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Real Ramifications for Masking **CDL Convictions**

Case Study: Indiana

By Erica J. Dobbs

The Crossroads of America—Indiana's well-earned nickname. Indiana is where several major interstates come together, connecting East to West and North to South. Every day there are 231,047,000 vehicle miles traveled in and across the state, including 26,996,000 commercial motor vehicle miles.1

It is no secret that traffic safety depends on effective traffic enforcement. In terms of commercial motor vehicles (CMVs), effective enforcement relies on accurate record keeping. Indiana has the unfortunate distinction of being one of the top five states for CMV crashes.2 One of the best tools for

¹ As of 2019, per Indiana Department of Transportation Historic VMT by County and Systems (2006-2021) Revised 7/22/2022 (retrieved 8/16/2022) www.in.gov/ indot/files/HistoricINVMTByCountyandSystem-2006-2021-20220722.xlsx

www.fmcsa.dot.gov/safety/data-and-statistics/2018-cmv-traffic-safety-factsheet (accessed 8/30/2022)

preventing these crashes is charging and adjudicating traffic offenses. Studies demonstrate some of the best predictors of a CMV operator being involved in a future crash are seemingly minor traffic infractions such as failure to signal, improper lane change, and failure to yield.3 Accurately tracking and monitoring these violations allows dangerous commercial driver's license (CDL) holders to be identified and prohibited from continuing to operate CMVs. As such, there are federal and state laws against masking convictions acquired by CDL holders.

What Is Masking and Why Does It Matter?

It is not uncommon for a defendant in a traffic case to seek a favorable disposition from the prosecutor. For a CDL holder, however, favorably resolving a traffic case may be illegal under the Federal Motor Carrier Safety Administration (FMCSA) regulations. When resolved contrary to federal (or state) law, the case resolution is called "masking" and is prohibited. Masking includes, among other things, deferral or diversion of a CDL holder's moving traffic violations including, but not limited to, speeding and impaired driving, or pleading the charged offense to a lesser offense without an evidentiary basis to do so.

FMCSA maintains the Commercial Driver's License Information System (CDLIS), a national driving record database of CDL holders. With the important goal of "one driver, one license, one record," all states report CDL drivers' violations to CDLIS, which is then relied upon by states to determine license eligibility and by employers to make hiring decisions.

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The State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CLP [commercial learner's permit] or CDL holder's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (other than parking, vehicle weight, or vehicle defect violations) from 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.6

Importantly, "conviction" in this context does not mean only a guilty verdict.

Conviction means:

- An unvacated adjudication of guilt,
- A determination that a person has violated or failed to comply with the law in a court of original jurisdiction or by an authorized administrative tribunal
- An unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court
- A plea of quilty or nolo contendere accepted by the court
- The payment of a fine or court cost; or
- Violation of a condition of release without bail

regardless of whether or not the penalty is rebated, suspended, or probated.⁷

Predicting Truck Crash Involvement: 2018 Update. Prepared by the American Transportation Research Institute. July, 2018.

⁴ Most states incorporate the federal regulations into their own state statutes.

⁵ Commercial Driver License (CDL) Program Implementation Grant. FMCSA. www.fmcsa.dot.gov/grants/cdl-program-implementationgrant/commercial-driver-license-cdl-program-implementation-grant (Accessed 8/30/22)

⁶ 49 CFR § 384.226—Prohibition on Masking Convictions.

⁷ 49 CFR § 383.5—Definitions.

Further, action collateral to an offense may result in disqualification, such as refusal to submit to a chemical test.8

Given the broad meaning of conviction for purposes of the prohibition against masking, and the fact that "the state" is defined to include local law enforcement, town governments, city attorneys, prosecutors, judges, court clerks, appellate courts, the Bureau of Motor Vehicles (BMV), etc., inappropriately exercised discretion, data entry errors, and failures of technology can allow for masking at many steps in the criminal justice process.

Masking poses serious public safety consequences by preventing the removal of dangerous CMV operators from the road. Beyond that, masking also poses severe economic risks and consequences.

Noncompliance with the prohibition against masking, shall, by federal law, result in reduced federal money coming to the state.¹⁰ After the first year of noncompliance, the violating state will lose 4% of its National Highway Performance Program, Highway Safety Improvement Program, and Congestion Mitigation and Air Quality Improvement Program grant money.11 After the second and subsequent years of noncompliance, the violating state will lose 8% of these grant monies.¹² Moreover, once this money has been taken away, it cannot be reobtained.13

Additionally, if a state is determined to be in "substantial noncompliance" with the prohibition on masking, the state's CDL program may be decertified.14 This means that the state is prohibited from issuing, renewing, transferring, or upgrading any CDLs, contributing to further economic decline.

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Indiana's History of Masking Prevention

In Indiana, we thought we had a solid handle on masking.¹⁵ The anti-masking provisions of the Code of Federal Regulations (CFR) are incorporated into Indiana state law.16 The Commercial Motor Vehicle Enforcement Division of the Indiana State Police (ISP) includes civilian weigh station operators who are empowered by statute to cite operators for certain common infractions. Over the last ten years, Indiana's Traffic Safety Resource Prosecutors have provided masking training at least once per year for all of Indiana's prosecutors. In 2014, Indiana rewrote its criminal code and developed an expungement scheme. These laws specifically provide that even an expungement does not prevent the state from reporting convictions to CDLIS.¹⁷

In 2016, we volunteered to participate in a FMCSA audit of CDL tickets being placed on diversion or deferral. That audit revealed that, where masking occurred (i.e., diversion or deferrals happened), it was almost entirely due to a lack of awareness. This seemed to be primarily due to non-attorney staff executing the deferral programs, rather than in situations with direct prosecutor oversight. It was also largely confined to very

⁸ 49 CFR § 383.51—Disqualification of Drivers.

⁹ 49 CFR 390.5T—Definitions.

¹⁰ 49 CFR 384.401.

¹¹ 49 CFR 384.401(a); see also 23 USC 104(b)(1), (b)(3), and (b)(4).

^{12 49} CFR 384.401(b).

^{13 49} CFR 384.403.

¹⁴ 49 CFR 384.405.

¹⁵ Editor's note: In this article, use of the word "we" refers to the author and the other Indiana Traffic Safety Resource Prosecutor, Chris Daniels.

¹⁶ I.C. § 8-2.1-24-18.

¹⁷ I.C. § 35-38-9-7(c) "Noting in this chapter prevents the bureau of motor vehicles from reporting information about a conviction for a violation of a traffic control law to the Commercial Drivers License Information System (CDLIS), in accordance with federal law, even if the conviction has been expunged."

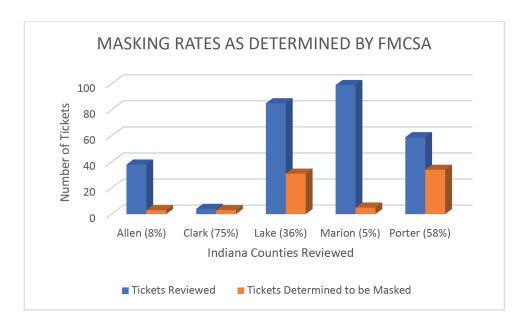
high-volume counties where the occasional prosecutor erred handling a CDL ticket, and very low-volume counties where prosecutors, although masking trained, lacked familiarity with CDL ticket handling due to the infrequent appearance of them on their court dockets. Since the audit, we receive quarterly notification from Court Services, the state agency that manages the online case docketing system the majority of courts in the state use, when new CDL tickets are diverted so the errors can be used as a learning opportunity and future issues prevented.

Given this history of special attention to masking in our state, it was surprising to learn that FMCSA was preparing a finding against Indiana for a "[P]attern of masking."18

2021 FMCSA Finding

In late 2020, a few Indiana State Police (ISP) officers conducted case follow-up in the state case docket system on a handful of CDL tickets they had issued and, believing the cases to be masked, contacted FMCSA with their concerns. FMCSA, in turn, initiated a review of Indiana's CDL ticket handling.

FMCSA performed a limited audit of Indiana CDL cases, focusing on the five counties the officers brought to its attention, pulling only offenses that would be "serious" offenses—i.e., those offenses appearing on the "Serious Violations" disqualification table. 19 After reviewing 285 tickets, FMCSA determined that seventy-six of them, or 26.6%, had been masked.



On March 10, 2021, FMCSA concluded that:

Because of the pattern of masking being identified in courts, FMCSA will issue a finding ... The State Driver's License Agency (Bureau of Motor Vehicles) will need to create an action plan that should include an outreach and court monitoring component to address masking. Furthermore, ISP should take steps to ensure CDL serious violations are enforced properly.²⁰

¹⁸ Indiana CDL Masking Review Results, FMCSA, March 10, 2021.

¹⁹ 49 CFR § 383.51—Disqualification of Drivers, Table 2.

²⁰ Indiana CDL Masking Review Results, FMCSA, March 10, 2021.

Response to the Finding

On February 9, 2021, the TSRPs learned of the FMCSA investigation and that a finding was imminent. In response, we quickly gathered a task force of Indiana traffic safety partners. As TSRPs responsible for training prosecutors, who committed most of the masking through improper plea negotiations, it was only natural for us to be part of the task force. Other members included the BMV, the Indiana Department of Transportation (InDOT), Courts, and the ISP. We selected these stakeholders because of their intertwined roles in the overall masking finding:

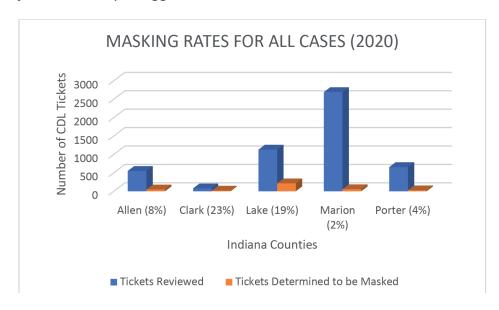
- ISP, through their CMV enforcement division and civilian weigh-station operators, wrote most of the tickets considered by FMCSA;
- Court Services houses court records and provides judicial training, and FMCSA identified a pattern of masking in a variety of courts around the state;
- The BMV is responsible for CDL record keeping, and is the regulating body the finding was entered against; and
- While they have no role in committing or preventing masking, InDOT is the recipient of all the money the state would lose if the finding was not addressed.

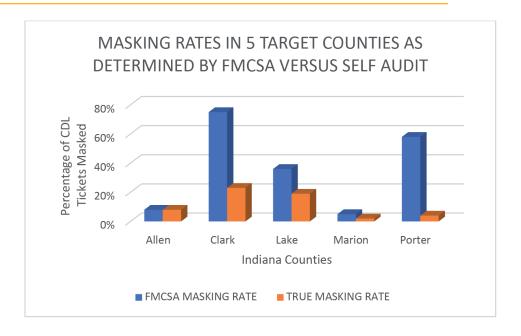
The task force first met on February 19, 2021, just ten days after learning of the FMCSA investigation. The task force quickly developed an action plan and, by the time the finding was made official on March 10, 2021, we were already diligently working to resolve it. As more fully described below, the action plan consisted of conducting a more thorough self-audit, conducting intensive outreach and training, and amending state law to expand statutory CDL-specific enforcement ability.

Step One: Self-Audit

As noted, FMCSA entered its finding on the premise that Indiana was masking an estimated 27% of CDL violations. Our first step was to fully understand the true scope of the problem.

We first obtained a complete list from Court Services of all cases handled throughout the state involving a CDL holder for calendar year 2020, which ended up being 9,997 resolved cases. Each of the cases was reviewed to compare the initial charge(s) to the adjudicated charge(s). For some counties, masking was obvious, such as where every pled ticket, regardless of the original charge, was reduced to "defective muffler" or "littering." But, in many instances, it was necessary to review the docket entries and, where possible, obtain and review plea agreements and dismissal motions to determine if masking occurred. In all, of the 9,997 cases, we determined 525 were masked, for an overall masking rate of 5%. From the five counties on which FMCSA focused its audit, 5,115 CDL-related cases were resolved in 2020, 366 of which—or 7%—were masked, a number much lower than what the originally reviewed sample suggested.





Step Two: Targeted Outreach and Training

In its finding, FMCSA directed the BMV to conduct outreach and oversight to prevent continued masking. The BMV is not realistically in a position to train or monitor prosecutors or courts on a large scale, so we assumed responsibility for this task.

Once the full 2020 data was analyzed, we contacted each of the state's 91 prosecutors' offices directly to alert them to the finding and provide them with their county's data. We then provided specific training related to the cause(s) of each county's masking problems, as well as hands-on support through the process of implementing new policies and procedures.

While we easily secured buy-in from prosecutors on safety concerns alone, the economic consequences posed by failing to resolve the finding proved to be a very persuasive tool as well.

If federal money was pulled from the state as required by the CFR, Indiana would lose \$26,736,108 the first year. Through consultation with InDOT, we were able to attribute this funding to real roads, bridges, and other improvements around the state, eliminating the abstractness of the potential consequences. Additionally, Indiana has 209,694 resident CDL holders.²¹ Decertification of its CDL program would mean 209,694 unemployed Hoosiers, the inability to license new CMV-operating, would-be employees, and the incapacitation of 38,716 Indiana-based motor carriers.²² This would have a crushing impact on state revenue and all Hoosier families—not just those directly affected through unemployment, but everyone in the state relying on the food supply chain, the healthcare system, waste removal operations, public transportation, etc.²³

These issues not only helped convince prosecutors to prioritize anti-masking policies, but also worked well to persuade others involved in the criminal justice process, such as judges and defense counsel.

FMCSA Analysis and Information Online. Registration Statistics, Custom Reports. ai.fmcsa.dot.gov/RegistrationStatistics/CustomReports. aspx (Accessed 3/12/21)

²³ When Trucks Stop, America Stops. www.trucking.org/sites/default/files/2019-12/When%20Trucks%20Stop%20America%20Stops.pdf

We made several masking resources available for prosecutors, including the National Traffic Law Center's monographs and quick reference guides and the Mastering Masking on-demand virtual training course.²⁴ We also created and widely advertised a masking webinar, "Don't Cost Indiana Millions of Dollars: Federal Anti-Masking Rules." We presented this webinar on April 14, 2021, and made a recording available for on-demand viewing later as needed. The live presentation was attended by 131 prosecutors, with many more watching ondemand later.

Step Three: Legislative Action

FMCSA's finding also identified a statutory issue in Indiana: certain violations could not be properly enforced by those charged with doing so. In Indiana, most traffic laws are in Title 9 of the Indiana Code. This is the Motor Vehicles title, where moving violations, license violations, and others, are defined and assigned penalties. The federal regulations pertaining to CDL holders, however, are incorporated into the Indiana Code in Title 8: Utilities and Transportation. Additionally, the civilian weigh station operators are granted certain enforcement powers through Title 10: State Police, Civil Defense, and Military Affairs.

in addressing the finding were due to confusion over the intricacies of masking.

challenges faced

Most of the

Indiana Code § 10-11-2-26 empowers civilian weigh station operators to "Stop, inspect, and issue citations to operators of trucks and trailers"

for violations of certain enumerated statutes. One of these statutes is IC § 8-2.1 et seq., the Motor Carrier Regulation portion of Title 8, which incorporates the CFR and sets CMV-specific rules. When the civilian weigh station operators discovered a CDL holder committing a violation that was not included in the list of Title 9 violations for which they were authorized to write citations—such as using a cell phone while operating their CMV—they would instead issue a citation for violating the CFR through IC § 8-2.1. When such a citation is resolved and a judgment entered for the violation under Title 8 instead of Title 9, it cannot be reported to the BMV, assigned points, or reflected in CDLIS.

Unfortunately, the 2021 legislative session was already well underway before the FMCSA finding against the state was handed down, so the necessary legislative fix could not be made until the 2022 session. But, once the 2022 session arrived, the senate introduce SB-156, which addressed the statutory concerns identified by FMCSA.

Civilian weigh station officers are now specifically empowered by statute to enforce three (3) additional common motor carrier violations—use of a cellphone while driving, operating in violation of license restrictions, and driving on a suspended license—under IC § 10-11-2-26.

Challenges

Most of the challenges faced in addressing the finding were due to confusion over the intricacies of masking.

Overall, Indiana's 900 prosecutors were highly receptive to what was being asked of them in response to the finding. Initially, many were understandably surprised at the scope of the problem. Given the extensive training provided for the decade leading up to the finding, many prosecutors believed they knew what masking was and that they were not doing it—or, in the case of a few very honest confessors, were only doing it "selectively."

²⁴ See the National Traffic Law Center's (NTLC) Commercial Driver's Licenses: A Prosecutor's Guide to the Basics of Commercial Motor Vehicle Licensing and Violations, Distracted Driving CDL Enforcement for Prosecutors and Law Enforcement, CDL Quick Reference Guide, and the Masking Quick Reference Guide. See also the NTLC's online training, including Mastering Masking: Legal and Ethical Consequences of Plea Negotiations Involving Commercial Driver's Licenses, and the Mastering Masking Digital Course, both of which offer the attendee continuing legal education credit. NTLC also offers a four-part video, From Roadside to Record, that focuses on enforcing, prosecuting, and adjudicating CDL traffic stops in accordance with federal and state regulations. NTLC staff is also available for CDL-related technical assistance by visiting the NTLC website at ndaa.org/programs/ntlc/commercial-drivers-license/ or by emailing Senior Attorney Jim Camp or Staff Attorney Aaron Ann Cole-Funfsinn directly.

Showing these prosecutors the real numbers from the data moved them past this belief quickly, and through our discussions it became clear there was a fair amount of confusion as to the many nuances of what constitutes masking.

Much of the confusion came from the counterintuitive nature of resolving cases in consideration of the CDL disqualification tables. All violations on the Serious Offense table serve as prior offenses for enhancing the penalty of subsequent Serious violations, 25 and all Major Offenses serve as priors for enhancing the penalty of subsequent Major violations.²⁶ But, violations from one table do not serve to enhance penalties for violations on the other table.

This means someone who is cited or charged with a violation from each table must be adjudicated on both counts in order to avoid masking. It also means additional charges not appearing on the disqualification tables are charges for which negotiation is available. This can lead to absurd results. Technically, for example, if a CDL 04. holder is charged with murder, the infraction of operating a CMV with a blood alcohol content greater than (a Major offense), and making an improper lane change (a Serious offense), he/she *must* plead to the operating over .04 charge and the improper lane change, but the murder charge is negotiable. A more common example is a CDL driver charged with impaired driving, leaving the scene of a crash, and resisting law enforcement with a vehicle, must plead to all charges, even though they all appear in the same table. This is obviously contrary to how prosecutors are accustomed to approaching plea negotiations, wherein a dismissal or reduction on one charge is exchanged for a conviction on another.

Learning more about masking has led to some prosecutors reevaluating outstanding plea offers and, in some instances, revoking them. This led to some pushback from the defense bar. We encouraged prosecutors to direct defense attorneys to us to discuss the issue, when necessary. To date, we have spoken with several. In the end, the at-issue, previously offered plea deals were contrary to law and, therefore, withdrawing the offer was no different than it would be with any other illegal plea.

One Year Later

We are now one year out from FMSCA entering its finding against Indiana for engaging in a pattern of masking. The finding remains open, and likely will for some time. Despite that, we have made great strides and all signs point to our masking problems being largely corrected.

The five FMCSA-identified counties all implemented new policies for deputy prosecutors handling CDL cases, preventing masking of any sort. The other eighty-six prosecutor offices also implemented improved CDLhandling policies and heightened awareness of what constitutes masking and the potential consequences of masking. We still field multiple masking-related support calls every week from around the state and encourage all prosecutors to continue to reach out whenever there are any questions or concerns.

Current Statistics

We again obtained and reviewed a year's worth of data (April 1, 2021, to March 31, 2022) for all cases involving a CDL-holding defendant. This date range began after we implemented the action plan and all prosecutor's offices were contacted. During this timeframe, county prosecutor's offices resolved 10,925 cases with CDLholding defendants. Of the identified cases, only seventeen were masked. This means Indiana reduced the statewide masking rate from 5% to 0.1%.

²⁵ 49 CFR § 383.51—Disqualification of Drivers, Table 2.

²⁶ 49 CFR § 383.51—Disqualification of Drivers, Table 1.

Ongoing Obstacles

Indiana's biggest hurdle to fully eliminating masking is that a handful of counties still utilize a town court system. Cases in these town courts are regularly handled by private attorneys who are not deputized prosecutors. The Indiana Prosecuting Attorneys Council (IPAC), where we are housed, does not have any relationship—or even contact—with these private attorney prosecutors. It is often the case that the county prosecutors are not even aware of who the private attorneys are that have the responsibility to handle town court cases. In the 2021 data, town courts masked forty-eight CDL cases. We are working with the Indiana Judicial Center, which trains town court judges, and with the Indiana Bar Association to reach more private attorneys on issues related to masking.

Additional ongoing issues include the continued, inefficient and counter-intuitive pleading that comes from strict adherence to the prohibition against masking, as discussed above, and pressing concerns over supply chain issues and the current trucker shortage. As the country still grapples with the economic difficulties arising during the COVID-19 pandemic, facilitating shipments remains a major consideration.

Going Forward

In order to continue the progress made against masking, we will continue to annually review CDL data and address any new problems that may arise.

It is anticipated there will always be high turnover among lower-level and newer prosecutors. These are typically the prosecutors assigned to traffic and misdemeanor dockets and who handle the cases where masking is most likely to occur. Hopefully, as new prosecutors come along, they will be trained on the antimasking policies and procedures now in place in every office, since masking remains a high priority for each county's prosecutor's office. We also increased masking training, including it in all new-prosecutor training, as well as including it with office administrator training. Additionally, we are keeping the masking webinar easily accessible and available for prosecutors and law enforcement. Of course, we also always encourage prosecutors, law enforcement, and court staff to contact us for support.

Perhaps most importantly, all CDL stakeholders are committed to maintaining the open communication we developed through this shared experience. If everyone is watching for potential masking or masking-related problems and is able to approach one another with ease, problems will be easier to rapidly address.

While the FMCSA finding initially caused a great deal of concern among Indiana's traffic safety partners and exposed some of the weaknesses in how Indiana handled some of its CMV cases, it also revealed our strengths and improved how we work together. Ultimately, this experience will lead to greater safety on the Crossroads of America.

About the Author

Erica J. Dobbs joined the Indiana Prosecuting Attorneys Council as Indiana's second Traffic Safety Resource Prosecutor in December, 2019. She received her undergraduate degrees in Criminal Justice and Political Science from Indiana University in 2005. Ms. Dobbs then worked for four years as a paralegal in the Boone County Prosecutor's Office (BCPO) in Lebanon, Indiana before returning to law school at the Indiana University McKinney School of Law in Indianapolis. Upon graduating in 2012, she returned to the BCPO, ultimately becoming the Fatal Alcohol Crash Team prosecutor, in which role she was solely responsible for vertical prosecution of all Operating While Intoxicated and Habitual Traffic Violator cases in Boone County. She lives in the greater Indianapolis area with her husband and two wonderful children.



If you have questions about Indiana's experience, Ms. Dobbs may be reached by email at ➤ erdobbs@ipac.in.gov or by phone at (317) 232-1836.



From Roadside to Record

COURSE CURRICULUM











From Roadside to Record **Training Curriculum**

The National Traffic Law Center is proud to announce the From Roadside to Record training curriculum is now available for download. Many prosecutors, law enforcement officers, judges and clerks are unaware of the federal prohibition against Masking (49 CFR 384.226). As a result, charges against CDL holders are often improperly deferred, diverted, reduced or dismissed.

This course will improve the working knowledge of prosecutors and other stakeholders regarding the importance of the following: accurate issuance of traffic citations; capturing all pertinent license and vehicle data from the driver after an offense; prosecutor's substantive and ethical review of the case; presentment of the case to the court without Masking, complete and accurate judgments of conviction, and the proper and timely recording of convictions. This will be done by utilizing Instructor and Participant Guides, PowerPoint slides, and the four From Roadside to Record videos to illustrate the responsibilities law enforcement, prosecutors, judges, clerks and state driver license agencies have in enforcing, prosecuting, and adjudicating CDL traffic stops in accordance with federal and state regulations. This training will help ensure the attendees are fully prepared to work with their state agencies to properly and fully adjudicate and record convictions to eliminate Masking and meet the FMCSA mission of "One Driver, One License, One Record."

The course can be found here:

Course ➤ ndaa.sharefile.com/d-s97d657b62d6f42b8a0d403972240c08a

Website ➤ ndaa.org/programs/ntlc/commercial-drivers-license/training/

NTLC is available to discuss and/or assist with the administration and presentation of this course in your jurisdictions. Please contact Senior Attorney Jim Camp or Staff Attorney Aaron Ann Cole-Funfsinn directly for additional information about the course or any CDL-related assistance.