

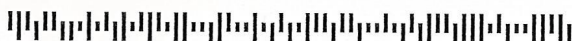
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Keeping Your DRIVERS HEALTHY

Promoting physical and emotional
wellness is key to retaining your team



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Driver Coercion and Harassment Claims

8 best practices for managing the risk

BY JONATHAN TODD

Moving is a demanding business that requires hard work and attention to detail. This year, the risk that carrier and shipper demands could result in liability is greater than ever. New rules issued by the Federal Motor Carrier Safety Administration (FMCSA) allow drivers to file complaints for coercion and harassment that could subject both carriers and shippers to investigations and steep penalties. Your company can work to manage the risk associated with these coercion or harassment claims by implementing operational best practices.

DRIVER COERCION CLAIMS

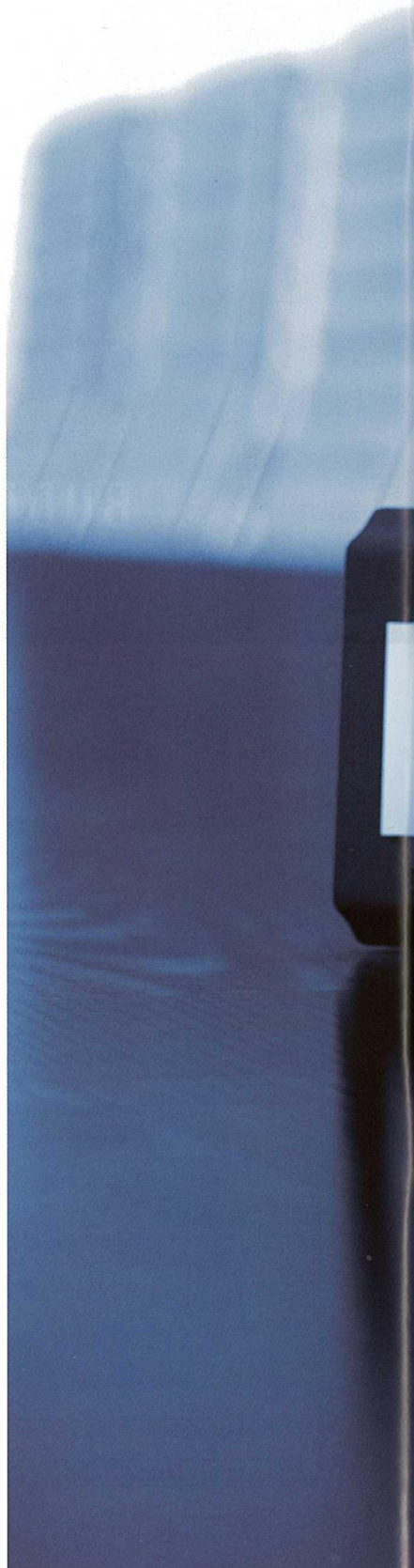
Driver coercion claims carry risk for carriers and shippers. The FMCSA's Prohibiting Coercion rule, which went into effect on Jan. 29, prohibits coercing drivers to operate in violation of the safety regulations, hazardous materials regulations or the motor

carrier commercial regulations. *Prohibiting Coercion of Commercial Motor Vehicle Drivers, Final Rule, 80 Fed. Reg. 74695-74710 (November 30, 2015).*

Driver coercion occurs when threats or adverse actions, including withholding future opportunities, are taken against a driver in response to the driver's statements that transporting a load will violate the regulations. Merely assigning a particular load to another driver when the first cannot lawfully haul the shipment is *not* considered coercion; however, any threats or adverse actions when a driver raises concerns or refuses to haul will be considered coercion—even if the driver's allegation of potential violations was incorrect.

DRIVER HARASSMENT CLAIMS

Carriers may also find themselves subject to driver harassment claims. The FMCSA's Electronic Logging Device (ELD) Mandate, with a compliance



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date of Dec. 18, 2017, in part prohibits harassing drivers to violate the hours-of-service (HOS) rules in connection with the use of ELDs. *Electronic Logging Devices and Hours of Service Supporting Documents, Final Rule, 80 Fed. Reg. 78292-78416 (December 16, 2015).* Driver harassment claims are a risk beginning the very moment ELDs are installed in power units, despite the mandatory compliance date.

Driver harassment occurs when the driver commits a violation of the HOS rules based on the carrier's actions in connection with an ELD. Unlike coercion, harassment requires that the carrier "knew or should have known" the driver would engage in fatigued driving or violate the HOS rules and that the violation actually occurred. The flood of ELD data that carriers are now receiving, or will soon receive, dramatically increases the likelihood of possessing information about the driver's real-time performance and

failing to consider that data when dispatching loads.

YOUR RISK EXPOSURE

Coercion and harassment claims each carry civil penalties of up to \$16,000 for each offense. In egregious cases, claims can also result in revocation of operating authority. Civil penalties are in addition to any penalties associated with underlying regulatory violations and any lawsuits filed by drivers, such as for retaliation in response to refusals to haul.

Driver complaints must be filed with the FMCSA local division office or the National Consumer Complaint Database within 90 days of the incident. The FMCSA will investigate all nonfrivolous complaints that include adequate information regarding the alleged coercion or harassment. The investigation will include contacting both the driver and the company against which the claim was filed for additional information. The FMCSA also recommends that drivers consider filing whistleblower complaints with the Occupational Safety and Health Administration.

YOUR OPERATIONS PLAYBOOK

The following are eight best practices to consider as you develop and implement your plan for managing the risk associated with coercion and harassment.

Engage each driver professionally and with respect, just as with an independent third-party service provider. Recognize that compliance is a team effort.

Train all staff who interact with drivers to be aware of the regulatory issues relevant to their areas and to be proactive in conversations with

drivers. Even seemingly simple driver comments, such as noting an outdated inspection certificate or low tire tread, could result in a coercion claim if the driver is persuaded to proceed.

Stop if a driver states that a request will cause him or her to violate the regulations. Listen carefully and understand the driver's concern.

Do not take any actions that may be viewed as pressuring, threatening, intimidating or otherwise harming a driver after he or she expresses a concern. Any consequence for raising a regulatory issue will be used in support of a coercion claim.

Collaborate with those involved to find a solution for hauling the goods. Accept that you may need to find an alternative means of servicing the shipment due to the driver's concern.

Document any communications or incidents with drivers regarding regulatory issues. Create a record of the specific concern, any relevant facts and circumstances, and your company's response. Of course, also document the names of the individuals involved and the dates and times of communications or actions.

Maintain all records and dispose of them appropriately. If a record is created, keep it in accordance with your document retention policy and the requirements for that information type.

Manage data received from ELDs. Any data in your company's possession will be imputed knowledge in support of a harassment claim if dispatch orders or assigned loads caused HOS violations or fatigued driving.

If your company finds itself the target of an FMCSA investigation, your documentation of the events in question and demonstration of responsible processes and procedures will be key to an appropriate outcome. ■

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