

Technology and Data Privacy Implications for Driver Relationships

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It is no surprise that technology is driving change in the motor carrier industry. In fact, we are observing a perfect trifecta of challenges as technology and carrier business converge. The technological solutions that have driven efficiency and profitability are allowing for far greater visibility and access to data than ever before. The regulatory regimes that govern the use of technology and data are emerging as complex and aggressive tools for society that result in greater financial and reputational risks than ever before. Rounding the trifecta, independent contractor issues remain increasingly under threat with laser focused scrutiny on the relationship between carrier and contractor in this brave new world where the carrier is electronically “in the cab” with the contractor.

The key take-away developed in this article is a simple guiding principle that aligns with the interests of both technology as well as transportation regulators - motor carriers should take care to disclose and gain consent for their deployment of technology and corresponding use and disclosure of collected information. The tactical deployment of this strategy will vary by circumstance although the perspective may be new for some. In short, think of drivers as a “users” when they engage in the entrepreneurial delivery of their services. This approach of principle and its tactical application will guide most carrier leaders through charting best practices in these new and uncertain times.

Technology as a Driver of Change in Industry

Today’s motor carrier operations are far from the old days of booking drivers by chalkboard. The massive growth of transportation technology has gone from elementary means of managing business operations, to EDI interfaces, to highly complex TMS/WMS/OMS systems, and ultimately to the highly “sticky” world of shipper portals that contribute real value and visibility to accounts. Shippers will increasingly ask about safety technology, satellite and cellular tracking, integration into their ERP systems, and turn-key cloud-based solutions. The carrier value proposition has essentially exploded from one of hauling cargoes from Point A to Point B, to one as a trusted supply chain solutions provider.

Indeed, carriers are, whether deliberately or not, quickly becoming technology providers and licensors, finding themselves not only on the receiving end of web-based platforms or other software tools but as a provider of software and other technologies, to their own personnel, to their drivers, and to shippers. This role brings with it not only the risks associated with allowing drivers and other parties to access third-party tools (over which the carrier has a low degree of control) but also new demands-both within and external to the legal agreement-by those to whom the tools are being

provided. In short, if carriers are technology providers, that makes the shippers (among others) users and possibly licensees of technology.

The carrier-driver relationship is no less impacted and, in the foreseeable future, may in fact be more intimate than shipper relationships. Drivers and the services they offer are in many ways the practical point of implementation for technology. The expanding range of safety and visibility related technological solutions must be understood by drivers for correct use while, at the same time, seemingly relieving the burden on drivers and the strain on the driver population at large. Still, this leaves drivers in a position to serve as part technology expert during their day-to-day activities of running their businesses. Achieving this new and growing role requires disclosure, information, training, and acceptance. Drivers need to know what tools are available to them, what tools are required, how they use those tools, what data those tools collect, and how that data is used and disclosed.

Enter drivers as “users” or “consumers.” Business-to-business personal information, such as personal information relating to drivers-as opposed to personal information about an individual who is consuming products or services (your typical “consumer”)-can no longer be ignored (to the extent it ever could be), both as a legal matter and as a practical matter.

Change Impacting our Drivers, our Risk

The motor carrier industry has in many ways “been here before” despite the pace of change. During the run up to the ELD mandate, the entire industry confronted a range of knowns and unknowns, risks and rewards, as it looked to respond to change. On the one hand, many carriers led the pack by early adoption recognizing that earlier technology paved the way in certain regards and that the advance in systems would yield great operational and safety benefits. On the other hand, many carriers were reluctant to adopt the technology due to fear of the plaintiffs’ bar, the sheer cost of adoption, and the negative impact on the available driver base. In the end, in our experience, carriers were able to navigate the path forward based upon certain guiding principles such as the need to act upon data received (e.g., speeding or hard braking data). The consternation that arose during roll out of the ELD mandate is practically ancient history.

The impact of increasingly business-critical technologies on carriers mirrors the ELD mandate in many ways, including by begging innumerable questions about the collection, use, and sharing of data: What data will be collected? How is it collected? Can certain types of collection be turned off? How much control is there over the collection, storage, and retention functionality? Is there any opportunity to customize that functionality? How is the collected data used and who will have access to it? While the competitive advantage of deploying these technologies is clear, the risk profile can be somewhat cloudy. With the increased and varied data protection frameworks being deployed across the nation and the globe comes a need for greater interdepartmental communication: there need to be open lines of communication among members of a carrier’s legal, compliance, operations, human resources, information technology, marketing, and other teams and those teams need to work together to ensure that the relevant stakeholders are involved in decisions around the use of technology and the collection and use of information.

Data is the most valuable resource of our time. Regulators are increasingly taking interest precisely because it is so highly valuable, it can be manipulated, and it can impact disadvantaged parties. This interconnected world has brought many parties to the conversation around data generation and use.

Shippers, carriers, third party providers, and drivers all have an interest in the data-driven exercise. In large part, efficiency / productivity / visibility win the day. That win derives in large part from data generated at the precise point where drivers conduct their business - at the level of cargo. It is probably not unfair to view drivers as in many ways the precise point of generation for many of these systems, and yet, they are also human beings looking to conduct their own businesses profitably. Drivers are a key point of risk requiring focus.

The traditional mindset of only protecting personal information relating to traditional “consumers” of products and services now comes with much greater risk, as the types of personal information governed by the most recent data privacy legislation become broader and broader. Watch out for misleading defined terms in such legislation, for example, “consumer” in the California Consumer Privacy Act of 2018, the definition of which is broader than one may expect. With drivers as individuals whose personal information may be protected by increasingly complex data privacy and security frameworks at the state, national, and international levels, mitigation of the risk areas traditionally associated with such frameworks (such as data breaches) needs to take into consideration drivers as a source of data and, depending on the facts, as consumers with enumerated consumer rights.

Driver-Facing Technology Implementation

More and more traffic, and supply chain relationships generally, are supported by significant contracts rather than mere bills of lading, tariffs, and terms of service. This interconnected world requires carriers to consider technology provisions in their shipper relationships, warehousing relationships, certainly their technology provider relationships, and of course driver relationships. The carrier serves as a conceptual spoke in this contractual hub which in many ways directly or indirectly positions the carrier as a technology provider itself. While this is somewhat of a paradigm shift, viewing the motor carrier as a technology provider and the driver as a user will assist in appropriately framing technology implementation so that results are well conceived and actionable.

Refocusing our attention on drivers more as individual users of hardware, software, and other technology solutions and less as replaceable providers of services helps to put the associated risks-legal and otherwise-in perspective and to implement strategies-again, legal and otherwise-to help mitigate those risks. A driver-facing mobile app, for example, needs to incorporate the appropriate legal terms and privacy policy in an enforceable manner; but the user experience (UX) of that mobile app may also need to include additional on-screen explanations and disclaimers, especially with respect to the collection of information as a result of the driver’s use of the mobile app. The role of the legal advisor does not, and should not, stop with the “Accept” button.

For most motor carriers, the most significant legal risks that come to mind with drivers generally are those associated with casualty litigation arising from vehicular accident. With respect to independent contractors, the second most significant risks are those associated with worker misclassification. Technology is unique because it can in principle assist in safer driving (provided that distraction is managed) while also creating challenging fact patterns for independent contractor analysis. Technology can conceivably allow a motor carrier to over-reach by providing tools of the trade, observing drivers in circumstances unrelated to safe operation, or other ways that may be construed as exerting control over the manner and means of work. These issues are not impossible to

overcome, but it is critical to view technology as one part of the broader arms-length relationship with independent contractor owner-operators who must remain truly independent in their work.

Technology Contracting and Driver Implications

In case you have not yet heard, we have officially entered a world of “dynamic” contracting. Agreements that you have to print out (or at least save as a PDF) and have four corners still play an important role, of course, but, in practice, legal agreements-and how they are structured-are not as straightforward creatures as they once were.

More often than not, legal agreements have multiple moving pieces, incorporate third-party terms (that may or may not actually be attached to the agreement or available for your review), and may or may not be named in an informative manner (imagine a benign-looking set of online “Terms of Use” that is actually a comprehensive agreement contemplating the provision and development of software services, with some co-marketing obligations on top of that).

The “contract” (the loaded term it may now be), while perhaps “owned” by a particular department, truly requires the attention of the business stakeholders and the legal/compliance team. Especially key to a successful contracting process are the translation skills that each stakeholder brings to the table (or, more realistically, chain of emails), with the business team needing to appreciate the legal landscape and the legal team needing to understand exactly what is being provided and by whom.

The natural contractual setting to establish any required disclosures, consents, and other data-related mechanisms is in the independent contractor services agreement with drivers. The regulatory framework for those agreements is of course found in the Federal Leasing Regulations set out at 49 CFR 376.12. The regulations are similar to data privacy regulations in that they seek as their chief end the disclosure of conditions and gaining of consent.

The regulations require, among other express provisions, the statement that an independent contractor owner-operator is not required to purchase or rent any equipment from the carrier as a condition of entering into the relationship. Additionally, the regulations require establishing with reasonable specificity the terms for any purchase or rental of equipment through the driver and the mechanism for deduction of associated amounts. Non-compliance with these provisions is subject to a private cause of action on the part of drivers by virtue of 49 USC 14704, and the availability of attorney’s fees. It is imperative, therefore, that the incorporation of technology provisions that allow for the sourcing of any required equipment from sources other than the motor carrier. If the technology is provided through the carrier upon the driver’s election then the terms of purchase, rental, or service must be disclosed.

The more narrow practicalities of contracting for technology use with drivers also require close attention when contracting. Disclosures of the existence or requirement of certain functionality-and in a manner that can be readily understood and will actually assist the driver-is essential. However, pragmatically outlining the entire life cycle for the technology will add to the user experience and lower the risk of confusion. Any elections and costs must be adequately memorialized including possible installation fees, monthly use fees, de-install fees, re-install fees, and loss fees. The terms related to the end of the relationship, or the end of the technology life cycle, will also clarify expectations and avoid surprises for both parties.

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