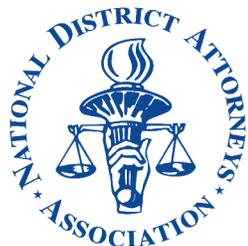


Distracted Driving CDL Enforcement for Prosecutors and Law Enforcement





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Distracted Driving CDL Enforcement for Prosecutors and Law Enforcement

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CONTENTS

Distracted Driving CDL Enforcement for Prosecutors and Law Enforcement	5
What Does it Mean to be “Distracted?”	11
Types of Inattention	11
Insufficient Attention (Drowsiness and Fatigue)	12
Misdirected Attention (Distraction)	14
Types of Driver Distraction	14
<i>Biomechanical Distraction</i>	14
<i>Auditory Distraction</i>	15
<i>Visual Distraction</i>	15
<i>Cognitive Distraction</i>	15
<i>Combination</i>	15
Research Findings on the Impact of Truck Driver Drowsiness and Fatigue	15
Research Findings on the Impact of Truck Driver Distraction	17
Commercial Drivers: A Special Class of Driver	22
CDL Holder Accountability	24
<i>The Single License Requirement</i>	24
<i>CDLIS</i>	25
<i>Driver Behavior Violations and Crash Risk</i>	26
Effective CMV Distracted Driving Enforcement	28
After the Traffic Stop — Contacting the Driver	31
Investigation of the Distracted Driving Crash	33
Cell Phone Records	33
Forensic Imaging — Data Extraction	34
Heavy Vehicle Event Data Recorders	35
Prosecuting the Non-fatal, Non-serious Injury Distracted Driving case	36
Prosecuting the Fatal or Serious Injury Distracted Driving Case	38
<i>Crime Scene</i>	39
<i>Interviewing the Operator</i>	40
<i>Expert Opinions</i>	41
<i>Charging Decisions in the Fatal or SBI Distracted Driving Case</i>	42
<i>General Trial Strategy</i>	45
Victim/Victim Family Communication in Fatal or SBI Distracted Driving Cases	48
Conclusion	49
Appendix I — Disqualification Tables from 49 C.F.R. § 383.51	50
Appendix II — To Determine CDL Class Needed	55

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DISTRACTED DRIVING CDL ENFORCEMENT FOR PROSECUTORS AND LAW ENFORCEMENT

If you were asked to imagine a “Commercial Motor Vehicle” (CMV),¹ what type of vehicle would come to mind? Would it be a tractor-trailer, a box truck, a tanker? How about a school bus? School buses are designed to be among the safest of vehicles on the road.² And while seldom recognized as commercial vehicles, they are “the most regulated vehicles on the road.”³ Designed to be highly visible with protective features such as flashing red lights and stop arms, children

¹ CMV has a different definition depending on where in the Code of Federal Regulations it is found.

Under 49 C.F.R. § 390.5T, Commercial motor vehicle means any self-propelled or towed motor vehicle used on a highway in interstate commerce to transport passengers or property when the vehicle—

- (1) Has a gross vehicle weight rating or gross combination weight rating, or gross vehicle weight or gross combination weight, of 4,536 kg (10,001 pounds) or more, whichever is greater; or
- (2) Is designed or used to transport more than 8 passengers (including the driver) for compensation; or
- (3) Is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation; or (4) Is used in transporting material found by the Secretary of Transportation to be hazardous under 49 [U.S.C. 5103](#) and transported in a quantity requiring placarding under regulations prescribed by the Secretary under 49 CFR, subtitle B, chapter I, subchapter C. Examples of these types of CMVs may include vehicles such as box trucks, small package delivery vehicles, or in some cases, pickup trucks with trailers. Often, operators of these CMVs do not require a CDL, but state requirements may differ.

Under 49 C.F.R. § 383.5, Commercial motor vehicle means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property 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 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. Vehicles meeting this definition often include tractor trailers, school buses and large passenger buses. In addition, operators of these vehicles generally require a CDL, but state requirements may differ.

² <https://www.nhtsa.gov/road-safety/school-bus-safety> (last visited Feb. 28, 2020).

³ *Id.*



Image by EB Pilgrim from Pixabay

are more likely to arrive at their destinations safely while in a school bus.⁴ But what if the greatest risk from traveling on a school bus is from the school bus driver? ←

On December 2, 2014, a school bus driver was transporting children from school in Knoxville, Tennessee. As the driver approached an intersection, he swerved to avoid stopped traffic, crossed the median into oncoming traffic, and struck a second school bus killing two children and an adult teacher's aide.⁵ The National Transportation Safety Board (NTSB) investigated the collision and determined that the probable cause was the driver's distraction caused by his reading text messages on his cell phone while driving.⁶ The NTSB stated, "[F]ocusing on any other task while driving impairs performance and can have deadly consequences, as it did

School bus drivers are required to have a Commercial Driver's License.
<https://www.fmcsa.dot.gov/registration/commercial-drivers-license/drivers>

⁴ *Id.*

⁵ NATIONAL TRANSPORTATION SAFETY BOARD, *Collision of Two School Buses with Subsequent Rollover in Knoxville, Tennessee on December 2, 2014*, Rpt. No. HAB-16/04 (Washington, DC: National Transportation Safety Board, 2016).

⁶ *Id.* at 9.

in this case. The fact that even while transporting children a driver would engage in such risky behavior shows how prevalent it has become on our roads.”⁷ Even being in the safest, most highly regulated commercial vehicle on the road could not save two young primary school students and a teacher’s aide from the distracted bus driver that was behind the wheel.

This publication seeks to assist prosecutors and law enforcement in holding commercial driver’s license holders (CDL) and/or CMV drivers accountable for distracted driving related behaviors that result in serious injury or death. While this publication will examine the nature of behaviors that distract drivers generally, special emphasis will be placed on discussing activities related to the use of electronic devices by the operators of larger commercial vehicles. Further, for the purpose of this monograph, the terms: “CDL holder,” “CMV driver,” “CMV operator” or “driver” or “operator,” are each used interchangeably to refer to drivers of CMVs who are required to possess a CDL.

Distracted driving is a problem that has existed for as long as people have been operating vehicles. While most people immediately think of cell phones, drivers have always been faced with any number of distractions that threaten to divert their attention away from the road, ranging from eating and drinking to operating the infotainment⁸ system. In fact, “[d]river distraction is [considered] the diversion of attention from activities critical for safe driving to a competing activity.”⁹

In 2013, the number of distraction-affected crashes was 2,923.¹⁰ By 2017, that number had slightly increased to 2,935 crashes that were attributable to distracted driving.¹¹ This means that close to 1 in 10 of all fatal crashes involved distraction.¹² As the population has grown, so have the number of vehicles on the road.¹³ With this, the risk of distracted driv-

“The word “infotainment” is a blanket term generally used to describe in-car communications, entertainment and data presented to the driver — namely, the central screen with its associated radio, media and navigation functions.”

⁷ *Id.* at 10.

⁸ Jake Lingeman, *What is Infotainment? Autoweek Explains*, AUTOWEEK: TECHNOLOGY BLOG, <https://autoweek.com/article/technology/what-infotainment-autoweek-explains>, June 2, 2017 (last visited Feb. 28, 2020).

⁹ Engstrom, J. Monk, C.A., Hanowski, R.J., Horrey, W.J., Lee, J.D., McGehee, D.V., Regan, M., Stevens, A., Traube, E., Tuukkanen, M., Victor, T., & Yang, C.Y.D. (2013). *A Conceptual Framework and Taxonomy for Understanding and Categorizing Driver Inattention*. US-EU ITS Cooperation, at 5, <https://ec.europa.eu/digital-single-market/en/news/us-eu-inattention-taxonomy-report> (last visited Mar. 9, 2020).

¹⁰ National Center for Statistics and Analysis, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., *Distracted driving in fatal crashes, 2017*, at 3 (Traffic Safety Facts Research Note. Report No. DOT HS 812 700, Apr. 2019).

¹¹ *Id.*

¹² *Id.*

¹³ Between 2014 and 2017, the number of registered vehicles in the United States has grown from 260,350,938 to 272,480,899. FMCSA OFFICE OF ANALYSIS, RESEARCH AND TECHNOLOGY, *2019 Pocket Guide to Large Bus and Truck Statistics* at 8 (Jan. 2020).



ing related crashes has increased especially considering advances in technology.¹⁴ Advances such as map applications on cellular phones, GPS devices, and built-in infotainment systems have become commonplace tools for drivers. In response, many states have made strides to reduce distracted driving through legislation such as banning texting while driving and mandating hands-free systems.¹⁵ Electronics and vehicle manufacturers continue to install safety features and applications to prevent driving distractions in an attempt to reduce crashes on the highways.

Among the vehicles traveling the roadways are an ever-increasing number of commercial motor vehicles (CMVs).¹⁶ Large trucks are among the most recognizable of these commercial vehicles and are an essential com-

An example of a few of the gauges and switches in the interior of a semi-truck that require either monitoring or manipulation by the truck's driver is depicted.

Not all operators of CMVs are required to possess a CDL. CMVs with a weight that is defined under section 390.5 of the Federal Motor Carrier Safety Regulations (FMCSRs) do not require their driver to hold a CDL.

The drivers referred to in this publication operate CMVs as defined in section 383.5 of the FMCSRs, i.e., drivers who are required to hold a CDL.

¹⁴ A 2011 study shows that approximately 89% of drivers own cell phones, a number expected to increase. Tison, J., Chaudhary, N., & Cosgrove, L. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *National phone survey on distracted driving attitudes and behaviors* (Report No. DOT HS 811 555, Dec. 2011).

¹⁵ 20 States currently have hand-held cell use bans, 38 states ban all use by teenage or novice drivers, and 48 states have laws against texting while driving. INSURANCE INSTITUTE FOR HIGHWAY SAFETY, <https://www.iihs.org/topics/distracted-driving#cellphone-use-by-drivers> (last visited Mar. 2, 2020).

¹⁶ Between 2014 and 2017, the number of registered large trucks and buses in the United States has grown from 11,777,983 to 13,212,447. FMCSA OFFICE OF ANALYSIS, RESEARCH AND TECHNOLOGY, *2019 Pocket Guide to Large Bus and Truck Statistics* at 8 (Jan. 2020).

ponent of our consumer driven economy.¹⁷ Drivers of these CMVs remain in growing demand as the need for the delivery of consumer goods increases. From groceries to gasoline, most commodities used or consumed in this country have spent at least some time in transit on a truck.¹⁸

Commercial driving schools help people learn to operate CMVs in order to obtain their commercial driver's licenses (CDLs), teaching them how to safely operate these massive vehicles. However, CDL holders face the same, if not greater, risks from distracted driving. Unfortunately, given the size and weight of these vehicles, commercial motor vehicle crashes often result in serious injury or death.

Commercial motor vehicle drivers face all the routine risks of distraction, plus many more that are unique to their job. CMV drivers literally work in their vehicle. Not only does their occupation require them to drive for a living, but drivers often complete a number of work-related tasks while in their vehicles. Many drivers are responsible for shipment updates, estimating arrival and delivery dates, as well as communicating with their employer while in their vehicle. Long stretches of driving also increase the likelihood of distractions such as eating, drinking, or the need to manipulate items in the cab of the vehicle.

Finally, the long hours on the road for truck drivers can often mean boredom or fatigue that results in inattentiveness, which is its own kind of distraction. Thus, CDL holders must be vigilant in making sure they avoid distraction to ensure the safe operation of their vehicle.

According to the Federal Motor Carrier Safety Administration (FMCSA), "driving a Commercial Motor Vehicle (CMV) requires a higher level of knowledge, experience, skills, and physical abilities than that required to drive a non-commercial vehicle. . . . Additionally, CDL holders are held to a higher standard than when operating any [other] type of motor vehicle on public roads."¹⁹



FMCSA is the federal agency that regulates and provides oversight of commercial vehicles. FMCSA also sets the minimum standards necessary to obtain a state-issued commercial driver's license.

¹⁷ "Trucking accounts for the vast majority of freight in America, [with trucks carrying almost 71% of the tonnage moved about the country](#). That far surpasses trains, boats, and air when it comes to moving cargo around the nation." Steven John, *11 incredible facts about the \$700 billion US trucking industry*, MARKETS INSIDER (JUN. 3, 2019, 08:31 AM), <https://markets.businessinsider.com/news/stocks/trucking-industry-facts-us-truckers-2019-5-1028248577#and-trucks-move-more-than-70-of-all-goods-transported-around-the-united-states5>, see generally AMERICAN TRUCKING ASSOCIATION, Reports, Trends & Statistics webpage, (last visited Mar. 2, 2020).

¹⁸ *Id.*

¹⁹ FMCSA, <https://www.fmcsa.dot.gov/registration/commercial-drivers-license> (December 18, 2018) (last visited Mar. 2, 2020).

CMVs often weigh several thousand pounds more than the average passenger vehicle.²⁰ At typical highway speeds, it can take a loaded CMV just over the length of two football fields to come to a complete stop.²¹ Even then, these circumstances assume an attentive driver aware of road conditions. Once distraction is factored in, circumstances become more dire. A driver who manipulates a cellular phone, on average, takes their eyes off the road for just over 4 seconds.²² While that may sound brief, at average speeds that means a driver will often travel the length of a football field without their eyes on the road, *before* any attempt to brake.²³ What is a mere distraction for a CMV driver now becomes deadly for the motoring public.

The question becomes: “when is a CDL holder who has been cited for merely an infraction related to distracted driving, subject to greater criminal liability?” Many times, crashes are labeled as an “unavoidable accident.” That is, “[a]n accident that is produced by an irresistible physical cause that cannot be prevented by human skill or reasonable foresight.”²⁴

However, most crashes, by their very nature, are caused by some sort of inattentiveness or negligent behavior. What the criminal justice system looks to determine is whether that behavior is criminal. This remains a difficult area, as many states have varying crimes that can be charged in these instances ranging from a traffic infraction to vehicular manslaughter. Each crime requires a different mental state to determine whether a CDL holder has committed an offense. Beyond the laws of that state, violations are also viewed within a Federal context since convictions for “major offenses” and “serious traffic violations” also trigger disqualification of a driver’s commercial driving privileges.²⁵

Investigating these cases requires an in-depth understanding of the law by both law enforcement officers and prosecutors. The nature of distracted driving cases requires a different type of investigation because often, ac-

A CDL holder’s driving privileges can be disqualified for convictions of Major Offenses and Serious Violations. A table referencing these offenses is located at Appendix I.

²⁰ FMCSA “Size Differences,” www.fmcsa.dot.gov/ourroads/cmV-safety-challenges (May 20, 2019) (last visited Mar. 2, 2020).

²¹ FMCSA “Long Stopping Distances,” www.fmcsa.dot.gov/ourroads/long-stopping-distances (May 20, 2019) (last visited Mar. 2, 2020).

²² R. Olson, R. Hanowski, J. Hickman, J. Bocanegra, *Driver Distraction in Commercial Vehicle Operations* (Report No. FMCSA-RRR-09-042 FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION), (Sep. 2009). <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/DriverDistractionStudy.pdf> (last visited Mar. 24, 2020).

²³ *Id.*

²⁴ Accident, BLACK’S LAW DICTIONARY (11th ed. 2019).

²⁵ See, 49 C.F.R. § 383.51.

tivities that are viewed as commonplace make up the essential evidence in a distracted driving case. Beyond that, prosecutors must focus on the responsibility of the driver. As professional drivers, CDL holders are expected to be vigilant, given the nature of the risks inherent in driving a CMV.²⁶ A CDL holder's training and experience make him or her well aware of the dangers of distracted driving, and these drivers who are held to a higher standard, cannot ignore those risks.

What Does it Mean to be “Distracted?”

According to FMCSA, “[d]river distraction is the diversion of attention from activities critical for safe driving to a competing activity.”²⁷ According to the National Highway Traffic Safety Administration (NHTSA), “[d]istracted driving is any activity that diverts attention from driving.”^{28, 27} The key phrase in this definition is “safe driving activities”, meaning it has to have an impact on safety to be considered inattention. Thus, inattention is not merely a reduction in attention, but a mismatch between current attentional resources and those needed to safely operate the vehicle. Finally, Merriam Webster defines being “distracted” as “having one's thoughts or attention drawn away: unable to concentrate or give attention to something.”²⁹ Each of these definitions contain the concept of “inattention.” While the use of cellular and/or electronic devices while driving can certainly prevent motorists from paying attention, it is critical to understand that distraction, itself, takes many forms.

Distraction-based inattention is associated with divided attention and originates from dual task issues (e.g. driving and texting).

Types of Inattention

There are two types of driver inattention: (1) insufficient attention and (2) misdirected attention.³⁰ Fatigue and drowsiness-related inattention are associated with sustained attention caused by lowered alertness (*i.e.*, insufficient attention). Distraction-based inattention is associated with divided attention and originates from dual task issues (*e.g.*, driving and

²⁶ 49 C.F.R. § 383.111(a)(1).

²⁷ <https://www.fmcsa.dot.gov/safety/driver-safety/cm-v-driving-tips-driver-distraction>.

²⁸ <https://www.nhtsa.gov/risky-driving/distracted-driving>.

²⁹ <https://www.merriam-webster.com/dictionary/distracted>.

³⁰ Engstrom, J. Monk, C.A., Hanowski, R.J., Horrey, W.J., Lee, J.D., McGehee, D.V., Regan, M., Stevens, A., Traube, E., Tuukkanen, M., Victor, T., & Yang, C.Y.D., *A Conceptual Framework and Taxonomy for Understanding and Categorizing Driver Inattention*. US-EU ITS COOPERATION, at 3, (Sept. 2013), <https://ec.europa.eu/digital-single-market/en/news/us-eu-inattention-taxonomy-report>.

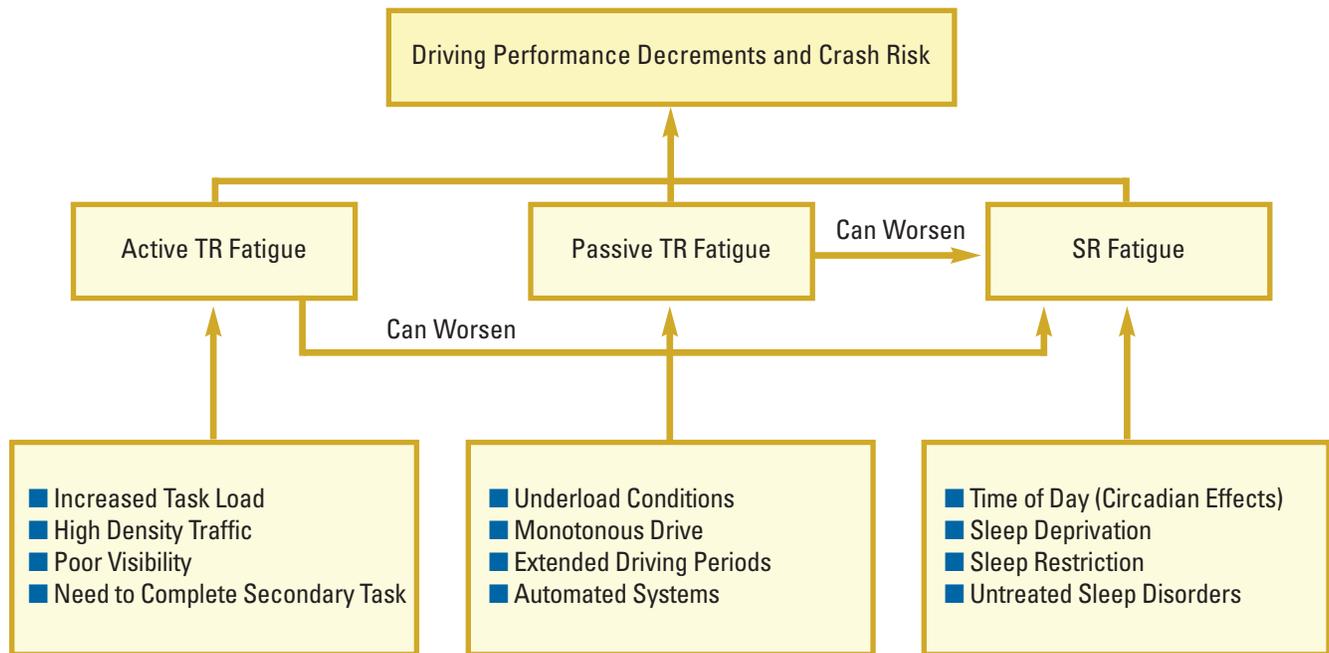


Figure 1—Concepts of Task-Related (TR) and Sleep-Related (SR) Fatigue and Drowsiness.

texting). To mitigate fatigue and drowsiness, drivers may engage in secondary tasks (or non-driving tasks such as texting) while driving in order to generate stimulation. Engaging in these secondary tasks to boost alertness creates opportunities for distraction-related inattention errors.³¹ Overall, these driver inattention concepts are likely to result in comparable deteriorations in driving performance while calling for different types of interventions.³²

Insufficient Attention (Drowsiness and Fatigue)

Driver drowsiness and fatigue causal factors include those related to the following: (1) sleep quality and quantity, (2) time of day, (3) time on task (related to the task of driving), (4) task-related fatigue (arousal levels re-

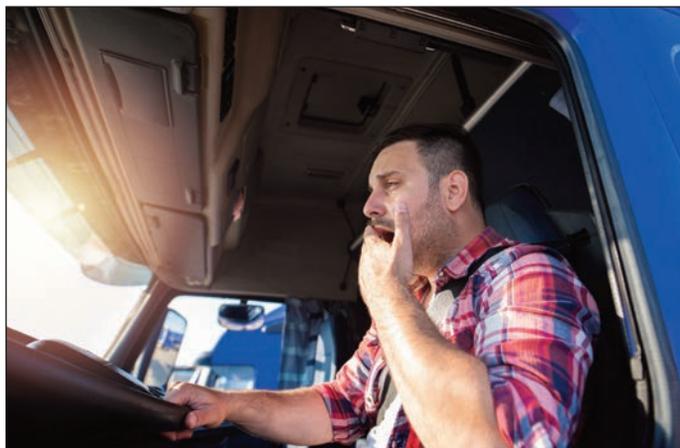
³¹ Thiffault, P. (2011). *Addressing Human Factor in the Motor Carrier Industry in Canada*. Ottawa, Ontario: Canadian Council of Motor Transport Administrators.

³² Engstrom, J. Monk, C.A., Hanowski, R.J., Horrey, W.J., Lee, J.D., McGehee, D.V., Regan, M., Stevens, A., Traube, E., Tuukkanen, M., Victor, T., & Yang, C.Y.D., *A Conceptual Framework and Taxonomy for Understanding and Categorizing Driver Inattention*. US-EU ITS COOPERATION, (Sept. 2013), <https://ec.europa.eu/digital-single-market/en/news/us-eu-inattention-taxonomy-report>.

lated to task underload and overload), and (5) combinations of these factors. Medical, conditions, medication, alcohol or drugs can also exacerbate drowsiness.³³

Figure 1 illustrates the factors that influence drowsiness and fatigue. Most of us are familiar with drowsiness associated with poor sleep quality and quantity, this is an internal process.³⁴ Factors that impact sleep-related (SR) fatigue are internal, while factors that impact task-related (TR) fatigue are external. On average, truck drivers get 6.5 hours of sleep on duty days and 8.8 hours on non-duty days.^{35, 36} The former is less than the recommended 7 to 9 hours of nightly sleep.³⁷ Regardless of sleep quantity and/or quality, the body has a natural tendency (*i.e.*, internal process) to feel drowsy from 2:00 a.m. to 4:00 a.m. and 1:00 p.m. to 3:00 p.m. This is the body's circadian rhythm, with the effect being the strongest from 2:00 a.m. to 4:00 a.m.³⁸

External factors can also impact driver fatigue, which can be passive or active. For example, passive Task-related fatigue (*e.g.*, driving for a long time, driving on a flat, straight road, using driver assistance systems, such as lane assist) is similar to boredom which results in reduction in attention. Active (heavy loading/unloading activity or driving through high-density traffic, poor visibility, strong winds, etc.) is similar to an overload condition which results in reduction in attention. As shown in Figure 1, active or passive TR fatigue can combine with SR fatigue and exacerbate the decrease of alertness, increasing the potential for microsleep episodes and falling asleep.³⁹ For example, poor sleep and active TR fatigue (*e.g.*, heavy loading/unloading) can combine to create greater reductions in driver attention.



Drowsy and fatigued drivers pay less attention to the driving environment and are more likely to make errors.

³³ NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, *Commercial Motor Vehicle Fatigue, Long-Term Health, and Highway Safety: Research Needs*, THE NATIONAL ACADEMIES PRESS, (2016), <https://doi.org/10.17226/21921>.

³⁴ May, J. F., & Baldwin, C. L., *Driver fatigue: The importance of identifying causal factors of fatigue when considering detection and countermeasure technologies*, TRANSPORTATION RESEARCH PART F, at 12, 218-224 (2009).

³⁵ Dinges, D.F., Maislin, G., Hanowski, R.J., Mollicone, D.J., Hickman, J.S., Maislin, D., Kan, K., Hammond, R.L., Soccolich, S.A., Moeller, D.D., & Trentalange, M., *Commercial Motor Vehicle (CMV) Driver Restart Study: Final Report*, (Report No. FMCSA-RRR-15-011, FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION) (2017).

³⁶ Hanowski, R.J., Hickman, J.S., Fumero, M.C., Olson, R.L., & Dingus, T.A., The sleep of commercial vehicle drivers under the 2003 hours-of-service regulations, *ACCIDENT ANALYSIS AND PREVENTION*, at 39(6), 1140-1145, (2007), <https://www.ncbi.nlm.nih.gov/pubmed/17920836>.

³⁷ National Sleep Foundation. (n.d.). *How much sleep do we really need?*, <https://www.sleepfoundation.org/excessive-sleepiness/support/how-much-sleep-do-we-really-need>.

³⁸ National Sleep Foundation. (n.d.). *What is circadian rhythm?*, <https://www.sleepfoundation.org/articles/what-circadian-rhythm>.

³⁹ Kecklund, G., & Akerstedt, T. *Report on methods and classification of stress, inattention and emotional states*, PROJECT SENSATION, INFORMATION SOCIETY TECHNOLOGIES PROGRAM, 12-15, (2004).

Misdirected Attention (Distraction)

Misdirected attention can take two forms: (1) incomplete selection of safety-critical activities, and (2) driver distraction. Misdirected attention is when a driver attends to some, but not all, activities critical for safe driving. An example of this might be a speedometer check that lasts too long or a driver making a lane change who looks in his/her side-view mirror too long as traffic changes in front of the vehicle. In both examples, the driver performed a safety-critical activity (speedometer check or mirror check). However, the driver's glance took longer than necessary. This made it less likely for the driver to attend to the traffic in front of the vehicle, potentially resulting in a crash.⁴⁰



Visual distractions include glances away from the forward roadway that are not considered safety-critical activities.

Types of Driver Distraction

Driver distraction is when a driver performs a non-driving task while driving (e.g., texting, reaching for phone, looking at a billboard, etc.). There are five types of driver distraction — Biomechanical Distraction, Auditory Distraction, Visual Distraction, Cognitive Distraction, or a combination of the four.⁴¹

Biomechanical Distraction

This occurs when the driver is doing something physical, like reaching for an object inside the vehicle with one or both hands, that is not related to driving. It can also occur when the driver is holding something in one or both hands or, is using her legs for some activity unrelated to driving.

⁴⁰ Engstrom, J. Monk, C.A., Hanowski, R.J., Horrey, W.J., Lee, J.D., McGehee, D.V., Regan, M., Stevens, A., Traube, E., Tuukkanen, M., Victor, T., & Yang, C.Y.D., *A Conceptual Framework and Taxonomy for Understanding and Categorizing Driver Inattention*. US-EU ITS COOPERATION, (Sept. 2013), <https://ec.europa.eu/digital-single-market/en/news/us-eu-inattention-taxonomy-report>.

⁴¹ Pettitt, M., Burnett, G., & Stevens, A., *Defining driver distraction*, Proceedings of the 12th World Congress on Intelligent Transportation Systems. San Francisco, CA, at 3, (2005), https://www.researchgate.net/publication/242449092_Defining_Driver_Distraction.

Auditory Distraction

An auditory distraction occurs when a sound inside or outside the vehicle draws the driver's attention away from the driving task (e.g., an unexpected sound that startles the driver). It could also result from a repetitive loud or irritating sound, such as the sound of an amber alert from a mobile phone.

Visual Distraction

A driver looking away from the forward roadway is an example of a visual distraction. Visual distractions include glances away from the forward roadway that are not considered safety-critical activities. This would include glances at objects outside the vehicle or inside the vehicle, such as glancing at an animal outside the passenger window or locating an object inside the vehicle. Visual distractions may also include safety critical activities, such as checking the side view mirror, especially if the glance takes too long.

Cognitive Distraction

Cognitive distraction occurs when the driver's attention is not on the driving task. This occurs when a driver diverts his/her attention to another mentally demanding task (such as computing numbers) or to thoughts on other topics (mind wandering or daydreaming).

Combination

Most often, combination involves two or more types of driver distraction. For example, an amber alert on a mobile phone startles the driver (auditory distraction). The driver looks away from the forward roadway to locate the phone (visual distraction); then the driver reaches for the phone (biomechanical distraction). In this example, the driver is thinking about these non-driving activities the entire time (cognitive distraction).

Research Findings on the Impact of Truck Driver Drowsiness and Fatigue

Inattention from fatigue and drowsiness adversely affects productivity and safety. As fatigue is difficult to assess during crash reconstruction, es-



A driver looking away from traffic in front of him.

estimates of the frequency and outcomes of fatigued driving are likely conservative (estimates are 10% to 20% of crashes).⁴² CMV drivers may be hesitant to disclose their level of drowsiness while driving, or the severity of the crash may leave the driver too incapacitated to report this information. Fatigued drivers are more likely to be involved in crashes since drivers' reaction times may be delayed and/or drivers have not initiated crash avoidance maneuvers.⁴³ Drowsy and fatigued drivers may exhibit poor judgment and impairments in concentration, memory, cognitive function, reaction time, and alertness.^{44,45} Given the size and weight of a truck, operating this type of vehicle requires high levels of alertness and concentration. CMV drivers are often faced with scenarios that require rapid and critical decision-making.

However, drowsy and fatigued drivers pay less attention to the driving environment and are more likely to make errors, which decreases their likelihood of perceiving potential traffic safety conflicts (e.g., lead vehicle braking). Being awake for 17 hours is similar to having a blood alcohol concentration of 0.05%.⁴⁶ This is independent of any caffeine use which may address the deleterious effect of acute drowsiness and fatigue.⁴⁷ National crash statistics derived from crash reconstruction indicate that driver drowsiness is a contributing factor in 2% to 3% of crashes.⁴⁸ An American Automobile Association (AAA) Foundation for Traffic Safety study using naturalistic driving data found that 8.8% to 9.5% crashes were related to drowsy driving, including 10.6% to 10.8% of high-severity crashes.⁴⁹ Other research indicates that driver drowsiness is a contributing fac-

⁴² NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, *Commercial Motor Vehicle Fatigue, Long-Term Health, and Highway Safety: Research Needs*, THE NATIONAL ACADEMIES PRESS, at 1, (2016), <https://doi.org/10.17226/21921>.

⁴³ *Id.* at 43.

⁴⁴ *Id.*

⁴⁵ Lim, J., and D.F. Dinges., A meta-analysis of the impact of short-term sleep deprivation on cognitive variables. *PSYCHOLOGY BULLETIN*, 136, 375-389, (2010).

⁴⁶ Williamson, A., & Feyer, A-M., *Moderate sleep deprivation produces impairments in cognitive and motor performance equivalent to legally prescribed levels of alcohol intoxication*, *OCCUPATIONAL AND ENVIRONMENTAL MEDICINE*, 57(10), at 649-655, (2000).

⁴⁷ NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, *Effects of Psychoactive Chemicals on Commercial Driver Health and Performance: Stimulants, Hypnotics, Nutritional, and Other Supplements*, THE NATIONAL ACADEMIES PRESS, at 27-38, (2011), <https://doi.org/10.17226/14534>.

⁴⁸ NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION *Traffic Safety Facts: Drowsy Driving 2015*, at 1, (2017), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812446>.

⁴⁹ Owens, J.M., Dingus, T.A., Guo, F., Fang, Y., Perez, M., McClafferty, J., & Tefft, B.C. *Prevalence of Drowsy Driving Crashes: Estimates from a Large-Scale Naturalistic Driving Study*, AAA FOUNDATION FOR TRAFFIC SAFETY, at 1, (2018), https://aaafoundation.org/wp-content/uploads/2018/02/FINAL_AAFTS-Drowsy-Driving-Research-Brief-1.pdf.



Figure 2—Split-screen presentation of the five camera views used in a naturalistic truck driving study.

tor in up to 30% of crashes.^{50, 51}

Why is there such a discrepancy between official crash statistics and research? Determining if the actions of a drowsy or fatigued driver contributed to a crash is challenging, even for trained investigators. Currently, there is no test for detecting drowsiness or fatigue in drivers. And, a previously drowsy or fatigued driver may not show signs of inattention during the police interview process due to heightened arousal. Thus, drowsy driving is not indicated in a crash unless the driver and/or a witness indicate drowsiness to crash reconstruction personnel or multiple pieces of

↑
This is an image of the video camera view for a naturalistic driving study. Video footage is just one of the methods used to collect data about the truckers who participated in this study.

⁵⁰ Horne, J.A., & Reyner, L.A., *Sleep related vehicle accidents*. BRITISH JOURNAL OF MEDICINE, at 310(6979), 565-567, (1995).

⁵¹ NATIONAL TRANSPORTATION SAFETY BOARD, *Safety Study: Fatigue, Alcohol, Other Drugs, and Medical Factors in Fatal-to-the-Driver Heavy Truck Crashes (Volumes I, II)*, NATIONAL TRANSPORTATION SAFETY BOARD, (1990).

Table 1—Odds Ratios for Tasks Performed While Driving.

TASK	Odds Ratio
Text message on cell phone	23.24*
Other—Complex (e.g., cleaning side mirror, rummaging through a grocery bag)	10.07*
Interact with/look at dispatching device	9.93*
Write on pad, notebook, etc.	8.98*
Use calculator	8.21*
Look at map	7.02*
Dial cell phone	5.93*
Read book, newspaper, paperwork, etc.	3.97*
Use/reach for other electronic device (e.g. video camera, 2-way radio)	6.72*
Other—Moderate (e.g., opening a pill bottle to take medicine, exercising in the cab)	5.86*
Personal grooming	4.48*
Reach for object in vehicle	3.09*
Look back in Sleeper Berth	2.30*
Talk or listen to hand-held phone	1.04
Eating	1.01
Smoking-related behavior—reaching, lighting, extinguishing	0.60*
Talk or listen to CB radio	0.55*
Talk or listen to hands-free phone	0.44*
Put on/remove/adjust sunglasses or reading glasses	3.63*
Remove/adjust jewelry	1.68
Put on/remove/adjust hat	1.31
Use chewing tobacco	1.02
Put on/remove/adjust seat belt	1.26
Talk/sing/dance with no indication of passenger	1.05
Smoking-related behavior—cigarette in hand or mouth	0.97
Drink from a container	0.97

Significant odd ratio ratios are bolded and have an asterisk.

evidence point to driver drowsiness. Overall, drivers are poor at identifying mild to moderate signs of their drowsiness.

Research Findings on the Impact of Truck Driver Distraction

Most of the existing driver distraction research focuses on passenger cars as opposed to large trucks. However, research on light vehicle drivers may not necessarily translate to truck drivers given the size and weight of the vehicle, increased training and licensure requirements, and different rules and regulations. A recent review of 374 published articles on driver distraction yielded five articles that included truck drivers as participants.⁵² Of these, two were naturalistic truck driving studies that documented the risk of various non-driving tasks.

Naturalistic driving studies involve outfitting vehicles with equipment that collects data while the trucks make their normal revenue-producing deliveries.⁵³ This approach captures real-world driver behavior under daily driving pressures. This equipment includes sensors (e.g. radar, lane trackers and accelerometers) and video cameras. Figure 2 is a camera view from data collected during a naturalistic driving study (Lower left quadrant is a camera view looking over the drivers' shoulder, top left quadrant displays the driver's face, top right quadrant displays the forward view, and bottom right quadrant is split and displays the rear-facing-right and rear-facing-left views).⁵⁴

Table 1 shows the results from one of these studies using truck drivers.⁵⁵ The different tasks observed in the study are shown in the 1st column and the odds ratio for each task is shown in the 2nd column. Here, the odds ratio illustrates the probability of risk, which can be interpreted much like a percentage. Significant odds ratios greater than 1.0 indicate increased risk, and those less than 1.0 indicate lowered risk. Non-significant odds ratios indicate the task does not increase or decrease risk. According to Table 1, texting while driving increases risk by 23.24 times and talking on a hands-free cell phone decreases risk by 56%.

⁵² Atchley, P. Tran, A. V., Salehinejad, M. A. *Constructing a publicly available distracted driving database and research tool*. ACCIDENT ANALYSIS AND PREVENTION, 99, 306-311, (2017).

⁵³ Olson, R.L., Hanowski, R.J., Hickman, J.S., and Bocanegra, J., *Driver distraction in commercial vehicle operations*. p. xvii, (Report No. FMCSA-RRR-09-042. FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION), <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/FMCSA-RRR-09-042.pdf>, (2009).

⁵⁴ *Id.* at 22.

⁵⁵ *Id.* at 44-45.

Truck drivers may often engage in work-related tasks while driving (which are dangerous), such as using a dispatching device; writing on a pad, notebook, etc.; using a calculator; looking at a map; and reading a book, newspaper, paperwork, etc. What is clear from Table 1 is that tasks that require the driver to look away from the forward roadway (*i.e.*, visual distraction) are the most dangerous.

Tasks that require the driver to look away from the forward roadway (*i.e.*, visual distraction) are the most dangerous.

The finding that talking on hands-free cell phone decreases risk has only been demonstrated with truck drivers.^{56,57} Other naturalistic driving studies with teen drivers⁵⁸ and passenger car drivers⁵⁹ have found this activity does not decrease risk. FMCSA allows truck drivers to use a hands-free cell phone while driving a commercial motor vehicle⁶⁰ however, state law may prohibit use of a hands-free phone. Table 1 shows that dialing a cell phone, texting on a cell phone, and reaching for a cell phone while driving a truck all increase risk. This is why FMCSA prohibits using a handheld mobile telephone, texting and other forms of hand-held cell phone use while driving a CMV.⁶¹

It can be difficult to identify inattention unless a driver self-reports or there is objective evidence to indicate the presence of inattention (video or cell phone records). Without that, there is no single piece of evidence that identifies driver inattention with 100% accuracy. The decline in driving performance is ultimately what must be evaluated to identify driver inattention as a contributing factor in a crash.

Since driver inattention (if not obvious or self-reported) is difficult to detect, police and/or prosecutors should instead search for evidence of a decline in the driving behavior of the CDL holder, such as failing to maintain proper lane position or erratic lane changes. Driver



Table 1 shows that dialing a cell phone, texting on a cell phone, and reaching for a cell phone while driving a truck all increase risk.

⁵⁶ *Id.*

⁵⁷ Hickman, J.S., & Hanowski, R.J., *An assessment of commercial motor vehicle driver distraction using naturalistic driving data*. TRAFFIC INJURY PREVENTION, at 13(6), 566-574, (2012).

⁵⁸ Klauer, S.A., Guo, F., Simons-Morton, B.G., Ouimet, M.C., Lee, S.E., & Dingus, T.A., *Distracted driving and risk of road crashes among novice and experienced drivers*, NEW ENGLAND JOURNAL OF MEDICINE, 370, 54-59, (2014).

⁵⁹ Dingus, T.A., Owens, J.M., Guo, F., Fang, Y., Perez, M., McClafferty, Buchanan-King, M., & Fitch, G.M., *The prevalence of and crash risk associated with primarily cognitive secondary tasks*, SAFETY SCIENCE, online proof, 8 pages, (2019).

⁶⁰ U.S. DEPARTMENT OF TRANSPORTATION, PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION AND FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, *Drivers of CMVs: Restricting the use of cellular phones*, 76 Fed. Reg. 75470, (Dec. 2, 2011).

⁶¹ 49 C.F.R. § 392.80, 49 C.F.R. § 392.82; See also 49 C.F.R. § 390.17.

behavior has consistently been found to be the primary contributing factor in crashes. Results from the Indiana Tri-Level Study⁶² indicated the vast majority of traffic crashes are principally related to human causes — risky driving behaviors, inadvertent errors, or impaired states. Recent truck-based research made similar findings. The Large Truck Crash Causation Study⁶³ performed a detailed post-crash investigation on 967 truck crashes that resulted in a serious injury and/or fatality. Results found that driver behavior was a contributing factor in 87% of the crashes. The remaining 13% were caused by environmental and vehicle-related conditions.⁶⁴ Naturalistic truck driving studies reported similar findings (*i.e.*, driver behavior is the primary contributing factor in truck crashes).^{65, 66}

In a 2011 study, the American Transportation Research Institute sampled data from over 500,000 truck drivers, comparing driving behaviors (identified via moving violation history) with future crash probability.⁶⁷ This study of driving behaviors was conducted, first in 2005, in 2011 and then again in 2018.^{68, 69} In general, moving violations were significantly predictive of a future crash. Any prior conviction was associated with a 43% increased likelihood of future crash involvement.⁷⁰ Increased traffic enforcement may reduce bad driving behaviors in at least two ways. Drivers may become more vigilant if they observe a heightened police presence in the area and/or if drivers are stopped by police more often. This relationship is best illustrated by a high visibility enforcement program that significantly reduced the prevalence of texting while driving and

⁶² Treat, J.R., Tumbas, N.S., McDonald, S.T., Shinar, D., Hume, R.D., Mayer, R.E., Stansifer, R.L., & Catellan, N.J., *Tri-Level Study of the Causes of Traffic Accidents: Final Report Volume I: Causal Factor Tabulations and Assessments*, INSTITUTE FOR RESEARCH IN PUBLIC SAFETY, INDIANA UNIVERSITY, DOT HS-805 085 (1979).

⁶³ FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, *Report to Congress on the Large Truck Crash Causation Study (LTCCS)*, (MC-R/MC-RRA, Mar. 2006), <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/ltccs-2006.pdf>.

⁶⁴ *Id.* at 13.

⁶⁵ R. Olson, R. Hanowski, J. Hickman, J. Bocanegra, *Driver Distraction in Commercial Vehicle Operations* (Report No. FMCSA-RRR-09-042 FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION), (Sep. 2009), <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/FMCSA-RRR-09-042.pdf>.

⁶⁶ Hickman, J.S., Knipling, R.R., Olson, R.L., Fumero, M.C., Blanco, M., & Hanowski, R. J., *Light Vehicle-Heavy Vehicle Interaction Data Collection and Countermeasure Research Project, 72-77*, (Report No. FMCSA-RRR-11-029, FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION) (Nov. 2016).

⁶⁷ Lueck, M. D., & Murray, D. C., Predicting truck crash involvement: Linking driver behaviors to crash probability, *JOURNAL OF TRANSPORTATION LAW, LOGISTICS, AND POLICY*, 78(2): 109-128, (2011).

⁶⁸ Boris, M.D. & Murray, D.C., *Predicting Truck Crash Involvement: A 2018 Update*. (AMERICAN TRANSPORTATION RESEARCH INSTITUTE), Arlington, Virginia, (2018): Available at <https://atri-online.org/wp-content/uploads/2018/08/ATRI-Crash-Predictor-2018-Update-07-2018.pdf>.

⁶⁹ *Id.* at 30.

⁷⁰ *Id.*

hand-held phone use while driving.⁷¹ Thus, enforcement is a critical activity that may prevent future truck crashes, whose primary cause may be driver inattention.

Commercial Drivers: A Special Class of Driver

As a result of their size, weight and sheer miles traveled, commercial vehicles are a special class of vehicle and operating them requires a special class of driver. According to FMCSA, “driving a Commercial Motor Vehicle (CMV)⁷² requires a higher level of knowledge, experience, skills, and physical abilities than that required to drive a non-commercial vehicle... Additionally, CDL holders are held to a higher standard when operating any [other] type of motor vehicle on public roads.”⁷³

Like passenger vehicle drivers, obtaining a CDL requires the completion of a knowledge test in order to obtain a commercial learner’s permit (CLP), a pre-trip inspection (walk around), as well as a skills test, *i.e.*, a road test.⁷⁴ However, unlike the knowledge and skills tests for obtaining a non-



Driving a Commercial Motor Vehicle requires a higher level of knowledge, experience, skills, and physical abilities than that required to drive a non-commercial vehicle.

⁷¹ Cosgrove, L., Chadhary, N., & Reagan, I., *Four High-Visibility Enforcement Demonstration Waves in Connecticut and New York Reduced Hand-Held Phone Use*. Traffic Safety Facts Research Note, (DOT-HS-811-845, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, Jul. 2011), https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/811845_hve_demonstration_waves_in_cn_ny_tsf-rn-july2011.pdf.

⁷² 49 C.F.R. § 383.5 (2019). Commercial motor vehicle (CMV) means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property 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 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.

⁷³ Commercial Driver’s License Program, FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, <https://www.fmcsa.dot.gov/registration/commercial-drivers-license>.

⁷⁴ For more information on the requirements for a CLP, see NATIONAL DISTRICT ATTORNEYS ASSOCIATION, *Commercial Drivers’ Licenses: A Prosecutor’s Guide to the Basics of Commercial Motor Vehicle Licensing and Violations*, (2d. ed., 2017) at 8, https://ndaa.org/wp-content/uploads/CDLMono_REV2017_FinalWeb-2.pdf.

commercial driver's license, obtaining a CDL requires that a candidate pass all the knowledge and skills tests for the type of vehicle the candidate is expected to drive, a check of the candidate's driving history for the last 10 years, and proof that the candidate is medically qualified to obtain a CDL.⁷⁵ This is not to mention any other specific requirements a state may impose on candidates for a CDL.

CMVs have unique characteristics associated with their ability to transport special loads or large groups of people. More specifically, these characteristics are tied to the heavy 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 passengers that 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.⁷⁶

Licensing for operation of CMVs is specialized because the safe operation of these vehicles requires specialized knowledge and skills. Since commercial vehicles are classified by groups; CDLs are classified by the type of license necessary to operate the particular type of CMV in each group. Commercial vehicle 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.⁷⁷ There are three basic CDL classifications: "A," "B" and "C."⁷⁸

The Federal government does not issue CDLs. Rather, states, acting through their respective state licensing agencies, issue CDLs.

■ 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" CMVs and vehicles in the two lower classifications.

⁷⁵ *How do I get a Commercial Driver's License?*, FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, <https://www.fmcsa.dot.gov/registration/commercial-drivers-license/how-do-i-get-commercial-drivers-license>.

⁷⁶ Commercial motor vehicle (CMV) means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property 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 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. 49 C.F.R. § 383.5.

⁷⁷ *Id.*

⁷⁸ 49 C.F.R. § 383.91.

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- 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.⁷⁹

A driver’s CDL may also be subject to an “endorsement”⁸⁰ or a “restriction.”⁸¹ An endorsement permits the individual to operate certain types of CMVs, such as an endorsement to operate a passenger CMV or an endorsement to haul hazardous materials. A restriction limits the applicant to operating a vehicle with certain characteristics. For example, if the applicant drove a vehicle without air brakes when the applicant took his or her skills test, then the state issuing the CDL must indicate whether that driver is restricted from operating any CMV equipped with air brakes. For more detailed information about CDLs and their requirements, consult NDAA’s Monograph, entitled *Commercial Drivers’ Licenses: A Prosecutor’s Guide to the Basics of Commercial Motor Vehicle Licensing and Violations*, (2d ed., 2017).

CDL Holder Accountability

The Single License Requirement

Commercial drivers are heavily regulated by both Federal and state law. Therefore, it is critical for prosecutors to consult both state regulations and the Federal Motor Carrier Safety Regulations (FMCSRs) when dealing with CDL holders (or CMV cases). As a result of these strict regulations, CDL holders are held to a higher standard. One such federal regulation states that “No person who operates a commercial motor vehicle shall at any time have more than one driver’s license.”⁸² This mandate is called “The Single License Requirement.”⁸³ Over time, this regulation has come to be known as the “One Driver, One License and One Record” concept. The idea being that every CDL holder should have only one driver’s license document, which is issued by their state of

⁷⁹ NATIONAL DISTRICT ATTORNEYS ASSOCIATION, *Commercial Drivers’ Licenses: A Prosecutor’s Guide to the Basics of Commercial Motor Vehicle Licensing and Violations* (2d. ed., 2017) at 6, https://ndaa.org/wp-content/uploads/CDLMono_REV2017_FinalWeb-2.pdf; see also, 49 C.F.R. § 383.91 for an illustration of CMV groups.

⁸⁰ 49 C.F.R. § 383.93.

⁸¹ 49 C.F.R. § 383.95.

⁸² 49 C.F.R. § 383.21.

⁸³ *Id.*

domicile⁸⁴ and one complete record of their driving history. As a result, a CDL holder does not have to be operating a CMV to have his/her CDL impacted, as crimes or infractions committed in a non-commercial vehicle, also affect a CDL.⁸⁵

CDLIS

To ensure a full, complete, and accurate picture of the CDL holder's driving history, the Commercial Driver's License Information System (CDLIS) was created.⁸⁶ CDLIS, is a nationwide computer system that enables state driver licensing agencies (SDLAs) to ensure that each commercial driver has only one driver's license and one complete driver record. Under 49 C.F.R. § 384.225, a CDL holder's driving record must include



include "... all convictions, disqualifications, and other licensing actions for violations of any state or local law relating to motor vehicle traffic control (other than parking, vehicle weight, or vehicle defect violations) committed in any type of vehicle" and all medical certification recordkeeping in accordance with 49 C.F.R. § 383.73(o). State driver licensing agencies use CDLIS to complete various procedures, including:

- Transmitting out-of-state convictions and withdrawals;
- Transferring the driver record when a commercial driver's license holder moves to another state; and
- Responding to requests for driver status and history.⁸⁷

⁸⁴ 49 C.F.R. § 383.5, Commercial driver's license (CDL) means a license issued to an individual by a State or other jurisdiction of domicile, in accordance with the standards contained in this part, which authorizes the individual to operate a class of a commercial motor vehicle.

⁸⁵ 49 C.F.R. § 383.51.

⁸⁶ 49 U.S.C. § 31309.

⁸⁷ *Commercial Driver's License Information System*, AMERICAN ASSOCIATION OF MOTOR VEHICLE ADMINISTRATORS, <https://www.aamva.org/CDLIS/>, see also 49 C.F.R. § 384.225.

Driver Behavior Violations and Crash Risk

As noted above, one of the primary functions of CDLIS is to transmit convictions for violations of states' motor vehicle control laws,⁸⁸ which would include many of the moving violation(s) a CDL holder receives as a result of operating while being distracted (e.g., reckless driving or failing to maintain the proper lane). Crash risks increase significantly when drivers are distracted.⁸⁹ In addition, crashes in CMVs are more likely to lead to serious injury or death because CMVs are generally larger and heavier than non-commercial vehicles. As such, even less serious traffic infractions are significant for CMV operators.

In a study⁹⁰ conducted in July 2018 by the American Transportation Research Institute (ATRI), it was noted that the likelihood of a crash by a CMV operator increased by 69% if the CMV operator had a previous reckless/careless/inattentive/negligent driving conviction⁹¹ (see the chart on the opposite page). In contrast, in the same study, a reckless driving violation⁹³ (as opposed to a conviction) yielded an increased crash likelihood of 114%.⁹⁴ Distracted driving behavior is often charged in the reckless/careless/inattentive/category. What accounts for the significant disparity in crash likelihood between a reckless driving vi-



⁸⁸ *Id.*

⁸⁹ Klauer, S.A., Guo, F., Simons-Morton, B.G., Ouimet, M.C., Lee, S.E., & Dingus, T.A., *Distracted driving and risk of road crashes among novice and experienced drivers*, NEW ENGLAND JOURNAL OF MEDICINE, 370, 54-59, DOI: 10.1056/NEJMsa1204142 (2014).

⁹⁰ Boris, M.D. & Murray, D.C., *Predicting Truck Crash Involvement: A 2018 Update*. (AMERICAN TRANSPORTATION RESEARCH INSTITUTE), Arlington, Virginia (2018): Available at <https://atri-online.org/wp-content/uploads/2018/08/ATRI-Crash-Predictor-2018-Update-07-2018.pdf>.

⁹¹ Within the context of the ATRI study, "Drivers receive convictions when an issued citation is adjudicated in court, and the truck driver is found guilty of the specific charge. These convictions are then stored in the CDLIS database." Boris, M.D. & Murray, D.C., *Predicting Truck Crash Involvement: A 2018 Update* (AMERICAN TRANSPORTATION RESEARCH INSTITUTE), Arlington, Virginia (2018): Available at <https://atri-online.org/wp-content/uploads/2018/08/ATRI-Crash-Predictor-2018-Update-07-2018.pdf>.

⁹² *Id.* at 15.

⁹³ "Violations are issued to drivers during roadside inspections when inspectors discover that a driver and/or vehicle is not in compliance with one or more of the Federal Motor Carrier Safety Regulations (FMCSRs). In turn, these violations get stored in the MCMIS database and are used by FMCSA to regularly monitor driver and carrier safety performance." *Id.* at 9. "MCMIS is a Federal Motor Carrier Safety Administration (FMCSA)-maintained database of carrier-based information regarding crashes and roadside inspections of commercial motor vehicles (CMVs) and drivers." *Id.* at 8. MCMIS — Motor Carrier Management Information System, *Id.* at 2.

⁹⁴ *Id.* at 15

Table 2—Summary of Crash Likelihood for All Data Analyzed⁹²

If a driver had:	The crash likelihood increased:	Sig
A Reckless Driving violation	114%	**
A Failure to Yield Right of Way violation	101%	***
A Failure to Keep in Proper Lane conviction	83%	**
A Failure to Use / Improper Signal conviction	82%	**
A Past Crash	74%	***
An Improper Lane / Location conviction	72%	***
An Improper Pass conviction	70%	**
A Reckless / Careless / Inattentive / Negligent Driving conviction	69%	***
An Improper or Erratic Lane Changes conviction	66%	***
An Improper Lane Change violation	63%	***
An Hours-of-Service violation	50%	***
An Improper Turn conviction	49%	*
A Following Too Close conviction	46%	**
A Speeding violation	45%	***
A False or No Log Book violation	45%	***
A Disqualified Driver violation	44%	***
Any conviction	43%	***
A Speeding More Than 15 Miles over Speed Limit conviction	40%	***
A Speeding 1 to 15 Miles over Speed Limit conviction	38%	**
Any Moving violation	35%	***
A Seat Belt violation	33%	***
A Failure to Obey Traffic Control Device violation	30%	***
Any OOS violation	29%	***
A Failure to Obey Traffic Sign conviction	25%	**
A Driving Too Fast for Conditions conviction	25%	*
A Size and Weight violation	20%	***
A Failure to Obey Traffic Signal / Light conviction	20%	*
A Reckless Driving conviction		ns
An Improper Turn violation		ns
A Failure to Yield Right of Way conviction		ns
An Improper Passing violation		ns
A Following Too Close violation		ns
A Medical Certificate violation		ns
A Failure to Obey Yield Sign conviction		ns
A Failure to Obey Warning Light / Flasher conviction		ns

**Significant at p < .05*
***Significant at p < .01*
****Significant at p < .001*
ns = non-significant

olation versus a conviction for the same or similar offense? During the study, 439,260 unique drivers' convictions and violations were analyzed.⁹⁵ Of those drivers, only 41,205 had at least one or more convictions on their driver's record.⁹⁶ However, for those same drivers, a total of 1,299,218 roadside inspections were conducted, with 1,966,976 separate violations issued during those inspections, with only the driver behavior violations being the subject of the study.⁹⁷

A fair inference from the crash predictor study is that many more driver violations are being noted during the inspection process than are being adjudicated through the court process. Although the information gathered in both processes (court adjudication and roadside inspection) still gets to FMCSA (through CDLIS or the FMCSA database that captures roadside inspection data [MCMIS, see footnote 93]), only violations adjudicated through the court process, will make it on to a CDL holder's motor vehicle record. Therefore, it is imperative that prosecutors (police and courts) refrain from diverting, deferring or otherwise avoiding the convictions of CDL holders who receive citations for distracted driving related behavior, *i.e.*, Masking.⁹⁸ "Masking prevents the court system, state licensing agency, and motor carrier employers from taking the appropriate action against a potentially dangerous driver;"⁹⁹ which means that drivers who ought to be removed from the roads remain licensed when they should not be.

For more information about Masking, consult NDAA's [Masking Quick Reference Guide](#).

Effective CMV Distracted Driving Enforcement

Effective CMV distracted driving prosecution begins with effective CMV distracted driving enforcement. Prosecutors cannot address CDL

⁹⁵ *Id.* at 9.

⁹⁶ *Id.* at 10.

⁹⁷ *Id.*

⁹⁸ 49 C.F.C.R. § 384.226 Prohibition on masking convictions — The State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CLP or CDL holder's conviction⁹⁸ 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 appearing 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. See also MASKING, Black's Law Dictionary (11th ed. 2019) — **masking n. 1. Criminal law.** The practice or an instance of a defendant's agreeing by plea bargain to plead guilty to a less serious offense than the one originally charged, as by pleading guilty to parking on the curb when one has been charged with speeding in a school zone. **2.** In critical legal studies, the act or an instance of concealing something's true nature <being a crit, Max contends that the legal system is merely an elaborate masking of social injustices>. — **mask, vb.**

⁹⁹ Elizabeth Earleywine, [Mastering Masking: Why & How to Avoid Masking CDL-Holder Convictions, Between the Lines, 1-10, Vol. 27, Issue 6 \(July 2018\)](#).

holders' distracted driving behaviors if drivers are not actually cited. As noted in the section prior, only violations that are issued, adjudicated and convicted through the court process, end up on a CDL holder's driving record. Therefore, law enforcement agencies employ varying strategies to effectively target distracted driving.



Due to the very nature of the offense where drivers often lower their devices below window level to text or surf the net, officers must react using creative and sometimes controversial methods to apprehend these violators. Officers are standing on street corners dressed as homeless people, perched in bucket trucks, riding in state or local Department of Transportation (DOT) vehicles, and utilizing team patrols with one goal in mind — catch the distracted driver before a collision occurs. While effective enforcement of distracted driving laws involving passenger vehicles is growing, the same cannot be said in the commercial vehicle realm.

By their very design, commercial motor vehicles are much taller than a standard police car or sports utility vehicle. The practices used to catch ordinary distracted drivers may be ineffective when targeting CMVs. However, using the enhanced patrol techniques below can increase effective enforcement of distracted driving laws:

- Rolling surveillance in similar vehicles (DOT dump truck, coach bus), radioing violations to strategically placed unmarked patrol vehicles;
- Using spotter officers on overpasses in target rich areas;
- Using time of day and sunlight angle to increase visibility of the driver; and
- Using dedicated funding, similar to “Click it or Ticket,”¹⁰⁰ for team distracted CMV patrols.

It should be noted that observation of distracted driving violations dur-



Prosecutors cannot address CDL holders' distracted driving behaviors if drivers are not actually cited.

¹⁰⁰ News, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, <https://www.nhtsa.gov/press-releases/highway-safety-program-grants-562-million> (last visited Mar. 19, 2020).

ing hours of darkness presents special challenges. Officers should utilize whatever ambient light is available while maintaining strategic positions of safety to observe these violations.

While some of these techniques are focused on team efforts or on using dedicated funding for specialized mobilizations, regular patrol officers can participate by simply being more observant to certain driving behaviors. The actions listed below are relatively easy to spot by an observant patrol officer:

- Late braking
- Jerky steering
- Lazy turning movements
- Stale red light violation
- Failing to maintain travel lane
- Following too closely
- Dozing or nodding off
- Frequent yawning

Non-CMV Law Enforcement Officers and prosecutors should be aware of their local traffic enforcement laws and polices before stopping a CMV.

A “stale red-light violation” is when a driver approaches an intersection where a red light has been red for a considerable amount of time. The driver has the expectation that the light will turn green shortly and does not slow down because the driver anticipates the light will turn green before the driver gets to the light.

Have you ever been traveling down a highway or interstate and observed a semi-truck start to make a lane change, then suddenly a passenger vehicle jumps that lane causing the CMV driver to make an evasive steering maneuver? The evasive steering movement by the CMV operator causes a very noticeable reaction, almost a “whipping” type motion with the trailer, which is common with articulated¹⁰¹ vehicles. Therefore, when a CMV driver performs these types of movements, it can be relatively easy for officers to spot. While the above listed example was certainly the fault of the motorist in the passenger vehicle failing to provide the proper care and attention around a semi-truck, the reactions of a distracted or fatigued CMV operator can be similar. Therefore, it is important for patrol officers to be aware that sudden noticeable movements by a CMV may signal that the operator is distracted or fatigued. An unexplained lane departure, a whipping left to right trailer motion, or swerving due to late braking, can be caused by an inattentive CMV operator. Remember that violations uncorrected can result in tragedy.¹⁰²

¹⁰¹ A vehicle is articulated when it has “a hinge or pivot connection especially to allow negotiation of sharp turns.” Merriam Webster online <https://www.merriam-webster.com/dictionary/articulated>.

¹⁰² *18 Wheels and BUSted Video*, minute:6:06, (Sept. 21, 2011) YOUTUBE.COM, <https://www.youtube.com/watch?v=KGvhD4Qlc8E> (last visited Mar. 25, 2020).

After the Traffic Stop — Contacting the Driver

When a traffic stop is initiated, vehicle placement and safety by the patrol officer is paramount. In a perfect world all traffic stops, especially those involving commercial motor vehicles would be made on oversized and level asphalt shoulders of the road. While this certainly could be true if working a specific targeted area where these “safe zones” exist, the majority of traffic stops will be made on a standard ten-foot shoulder. Officers must utilize sound principles when placing their patrol vehicles behind a CMV and consider all areas of escape when approaching the vehicle on foot. Consider passenger side approaches under most circumstances, keeping close eye on whether the driver exits the cab unexpectedly.



In a perfect world all traffic stops, especially those involving commercial motor vehicles would be made on oversized and level asphalt shoulders of the road.

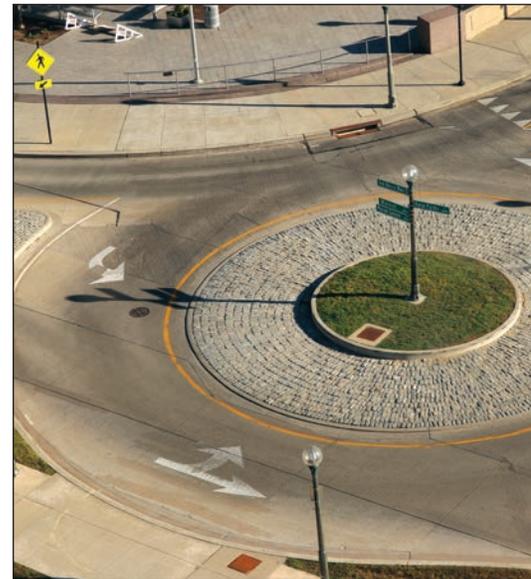
Once the officer steps-up onto the CMV and makes eye contact with the driver, the officer should observe the interior of the cab for items that are associated with distracted driving; cell phones in plain view, loose or mounted tablets, navigation and infotainment systems, food wrappers on the console or passenger seat. While these items may or may not have been used inappropriately, their mere presence can be an excellent conversation starter between the officer and driver. On the other hand, when an operator is obeying state law regarding hands-free operation, the driver may show the officer their headset or hands-free device in order to refute the officer’s allegations. Keeping police department rules and regulations regarding the questioning of traffic violators in mind, there are lines of questioning that can enhance the overall traffic stop and lead to a successful prosecution should the driver contest the summons in court.

Officers should ask questions that can uncover the reasons why the erratic driving behavior occurred. After beginning with a respectful introduction including the officer’s name and department, it is productive to provide a description of the specific driving conduct with as much detail

as possible. For example, “You were observed traveling northbound in the left lane and you failed to maintain your travel lane twice within a half mile. Your left side trailer tires crossed onto the apron twice, and on one occasion your tires dropped off the asphalt edge.” Follow up questions to the CMV driver may include:

Truck aprons are part of roundabouts' design to allow larger vehicles room to navigate without striking fixed objects or other road users.

- Where are you traveling to today?
- Where and when did your trip originate?
- Were you aware you failed to maintain your lane?
- Is there any reason out of your control for this to have occurred?
- How are you feeling today?
- Were you using or were you on the cell phone at the time?
- How long have you been driving today?
- Are you getting close to your driving time limitations?
- Are you feeling drowsy?
- What are your employer's regulations for cell phone usage?
- How do you use your phone while you are driving?
- Do have a hands-free device?
- How does it connect to your system?
- How do you communicate with your dispatch?



After this initial inquiry, officers who are not in a CMV enforcement unit, need only request the driver's CDL, registration and insurance card. Motor Carrier officers may request other documents, such as the driver's medical card or documentation related to a CDL holder's hours of service. In addition, officers may perform data inquiries through their home state and The International Justice and Public Safety Network (NLETS)¹⁰³ system to be assured the driver is operating within the regulations of the type CDL they are issued.

When the driver begins to answer these questions, keep in mind that what he or she says should be properly documented for court prosecution purposes. If the officer or his or her vehicle is equipped with a body cam-

¹⁰³ NLETS is the national interstate justice and public safety network for the exchange of law enforcement-, criminal justice-, and public safety-related information. NLETS links together and supports every state, local and federal law enforcement, justice and public safety agency for the purposes of sharing and exchanging critical information. The types of data being exchanged varies from motor vehicle and drivers' data, to Canadian and Interpol database located in Lyon France, to state criminal history records and driver license and corrections images. NATIONAL INTERSTATE JUSTICE AND PUBLIC SAFETY NETWORK, www.nlets.org, (last visited 8/16/19).

era or video recorder, officers should consider replaying the footage and document what the driver said. Furthermore, that video/audio footage should be cataloged so it can be turned over to the prosecutor in order to meet discovery obligations under the law. If an admission of distracted driving is obtained or the officer observed certain conduct by the driver, cite that operator with laws that are specific in nature, not generic. In other words, use a charge such as, Illegal Use of an Electronic Device, instead of generic charges like Inattentive or Careless driving. Also remember that while state specific cell phone bans vary, Federal regulations prohibit all CMV operators from using a hand-held mobile device or texting while driving.¹⁰⁴

Investigation of the Distracted Driving Crash

Investigating a crash involving a CMV where distracted driving is suspected is challenging. While in certain ways, the investigation is similar to that of an automobile crash, some of the most apparent differences when investigating CMV crashes are the size/weight and unique features of these heavier vehicles, not to mention the special regulations that govern the CDL holders who drive these specialized vehicles. For more information on the technical nuances of prosecuting a large truck crash, consult NDAA's Monograph: [Large Truck Crash Reconstruction for Prosecutors](#).

Cell Phone Records

Once the operator's cell phone number and carrier can be determined, a preservation letter should immediately be sent to that provider's law enforcement liaison department. This can assure that cell records and texting content (if available) are preserved until a search warrant or subpoena can be issued. Cell phone records, while not as invasive as a complete forensic analysis



Damaged phone (above), top glass shattered, found within a roadside debris pile. (top photo) Photo courtesy of Sgt. Anthony Mendez, Delaware State Police.

¹⁰⁴ 49 C.F.R. §§ 392.82, 392.80.

of the phone, can provide information such as the date and time of calls and texts and the last time the internet was accessed on the phone.

Forensic Imaging — Data Extraction

While obtaining cell phone records is an important key to any investigation involving serious or fatal injuries, the best avenue for obtaining specific data such as text message content and internet usage is through a forensic imaging process. Copying data with the intent to preserve is typically done by specially trained forensic examiners in a laboratory setting. From direct experience through recent investigations, forensic imaging provides a more timely and specific data in comparison to cell phone records. While there are still some situations where a phone cannot be imaged, most password protected phones are able to be accessed with the exception of the newer model Apple iPhones. Under certain circumstances and accompanied by a warrant, these inaccessible iPhones can be sent to the Apple Corporation in Seattle, Washington where the data can be imaged. A forensic examination report can obtain the following information:

- Texting Content & Instant Messages
- Contacts & Emails
- Data Files
- Thumb Nails
- User Accounts
- Web Pages Visited (Twitter, Face Book, Instagram, etc.)

In cases of forensic imaging, except where the owner consents, a search warrant must be issued prior to the extraction process. The search warrant must be specific in scope in order to provide the examiner the exact time frame in which the data is needed. Unlike on-going drug or homicide investigations, time of occurrence with a crash is much more easily determined. Therefore, when completing a search warrant for a forensic examination, investigators should narrow the time frame for the desired data, so their warrant does not seem overly broad. However, an investigator should consider the possibility of a driver committing multiple distracted driving violations over a certain period of time leading up to the crash. Expanding the time frame in your warrant, perhaps thirty minutes



Copying data with the intent to preserve. Photo courtesy of Sgt. Anthony Mendez, Delaware State Police.

to an hour prior to the crash may be able to show a driver's continuing course of conduct which is necessary to satisfy more serious charges involving state of mind.

Heavy Vehicle Event Data Recorders

Most all modern heavy trucks have electronic or engine control modules (ECM). The engine control module is "an electronic module designed to protect the vehicle's engine from damage, which also contains [event data recording] capabilities."¹⁰⁵ ECMs are similar to a power train control module in an automobile. This technology is used by the trucking industry for many purposes, such as fuel mileage, Environmental Protection Agency (EPA) compliance and engine performance. One use for the electronic control module is that it also



Image courtesy of www.collisiondata.com

functions as an event data recorder (EDR).¹⁰⁶ Unlike the automobile application, which is determined by vehicle manufacturer, the heavy truck EDR is determined by the manufacturer of the engine; Cummins, Detroit, Caterpillar, Mack, etc. For data to be stored during an event in a heavy truck EDR, typically some type of change in wheel speed is needed. Specifically, most events are triggered by a sudden decrease in wheel speed. Data that can be stored by the EDR can include wheel speed, braking application, engine revolutions per minute (RPM), cruise control and clutch pedal application. A police department involved in the reconstruction of serious or fatal crashes involving a commercial vehicle or heavy truck should reach out to the experts in the trucking industry for assistance in the imaging of the EDR. While emphasis during this section has been on the investigation of a distracted driving CMV crash, few crash investigations can begin without a thorough examination of the culpabil-

Data for commercial vehicles is stored in the engine ECM(s) and related systems and each manufacturer has their own way to store and recover crash related data.

¹⁰⁵ John Kwasnoski, *Large Truck Crash Reconstruction for Prosecutors*, (NATIONAL DISTRICT ATTORNEYS ASSOCIATION, Arlington, V.A.), 2018 at 37.

¹⁰⁶ *Id.*

ity of the driver behind the wheel of a CMV, *i.e.*, the CDL holder.

Prosecuting the Non-fatal, Non-serious Injury Distracted Driving case

In cases where there was no fatality, no serious injury, or no crash, without a thorough investigation and facts tied to the officer's articulation of the behavior(s) that signaled the distracted driving, proving the driver was distracted can be difficult. For instance, suppose a CMV driver is distracted by looking down at his cell phone, resulting in a sideswipe collision of a vehicle in the adjacent lane. If there are no injuries to either party, a cursory look at the collision may lead to the conclusion that the reason for the crash was that the CMV driver failed to maintain his lane. An investigating officer's articulation of the facts above should not only involve the fact that the CMV failed to maintain its lane, but also that the actual cause of the crash was that the CMV driver was distracted by his cell phone, which resulted in a failure to maintain his lane.



In distracted driving cases, to ensure your factfinder (be it jury, judge or hearing examiner) is properly educated about unique CDL holder issues, you will want to call expert witnesses. Usually, a MCSAP officer will be your key expert witness. MCSAP stands for Motor Carrier Safety Assistance Program.¹⁰⁷ These officers are specially trained to work with CMVs and enforce the Federal Motor Carrier Safety Regulations. The goal of the MCSAP program is to reduce CMV-involved crashes, fatalities, and injuries through con-

¹⁰⁷ 49 C.F.R. § 350.101 (a) - The MCSAP is a Federal grant program that provides financial assistance to States to reduce the number and severity of accidents and hazardous materials incidents involving commercial motor vehicles (CMVs). The goal of the MCSAP is to reduce CMV-involved accidents, fatalities, and injuries through consistent, uniform, and effective CMV safety programs. Investing grant monies in appropriate safety programs will increase the likelihood that safety defects, driver deficiencies, and unsafe motor carrier practices will be detected and corrected before they become contributing factors to accidents. The MCSAP also sets forth the conditions for participation by States and local jurisdictions and promotes the adoption and uniform enforcement of State safety rules, regulations, and standards compatible with the Federal Motor Carrier Safety Regulations (FMCSRs) and Federal Hazardous Material Regulations (HMRs) for both interstate and intrastate motor carriers and drivers.

sistent, uniform, and effective CMV safety programs.¹⁰⁸ Interview these officers prior to trial and be prepared to qualify them as an expert witness in CMVs, CDL laws, and enforcement. These witnesses will be essential in educating the factfinder. This witness can also testify about the dangers of manipulating a phone or mobile device while driving.

Discuss the reason why the CDL holder was stopped with the officer. Have the officer describe what behavior led to the stop. For example, an officer observing traffic may have noticed:

- the driver's head looking down, looking up and then back down;
- nearly striking an object or vehicle;
- driving into the opposing lane of travel or crossing lane markers;
- slow response to signals;
- turning abruptly or illegally;
- failing to maintain constant speed;
- failure to signal;
- nighttime glow of a device; and/or
- hand to ear with device in hand, etc.

At trial, prosecutors must be aware of the need to educate the factfinder. Explain that CDL holders are not like other drivers. They are professional drivers with extensive training and experience and should be held to a higher standard. Prosecutors must educate the factfinder about the specialized knowledge and skills CDL holders must acquire to demonstrate their proficiency prior to receiving a CDL. Because of their specialized education, the number of miles traveled as well as the size and weight of CMVs, these drivers are held to a higher standard on the roads and while operating non-commercial vehicles.

To ensure a juror understands that a CDL holder is held to a higher standard than a passenger vehicle driver, it is best practice to use a consistent theme during trial, for example, "professional driver." A CDL holder is a "professional driver." Use the testimony of your police officer to explain what makes a CDL holder a professional driver. Have your officer explain why there is a higher likelihood of injury or death when a CMV is involved. Discuss the requirements necessary to obtain a CDL and why a CMV operator should have a more detailed understanding

¹⁰⁸ *Id.*

about the hazards of driving.

Naturally, jurors can rely on their own personal experience, but it is more impactful to have a witness clearly explain this to the jury. This obviates the natural juror response to make the CDL holder's behavior akin to what they do behind the wheel of a car. Many jurors have engaged in distracted driving with no ill effects. Therefore, creating a distinction between their behavior in their personal vehicles and a CDL holder is key to educating your factfinder.

Talk to the jury in layman's terms. Do not use legal jargon. When dealing with complex concepts, it is best to use an illustration with a jury or judge. In trial, try to use distance rather than time. For example, sending or receiving a text message can take the driver's vision off the road for an average of 4.6 seconds which means the driver will travel the length of a football field with no visual guidance.¹⁰⁹ Here, "4.6 seconds" seems short but when the illustration of a "football field" is used, the factfinder gets a more accurate description of the danger.



Prosecuting the Fatal or Serious Injury Distracted Driving Case

Commercial motor vehicle (CMV) crash investigations are very complex. Whether they are single impact or multi-vehicle chain reaction collisions, the consequences are usually severe. It is common to see loss of life or serious injuries result from a CMV crash, especially when it involves a passenger vehicle. Circumstances are often further complicated when the cause of the crash is not immediately obvious, as can be the case with crashes involving distracted driving.

A CMV crash requires a team approach. The initial investigators and

¹⁰⁹ R. Olson, R. Hanowski, J. Hickman, J. Bocanegra, *Driver Distraction in Commercial Vehicle Operations*, at 143, 150 (Report No. FMCSA-RRR-09-042 FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION), (Sep. 2009) <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/DriverDistractionStudy.pdf>.

collision reconstructionist must communicate with the prosecutor early and often from the time of the incident. Prosecutors must remember that the full scope of the collision dynamics will likely not be fully determined at the crash scene. Therefore, a thorough collection and documentation of all potential evidence at the scene is critical for future consideration. Evidence not collected or documented will most likely be lost forever. Additionally, the photographs, electronic devices, videos, or other visual documentations made at the scene are critical to properly explain how the crash occurred to the jury during a trial. A poorly documented crash scene will lead to poor case outcomes.

Remember that while impressions from the crash site are important, be careful not to develop “tunnel vision” due to assumptions or preconceived notions from the crime scene. Distracted driving can manifest itself in more ways than the mere observation of a driver using a cell phone or texting. An initial determination of late breaking, failing to maintain travel lane, or following too closely, should not lead a prosecutor to believe that one of these actions is the sole cause of the crash, since any of these actions can, with additional evidence, signal a potentially distracted or fatigued driver.

A key role for the prosecutor throughout the investigation and prosecution of the CMV fatal/ serious bodily injury (SBI) case is to ensure that the team working the case constantly steps back to reevaluate all evidence and challenge all theories unless and until proven beyond a reasonable doubt to all involved. This is important to do in all fatal/SBI cases, but critical in cases where distracted driving may be a concern. This avoids the two biggest mistakes that can be made in any criminal matter, but especially in a complex crash case: (1) failing to charge or undercharging the CDL holder; or even worse (2) overcharging or charging a CDL holder with vehicular homicide when no charges were appropriate.

Crime Scene

As in a non-fatal, non-SBI case, all serious CMV crashes will require the participation of a MCSAP officer. As part of the crime scene processing and CMV search, special attention must be paid to any potential causes of inattentive or distracted driving that may be a causal factor in the crash like electronic devices. The investigators and prosecutors must also adhere to state constitutional and statutory requirements concerning whether a search warrant or other court order will be required to conduct searches.



In some instances, the collection of the evidence of distraction from the CMV may only be accomplished by obtaining a search warrant. Obtaining evidence from electronic devices, like cellphones, will typically require a separate search warrant or court order to download or “dump” the data from the electronic device. An examination of the electronic device may detail different multimedia applications being used by the CDL holder. Preservation letters should be sent to any cellphone service providers or social media services. Even if certain data, like text messages, are no longer available, basic billing records from cellphone providers should at least be obtained in order to analyze whether any patterns of cellphone activity exist.



Interviewing the Operator

A detailed interview of the CMV operator is going to be a crucial part of your potential distracted driving case. The prosecutor should work with law enforcement on developing uniform methodologies for interviewing the CDL holder so that all necessary and important questions can be asked to the driver. While many initial on-scene inquiries (such as the questions noted earlier in the “contacting the driver” section, page 32) or emergency room interviews regarding basic collision questions may not rise to the level of custodial interrogations, follow-up recorded interviews at a police station may require the issuance of *Miranda* warnings. If there is any question as to whether or not *Miranda* warnings are needed, law enforcement should consult their prosecutors.

Expert Opinions

A necessary expert in an inattentive driving case is one in “human factors.” A human factors expert in the field of vehicle safety research, studies the interactions between human behavior and the driving function. Human factors studies explore all areas of the driving function, including inattentive driving. Frequently the science behind distraction, specifically crash/near crash ratios while engaging in driving function, will be beyond the scope of expertise of a collision reconstructionist who has not received specialized training in the field of human factors. This could potentially render such testimony from a collision reconstructionist as inadmissible.

Some experts may be relevant regardless of the nature of the collision. These may include: (1) lighting and visibility experts; (2) CMV component part experts, i.e. brakes, axles, etc; (3) civil engineer or roadway design experts; (4) forensic toxicologists; (5) Drug Recognition Experts (DRE’s); (6) medical experts regarding health issues of CDL holder; and (7) expert in CDL and Federal Motor Carrier Safety Administration regulations. When electronic devices are involved, experts in cellphone or computer analysis may be critical to explain the nature and timing of data retrieved from the equipment.

Regardless of inadmissibility concerns, other sound reasons exist for obtaining a human factors expert separate from the collision reconstructionist. First, an independent human factors expert will typically have heightened qualifications and expertise in the research behind the distracting behavior of the CMV driver. This will provide a greater weight to any critical opinions regarding inattentive driving being the cause of the crash. Second, as mentioned previously, the prosecutor must educate a finder of fact, be it judge or jury, on how engaging in distracted driving meets both the criminal mental state and causal factor requirements of crimes charged. A human factors expert will intricately know the science behind the dangers of inattentiveness in the driving function and be able to educate the factfinder on these issues. Finally, it is not always wise to use the collision reconstructionist to cover multiple scientific areas regardless of the quality of that expert. The more topics that one expert must cover may expose the expert to challenges that could compromise their testimony. Everyone has strengths and weaknesses in their areas of knowledge; experts are no exception. The best plan is to keep experts within their areas of greatest strength and obtaining a human factors expert will accomplish this goal.

“Human factors” is shorthand for Human Factors Engineering. “The application of knowledge about human abilities, limitations, and other human characteristics to the design of equipment, tasks, and jobs.”

<https://www.nhtsa.gov/research-data/human-factors>.



Charging Decisions in the Fatal or SBI Distracted Driving Case

Once all evidence and expert evaluation is gathered, the prosecutor should discuss charging decisions with, at a minimum, the lead crash investigator and collision reconstructionist. Whether or not to criminally charge an individual is one of the most significant decisions made by the prosecutor. Like all fatal/SBI crashes, charging decisions in CMV cases will turn on causation and mental intent of the at-fault driver. Frequently the most challenging decision will relate to the mental state element required for criminal charges.

Generally, three mental states are most at issue in distracted driving CMV crashes: criminal negligence, recklessness, and malice. The difference between these levels of intent are substantial. Most charging decisions will turn on the distinctions between criminal negligence and recklessness, which depending upon the jurisdiction may be the difference between a vehicular homicide charge and a traffic citation.

Many jurisdictions have definitions of criminal negligence that derive from the Model Penal Code (MPC). Section 2.02 (2)(d) of the MPC defines criminal negligence as follows:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.¹¹⁰

The most common vehicular homicide statutes that cover inattentive driving as a causal factor of the crash require proof of recklessness. Section 2.02 (2)(c) of the MPC defines recklessness as follows:

A person acts recklessly with respect to a material element of an



¹¹⁰ MODEL PENAL CODE § 2.02 (2)(d) (Am. Law Inst., 2018).

offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.¹¹¹

Malice¹¹² is a heightened form of recklessness, wherein the reckless conduct is to such a nature and degree that it manifests an extreme indifference to the value of human life. As the preceding definitions highlight, the driver's failure to perceive or conscious disregard of a substantial and unjustifiable risk may determine the type of crime at issue.

Establishing the degree of knowledge of the substantial and unjustifiable risks caused by the CMV operator's conduct turns on many factors and should not solely be limited to proof of engaging in distracting behaviors. First and foremost, the collision dynamics behind the crash will develop driving conduct that was inherently dangerous regardless of the human behavior that caused it. Frequently seen examples include failing to perceive stopped traffic, leaving the lane of travel, or failure to adjust speed to known traffic conditions. The failure to properly maintain key component parts of the CMV, like air brakes,¹¹³ within regulations may be relevant to the CDL holder's general disregard for the safety of others on the roadway. For instance, if a CDL holder allows their vehicle to be operated in an unsafe¹¹⁴ condition on the roadway, this may show their gen-

¹¹¹ MODEL PENAL CODE § 2.02 (2)(c) (Am. Law Inst., 2018).

¹¹² "[M]alice in the legal sense imports (1) the absence of all elements of justification, excuse or recognized mitigation, and (2) the presence of either (a) an actual intent to cause the particular harm which is produced or harm of the same general nature, or (b) the wanton and willful doing of an act with awareness of a plain and strong likelihood that such harm may result ... The Model Penal Code does not use 'malice' because those who formulated the Code had a blind prejudice against the word. This is very regrettable because it represents a useful concept despite some unfortunate language employed at times in the effort to express it." Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 860 (3d ed. 1982). Malice, *BLACK'S LAW DICTIONARY* (11th ed. 2019).

¹¹³ Air brake system. A system, including an air-over-hydraulic brake subsystem, that uses air as a medium for transmitting pressure or force from the driver control to the service brake, but does not include a system that uses compressed air or vacuum only to assist the driver in applying muscular force to hydraulic or mechanical components. 49 C.F.R. § 393.5

¹¹⁴ Unsafe Operations forbidden. (a) General. A motor vehicle shall not be operated in such a condition as to likely cause an accident or a breakdown of the vehicle. (b) Exemption. Any motor vehicle discovered to be in an unsafe condition while being operated on the highway may be continued in operation only to the nearest place where repairs can safely be effected. Such operation shall be conducted only if it is less hazardous to the public than to permit the vehicle to remain on the highway. 49 C.F.R. § 396.7

eral conscious disregard for the risks caused by engaging in dangerous driving behaviors. The state of mind of the driver includes the aggregate of all conduct, not just the one specific act that may have the greatest relationship to the causal factor of the crash.

A CDL holder's specialized training is relevant evidence to establish that driver's knowledge of the dangerous consequences of their actions leading up to a crash. Even without a CDL, all drivers receive information regarding the dangers of certain driving conduct, including inattentiveness, in order to receive a non-commercial driver's license. These training materials may be used as evidence in court to establish the driver's intent required to commit the applicable vehicular crimes.

Also, as part of the distracted driving investigation, investigators should conduct a full background check on the CDL holder's prior driving conduct, focusing on the existence of any driving violations that may be substantially similar to the driving conduct at issue in the case at hand. Alternatively, the prosecuting attorney may conduct the background check during a review of the case file. Prior driving violations may be relevant to establish the knowledge that the driver's conduct may result in a crash; this is of greater importance if the driving conduct actually resulted in a crash with fatalities or SBI. Depending upon the nature of prior violations, the evidence may establish recklessness to such a degree that, in combination with all facts concerning the collision at issue, it was with a wanton disregard to the strong likelihood that the result could occur, *i.e.*, malice.

The prosecutor should file a pretrial *motion in limine* to seek the introduction of any evidence establishing intent or knowledge that is outside of the specific scope of the crash. This is especially important where the prosecutor wants to introduce evidence of other driving violations, which would constitute other bad acts evidence. All jurisdictions have specific requirements for introducing evidence of other bad acts that may have important distinguishing characteristics from F.R.E. 404(b).¹¹⁵ It is criti-



¹¹⁵ Federal Rule § 404 (b) Crimes, Wrongs, or Other Acts. (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. (2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must: (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and (B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice. FED. R. EVID. § 404.

cal to litigate these evidentiary issues prior to trial, as such rulings may substantially impact the scope of the criminal trial and adverse rulings may be ripe for interlocutory appeals.

General Trial Strategy

Knowing that death or SBI may be a consequence of operating a CMV while being distracted, especially by an electronic device, may seem obvious. But one basic rule of vehicular crime litigation is “it’s never obvious.” CMV crashes involve a significant amount of highly technical testimony in scientific and CMV regulatory areas. These complex scientific matters are even greater when a causal factor of the fatal/SBI collision is inattentive driving on the part of an operator of a CMV. These technical issues require the prosecutor to develop a trial strategy focused on making these complexities simple for the finder of fact. Every fact and expert witness called by the prosecutor should advance the factfinder’s understanding of why the CDL holder was the reckless (or criminally negligent or malicious depending upon the crime) cause of the crash. This theme must be pursued from the opening statement through the closing argument.

Critical to this education is the presentation of expert testimony. A well-crafted examination of CMV crash experts will pull the entire case to-



gether in simple terms. Expert witnesses provide material for some of the best summations for the prosecution if they are asked the right questions in the right order with the right visual exhibits to support their testimony. The biggest error prosecutors make with expert witnesses in vehicular crime cases is relying on the expert to develop their own testimony through a narrative format. The best expert testimony comes from call-and-response testimony from well-crafted and orderly questions by the prosecutor. This is why the prosecutor should typically choose to engage in some *voir dire* of the expert's qualifications rather than merely stipulating to the witness being an expert.

An important aspect of expert testimony development is the use of visual aids. Obvious exhibits include photos and forensic mapping of the crash site, as well as any video or computer animation scene reenactments. Equally as important, however, is presenting EDR data in visual chart for-





mat rather than merely having the collision reconstructionist read the data followed by the expert's conclusions from the data. In fact, the best presentation of expert opinion is to weave it throughout the discussion of the exhibits while they are shown before the factfinder. Additionally, charts and graphs from scientific literature may also be valuable in explaining the technical basis for the expert's opinions. This is especially true for a human factors expert explaining crash risk ratios for distracting behaviors by CMV drivers. Simple and concise visual aids will enhance the expert's ability to educate the jury.

Frequently, the defense will call experts in a CMV crash case. Again, the prosecutor should typically cross-examine the defense expert on qualifications to expose any weaknesses and biases before the factfinder. While the witness may ultimately be qualified as an expert, such exploration will allow the factfinder to make critical credibility determinations and comparisons between the prosecution and defense experts. Further, the prosecutor should use visual aids to cross-examine the defense expert, including important charts and graphs from scientific literature. As with direct examination of the prosecution expert, use of visual aids in cross-examination will allow the finder of fact to avoid being confused by the testimony of the defense expert. Moreover, it is easier to obtain concessions from a defense expert regarding scientific principles when the supporting literature or data is being presented in the courtroom as a part of cross-examination.

The prosecutor’s closing argument should continue to advance the explanation of the complex scientific and legal concepts in simple, compelling terms. If the trial testimony and exhibits were carefully presented at trial, then the prosecutor can focus on reinforcement of what was previously presented, especially through expert testimony, instead of “pulling the case together” in closing argument. And as with trial testimony, well-placed visual aids during the prosecution closing argument will help educate the factfinder, especially a jury regarding the interplay of the facts in the CMV crash case with the legal principles the jury (or judge) is to apply to the case.

Finally, do not forget to argue how the totality of all conduct exhibited by the CDL holder establishes the mental state and causation of the collision. This is crucial in a distraction case. As noted previously, it is a natural tendency to focus on the inattentive behaviors of the CDL holder and forget to emphasize the other causal factors during the trial, such as failing to perceive stopped traffic, leaving the lane of travel, or failure to adjust speed to known traffic conditions. In closing argument, the prosecutor must emphasize the combination of all driving conduct: the physical collision dynamics and the behavioral conditions, like inattentiveness, that led to the fatal/SBI CMV collision.



Victim/Victim Family Communication in Fatal or SBI Distracted Driving Cases

Often, victims in distracted driving CMV cases involving fatalities have already suffered physical and/or emotional pain, which is only compounded by the loss of control and unfamiliar landscape that the criminal justice system imposes. Honest, thorough, and empathetic communication by the prosecutor with victims can help to reduce any additional unintended trauma. It is the solemn duty of the prosecutor to engage in such communication with victims.

Prosecutors should be aware of their state’s victims’ rights bill. In general, these laws require that victims have certain information, protections, and a limited role in the criminal justice process. Victims’ rights depend on the laws of the jurisdiction where the crime is investigated and prose-

cuted: state, federal or tribal government, or military installation. Even without the law demanding it, a prosecutor would be wise to consider the wishes of and consult with the victim(s) or surviving family members of the victim(s) throughout the case.

The charging decision is one of the most, if not the most, important decision in the case. Communication with victims should occur about the charging decision; especially in cases where the ultimate charge ends up being less severe than the victim or family may expect. Early and sustained, meaningful victim contact is a critical part of CMV crash prosecution. Discuss the charges with the victim(s) and explain what they mean. Explain the process of the criminal justice system and explain how the victim or the victim's family may submit a victim impact statement if they wish. Manage the victim's or their family's expectations. Be truthful but compassionate.

Be mindful of the devastating nature of a CMV crash with fatalities or serious injuries. Typically, the penalties for these crimes will be far less than in a shooting or stabbing despite the harm to the victim being the same. This gap in penalties, while based upon legal principles, can serve to increase the pain felt by victims already experiencing the worst moments of their lives.

CONCLUSION

Distraction can take many forms, including but not limited to: visual, auditory, cognitive, fatigue, drowsiness, etc. Any one of these factors can take a driver's attention away from the main task at hand, *i.e.*, driving. While not every distraction qualifies as criminal under state and/or federal law, the fact remains that the long hours, the repetitive nature, physical demands (loading and unloading cargo) and the economic pressures of meeting delivery deadlines, can in their own way contribute to distraction. While detecting distraction is not always obvious, investigators and prosecutors should be aware that the signs of distraction often mimic routine traffic infractions. A thorough investigation and review of the evidence will lead to the appropriate charging decision. Further, when dealing with CMV crashes, prosecutors and police should remember that the specialized training and exacting standards that CDL holders are held to may reveal that a mere infraction or "accident" is actually a more serious crime.

APPENDIX I¹¹⁶

§383.51 Disqualification of drivers.

(a) *General.* (1) A person required to have a CLP or CDL who is disqualified must not drive a CMV.

(2) An employer must not knowingly allow, require, permit, or authorize a driver who is disqualified to drive a CMV.

(3) A holder of a CLP or CDL is subject to disqualification sanctions designated in paragraphs (b) and (c) of this section, if the holder drives a CMV or non-CMV and is convicted of the violations listed in those paragraphs.

(4) *Determining first and subsequent violations.* For purposes of determining first and subsequent violations of the offenses specified in this subpart, each conviction for any offense listed in Tables 1 through 4 to this section resulting from a separate incident, whether committed in a CMV or non-CMV, must be counted.

(5) The disqualification period must be in addition to any other previous periods of disqualification.

(6) *Reinstatement after lifetime disqualification.* A State may reinstate any driver disqualified for life for offenses described in paragraphs (b)(1) through (8) of this section (Table 1 to §383.51) after 10 years, if that person has voluntarily entered and successfully completed an appropriate rehabilitation program approved by the State. Any person who has been reinstated in accordance with this provision and who is subsequently convicted of a disqualifying offense described in paragraphs (b)(1) through (8) of this section (Table 1 to §383.51) must not be reinstated.

(7) A foreign commercial driver is subject to disqualification under this subpart.

(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, as follows:

¹¹⁶ 49 C.F.R. § 383.51

TABLE 1 to §383.51

If a driver operates a motor vehicle and is convicted of:	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	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	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	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	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
(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.
(10) Using a CMV in the commission of a felony involving an act or practice of severe forms of trafficking in persons, as defined and described in 22 U.S.C. 7102(11)	Life—not eligible for 10-year reinstatement	Not applicable	Life—not eligible for 10-year reinstatement	Life—not eligible for 10-year reinstatement	Not applicable.

(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, as follows:

TABLE 2 to §383.51

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 ¹	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. ²	60 days	Not applicable	120 days	Not applicable.

¹ 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.

² 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.

(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, as follows:

TABLE 3 to §383.51

If the driver is convicted of operating a CMV in violation of a Federal, state or local law because:	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	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	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
(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

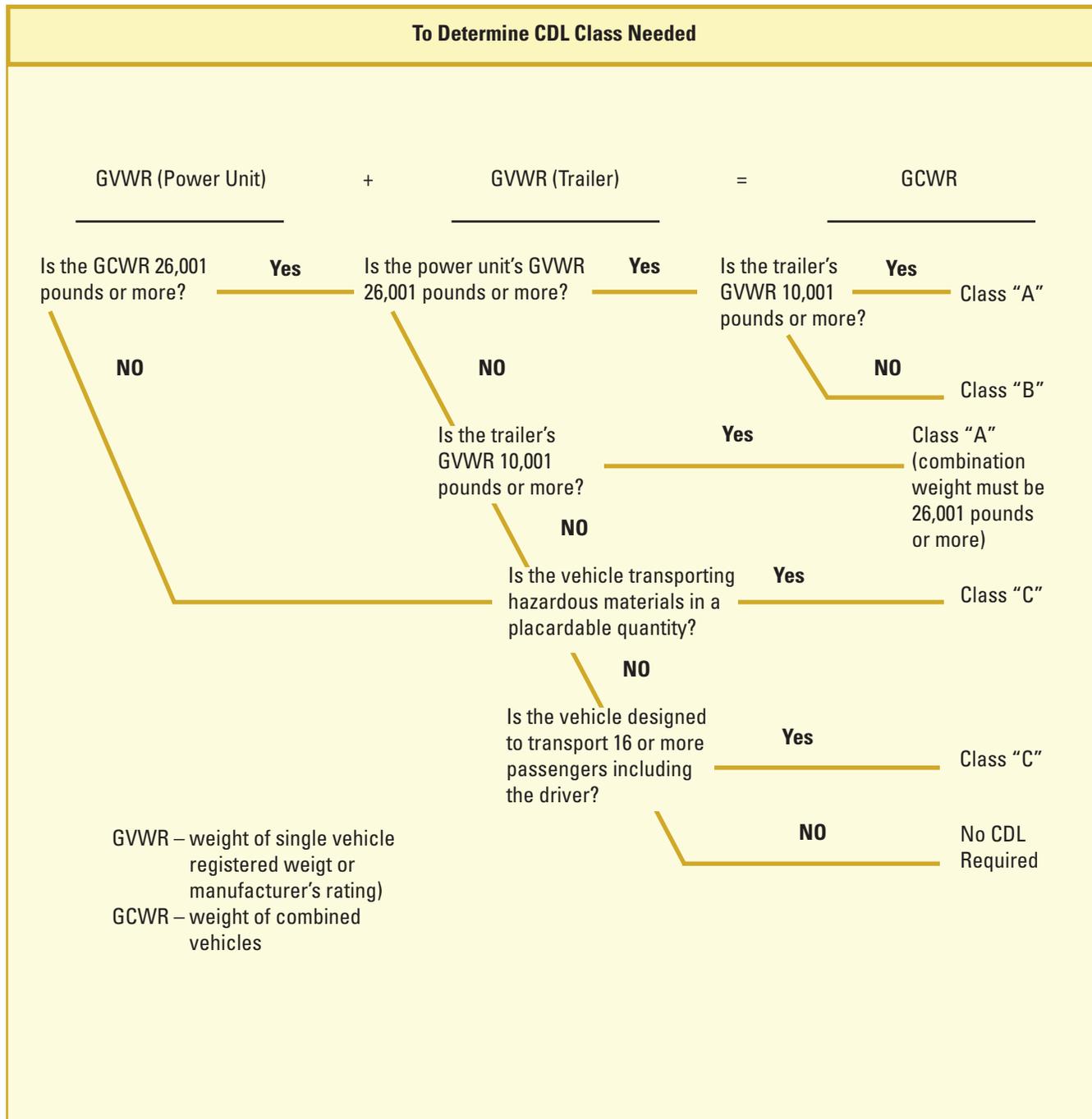
(e) Disqualification for violating out-of-service orders. Table 4 to §383.51 contains a list of the offenses and periods for which a person who is required to have a CLP or CDL is disqualified when the driver is operating a CMV at the time of the violation, as follows:

TABLE 4 to §383.51

If a driver operates a CMV and is convicted of...	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	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	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
(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

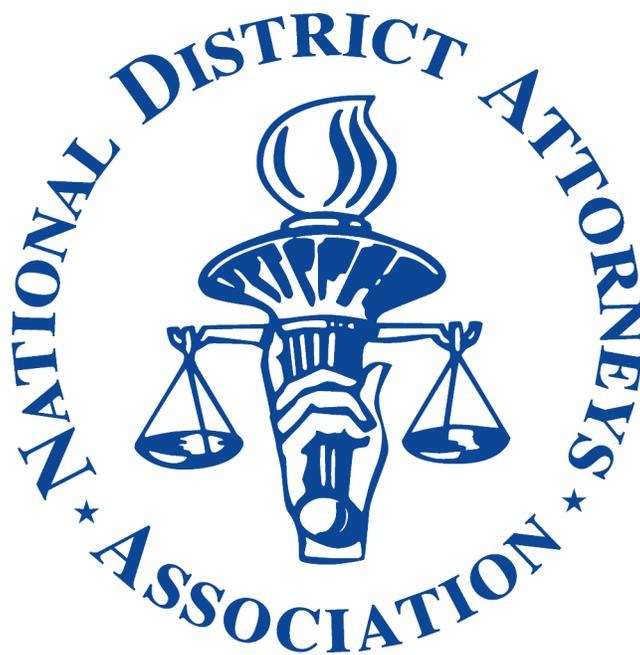
[67 FR 49756, July 31, 2002, as amended at 68 FR 4396, Jan. 29, 2003; 72 FR 36787, July 5, 2007; 75 FR 59134, Sept. 27, 2010; 76 FR 26879, May 9, 2011; 76 FR 75486, Dec. 2, 2011; 77 FR 59825, Oct. 1, 2012; 78 FR 58479, Sept. 24, 2013; 78 FR 60231, Oct. 1, 2013; 84 FR 35338, July 23, 2019]

APPENDIX II¹¹⁷



¹¹⁷ Commercial Driver's License Program, AMERICAN ASSOCIATION OF MOTOR VEHICLE ADMINISTRATION, <https://www.aamva.org/CDL-Program/>, (last visited 3/23/20).

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