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WHITE PAPER:

Driver Risk Exposure & the Advantages of Continuous Driver Monitoring

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"Regardless of the size of the vehicles, and often despite the utmost caution, operating vehicles can be a risky endeavor."

40%

of all motor vehicle **ACCIDENTS** are **WORK-RELATED**

and **COST EMPLOYERS** a staggering

$56.7

BILLION in 2017

According to the National Highway Transportation Safety Administration, highway accidents accounted for 37,461 deaths in the U.S. in 2016.[1] Moreover, a recent study by Motus, a vehicle management and reimbursement platform, found that 40% of all motor vehicle accidents are work-related and cost employers a staggering $56.7 billion in 2017, taking into account medical expenses, property damage, increased insurance premiums, and lost productivity.[2]

While liability insurance is an important way for employers to address that risk, it's by no means a panacea. Companies can and should be doing more to lessen the likelihood of accidents in the first place. And given that the vast majority (94%, according to NHTSA's study) stem from driver-related actions or inactions as opposed to equipment malfunctions, one of the most important ways of doing so is to ensure that the individuals who drive in connection with their employment (including those who do so for a living) are safe drivers.

In the Firm's experience, companies that carefully and continuously vet their drivers are not only better positioned in their defense of catastrophic accidents but are also much less likely to find themselves in that position to begin with. Additionally, these companies often have a much lower risk profile than their peers and can leverage that fact in their negotiations with their insurance providers. This paper explores the added benefits of continuous driver-monitoring services.

[1] 2016 Fatal Motor Vehicle Crashes: Overview, NHTSA, Oct. 6, 2017, https://www.nhtsa.gov/press-releases/usdot-releases-2016-fatal-traffic-crash-data.

[2] Vehicle accidents cost companies $57B in 2017, FLEETOWNER, April 20, 2018, https://www.fleetowner.com/safety/vehicle-accidents-cost-companies-57b-2017.

A. The Legal Landscape

In 2009, Eduardo Delgado, an employee of Xerox, was driving a company vehicle when he struck and killed 63-year-old Elvira Gomez in California as she crossed the street on her way home from church. Delgado was driving under the influence of alcohol at the time and had a history of at least two prior DUIs. Mrs. Gomez's adult children and husband filed a wrongful death lawsuit against Xerox, arguing among other things that Xerox was negligent in allowing Delgado to drive a vehicle without first checking his Motor Vehicle Report ("MVR")—a fact admitted by Xerox—which would have revealed his prior DUIs. In fact, had Xerox checked Delgado's driving record, it would have discovered that his license was actually suspended due to his DUIs. After a lengthy trial, the case ultimately settled, with Xerox agreeing to pay Ms. Gomez's family $5 million for their loss.

Unfortunately, the Xerox case is not an outlier; it is one of many in which companies have been forced to pay millions of dollars in damages due to accidents caused by the employees or contractors they put behind the wheel. The legal theories upon which these companies are held liable vary from case to case and from state to state, but they share some common themes.

As a general rule, employers[3] are vicariously liable for any motor vehicle accidents caused by their employees under the doctrine of respondeat superior, which imputes the conduct of the employee to his/her employer under agency principles. Of course, there could be exceptions to the rule, including, for example, if the employee is operating the vehicle outside the scope of his/her employment when the accident occurs. But generally speaking, employers—and their insurers—will be held responsible for any damages stemming from their employees' accidents.

> "As a general rule, employers are vicariously liable for any motor vehicle accidents caused by their employees."

At the same time, an employer could also be directly liable to the injured party(ies) if the employer's own independent negligence was the proximate cause of the injuries.[4] This liability is distinct from vicarious liability in the sense that the latter is premised on the employer's master/servant relationship with its employee, whereas the former is premised on the employer's own actions or inactions. This type of "direct" liability is at the heart of this paper, and it's precisely the issue that Xerox faced in its lawsuit. It is also the type of liability that can open the door to punitive damages (i.e., those meant to punish the company for its egregious conduct) on top of compensatory damages already awarded to the injured party.

The most common direct-liability theories in highway-accident cases are negligent hiring, negligent selection, and negligent entrustment. Under these theories, the injured party alleges that the company was negligent in allowing its employee/subcontractor to operate a motor vehicle, and, but for that decision, the accident would never have occurred.

"The most common direct-liability theories in highway-accident cases are negligent hiring, negligent selection, and negligent entrustment."

[3] Companies that engage independent contractors to operate motor vehicles on their behalf rather than employees may not be vicariously liable for the contractor's operation of those vehicles, but this depends on a number of factors, including, for example, whether the state law at issue considers the operation of a motor vehicle to be an "inherently dangerous" activity and whether companies have "non-delegable duties" with respect to their operation. Additionally, pursuant to federal and state leasing regulations, motor carriers who contract with independent-contractor owner-operators are generally vicariously liable for any accidents caused by those owner-operators as a matter of law. And regardless of whether companies utilize employees or independent contractors to operate vehicle, the companies could still be directly liable for damages stemming from the companies' own negligence.

[4] Some state laws, but certainly not all, provide that an employer who is vicariously liable for its employee's conduct cannot be separately liable to the injured plaintiff under a theory of direct liability.

"Companies should be doing something to ensure the individuals who drive vehicles in connection with their employment are safe."

Often, the company's alleged negligence is premised on its failure to adequately vet the employee's driving history before allowing him/her to operate a vehicle on the company's behalf. In Xerox's case, for example, the plaintiffs alleged that the company was negligent in failing to check its employee's MVR, which would have revealed his prior DUIs and the fact that his license was suspended.

What precisely is a company's duty with respect to vetting its drivers before allowing them to operate a vehicle? Unfortunately, that's a question with no definitive answer—one often left to the judge or jury to decide what a "reasonable" company would have done under the circumstances. What's clear, however, is that companies should be doing something to ensure the individuals who drive vehicles in connection with their employment are safe. And the most prudent something involves verifying the driver has a valid license and checking his/her MVR for prior violations/accidents, at a minimum. As addressed in the next section, for companies that are subject to federal and/or state motor carrier safety regulations, this is a legal requirement. But even for those who are not, it is best practice.

B. Regulatory Obligations

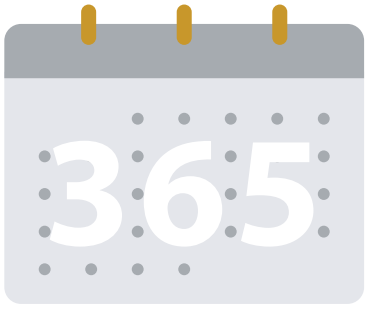
In addition to damages stemming from highway accidents, companies that hire or engage unsafe or unqualified drivers to operate "commercial motor vehicles" also face regulatory fines and other enforcement action. The Federal Motor Carrier Safety Regulation ("FMCSA") regulates the operation of "commercial motor vehicles" in interstate commerce, defined to include self-propelled or towed vehicles used on a highway to transport passengers or property when the vehicle:

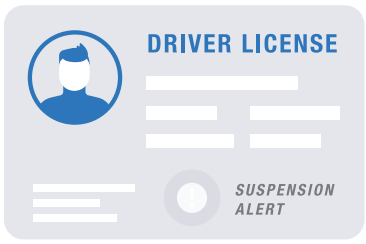
1. **Has a gross vehicle weight rating, gross combination weight rating, or gross weight of 10,001 pounds or more.**
2. **Is designed or used to transport more than 8 passengers including the driver for compensation, or more than 15 passengers including the driver not for compensation.**
3. **Is used to transport a placardable quantity of hazardous materials.**

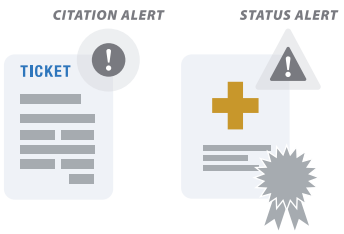
See 49 C.F.R. § 390.5. Thus, generally speaking, any company or person—regardless of whether they are a traditional motor carrier—that operates a vehicle or vehicles fitting any of these descriptions for a commercial purpose in interstate commerce[5] is subject to the FMCSA's safety oversight.

The FMCSA's safety regulations—codified in Parts 350 through 399 of Title 49 of the Code of Federal Regulations—impose a host of requirements on those who operate commercial motor vehicles. Importantly for purposes of this paper, Part 391 addresses driver qualification and, in particular, imposes a duty on entities who hire or otherwise engage drivers to ensure they meet the minimum driver-qualification standards set out in that Part. Notably, in order to be qualified under the regulations, a driver must...

1. **Be at least 21 years old.**
2. **Be able to speak and read English sufficiently to converse with the general public and to respond to official inquiries.**
3. **Be able to safely operate the type of commercial motor vehicle he/she operates.**
4. **Be physically/medically qualified to drive.**
5. **Have a valid license, appropriate for the type of vehicle he/she operates. See 49 C.F.R. § 391.11.**







In addition to verifying a driver's qualifications prior to allowing him/her to operate a vehicle, companies also have a responsibility under the regulations to maintain a qualification file for each driver and to periodically update the information in that file to ensure that the driver continues to be qualified over the course of his/her relationship with the company. By way of example, the regulations mandate that companies run a check (at least annually) of each driver's Motor Vehicle Report ("MVR") in each state in which the driver has held a license over the past three years, and to review the MVR to ensure that the driver has a valid and appropriate license and has not incurred any moving violations or been involved in any accidents that might disqualify him/her from operating under the company's safety policy or the regulations.

[5] Even if the vehicles are operated only in intrastate commerce, it's possible they are still subject to a particular state's safety regulations. Indeed, every state in the country, as a condition to receiving federal funding, has adopted the FMCSA's safety regulations to some extent. In that regard, many states' laws mirror the FMCSA's "commercial motor vehicle" definition; however, others have modified that definition, such that their safety regulation may only apply to larger vehicles (e.g., those weighing more than 26,000 pounds). Companies and individuals that operate vehicles in a particular state for a commercial purpose should check with the state agency that regulates motor carriers to determine whether their operations are subject to the state's safety regulations.

"Companies that fail to meet their obligations under the safety regulations, including failing to properly qualify their drivers, face a number of consequences."

Companies that fail to meet their obligations under the safety regulations, including failing to properly qualify their drivers, face a number of consequences. For one, the FMCSA is empowered to issue Civil Penalties from $1,214 -$3,685 for recordkeeping violations (e.g., failing to maintain a driver qualification file) and up to $3,685 for non-recordkeeping violations (e.g., allowing a driver who is not physically qualified to operate a commercial motor vehicle). See 49 C.F.R. Part 386, Appendix B. Additionally, driver-related violations can—and frequently do—result in drivers being placed out-of-service during a roadside inspection (meaning they are physically prohibited from continuing to operate the vehicle until the violation is corrected). Obviously, depending on the cargo's value and time-sensitivity, this can cost the carrier thousands of dollars in losses, including repowering expenses, customer late fees, and potentially cargo damage. Additionally, driver-related violations can also prompt the FMCSA to commence a formal audit of the company's operations. Depending on the results of such an audit, the company could receive a downgraded safety rating and potentially an operational out-of-service order that would prohibit it from operating any commercial motor vehicles, unless and until the FMCSA agrees to lift the order.

In sum, the stakes, which for the reasons discussed in the preceding section are high enough for companies whose employees or contractors operate vehicles that are not subject to federal and/or state motor carrier safety regulations, are even higher for those that are.

C. Driver Vetting

Although companies cannot completely eliminate the exposure created by employees or contractors who operate vehicles (whether company-owned or personal) in connection with their employment, they can take concrete steps to mitigate it. Chief among these is carefully vetting the individuals to ensure they are safe drivers and legally permitted to operate the types of vehicles involved. In the Firm's experience, this is easier to do than most companies think.

As a preliminary matter, most organizations already have some form of driver safety policy in place (whether formally or informally), dictating the criteria they will use to assess whether an individual presents too much of a risk to operate vehicles in connection with their employment. Often, these standards include components like a minimum age, valid license/endorsements, and certain thresholds (or types) of moving violations and/or accidents over a period of time.

Of course, if the company's drivers operate "commercial motor vehicles" and are, therefore, subject to federal and/or state motor carrier safety regulations as addressed in the preceding section, the company's driver-qualification standards must, at a minimum, mirror the requirements of the applicable regulations (e.g., 49 C.F.R. § 391.11). That said, the regulations do not prohibit companies from imposing more stringent requirements, and many choose to do so.

"Companies should carefully review their driver safety policies and ensure they are reduced to writing. *And more importantly, implement and enforce the policies.*"

In any case, companies should carefully review their driver safety policies and ensure they are reduced to writing. Once they have done so, the obvious next step is to implement the policy. This is often where companies fall short, particularly with the passage of time or when exceptional circumstances or driver shortages tempt them to turn a blind eye to the standards that they carefully developed. The question really boils down to whether the company is better off not knowing about an individual's driving history, the answer to which is almost certainly "no." In the Firm's experience—and for the reasons addressed in the preceding sections—the risks of "not knowing" far outweigh any downsides in this regard. Likewise, the fact that a company had written driver-qualification standards but ignored them and allowed an unsafe driver to operate a vehicle in connection with his/her employment can be just as damning than if the company had no standards to begin with. So, it's imperative that, once the company's standards have been developed, they be consistently enforced on a going-forward basis. And, as addressed below, finding ways to automate the process can help avoid inconsistent enforcement that can sometimes result from manual processes.

This certainly isn't to say that individuals who fail to meet the standards in a company's driver safety policy must be terminated or reassigned, though that decision may turn in large part on the extent to which operating a vehicle is integral to the individual's employment. In other words, if an individual operates vehicles as his/her profession, the company's response to his/her failure to meet the company's driver qualification standards is likely to be more severe than in situations where individuals are only operating vehicles incidentally to their employment, in which case it could very well be "reasonable" for the employer to address the situation differently (e.g., imposing certain driving restrictions, requiring safety training, or mandating use of a cab, Uber, or Lyft for company travel).

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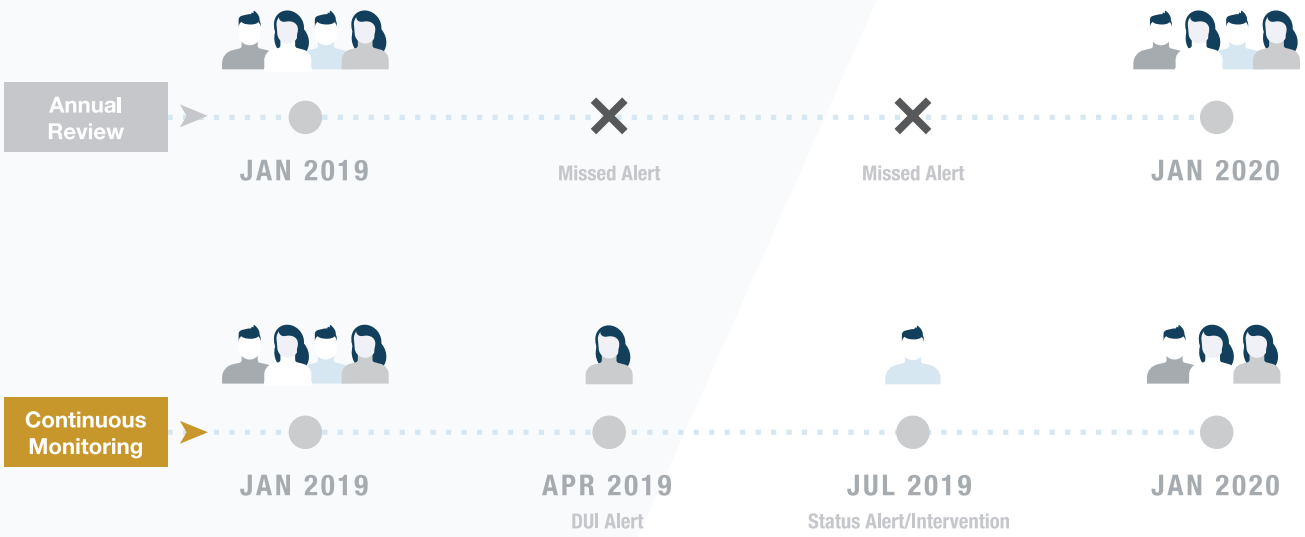
In any event, it's important that the policy be continuously enforced, which is to say that the company is auditing its existing drivers to ensure they remain qualified to operate vehicles for the company. This would include things like ensuring the driver's license has not been suspended or revoked and that the driver has not had any subsequent moving violations or accidents that might disqualify him/her under the company's standards.



Companies that are subject to federal and/or state motor carrier safety regulations have a regulatory obligation to do just that, including, for example, running a new MVR at least annually for every driver and examining it to ensure the driver...

1 | **Still has a valid license.**

2 | **Remains medically qualified.**

3 | **Has had no disqualifying violations or accidents since the last MVR review.**

In the Firm's opinion, companies—whether they are regulated at the federal/state level or not—should be continuously auditing their drivers' qualifications. Otherwise, they risk being cast as the "ostrich with its head in the sand" when one of their drivers is involved in a catastrophic accident and it comes to light that the company took no action (beyond the initial qualification) to ensure that the driver remained properly licensed and able to safely operate a vehicle. With that said, recent technological advances and the emergence of driver-monitoring services have paved the way for companies to have near real-time visibility into their drivers' compliance with the company's standards, presenting a cost-effective and automated way for companies to mitigate the risk created by the use of unsafe or unlicensed drivers.

If a driver's MVR (and the company's annual review of the MVR) can be likened to a still photograph—a static representation of the driver's license and qualification status at the time the MVR is run—a driver-monitoring service is akin to a motion picture—a continuous report of the driver's qualification status and driving performance. While an MVR is an important tool to assess a driver's history and determine his/her suitability to operate on a going-forward basis, it is virtually outdated the minute after it is pulled. In other words, if a driver's license is suspended the day after the company pulls and reviews his/her MVR, the company would have no way of knowing that fact unless (1) the driver reports it; or (2) until the company reviews a subsequent MVR, perhaps a year later. Driver-monitoring services, on the other hand, receive real-time data from state licensing agencies and report that data to their clients whenever new information is uploaded to

"Driver-monitoring services, on the other hand, receive real-time data from state licensing agencies and report that data to their clients whenever new information is uploaded to the driver's account."

the driver's account (i.e., license suspension, downgrade, or revocation; moving violation; accident), allowing companies to take swifter action to remove unlicensed or unsafe drivers from the road, hopefully before they cause an accident.

For companies that are subject to federal and/or state motor carrier safety regulations, these driver-monitoring services offer additional functionality, including license status and activity, medical card expiration notifications, and even CSA monitoring, which provides an additional mechanism to quickly notify carriers of driver-related violations. In the Firm's experience, these types of monitoring services provide three key benefits.

First, they help guard against violations of 49 C.F.R. § 383.37(a), an exceedingly common regulation cited in FMCSA and/or state safety audits, which provides that no employer shall allow or permit a driver to operate a commercial motor vehicle if it knows or should reasonably know that the driver's CDL has been disqualified or downgraded. The Firm has been involved in several recent cases in which the FMCSA or state agency has cited the company under this regulation and argued it should have reasonably known that the driver's CDL had been disqualified (typically stemming from the driver's failure to provide the state with his/her updated medical certification), despite the fact that the driver's most current MVR showed a valid CDL. Although the counter argument is that the safety regulations—as they currently exist—do not require a company to continuously monitor the driver's license status, companies that choose to do so would obviously be less likely to be tagged with this increasingly common violation.

Second, recent guidance published by the FMCSA contemplates that a company's use of a driver-monitoring service could satisfy its obligations to annually review its drivers' MVRs, assuming certain conditions are met. The guidance states, in pertinent part:

QUESTION 4:

Does the use of an employer notification system that provides motor carriers with a department of motor vehicle report for every State in which the driver held either an operator's license, a commercial driver's license (CDL), or permit when a driver is enrolled in the system and provides information about license status, crashes and convictions of laws or regulations governing the operation of motor vehicles on the driving record satisfy the requirement for an annual review of each driver's record?

GUIDANCE:

Yes. Since motor carriers would be provided with a department of motor vehicle report for every State in which the driver held a commercial motor vehicle operator's license or permit when a driver is enrolled in the system and the State licensing agency includes information about crashes and convictions of laws or regulations governing the operation of motor vehicles on the driving record, the requirements of § 391.25(a) would be satisfied. Generally, the requirements of § 391.25(b) and (c) would be satisfied if the employer notification system records the identity of the motor carrier's representative who conducted the review when the carrier's representative reviews the information on the driving record.

See FMCSA's Guidance to Section 391.25, Question 4, 80 Fed. Reg. 13,069 (March 12, 2015).

Thus, contracting with a driver-monitoring service could relieve some of the administrative burden and cost typically associated with the annual MVR review process.

And third, driver-monitoring services tend to help motor carriers from an efficiency standpoint by preventing driver-related out-of-service violations before they happen. For example, being alerted to the fact that a driver's CDL has been downgraded before that driver is dispatched allows the carrier to avoid a roadside out-of-service order, which could cost it thousands of dollars in fines, repowering expense, and potential cargo damage.

D. Conclusion and Recommendations

In sum, whether or not a company is subject to federal/state motor carrier safety regulations, it's important that **it consistently apply its driver-qualification standards and continuously monitor its drivers' compliance with those standards.** Moreover, companies should consider exploring the emerging driver-monitoring services and how those services can substantially assist them in their endeavors to reduce the exposure stemming from the use of unsafe/unqualified drivers by, for example, offering near real-time visibility into their drivers' compliance with the company's standards, providing active alerts for changes in license status and activity, and automating the safety-monitoring process.

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