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NEGLIGENT ENTRUSTMENT: THE HIDDEN FLEET

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GLOSSARY

The Federal Motor Carrier Safety Administration (the “FMCSA”), an agency within the U.S. Department of Transportation (the “DOT”), enacts and enforces federal regulations to improve the safety of commercial transportation. Part of this presentation will provide a brief overview of some of the FMCSA’s regulations for motor carriers and commercial drivers. By no means does this presentation discuss all legal obligations of motor carriers under federal law. Motor carriers should consult all relevant laws, both state and federal, to ensure that they are in compliance; this handout cannot be used as a substitute for doing so. The following terms and definitions are taken from *federal* regulations and are used throughout the presentation.

Commercial Driver’s License or “CDL” – refers to a license which authorizes a person to drive a motor vehicle that has a gross vehicle weight or gross vehicle weight rating in excess of 26,000 lbs.¹

Commercial Motor Vehicle or “CMV” – refers to one of two classes of motor vehicles defined by the FMCSA regulations. The first class of motor vehicles “CMV” refers to is any vehicle (or combination of vehicles) used in interstate commerce to transport passengers or property if the vehicle has a gross vehicle weight or gross vehicle weight rating in excess of 10,000 lbs.² The second class of motor vehicles that “CMV” refers to is any vehicle (or combination of vehicles) used to transport passengers or property if the vehicle has a gross vehicle weight or gross vehicle weight rating in excess of 26,000 lbs.³ For the purpose of this presentation, unless otherwise specified, the term “commercial motor vehicle” or “CMV” refers to the first class of motor vehicles. That is, any motor vehicle used in interstate commerce that is in excess of 10,000 lbs.

Driver – refers to any person that operates a commercial motor vehicle.⁴

Entry-level Driver – a driver with a CDL that has less than one year experience operating a commercial motor vehicle (in excess of 26,000 lbs.).⁵

Motor Carrier – means a for-hire motor carrier or a private motor carrier and includes the motor carrier’s agents, officers, representatives and employees that are responsible for hiring, supervising or dispatching of drivers and employees concerned with the installation, inspection and maintenance of motor vehicle equipment.⁶

¹ For further information, see 49 C.F.R. § 383.5.

² See 49 C.F.R. § 390.5. This term also applies to vehicles, regardless of weight, designed to: (1) transport more than 8 passengers (including the driver) for compensation; or (2) transport more than 15 passengers (including the driver) even if not for compensation; or (3) transport material considered “hazardous” under 49 U.S.C. 5103.

³ See 49 C.F.R. § 383.5. This term also applies to vehicles, regardless of weight, designed to: (1) transport more than 16 passengers (including the driver); or (2) transport “hazardous materials” as defined by 49 C.F.R. § 383.5.

⁴ See 49 C.F.R. § 390.5.

⁵ See 49 C.F.R. § 380.502.

⁶ See 49 C.F.R. § 390.5.

1.0 INTRODUCTION

Motor carriers face a host of litigation risks arising out of accidents that occur when their drivers are behind the wheel. To be successful in defending against these claims, motor carriers must understand the nature in which liability arises and take proactive steps to avoid liability before it occurs. In addition to vicarious liability, in which an employer may be held liable for the acts of its employee that occur within the scope of employment, employers may also be found liable for claims of negligent hiring, retention, supervision and entrustment. Negligent entrustment is the primary focus of this presentation.

2.0 THE DANGER: THEORIES OF LIABILITY

2.1. Related Negligence Claims

Minnesota courts recognize several related claims for negligence. In general, negligence is defined as the failure to exercise the degree of care of a reasonable person.

2.1.1 Negligent Hiring

Minnesota recognizes a cause of action for negligent hiring and requires that the plaintiff generally establish the following four requirements:

- (1) The motor carrier must have owed a duty to the plaintiff to exercise reasonable care in its hiring of the driver in question;
- (2) The motor carrier must have breached that duty by hiring a driver whom it knew or should have known was unfit for duty;
- (3) The plaintiff must have been injured; and
- (4) The motor carrier's breach of its duty must have been the proximate cause of the plaintiff's injury.

See generally Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 911 (Minn. 1983); *LM v. Karlson*, 646 N.W.2d 537, 544 (Minn. Ct. App. 2002).

The Minnesota Supreme Court first recognized the tort of negligent hiring in *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907 (Minn. 1983). In that case, the plaintiff was a female tenant in an apartment complex who was sexually assaulted by the resident manager of the complex. The resident manager was issued a passkey that permitted him to enter all of the apartments. It was determined that he used the passkey to gain entry to the plaintiff's apartment and assault her. The *Ponticas* court stated that “[a]n employer has the duty to exercise reasonable care in view of all of the circumstances in hiring individuals who, because of the employment, may pose a threat to members of the public.” *Id.* at 911.

Two sources of direct duty running from the employer were recognized in *Ponticas*. First, the employer has a direct duty to those members of the public whom the employer reasonably might anticipate will be placed in the position of risk of injury as a result of the hiring. *Id.* at 910–11; *see also LM v. Karlson*, 646 N.W.2d 537, 544 (Minn. Ct. App. 2002) (“A claim of negligent hiring is predicated on the negligence of an employer in placing a person . . . in an employment position in which, because of the circumstances of employment, it should have been foreseeable that the hired individual posed a threat of injury to others.”).

Second, the employer has a duty to make a reasonable investigation into the prospective employee’s background, though the depth and scope of the investigation can be directly related to the severity of risk to which third persons are subject by an incompetent employee. *Ponticas*, 331 N.W.2d at 914; *see also LM*, 646 N.W.2d at 544 (stating that an employer has a duty to conduct a “reasonable investigation”). In *Ponticas* the court noted that there is no absolute duty to check an applicant’s criminal record, and that the court will look to the totality of the circumstances to see whether the employer exercised reasonable care. *Id.* at 913. As discussed later, however, the standard of care applicable to motor carriers hiring drivers is considerably heightened under applicable DOT regulations.

Negligent hiring is a direct cause of action against a motor carrier, it does not arise out of the employment relationship, and is an independent tort resting on the combined negligence of the motor carrier and that of its driver. In determining whether the motor carrier breached its duty in using reasonable care in its hiring of a driver, courts will scrutinize the motor carrier’s actions or omissions at the time of the hiring decision. This requires that the motor carrier make a reasonable investigation of any driver who is to be hired. A negligent hiring claim is attractive to plaintiffs because it is possible to establish the motor carrier’s liability without showing that the driver was acting within the scope of employment.

The case of *Malorney v. B & L Motor Freight, Inc.*, 496 N.E.2d 1086 (Ill. Ct. App. 1979), illustrates the risk of liability faced by motor carriers when their drivers commit acts outside the scope of employment. In *Malorney*, the trucking company’s driver picked up and raped a hitchhiker. It was determined that the driver had previous criminal convictions for sexual crimes while employed with other trucking companies. The court denied the trucking company’s motion for summary judgment because the company had failed to verify the driver’s application response that he had no criminal convictions. The court held that an issue of fact existed as to whether the trucking company breached its duty to hire competent drivers by failing to investigate the driver’s non-driving background. The *Malorney* case is significant because it demonstrates how motor carriers may be held liable, under a negligent hiring theory, for actions that occur outside of the driver’s scope of employment.

2.1.2 Negligent Retention

Minnesota courts treat negligent hiring and negligent retention as separate, but closely related, theories of recovery. In order to establish a *prima facie* case of negligent retention, the plaintiff must generally establish four requirements similar to those found in the negligent hiring context:

- (1) The motor carrier must have owed a duty to the plaintiff to exercise reasonable care in its retention of the driver in question;
- (2) The motor carrier must have breached that duty by retaining without appropriate action a driver whom it knew or should have known was unfit for duty;
- (3) The plaintiff must have been injured; and
- (4) The motor carrier's breach of its duty must have been the proximate cause of the plaintiff's injury.

See generally LM v. Karlson, 646 N.W.2d 537, 545 (Minn. Ct. App. 2002); *Bruchas v. Preventive Care, Inc.*, 1996 WL 494975 (Minn. Ct. App. 1996) (requiring there be some threat of physical injury or actual physical injury in claims for negligent retention); *Yunker v. Honeywell*, 496 N.W.2d 419, 424 (Minn. Ct. App. 1993).

The principle difference between negligent hiring and negligent retention claims is the time at which the employer is charged with knowledge of the employee's unfitness. Negligent hiring occurs when, prior to the time the driver is actually hired, the employer knew or should have known of the employee's unfitness, and the issue of liability focuses primarily on the adequacy of the employer's pre-employment investigation into the employee's background. Robert B. Fitzpatrick, *Negligence Claims Against an Employer*, C932 ALI-ABA 729 (July 21, 1994). Negligent retention, on the other hand, occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action such as investigating, discharging, or reassigning the employee.

A critical issue that often arises in the negligent retention context concerns the nature of "appropriate" employer action. Even if a motor carrier learns of a driver's dangerous propensities, it will only be held liable for negligent retention if it fails to take "appropriate action" to address those activities. Such appropriate action may include:

- (1) Disciplining the driver;
- (2) Removing the driver from a position in which he or she could harm members of the public;
- (3) Exercising closer supervision over the driver; or
- (4) Terminating the driver's employment.

See Yunker, 496 N.W.2d at 424. The action to be taken, and the appropriateness of that action, will of course vary from case to case depending upon the nature of the driver's negative activities and other factors.

2.1.3 Negligent Supervision

The most recent negligence claim to arise in the employment context is negligent supervision. Unlike the “direct liability” claims of negligent hiring and retention, negligent supervision claims are based on a theory of respondeat superior (“vicarious liability”). See *Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 534 (Minn. 1992); *LM v. Karlson*, 646 N.W.2d 537, 546 (Minn. Ct. App. 2002); *Yunker*, 496 N.W.2d at 422.

For a plaintiff to succeed on a negligent supervision claim the plaintiff must prove the employee’s misconduct occurred within the scope of employment. In the case, *Yunker v. Honeywell*, the Minnesota Court of Appeals explained why the doctrine of negligent supervision encompasses a “scope of employment” limitation, “of the three theories advanced for recovery, only negligent supervision derives from the respondeat superior doctrine, which relies on connection to the employer’s premises or chattels.” 496 N.W.2d 419, 422 (Minn. Ct. App. 1993) (holding that plaintiff could not recover under negligent supervision theory because the employee was not on the employer’s property or using the employer’s “chattels” when the misconduct occurred); see also *Oslin v. State*, 543 N.W.2d 408, 414 (Minn. Ct. App. 1996) (“The basis of liability is that the tortuous act is committed in the scope of employment . . .”).

Minnesota courts have relied on both the Restatement (Second) of Agency § 213 and the Restatement (Second) of Torts § 317 to analyze negligent supervision claims. *Bruchas v. Preventive Care, Inc.*, 553 N.W.2d at 443 (Minn. Ct. App. 1996). The Minnesota Supreme Court adopted the Restatement (Second of Agency) § 213 in the case *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907 (Minn. 1983). The Restatement (Second of Agency) § 213 provides:

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:

* * * * *

(c) in the supervision of the activity.

Bruchas, 553 N.W.2d at 443.

Under the negligent supervision doctrine, an employer has a duty to prevent foreseeable misconduct of an employee when the misconduct may result in harm to others. *Grozdanich v. Leisure Hills Health Center, Inc.*, 25 F. Supp. 2d 953, 981 (D. Minn. 1998). To establish a claim of negligent supervision, a plaintiff generally must demonstrate the following elements:

- (1) The driver was acting within the scope of employment;
- (2) The negligence occurred on the motor carrier’s premises or with the motor carrier’s chattels (property);
- (3) The motor carrier failed to use ordinary care when supervising the driver;
- (4) The plaintiff suffered some form of physical injury.

See generally P.L. v. Aubert, 545 N.W.2d 666 (Minn. 1996) (holding that the school district was not liable for a teacher’s sexual harassment of a student under a theory of negligent supervision because while the conduct occurred “within work-related limits of time and place,” it was “unforeseeable” and “unrelated to the duties of the employee”); *Oslin v. State of Minnesota*, 543 N.W.2d 408 (Minn. Ct. App. 1996). The plaintiff must have suffered “physical injury” or threat of physical injury rather than “economic loss” to recover under a theory of negligent supervision. *Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 534 (Minn. 1992).

2.2 Motor Carrier Liability for Negligent Entrustment

Aside from the related theories of negligent hiring, retention, and supervision, a motor carrier may be held liable under the theory of negligent entrustment. A motor carrier’s legal responsibility for negligent entrustment is founded upon two liability theories. The first theory is one of strict liability and is created by statute. The second theory is based on the common law tort of negligent entrustment. An employer/employee relationship is not required for either of these theories of liability to be applicable. Thus, the driver does not have to be acting within the scope of employment in order for liability to attach to the motor carrier under a negligent entrustment theory.

2.2.1 Strict Liability (Minn. Stat. § 169.09)

Strict liability for negligent entrustment arises under a Minnesota statute commonly referred to as the Safety Responsibility Act. The elements to be proved under the strict liability statute include:

- (1) The motor vehicle must have been operated within the State of Minnesota;
- (2) The motor vehicle must have been operated by any person other than the owner; and
- (3) The motor vehicle must have been operated with the express or implied consent of the owner.

Once the plaintiff has established these three elements, the operator, if an accident occurs, shall be deemed the agent of the owner of the motor vehicle. Minn. Stat. § 169.09(5)(a) (2012) (“Whenever any motor vehicle shall be operated within this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof.”).

While agency principles typically rely on whether the operator was acting within the scope of employment, the Minnesota Supreme Court has stated that under Minn. Stat. § 169.09 (formerly, Minn. Stat. § 170.54) liability is “predicated upon agency arising out of the scope of *consent* rather than the scope of employment.” *Pluntz v. Farmington Ford-Mercury Inc.*, 470

N.W.2d 709, 712 (Minn. Ct. App. 1991) (citing *Reliance Ins. Co. v. Stack*, 289 N.W.2d 71, 74 (Minn. 1979)) (emphasis added).

Thus, if the driver has consent from the motor carrier to use the vehicle for the purpose for which the vehicle was being used at the time of the accident, the motor carrier is liable for the driver's negligence regardless of whether the accident occurred within the scope of the driver's employment. For example, if the motor carrier has given the driver consent to use the vehicle for the driver's personal reasons, the motor carrier is liable even though the driver was not performing work at the time of the accident.

It should also be noted that the courts have held that proof of ownership by the employer establishes a *prima facie* inference of consent; this inference can be rebutted by evidence of no consent at the time and place in question. *Reliance*, 289 N.W.2d at 74. Thus, the motor carrier, as owner of the vehicle, will have the burden of proving the absence of consent whenever its vehicles are involved in an accident.

In summary, the strict liability claim is a creature of statute that creates liability whenever any individual entrusts another with a motor vehicle. This liability claim relies on the element of consent rather than on the scope of the driver's employment. This particular theory of recovery does not deal with whether the motor carrier knew or should have known that the driver was unqualified to drive the vehicle. Under strict liability theory, it does not matter whether the driver was qualified, because liability is created when consent is given. Because liability cannot reach beyond the scope of consent, motor carriers should be careful in deciding when and how their drivers can use company vehicles.

2.3 Negligent Entrustment (Common Law)

2.3.1 Establishing Negligent Entrustment

In Minnesota, negligent entrustment has been defined as a separate wrongful act and creates direct liability to the entrustor (motor carrier). In order to establish a claim of negligent entrustment, the plaintiff must demonstrate the following elements:

- (1) The authorizer had at least temporary control over the vehicle;
- (2) Authorization was given to another to use the vehicle;
- (3) The authorizer knows or should have reason to know that the authorized person is not qualified to drive the vehicle; and
- (4) The authorized driver caused injury or damage by negligent operation of the vehicle.

Early cases recognizing a claim for negligent entrustment held that where the negligence of the operator of a vehicle is reasonably foreseeable, the owner has a duty to take steps to

prevent such operation. See *Illinois Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630 (Minn. 1978). Under the current rule, the entrustor (motor carrier) is liable if it entrusts operation of the vehicle to a person whom the entrustor could have foreseen would operate the vehicle in a negligent manner. *Axelton v. Williamson*, 324 N.W.2d 241 (Minn. 1982). In order to hold the entrustor liable to an injured third party, the entrustor's negligence must be accompanied by negligence on the part of the driver. The duty of the entrustor "runs directly to those who might be put at risk as a result of the negligent entrustment." *Lim v. Interstate System Steel Div., Inc.*, 435 N.W.2d 830, 833 (Minn. Ct. App. 1989).

As noted earlier, the common law theory of negligent entrustment is a separate theory of liability from strict liability. *Jones v. Fleishhacker*, 325 N.W.2d 633 (Minn. 1982). Minnesota courts permit plaintiffs to submit both a strict liability claim and a claim for negligent entrustment to the jury, even if the motor carrier admits to strict liability. *LIM v. Interstate System Steel Div., Inc.*, 435 N.W.2d 830, 833 (Minn. Ct. App. 1989). This can be extremely damaging, because courts will admit evidence of prior incidents to demonstrate a pattern of negligence under the negligent entrustment theory. This evidence often proves to aggravate liability, and thus is likely to increase damage awards.

The negligent entrustment claim is such that the motor carrier can be found liable even if the driver is not acting within the scope of employment at the time of the accident. Whenever the motor carrier entrusts a driver with a vehicle there is the potential for liability whether or not the driver is on duty. This is true because the doctrine of negligent entrustment is not limited to the employment arena. A common law negligent entrustment claim, however, will only create liability if the plaintiff can prove that the motor carrier knew or had reason to know that the driver was not qualified to drive. Thus, a motor carrier will not be liable under the doctrine of negligent entrustment for any incident that occurs where the driver is qualified. Accordingly, all motor carriers should take steps to ensure that their drivers are qualified in order to avoid any claims under the doctrine of negligent entrustment.

2.3.2 Recovery by the Driver

The negligent entrustment doctrine may be used by third persons as well as by the trustee (driver) himself. The Minnesota Supreme Court has held that the trustee can sue the motor carrier directly for negligently entrusting them with the vehicle. In *Axelton v. Williamson*, 324 N.W.2d 241 (Minn. 1982), a 15 year old driver was killed when she ran off the road into a ditch. The defendant had permitted the girl to use his vehicle. The court allowed a cause of action to be brought on behalf of the girl against the defendant on a negligent entrustment theory. *Id.* at 245. Applying this case to motor carriers, the case suggests that a *negligent driver* may recover damages from a motor carrier that permits the driver to operate the motor carrier's vehicles when he or she was not qualified to drive.

3.0 MINIMIZING RISK OF LIABILITY FOR EMPLOYEE NEGLIGENCE

In order to avoid claims for negligent hiring, retention, supervision, and entrustment, motor carriers should take proactive steps to ensure the hiring and retention of qualified drivers. The following steps are recommended.

3.1 Application of Employment

Under federal law, a person cannot drive a commercial motor vehicle unless he or she has provided the motor carrier with an application for employment containing the following:

- (1) Name and address of the employing motor carrier;
- (2) Applicant's name, address, date of birth, and social security number;
- (3) Addresses at which the applicant has resided at for the past three (3) years;
- (4) Date on which the application was submitted;
- (5) Issuing State, number and expiration date of each unexpired commercial motor vehicle operator's license or permit that has been issued to the applicant;
- (6) Nature and extent of the applicant's experience in the operation of motor vehicles, including the type of equipment which he/she has operated;
- (7) A list of all motor vehicle accidents during the preceding three (3) years specifying the date and nature of each accident and any fatalities or personal injuries caused;
- (8) A list of all violations of motor vehicle laws or ordinances (other than violations involving only parking) of which the applicant was convicted or forfeited bond or collateral during the previous three (3) years;
- (9) A statement setting forth in detail the facts and circumstances of any denial of revocation or suspension of any license, permit or privilege to operate a motor vehicle or a statement that none has occurred;
- (10) A list of names and addresses of the applicant's employers in the preceding three (3) years together with employment dates and the reason for leaving each employment;
- (11) If an applicant is applying to operate a commercial motor vehicle that is in excess of 26,000 lbs., the applicant must also include a list of all employers during the seven (7) years preceding the three (3) years contained in the previous

requirement, of which the applicant was an operator of a commercial motor vehicle, together with dates and the reason for leaving; and

- (12) There must be a certification and signature line at the end of the application form and it must be signed and dated by the applicant. The certification must state, “This certifies that this application was completed by me, and that all entries on it and information on it are true and complete to the best of my knowledge.”

49 C.F.R. § 391.21. Motor carriers should also use an employment application that includes an appropriate waiver and release permitting the employer to verify the information reported by the applicant. Where the motor carrier will also conduct a criminal background check, obtain a personal investigative report, and/or conduct a credit check on the applicant, the application should also contain appropriate disclosures (as discussed below) and a release from the applicant permitting the motor carrier to obtain such information.

3.2 Driver’s Qualifications

Mandatory driver’s qualifications require the driver to:

- (1) Be at least 21 years old;
- (2) Read and speak English;
- (3) Safely operate a vehicle;
- (4) Be physically qualified;
- (5) Have a current and valid commercial motor vehicle’s operator license;
- (6) Furnish a violation certificate;
- (7) Not be disqualified under rules; and
- (8) Have completed a driver’s road test and have been issued a certificate or, in place of such a certificate, have a valid CDL.

49 C.F.R. §§ 391.11, 391.33. This list of requirements is not exhaustive and motor carriers should be aware of all regulations that affect them. Should a motor carrier not comply with any of these rules and fail to determine a driver’s ineligibility as a result, liability will attach because the motor carrier *should have known* that the driver was unqualified.

3.3 Motor Vehicle Records

DOT regulations require motor carriers to make an inquiry into the applicant’s driving record during the preceding 3 years to the appropriate agency of every state in which the driver

held a motor vehicle operator's license or permit during those three years. 49 C.F.R. § 391.23(a)(1). The inquiry must be made within 30 days of the date the driver's employment begins and must be made in the form and manner those agencies prescribe. 49 C.F.R. § 391.23(b). A copy of the response by each state agency, showing the driver's driving record or certifying that no driving record exists for that driver, must be placed in the driver's qualification file within 30 days of the date the driver's employment begins. 49 C.F.R. § 391.23(b).

3.4 Drug and Alcohol Testing

**The following regulations apply only to drivers of commercial motor vehicles that exceed 26,000 lbs.*

A commercial driver must be drug-free in order to be qualified to drive a motor vehicle, and motor carriers are required by law to conduct pre-employment drug testing. 49 C.F.R. § 382.301. The federal rules also require a motor carrier to conduct random, post-accident, and reasonable suspicion drug and alcohol testing. All supervisors of commercial drivers must be trained to make determinations of "reasonable suspicion." Should a motor carrier fail to test a driver after it suspects the driver of being under the influence of drugs or alcohol (for reasonable cause), it could be faced with significant liability under the doctrines of negligent retention and negligent entrustment. Moreover, the DOT imposes significant fines and penalties for violations of the drug and alcohol testing rules. The best way to reduce potential liability is to adopt and follow a federally mandated drug and alcohol testing policy that has been reviewed by legal counsel.

Minnesota employers that wish to test employees other than commercial drivers for drugs or alcohol must comply with specific requirements under the Minnesota Drug and Alcohol Testing in the Workplace Act, Minn. Stat. § 181.950 *et seq.*

3.5 Driver Training

3.5.1 General Driver Training

Driver qualification and training is an ongoing process that should not be curtailed. A motor carrier should maintain an ongoing training program for all drivers and carefully document such training initiatives. The documentation of such training should be included in the driver's qualification file, which is required to be maintained by motor carriers for all of their drivers. 49 C.F.R. § 391.51.

3.5.2 Training Requirements for Entry-Level Drivers

**The following regulations apply only to drivers of commercial motor vehicles that exceed 26,000 lbs.*

The FMCSA issued a final rule⁷ requiring training for entry-level drivers who are subject to CDL requirements. These requirements are required by the Intermodal Surface Transportation Efficiency Act of 1991 (“ISTEA”).

Drivers who are required to hold a CDL and have less than one year’s experience in operating commercial motor vehicles in interstate commerce are subject to specific training requirements. 49 C.F.R. § 380.502(b).

a. Receipt of Training Certificate

An employer who uses an entry-level driver must ensure that the driver has received the training and has received a training certificate or diploma verifying that he/she received the training. 49 C.F.R. § 380.505. A copy of the certificate or diploma must be placed in the driver’s personnel or qualification file. 49 C.F.R. § 380.509(b). Employers must keep an employee’s entry-level training records for the duration of the employee’s employment and for one year following employment. 49 C.F.R. § 380.511.

b. Areas of Training

Training for entry-level drivers must include instruction in the following four areas:

(1) Driver qualification

This area of training must cover the federal rules on medical certification and examination procedures, general qualifications, responsibilities and disqualifications based on various offenses, orders and loss of driving privileges. 49 C.F.R. § 380.503(a). These regulations can be found at 49 C.F.R. Part 391, Subparts B and E.

(2) Hours of service

Instruction on the topic of “hours of service” must include the limitations on driving hours, the requirement to be off duty for a certain period of time, record of duty status preparation and exceptions. The training must also include fatigue countermeasures as a means to avoid crashes. 49 C.F.R. § 380.503(b). These regulations can be found at 49 C.F.R. Part 395.

(3) Driver wellness

Training in the area of “driver wellness” must include information on basic health maintenance including diet and exercise as well as the importance of avoiding excessive use of alcohol. 49 C.F.R. § 380.503(c). Additional topics could include stress, sleep apnea, how to maintain healthy blood cholesterol, blood pressure, and weight, as well as the importance of periodic health monitoring and testing, diet and exercise.

⁷ A copy of the final rule, as well as commentary summarizing the development of the rule, published in the Federal Register on May 21, 2004, can be found at: <http://www.fmcsa.dot.gov/rulesregs/fmcsr/final/04-11475EntryLevel.pdf>.

(4) Whistleblower protection

The training must include discussion of the right of an employee to question the safety practices of an employer without risk of losing his/her job or being subject to reprisals for stating a safety concern. 49 C.F.R. § 380.503(c).

c. Acceptable Training Providers and Cost

The final rule allows the employer considerable latitude in determining what entity can provide the required training. Examples include an in-house training program developed by the employer's staff, a training school, or a class conducted by a consortium or association of employers. The final rule allows a subsequent employer to accept a copy of a training certificate from a previous employer or other training provider.

The question of who pays for the required training is an employer/employee issue. For unionized employees, however, this topic should be the subject of collective bargaining negotiations. The National Labor Relations Board may consider the topic a "mandatory" subject of bargaining, at least with respect to drivers already employed.

3.6 Annual Reviews

Under applicable DOT regulations, motor carriers are required, at least once every twelve months, to review the driving record of each driver that it employs to determine whether the driver meets the minimum requirements for safe driving or is disqualified to drive a commercial motor vehicle. 49 C.F.R. § 391.25. A motor carrier should conduct a full review process at that time to ensure that the driver continues to be qualified in all respects. The regulations provide that "[t]he motor carrier must . . . consider the driver's accident record and any evidence that the driver has violated laws governing the operation of motor vehicles, and must give great weight to violations, such as speeding, reckless driving, and operating while under the influence of alcohol or drugs, that indicate that the driver has exhibited a disregard for the safety of the public." 49 C.F.R. § 391.25(b)(2).

The motor carrier must prepare a note, setting forth the date upon which the review was performed and the name of the person who reviewed the driving record, and include the note in the driver's qualification file. 49 C.F.R. § 391.25(c)(2). This review process can constitute an additional character check to safeguard against any detectable negative propensities of the driver. These propensities can then be cured immediately so as to avoid claims of negligent retention, supervision, and entrustment.

3.7 Hours of Service

One of the most recurrent allegations in trucking accidents is that the accident occurred because the driver was fatigued from driving "out of hours." This means that the driver was in violation of federal regulations regarding the maximum number of driving hours or hours of

service. 49 C.F.R. § 395.3; John A. Michaels, *Motor Carriers' Liability For Trucking Accidents*, 27 Ariz. Att'y 17 (July 1991).

The FMCSA issued a final rule⁸ regulating hours of service that became effective on February 27, 2012. The compliance date of selected provisions was July 1, 2013. The new rule reduces the number of hours a driver can work within the week. The rule also mandates that drivers rest for at least thirty minutes before returning to work after an eight hour shift. Companies that commit egregious violations of the rule will be subject to fines and penalties.

To document compliance with these rules, drivers are required to keep daily driving logs in the form of a DOT chart. *See* 49 C.F.R. § 395.8. These logs must be kept current at all times and contain records of the following four kinds of time: (1) "off duty"; (2) "sleeper berth"; (3) "driving"; and (4) "on-duty not driving." The log must be complete as of the last change of status. Should the motor carrier know that the driver habitually exceeds the number of permissible driving hours, the driver's prior logs can be used as evidence that the motor carrier had notice of the "out of hours" conduct, and the motor carrier may be found liable for knowing the person was not qualified to drive. Many lawsuits arising out of trucking accidents contain allegations that the driver was fatigued and that the motor carrier failed to comply with DOT hours of service rules.

3.8 Distracted Driving

The FMCSA and the Pipeline and Hazardous Materials Safety Administration ("PHMSA") issued a final rule⁹ prohibiting drivers from using mobile telephones while driving a commercial motor vehicle. Companies that allow or require drivers to use hand-held cell phones while driving may face a penalty of up to \$11,000. As such, motor carriers should institute policies that ban drivers from using mobile devices while driving to ensure the safety of the employee driver as well as everyone else on the road.

3.9 Investigate & Respond To All Incidents

Every incident that occurs with a driver should be closely investigated by the motor carrier for a number of reasons. The investigation can help determine the causal link (what caused the incident). This not only may help a motor carrier avoid liability if no causal link is found, but it may also help a motor carrier take appropriate corrective actions once the actual cause of the incident is known.

If a driver is found to have violated any law or company policy or procedure, the motor carrier should take immediate steps to correct the problem. Any response should be documented thoroughly. A motor carrier who is not responsive may find itself liable for negligent retention, entrustment or supervision claims that could have easily been avoided.

⁸ The complete text of the final rule is available at: <http://www.fmcsa.dot.gov/rules-regulations/administration/rulemakings/final/HOS-Final-Rule-12-27-11.pdf>.

⁹ The complete text of the final rule is available at: http://www.fmcsa.dot.gov/rules-regulations/administration/rulemakings/final/Mobile_phone_NFRM.pdf.

4.0 BACKGROUND CHECKS: A DOUBLE-EDGED SWORD

4.1 Employment History

DOT regulations require motor carriers to make an inquiry into the applicant's employment record during the preceding 3 years. 49 C.F.R. § 391.23(a)(2). The inquiry must be made within 30 days of the date the driver's employment begins. 49 C.F.R. § 391.23(b). The investigation may consist of personal interviews, letters, or any other method of obtaining information that the carrier deems appropriate. Each motor carrier must make a written record with respect to each past employer who was contacted. The record must include the past employer's name and address, the date he/she was contacted, and his/her comments with respect to the driver. 49 C.F.R. § 391.23(c). The record must be retained as part of the driver's qualification file. 49 C.F.R. § 391.23(c).

In addition to the DOT regulations, the doctrine of negligent hiring requires that employers conduct adequate background checks on every applicant. What is "adequate" depends on a number of factors, but usually would include contacting previous employers or references, identifying and evaluating gaps in the applicant's resume, and, for certain positions, requesting a criminal background check or consumer report. Pre-employment investigations are important to ensure that the applicant is the best-qualified individual and to provide an extra measure to test the veracity of the information provided by the applicant.

Motor carriers have a number of different tools available to conduct pre-employment investigations. When conducting background checks, however, the proverbial double-edged sword exists for human resources personnel. Certain inquiries may be unlawful, and excluding applicants based on personality traits or criminal histories may lead to potential liability for the employer. Thus, an understanding of the employer's dual obligation to conduct adequate background investigations, while not unlawfully refusing employment or violating laws regarding consumer reports, is critical.

4.2 General Criminal Background Checks

In some cases, a broad criminal background check of an applicant (seeking records beyond the applicant's driving history) may be appropriate, and may help the employer reduce potential liability for negligent hiring. In conducting background checks, employers generally should not obtain arrest record information about applicants or use such information to exclude applicants. Although conviction records may be considered, several legal issues come into play.

In most states, the use of conviction records is legal; however the Equal Employment Opportunity Commission (the "EEOC") requires such information be used in a nondiscriminatory manner. In April of 2012, the EEOC issued its *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (the "Enforcement Guidance").¹⁰ In its Enforcement Guidance, the

¹⁰ The complete text of the EEOC's *Enforcement Guidance* (including examples of when criminal records are not grounds for exclusion) is available at: http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

EEOC provides two examples of discriminatory use of conviction records: (1) when an employer treats two applicants or employees with the same criminal records differently because of an individual's protected characteristic, or (2) when the use of criminal records disproportionately excludes minorities from employment, and thus, has a disparate impact on minorities in violation of Title VII.

Employers that use criminal records as a basis to exclude applicants or employees should be ready to show that such exclusions are "job-related and consistent with business necessity." According to the EEOC, an employer can likely meet the business necessity standard if the employer develops a screening process that considers the following: (1) the nature of the crime, (2) the amount of time that has elapsed since the crime occurred, (3) the nature of the specific job and the ways, if any, criminal conduct undermines the essential functions of the job. These three factors come from the Eighth Circuit decision, *Green v. Missouri Pacific Railroad*, which held that an employer's policy of screening out all applicants that had a conviction for a crime other than a minor traffic offense was unlawful. 523 F.2d 1290 (8th Cir. 1975). In addition to the *Green* factors, the EEOC recommends that employers give the applicant or employee the opportunity to explain why he or she should not be excluded.

In Minnesota, a public employer cannot inquire into or consider criminal records of an applicant until the applicant has been selected for an interview. Minn. Stat. § 364.021(a). This means that public employers cannot include a "box" about criminal convictions on employment applications. The Minnesota State Legislature recently passed a law that amends Minn. Stat. § 364.021 so that all employers, public and private, are prohibited from asking about criminal records on employment applications. The law becomes effective January 1, 2014 and imposes monetary penalties on employers that fail to comply. See Jim Ragsdale, *State Senate Approves Bill to Give Ex-Felons Job-hunting Help*, STARTRIBUNE: POLITICS (April 20, 2013, 12:56 PM), <http://www.startribune.com/politics/blogs/203918611.html>.

4.3 Investigative Consumer Reports

Where appropriate and job-related, investigative reports regarding an applicant's background and/or consumer credit information may be used. However, federal and state laws impose some restrictions on the use of such information. Both laws impose *notice* requirements regarding the use of consumer investigative reports, i.e., reports prepared by a third party regarding an applicant's background. A general rule is that background checks, whether conducted by an employer or a third party, must be reasonable in scope.

4.3.1 The Federal Fair Credit Reporting Act

The Fair Credit Reporting Act ("FCRA") provides that an investigative consumer report may be used for employment purposes such as evaluating an applicant for employment, promotion, reassignment, or retention as an employee. 15 U.S.C. §§ 1681a & 1681b. While this tool is available to employers, the FCRA provides that an employee or applicant must be told that an investigative consumer report is being requested. 15 U.S.C. § 1681d(a)(1).

The FCRA defines an investigative consumer report as a type of a consumer report which contains information on a consumer's character, general reputation, personal characteristics, or mode of living which is obtained through personal interviews with neighbors, friends, or associates of the consumer. 15 U.S.C. § 1681a(e). An investigative consumer report may not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer. The type of investigative consumer reports covered by the law are those provided by a consumer reporting agency. A consumer reporting agency is an entity that regularly assembles or evaluates certain types of information for the purpose of providing consumer reports to third parties for a fee or on a cooperative nonprofit basis. 15 U.S.C. § 1681a(f).

The FCRA also provides that the potential use of an investigative consumer report must be disclosed to the applicant or employee in writing and mailed to the applicant or employee not later than three days after the date on which the report was first requested. 15 U.S.C. § 1681d(a)(1). This disclosure must include a statement informing the applicant or employee of their right to request additional information. 15 U.S.C. § 1681d(a)(1). If the employer acquires an investigative consumer report on an applicant or employee and the person makes a written request within a reasonable time, the employer must make a complete and accurate disclosure of the nature and the purpose of the investigation requested. This disclosure must be made in writing and mailed or delivered to the applicant or employee not later than five days after the request or when the report was first requested, whichever is later. 15 U.S.C. § 1681d(b).

If an employer denies employment, in whole or in part, because of information obtained through a consumer report, the employer must advise the applicant that employment was denied in whole or in part because of this information and supply the name and address of the consumer reporting agency making the report. 15 U.S.C. § 1681m.

4.3.2 Minnesota Consumer Reporting Act

Minnesota law provides that an employer provide advance notice to an applicant when a consumer report will be prepared for the employer as part of the background check on the applicant. Minn. Stat. § 13C.02(1) (2012). The law also requires that the employer advise the applicant of his or her right to receive a copy of the report. Minn. Stat. § 13C.02(2). A consumer report includes not only an agency report concerning an applicant's credit record, but also "investigative consumer reports." Minn. Stat. § 13C.001(6). The latter are broadly defined and may include many types of background checks performed by third parties in connection with hiring. In the case of an investigative report, the required disclosure must inform the consumer that the report "may include information obtained through personal interviews regarding the consumer's character, general reputation, personal characteristics, or mode of living." Minn. Stat. § 13C.02(1).

4.4. Credit Checks

4.4.1 Discrimination Claims

Credit checks should be used when such information is job-related and can be shown to be a business necessity. For instance, a credit check may be permissible when there is a close relationship between credit information and job performance. Employers should also be cautious to avoid the rejection of an applicant solely on the basis of a poor credit rating because such actions have a disparate impact on minority groups and therefore may be unlawful in the absence of a business necessity. The EEOC has found that employers who base their employment decisions on poor credit ratings may be creating a disparate impact on minority groups and women. As such, employers that rely on credit checks might be in violation of Title VII unless they can demonstrate a business necessity for doing so. In addition, the Minnesota Department of Human Rights has also advised that the use of credit checks or questions regarding the applicant's credit history may be problematic because such questions could result in an adverse impact on applicants who receive public assistance or belong to a protected class.

4.4.2 Fair Credit Reporting Act

The Fair Credit Reporting Act ("FCRA") also affects an employer's use of credit checks as a pre-employment investigation tool. A consumer report will include information on a consumer's "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." This type of information under FCRA can be used for employment purposes. 15 U.S.C. § 1681a(d). The guidelines discussed above for conducting investigative consumer reports, however, should also be followed when requesting credit checks.

5.0 BEST PRACTICES

5.1 Comply With All State and Federal Law

In addition to the laws previously discussed, there are many other legal requirements that apply to both drivers and motor carriers. By federal law, motor carriers must abide by numerous regulations, including but not limited to those concerning driver qualifications, controlled substance and alcohol use and testing, commercial driver's license requirements, gross vehicle weight rating, employment applications, annual reviews, record of violations, notification of convictions, physical qualifications, driver qualification files, and record retention. *See* 49 C.F.R. §§ 382-399. A violation of any of these laws can create liability for a motor carrier through claims of negligent hiring, retention, supervision, and entrustment. Accordingly, motor carriers should be cognizant of all applicable laws at the local, state and federal levels that regulate driver qualifications or the operation of motor vehicles. Smart motor carriers will conduct periodic "legal audits" to determine whether their policies, procedures, and day-to-day practices comply with these regulations.

5.2 Develop Effective Policies and Procedures

A motor carrier is never limited by the law – it can always institute policies and procedures that go beyond what the law requires. This is highly recommended to avoid claims of negligence. If an employer takes actions early and acts responsibly to prevent any liability the jury will look it upon favorably. Such additional policies and procedures might include things such as additional reviews, discipline procedures for any violations by drivers, procedures for check-in times to ensure a driver is not tampering with his/her driving log times, and an open door policy for drivers to come to the motor carrier with any of their concerns about themselves or co-workers.

6.0 CONCLUSION

We live in a society where lawsuits are all too common. For motor carriers, accidents and litigation are, unfortunately, part of “doing business.” By taking steps to comply with applicable state and federal laws, check and monitor the qualifications of drivers, and develop clear policies and expectations, motor carriers can significantly reduce their liability for claims of negligent hiring, retention, supervision, and entrustment.