TRANSPORTATION matters
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## DOT/FMCSA - Noteworthy Updates

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On 9/29/20, the Federal Motor Carrier Safety Administration's (FMCSA) final rule updating Hours of Service (HOS) regulations takes effect for normal, non-exempt operation. The key provisions include:

- Extend on-duty time by 2-hours for adverse weather;
- Extend the "short haul" exception from 100 air-mile radius to 150 miles and increase allowable drive time from 12 hours on-duty to 14 hours;
- Allow drivers to split the required 10 hours off-duty time into two periods: one period of at least 7 consecutive hours in the sleeper birth or a period of not less than 2 consecutive hours either off-duty or in the sleeper berth;
- Allow one off-duty break of between 30 minutes and 3 hours that would pause the 14-hour driving window as long as the driver takes 10 consecutive hours off-duty at the end of the shift.

The final rule may be found here: https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2020-05/HOS%20Master%20050120%20clean.pdf.

On 9/4/20, the FMCSA announced a new pilot program allowing drivers between 18 and 20-years-old to operate commercial motor vehicles (CMVs) in interstate commerce. Currently 49 states and the District of Columbia allow 18 to 20-year-olds to operate CMVS within state borders. The FMCSA previously sought comments for a similar program on 5/15/2019.

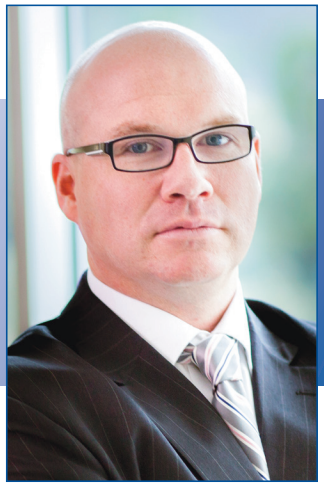
On 8/28/20, the FMCSA announced that it will seek public comments on a three-year pilot program to make more flexible the 14-hour driving window. The Split Duty Period Pilot Program seeks 200 to 400 drivers to study effects of pausing on-duty driving time with one off-duty period between 30 minutes and 3 hours. To qualify for the study, motor carriers must maintain a crash rate better than or equal to the national average and allow a video-based on board monitoring system for each driver. Pausing the 14-hour restart was not included in the recent changes to HOS regulations that take effect 9/29/20.

On 7/13/20, the DOT released a warning that drivers use Cannabidiol (CBD) oil at their own risk due to potentially mislabeled products that contain higher-than-legal levels of tetrahydrocannabinol (THC). In December 2018, President Trump signed into law a measure that legalized hemp and CBD oil that contain 0.3% THC or less. Concentrations higher than 0.3% may result in positive a urine drug screen for marijuana, use of which is not permitted for any reason. A positive drug test is reported to the FMCSA Drug and Alcohol Clearinghouse and remains on a driver's record for 5 years. Drivers are then required to undergo substance abuse counseling and pass 7 observed drug tests over the following 12 months. CBD oil is widely marketed for treating anxiety, movement disorders, and joint pain.

On 7/13/20, an FMCSA advisory committee met to discuss regulation of small commercial trucks similar to the ubiquitous Sprinter-style Amazon delivery vans, which weigh less than

10,000 pounds. Currently, the FMCSA does not regulate commercial vehicles in the weight class from 6,001 to 10,000 pounds. In order to determine the need for regulation, the committee has pledged to conduct studies of injury, fatality, and property-damage only accidents involving these vehicles, regardless of fault; to identify 9 companies and learn their best practices for driver recruitment and safety training; to obtain data from the Occupational Safety and Health Administration, Transportation Safety Board, and state transportation officials regarding workplace accidents and injuries involving these vehicles; and to monitor application for new Department of Transportation (DOT) numbers for vehicles in this weight class.





## Attorney Spotlight: Justin Robertson

*Justin Robertson serves as the managing partner of Hedrick Gardner's Wilmington office. His practice focuses in the area of workers' compensation. He regularly represents employers, self-insureds, third party administrators and carriers; and handles every aspect of the workers' compensation process from mediations, to hearings, and through the North Carolina appellate process.*

***Q: What do you enjoy most about your practice?***

**JR:** The people. I have been fortunate to have numerous clients that I have a 20+ year relationship with, and having those long-terms connections have afforded me an opportunity to form relationships and bonds that would have likely not otherwise been possible but for my practice.

***Q: What is your proudest moment?***

**JR:** I've done a lot in life, some not so great moments and a few that I do consider noteworthy. However, I am most proud of my two daughters – and all of their "moments". I remember my oldest's first hit in little league, and my youngest's first goal in soccer. I treasure all of their successes and accolades, and even more all the difficult times they have overcome. My oldest is 22 a college graduate, who is living/working in DC, and I could not be more proud. My youngest is in 11th grade, and has great things in store for her.

***Q: What is your favorite vacation destination?***

**JR:** There are so many places I have been, and even more that I want to go to – this is a difficult question to answer. But I have only been to two places my entire life that actually affected me emotionally. The Grand Canyon is an amazing place when you view it from the South or North Rim, but in January 2009 I spent two nights at the bottom of the Grand Canyon along the Colorado River, and the views you get from the bottom – well, they can change your perspective on life. The other place is Glacier National Park in Alaska. The visceral response I had to being in the middle of Glacier National Park in 2019 being amongst all the tidewater glaciers and rocky peaks, was surreal…(and seeing the Northern Lights) reminded me of being at the bottom of the Grand Canyon looking up at a sky full of stars.

***Q: What is your favorite book and why?***

**JR:** Unbroken by Laura Hillenbrand. A true story of unbelievable courage, hope and perseverance through the most difficult of circumstances. On tough days, I think about Mr. Louis Zamperini and what he endured, and it gives me perspective. If he was able to deal with what he dealt with, then I should be able to deal with whatever is on my plate at any given moment.

# Forward Facing Video Camera Systems – A Double Edge Sword?

Britt

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In my last article, I explained the benefits forward facing video camera systems may have on litigation expenses for commercial motor carriers and insurance companies. However, as the saying goes, not everything is as good as it seems. Even though the implementation of forward facing video cameras does have its benefits, it also creates the potential for greater exposure to commercial motor carriers and their insurers.

For example, forward facing video camera systems increase the possibility for exposure to a negligent supervision claim. North Carolina recognizes a claim for negligent hiring, supervision, and retention if the claimant can prove:

> (1) the specific negligent act on which the action is founded . . . (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in oversight and supervision,' . . .; and (4) that the injury complained of resulted from the incompetency proved.[1]

The crux of a negligent supervision/retention claim generally turns upon whether the employer had actual or constructive notice. Usually, the employer has nothing to fear if the driver does not have a history of traffic accidents or violations. Without this information, history of traffic accidents or violations, it is more difficult to prove the employer had actual notice and even harder to prove constructive notice. However, depending upon the accessibility while the vehicle is in operation, activation mechanism, and some other functional capabilities, forward facing video camera systems allow for the employer to have more knowledge than it otherwise would.

The camera allows trucking and insurance companies to have recorded video footage of how an accident occurred. It follows that the camera also allows trucking and insurance companies to have real time footage of the commercial driver's overall driving skill. The video footage would record the driver's speed, whether he commits traffic violations, and, more generally, his/her overall skill as a driver.

For instance, the employer would have actual notice if it sees footage detailing the driver's inaptitude or dangerous tendencies. Moreover, even if the employer has not seen the footage, a claimant would have a strong argument that the employer had constructive notice. As explained in the cause of action, the employer has constructive notice if it "could have known the facts had he used ordinary care in oversight and supervision."[2] The claimant would argue that the employer could/would have known the facts of the driver's driving ability if the employer had reviewed the recorded footage.

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1 *Medlin v. Bass*, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990).

2 *Id.*

Forward facing camera systems raise many questions. Does a commercial motor carrier need to review the recorded footage for its driver(s)? How often does the footage need to be reviewed? Does the employer have to retain the recorded footage? If so, for how long? Like most technological advancements, the law is slow to adapt.

Currently, the Federal Motor Carrier Safety Administration has minimum record retention guidelines for certain information and documentation.[3] For example, within the driver qualification file the driver application, motor vehicle report from hire, safety performance history, and photocopy of commercial driver's license must be retained for the driver's employment, plus three years.[4] Other records have shorter retention periods.[5] The retention of video footage is not yet specified. Furthermore, the amount of storage that would be needed for the footage could be immense. As a result, the requirement to retain the recorded footage could very well vary with the size of the commercial motor carrier.

Along the same lines, there is currently no case law defining the employer's duty to review the recorded footage or how often footage should be reviewed. However, as the technology is increasingly implemented, the likelihood of future case or statutory law is likely. Presumably the court will implement a "reasonableness" standard, especially since the fleet of commercial vehicles and employed drivers differs for each motor carrier.

Therefore, instead of waiting for the specific duty to be defined, the employer should take proactive steps to avoid being the potential poster child. The following are proactive measures that could prove beneficial for employers of commercial vehicle drivers with forward facing camera systems:

- Internal policy for reviewing recorded footage;
- Internal policy for the retention of recorded footage;
- Internal policy for tracking and documenting potential traffic violations;
- Training guidelines for corrective measures based on traffic violations.

Insurance carriers would also benefit by encouraging their insureds to create internal policies for forward facing camera systems. This would potentially help ensure that the commercial insurance carriers are not left footing the bill for a negligent supervision claim. It is important to note that compliance with internal policies does not insulate an employer from potential liability. Further, the policies and information surrounding the policies are likely discoverable if a lawsuit is filed. Nevertheless, the adherence to internal policies helps demonstrate the employer's reasonableness in its supervision and retention of its employers. Just like a double edge sword, the practical reality of forward facing camera systems is that they can help and hurt. At times, the camera system has the capability to reduce litigation costs, and at other times, exposes the employer to greater liability. The industry trend is toward using the devices.

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3 *See* 49 CFR §§ 391.51, 395.30.
4 *See* 49 CFR §§ 391.51, 391.21, 391.23, 391.31, and 391.33.
5 *See* 49 CFR §§ 391.25, 391.27, and 391.43.

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# AB5: A New Standard for Worker Classification

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One issue that has come up numerous times in the setting of the trucking and transportation industries is the classification of workers as either employees or independent contractors. Concerned with workers who were being misclassified as independent contractors and who were not getting the benefits afforded to employees, the State of California passed a law, which went into effect on January 1, 2020, addressing the classification of workers. The law, commonly referred to as AB5, dramatically changed the rules employers must use to determine whether workers are employees or independent contractors. Of note, the law applies to all workers in California no matter where the employer is based.

Prior to AB5 being passed, the decision on whether a worker should be classified as an employee or an independent contractor in California was determined by a standard set forth in *S.G. Borello & Sons vs. Department of Industrial Relations*. Similar to the common law independent contractor standard, the *Borello* test has 11 factors, primarily focusing on whether a company has control over the means and manner of performing contracted work, and additional secondary factors, such as who provides work tools and the individual's opportunity for profit or loss, to determine contractor status.

Under the new AB5 law, all workers are presumed to be employees. However, a worker can still be classified as an independent contractor if they can satisfy the "ABC Test." Under this test, a worker is an independent contractor only if he or she:

> (A) is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact, and
>
> (B) performs work that is outside the usual course of the hiring entity's business, and
>
> (C) is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

All three prongs of the "ABC Test" must be satisfied for workers to be independent contractors.

Recently, the new AB5 law was applied to Uber and Lyft drivers, who were previously classified as independent contractors. Judge Ethan Schulman concluded that Uber and Lyft had failed to comply with the provisions of AB5 and ordered the companies to stop referring to drivers as independent contractors and comply with unemployment and wage floor provisions for the workers.

However, attempts to apply AB5 to the Trucking Industry have been stalled. In response to the passing of AB5, the California Trucking Association filed a lawsuit contending that AB5 was preempted by the supremacy and commerce clauses of the U.S. Constitution and is in direct conflict with the Federal Motor Carrier Safety Act and the Federal Aviation Administration Authorization Act of 1994.

The California Truck Association was most concerned with prong "B" of the ABC Test, which states that for a worker to be an independent contractor, the worker must perform work that is outside the usual course of the hiring entity's business.

On January 16, 2020, Judge Roger Benitez of the US District Court issued a preliminary injunction prohibiting California from applying AB5 to motor carriers. Judge Benitez commented,

> "There is little question that the state of California has encroached on Congress' territory by eliminating motor carriers' choice to use independent contractor drivers, a choice at the very heart of interstate trucking. In so doing, California disregards Congress' intent to deregulate interstate trucking, instead adopting a law that produces the patchwork of state regulations Congress sought to prevent. With AB-5, California runs off the road and into the preemption ditch of the FAAAA."

With the injunction issued, the standard for determining whether drivers are employees or independent contractors reverts to the longstanding *Borello* test. In early September, 2020, the issue of whether the preliminary injection issued by Judge Benitez was appropriate was heard by a panel of the ninth Circuit Court of Appeals. Based on people who observed the hearing, the panel of Judges appeared split on the issue. A ruling from the Ninth Circuit Panel on the preliminary injection is expected in the near future.

If AB5 is eventually applied to the trucking industry, it would make it very difficult for motor carriers to classify any of its drivers who work in California as independent contractors. I also assume that if the Court concludes that AB5 is not preempted by Federal Law, other States will follow California's lead and adapt a test similar to the ABC Test. This would obviously have far reaching and significant effects on the trucking industry.

We will continue to monitor this pending litigation and provide updates as needed.

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