

Private Carriage Stand-Up: Where to Begin When In-Sourcing Transportation

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An emerging trend in this era of supply chain disruption is the interest of large enterprise shippers, often in the consumer retail space, to in-source transportation operations at the strategic direction of their boards of directors and supply chain leadership. The motivating factor extends far beyond the mission-critical need for capacity and the current challenges in transportation procurement. Many we assist when embarking on this effort seek to closely manage service levels, branding, market reputation, the user experience of customers, cost variance, and overall risk exposure.

Enterprises with any material size of supply chain are often well versed in transportation procurement. Those services that are otherwise bought on the market may in many instances be in-sourced where the appetite exists, including an array of transportation, logistics, and supply chain management services. The potential to build out last mile residential delivery often receives the greatest attention, but additional tactical options are available. Some enterprises are building out entire middle-mile over the road, warehousing, and fulfillment networks to gain “ownership” over as many nodes in the supply chain as possible.

Practical Starting Point for Private Carriage

The nuts and bolts of building a private carrier are not all that distinct from building for-hire operations except that, as a private carrier, there is a clear interest in the goods that are transported in furtherance of the core non-transportation business. This fact means that certain regulatory filings may be different, as well as certain day-to-day practices, although the substantive regulatory and operational safety concerns that would otherwise apply to traditional trucking companies remain applicable. In short, decisions to launch private carriage are essentially decisions to start transportation companies regardless of whether transportation is sold to third parties.

Viewed from an attorney’s perspective, the stand-up of private carriage is primarily a task of satisfying regulatory compliance obligations and employing internal procedures designed for lawful operation as well as risk mitigation. These compliance efforts include obtaining federal and state operating authorities where necessary, maintaining adequate insurance, and building out the processes and tools necessary for driver management and recordkeeping. Safety is the paramount theme across these compliance efforts and, in practice, the observance of those requirements may be far afield from the day-to-day compliance obligations associated with the core business of the enterprise.

This article provides a clear roadmap of the path toward launching private carriage, with four specific milestones: (1) licensure; (2) drivers; (3) equipment; and (4) safety protocols.

Milestone 1 - Licensure for Private Carriers

Federal and state licenses may be required for private carrier operations just as one would expect to see a U.S. DOT No. held by for-hire motor carriers. The initial jurisdictional determination is dependent on the age-old constitutional question regarding nature of commerce. This is often a fact-specific and counterintuitive analysis focusing on the goods moving through the supply chain rather than the point-to-point movement of any particular vehicle or on the type of vehicle that is used.

If the goods serviced by private carrier operations are in “interstate commerce,” then obtaining a U.S. DOT No. from the Federal Motor Carrier Safety Administration (FMCSA) will be required. However, private carriers transporting their own cargo typically do not need to obtain operating authority (i.e., an MC Docket number) as part of their registration. Private motor carriers must comply with all other registrations commensurate for the type of operation, such as the Unified Carrier Registration, the International Fuel Tax Agreement, and International Registration Plan.

If the goods serviced by private carrier operations are in “intrastate commerce,” then the private carrier will need to assess whether the states having jurisdiction over that commerce require private motor carriers to obtain operating authority or other registrations to operate within the state. This is of course a state-by-state analysis. The state requirements for obtaining operating authority for private carriage vary widely such that there are even some states that do not regulate motor carriers (private or for-hire) any differently than the FMCSA. Certain other states take a more lenient approach in regulating for-hire and private motor carriers operating in intrastate commerce quite differently. For example, some states only regulate private motor carriers that operate heavy commercial motor vehicles for their deliveries.

Milestone 2 - Driver Compliance for Private Carriers

Speed to market is often front of mind for those tasked with launching private carriage. One trend that we often see is for private motor carriers to maximize speed by engaging third-party driver leasing companies to place drivers within the carriers at the commencement of operations. These third-party companies can help alleviate the burden of sourcing drivers and complying with the regulatory scheme required in the Federal Motor Carrier Safety Regulations (FMCSRs).

One of the primary concerns of those who utilize third-party driver leasing companies is contractual, as the underlying contract with the third-party leasing company is customarily heavily negotiated so that it is clear which party bears responsibility for qualifying, testing, and certifying drivers pursuant to the FMCSRs. Importantly, even when private carriers initially utilize a third-party driver leasing company to stand up its driver force, the obligations under the FMCSRs will remain with the private carrier and cannot be delegated to the third-party driver leasing company.

Regardless of how drivers are sourced, the pertinent FMCSRs for the primary carrier obligations for drivers apply to private carriers. For example, if the private carrier is utilizing commercial motor vehicles, defined in the FMCSRs as a property-carrying vehicle with a gross vehicle weight rating or gross vehicle weight of 10,001 lbs. or more, in interstate commerce, then the traditional obligations

of driver qualification (49 CFR Part 391), maintenance of driver qualification files, and required compliance with the Hours of Service regulations (49 CFR Part 395) will also apply to a private carrier's operations. Similarly, if the private carrier is operating vehicles also requiring a Commercial Driver's License, the additional obligations, including in regard to driver qualification and drug and alcohol testing (49 CFR Part 382), will apply in a similar fashion as a for-hire carrier.

Milestone 3 - Equipment Compliance for Private Carriers

Speed to market and commercial feasibility often lead enterprises to source equipment through traditional leasing companies rather than purchasing outright. Those leases can vary in term and the inclusiveness of maintenance or other requirements, which can have the effect of easing the practical compliance burden at the outset. These engagements tend to require close contractual negotiation between the private carrier and the equipment leasing company so that, similar to driver leasing, it is clear whether and to what extent the equipment lessor will assist with compliance.

Here also, a private motor carrier will remain responsible for its continuing obligations for equipment in the FMCSRs, subject to the contractual rights negotiated between the entities. At a high level, the general equipment obligations for motor carriers, including the general vehicle safety requirements in 49 CFR Part 393, the equipment inspection requirements found in Appendix G of Part 396, Subchapter B, and the Electronic Logging Device requirements found at 49 CFR Part 395, Subpart B, will also apply to private motor carriers.

Milestone 4 - Safety Protocols for Private Carriers

Enterprises and their in-house counsel are well versed in the need to bring in risk management and human resources teams during the launch of private carriage. A point that is often recognized later in the endeavor is the need to build out safety and operations leadership as well as reasonable compliance programs. Hiring a knowledgeable transportation operations manager, or tasking well-qualified individuals existing within the organization, is a critical step in building carriage safely and scaling as efficiently as possible.

Many new private carriers will develop driver training materials, compliance protocols, emergency response procedures, and similar functional tools based upon the obligations under the FMCSRs. Consideration of other influences such as litigation risk or the set of standards that the FMCSA will apply during audit are also helpful in dialing-in the baseline for size-appropriate compliance activities. The precise elements of a strong compliance program will vary based upon the nature of operations, including whether operations will be interstate or intrastate in nature, the type of vehicles utilized, and the sourcing strategy for drivers and equipment. Though the regulatory framework is dense, taking care when standing up private motor carriage offers companies additional control over safety, costs containment, and operational performance in an otherwise unpredictable space. Additionally, there are many third-party safety compliance companies that can assist new private carriers in standing up regulatory-compliant procedures and operations.

Reducing Surprise and Maximizing Opportunity

The team at Benesch have built private and for-hire carrier operations across a wide range of industries, geographies, and operation types. Savvy transportation counsel can be helpful beyond level-setting with industry practice, obtaining required licenses and permits, negotiating with

third-party vendors, structuring driver programs, and building defensible compliance regimes that mitigate risk. Private carriers yield other creative opportunities many rarely consider at the outset, including the possibility of offering for-hire carriage to provide backhaul for offsetting overall transportation cost. Our deep bench of knowledgeable counsel, many of whom come from industry, yields the “shop talk” that goes beyond helping to sleep well at night by also maximizing opportunities for the project.

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