impose higher regulation. However, the states must agree to at least the minimum standards to become part of the FMCSA framework. All fifty states have signed on with the FMCSA.

FMCSA carries out its duties by focusing primarily on two groups of industry players: the drivers and the operating companies. Regarding CMV drivers, FMCSA acts primarily in a regulatory manner. FMCSA treats operating companies both as a group to be regulated and also as a partner in improving public safety.

Driver Regulation

The driver is the most critical element in CMV safety. If the vehicle itself is unsafe, we count on the driver not to take it out on the road. Likewise, if the driver is unfit, we trust that he or she will not be put out on the road. FMCSA has set forth minimum standards of driver knowledge and skills competency for the issuance of CMV licenses. In addition, FMCSA has worked diligently to establish on-going review criteria of drivers after issuance of their license. Similar to the FAA's regulatory scheme for aircraft pilots, FMCSA mandates an annual medical examination to ensure that drivers maintain the physical and mental ability to control the vehicles under their control. In 2008, the Hours of Service (HOS) rules were made more stringent: a driver can only be behind the wheel eleven hours in a twenty-four hour period and can be on the job no more than fourteen hours in a day. A driver must

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rest ten hours between shifts and can drive no more than sixty hours in a week. To reset the weekly work schedule now requires thirty-four hours of continuous rest. FMCSA also imposed upon a driver a duty to report any traffic violation (except parking) to his or her employer within thirty days, regardless of the type of violation or the vehicle (commercial or personal) being operated at the time of the violation.

Perhaps the two most important areas of driver regulation championed by FMCSA are the prohibitions on multiple driver's licenses and drug / alcohol use. In 1986, the U.S. Congress made it illegal for a CMV driver to hold more than one driver's license. At the time, many drivers held multiple commercial and non-commercial licenses in order to hide violations and deficient driving records. As a result of the enactment, the Commercial Driver's License Information System (CDLIS) came into being. This system serves as a clearinghouse for CMV driver's license status and conviction information. Moving forward, FMCSA hopes to expand, strengthen and improve the CDLIS, its operations and the data found therein.

FMCSA forbids the use of alcohol while driving, driving with a 0.04% or higher blood alcohol concentration, drinking alcohol within four hours prior to driving, and refusing a blood alcohol test. In addition, alcohol testing is mandated post-crash, upon reasonable suspicion, on a random basis, and prior to a return-to-duty following a suspension for a violation of the alcohol conduct standards. The return-to-duty tests continue for at least twelve months and can last for as long as sixty months. The random testing regulations require employers to test at least ten percent of their drivers every year. The testing must be spread reasonably throughout the year. An employee (driver) who violates the alcohol conduct policies must immediately be removed from safety-sensitive duties. The employee must then be evaluated by a substance abuse professional and comply with the recommendations of that professional prior to be eligible for a return-to-duty. FMCSA imposes no obligation upon employers to provide rehabilitation or treatment to the driver, or to reinstate the driver. Public safety is primary. Thus, one violation could possibly end a career. Notably, the alcohol rules apply to foreign motor carriers when their drivers operate within the United States.

FMCSA rules on drug testing are the same as those for alcohol. Pre-employment drug testing is mandated, as is post-crash, reasonable suspicion, random, return-to-duty and follow-up testing. Like alcohol testing, the results of the testing are kept confidential at the discretion of the subject tested. However, the results are discoverable in a criminal investigation upon a proper application to a court.

Obviously, FMCSA relies heavily upon the motor carrier operating companies to enforce driver licensing, competency, fitness and drug/alcohol testing regulations. In this way, the company can be seen as the partner or agent of the government in promoting and ensuring public safety. But the company is also a direct subject of government regulation itself.

The Motor Carrier Company

Motor carrier companies do not execute the FMCSA's protocols out of the goodness of their hearts. However, as the FMCSA points out, "safety is good business. The average cost of a large truck crash is \$91,000. A crash involving injury costs almost \$200,000, and the cost of a fatal crash is \$3.6 million. Safety is not just the rule, it makes good business sense.

Motor carrier companies must enforce the FMCSA driver supervision scheme or suffer the consequences. Earlier this year, FMCSA conducted Operation Safe Student. Aimed at improving the safety of passenger carriers transporting students on fieldtrips, this intergovernmental strike force covered all fifty states and resulted in over 665 bus companies being contacted for comprehensive compliance reviews. In addition, over 8,700 roadside inspections of buses were performed. As a result of these inspections, over 650 buses and 250 drivers were placed "out-of-service" for failure to comply with regulations. One company in Delaware was fined over \$83,000 for failure to conduct random drug and alcohol testing, failure to carry federal minimum levels of insurance, failure to properly inspect vehicles and employing a driver who tested positive for controlled substances. The financial impact to these companies is not just the fines themselves, but in the downtime costs associated with vehicles and drivers being taken out-of-service. Additionally, a repeated pattern of failure can subject a company to additional civil and criminal penalties. Safety is not just the rule, it also makes good economic sense.

Your role as the prosecutor

During your career as a prosecutor it is quite likely that you may come across a motor carrier case. It may seem as innocuous as an Hour Of Service or inspection ticket, but you need to understand that you play an important role in the regulation of motor carriers and the safety of all of us out on the roads. You should analogize the role of the driver and motor carrier company to that of a pilot and airline company. The potential for large scale disaster is just as real. Few prosecutors would give a break to a pilot flying an aircraft that was unsafe or operating it while unfit. The same should hold true for motor carrier drivers and companies. Don't give them a break.

When presented with a motor carrier case, you should make sure to obtain the records of the driver and company from CDLIS and other available databases. Compare your local and state ordinances and find the corresponding

federal regulatory provisions to use as reference. When the disposition of the case occurs, you should make sure that the actual ordinance violations and the corresponding federal provisions are properly reported to the appropriate state regulatory entity and FMCSA. If the driver holds an out-of-state license, then you should make sure that the home state receives notice of the disposition. And, when the defense pleads with you to reduce the severity of the violations or agree to the grant of a “conditional” license (they don’t exist, by the way) because of the economic hardship that will be visited upon the offender, please remember – the rules on the books are their for the public safety.

Kristen Shea Joins National Traffic Law Center as Senior Attorney



The National District Attorneys Association is pleased to announce that Kristen Shea has been hired as the new Senior Attorney for the National Traffic Law Center. Kristen comes to NDAA by way of the Tennessee Governor's Highway Safety Office where she worked as a program manager for the DUI courts and multiple law enforcement grants. Prior to her work in program management, she served as a prosecuting attorney for almost 10 years with the majority of her time spent as an Assistant District Attorney in Nashville, Tennessee. During the last several years of her time as prosecutor, she worked as the team leader of the Vehicular Crimes Unit, specializing in traffic-related criminal offenses at the state trial court level. She earned her law degree from the University of Memphis and her undergraduate degree at Trinity University in San Antonio, TX. She will be working to develop and produce resource materials addressing commercial driver's licensing and other commercial vehicle issues common to the criminal justice system. Kristen's contact information is as follows: kshea@ndaa.org and 703.519.1644.

Technical Assistance

The National Traffic Law Center provides evidentiary and technical assistance on a number of topics in the traffic law realm, tracks national and state legislation, provides training programs on legal issues concerning impaired driving, publishes a number of monographs on specific topics pertaining to traffic safety and a number of other services. This includes an informational database on topics related to traffic safety, including expert witnesses, studies, case briefs, decisions and more. If you are in need of any assistance, please contact the National Traffic Law Center.

Contact Us

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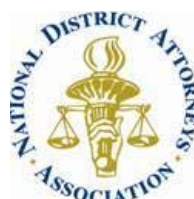
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NTLC Publications

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Other publications available in print by contacting the National Traffic Law Center directly include the DWI Prosecutor’s Handbook, Hardcore Drunk Driving Prosecutorial Guide and The Criminal Justice System: A Guide for Law Enforcement Officers and Expert Witnesses in Impaired Driving Cases.



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