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Between a Rock and a Hard Place: Employers Must Walk a Narrow Path to Comply with DOT and EEOC Directives

Counsel for the Road Ahead®

Between a Rock and a Hard Place: Employers Must Walk a Narrow Path to Comply with DOT and EEOC Directives

New FDA Guidance for 3PLs on License Reporting Under the DSCSA

Moving Ahead in Increasing Financial Responsibility Minimums for Motor Carriers

Recent Events

On the Horizon



Christopher J. Lalak

Although Department of Transportation (DOT) regulations prohibit alcoholics from driving a commercial truck, an unwritten policy banning drivers from returning to the driver's seat once they have identified themselves as alcoholics violates the Americans With Disabilities Act (ADA), a jury ruled in *EEOC v. Old Dominion Freight Line*, 2:11-cv-02153 (W.D. Ark. Jan. 16, 2015).

The case involved Charles Grams, a commercial motor vehicle (CMV) driver who had driven for years without a major accident or incident. In June 2009, Grams disclosed to his supervisor that he drank too much over the previous weekend, and that he believed he was an alcoholic. He further disclosed that he would begin attending Alcoholics Anonymous meetings.

As was its practice, Old Dominion put Grams into a non-driving role as a part-time dock worker and informed him that he would not return to a driver's capacity under any circumstances. Grams' employment was ultimately terminated when, citing financial difficulty, he failed to attend a counselor-recommended outpatient treatment program.

The Equal Employment Opportunity Commission (EEOC), which administers the ADA, brought suit on the driver's behalf, alleging that the company's policy was unlawful. Old Dominion countered by noting that driving is a safety-sensitive position, and that it was unsafe to entrust the driving of a CMV to an alcoholic given the possibility for relapse and the difficulty of supervising an employee who works almost entirely alone. Moreover,

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New FDA Guidance for 3PLs on License Reporting Under the DSCSA



Stephanie S. Penninger

Guidance Document

On December 9, 2014, the U.S. Food and Drug Administration (FDA) unveiled yet another guidance document, entitled *DSCSA Implementation: Annual Reporting by*

Prescription Drug Wholesale Distributors and Third-Party Logistics Providers, implementing the Drug Supply Chain Security Act, signed into law on November 27, 2013 (DSCSA). The new draft guidance document complements the December 9, 2014, FDA-published *Federal Register* notice, and highlights the FDA's expectations for 3PLs on: (1) mandatory and optional reporting; (2) the timeline for submissions; (3) formatting; and (4) the reporting method, by way of an online portal. The comment period closed on February 9, 2015.

Purpose

3PL reporting requirements under the DSCSA are intended to strengthen the prescription drug supply chain by allowing the FDA to identify existing gaps and prevent contaminated and counterfeit drugs from entering the supply chain. The reported information, submitted to a single repository, should also allow the FDA to pinpoint the actual number of 3PLs operating in the U.S. instead of providing estimates based on limited state licensure information.

Impact

In addition to prescription drug wholesale distributors, the new guidance document applies to 3PLs that provide or coordinate warehousing or other logistics services of a product, in interstate commerce, on behalf of a manufacturer, wholesale distributor or product dispenser, without taking ownership or the responsibility for directing the sale or disposition of the product.

Required Reporting

3PL reporting, under the DSCSA, is based on the licensing of any facility that handles or stores pharmaceutical products. 3PLs are *required* to report the following to the FDA for each facility operated: (1) licensure information (including state and identifying number); (2) company name and facility address; and (3) all trade ("dba") names under which each facility conducts business. There is no requirement for 3PLs to trace or report product information.

Optional Reporting

The FDA has advised that 3PLs *should* report the following for each facility: (1) the name of the contact person with whom the FDA should interact, and an email address and phone number; (2) the unique facility identifier (DUNS number); (3) the license expiration date; (4) any significant disciplinary actions within the preceding 12 months by any state or federal agency, such as license revocation or suspension and other actions that limit or prevent distribution or facilitating distribution, including the state where the action occurred, date of final action, type of disciplinary action, description of violation and associated documents, e.g., consent decree or final State Board ruling; and (5) if a facility goes out of business or voluntarily withdraws a state or federal license.

Timeline

The initial report for 3PLs must be submitted between November 27, 2014, and March 31, 2015. However, newly licensed 3PL facility submissions will be due within 30 days of obtaining a state or federal license. Subsequent annual reports will be due between January 1 and March 31. 3PLs are considered to be licensed until the licensing rules are issued by November 27, 2015, and go into effect by November 2016. Although a 3PL may not currently have information to report to the FDA about state licensure (only Florida and California have or will have a licensing

program by January 1, 2015), 3PLs must still report facility location, contact information and company information to the FDA by March 31, 2015. The FDA asks that significant disciplinary action, out-of-state business and voluntary withdrawal reports be made within 30 days of the final action or occurrence, respectively.

Manner of Submission and Publication

3PLs will submit the requested information electronically through the FDA's CDER Direct Electronic Submission Portal, and preferably using extensible markup language (XML) files in a standard Structured Product Labeling (SPL) format. A company can report on multiple facilities using a single account. As a measure of enforcement, information collected by the FDA from 3PLs will be made publicly available on the FDA's website, including significant disciplinary action, as allowed by law.

Considerations for 3PLs

3PLs should ensure that all required paperwork is submitted to the FDA before March 31, 2015. 3PLs should be cautious about voluntarily submitting information regarding significant disciplinary actions, in light of the FDA's intended publication of that information through its website. The provision of adverse information could lead to unwanted and unfettered scrutiny by potential customers and governmental agencies, and could possibly be used against 3PLs by plaintiffs. On the flip side, 3PLs should take advantage of the FDA's website when vetting other logistics providers and wholesalers with which they are considering doing business.

For more information, please contact **STEPHANIE S. PENNINGER** at spenninger@beneschlaw.com or (317) 685-6188.

Between a Rock and a Hard Place: Employers Must Walk a Narrow Path to Comply with DOT and EEOC Directives

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the company argued, DOT regulations provide that a person is not qualified to be a commercial driver if he has a “current clinical diagnosis of alcoholism.” [40 C.F.R. 391.41(13)] Nevertheless, the jury found that the company had violated the ADA and awarded the driver a six-figure verdict.

How Can an Employer Comply with Both DOT and EEOC Frameworks?

It's easy to see Old Dominion's situation as a classic Catch-22. Drivers who are currently “alcoholic” are banned from driving by one federal agency. Meanwhile, however, another federal agency stands prepared to haul employers into court should they discriminate against a driver by preventing a self-described alcoholic to get behind the wheel. So what is an employer to do?

According to the EEOC, Old Dominion's policy ran afoul of the ADA because it failed to allow for an “individualized assessment” of the driver, and banned him from ever returning to the driver's seat again under *any circumstances*. Instead of a blanket policy, the company should have examined Grams' case on an individual basis, and allowed him the reasonable accommodation of taking leave to obtain treatment and determine whether he had a “current, clinical” diagnosis of alcoholism.

Employers are warned: The EEOC has actively targeted blanket policies such as the one at issue in this case. Moreover the agency is not eager to sympathize with employers who must balance multiple regulatory frameworks. Accordingly, employers should review their policies—both written and unwritten—to avoid such across-the-board prohibitions. As *Old Dominion* demonstrates, a failure to do so can be costly.

For more information, please contact **CHRISTOPHER J. LALAK** at clalak@beneschlaw.com or (216) 363-4557.

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Moving Ahead in Increasing Financial Responsibility Minimums for Motor Carriers



Stephanie S. Penninger



Brittany Shaw

Safety on the roads has been a top priority in new regulations for the transportation industry as of late. The danger caused by truck accidents can be severe, resulting in extensive property damage and personal injury. It has been decades since the minimum financial responsibility requirements were set for motor carriers. Accordingly, the Federal Motor Carrier Safety Administration (FMCSA) recently sought public input on proposed minimum financial responsibility changes set forth in its November 28, 2014, Proposed Rule. The comment period closed on February 26, 2015.

In 2012, as part of the Moving Ahead for Progress in the 21st Century Act (MAP-21), signed into law on July 6, 2012, the FMCSA was tasked to review the current levels of financial responsibility that motor carriers must maintain (through insurance, a bond or other financial security) to ensure the protection of the public in the event of a crash, or carriers and shippers against dishonest and financially unstable brokers. Currently, 49 C.F.R. § 387.9 requires freight motor carriers greater than 10,000 pounds to obtain insurance in the amount of \$750,000, \$1 million or \$5 million, depending on the type of freight hauled. As a result of the study, the FMCSA is considering increasing the minimum levels of financial responsibility for motor carriers, including

liability coverage for bodily injury or property damage.

Based upon its review, the FMCSA has concluded that the current minimum financial responsibility limits are inadequate to cover catastrophic crashes and should be increased, but the agency sought additional information from the public before amending the existing rules. Some of the studies reviewed by the FMCSA highlight that the costs for severe crashes easily exceed \$1 million due, in part, to medical care in the United States becoming increasingly expensive. A study from Pacific Institute for Research and Evaluation went as far as concluding that the required insurance should be raised to a minimum of \$10 million per crash, indexing for inflation and productivity growth. Data compiled by the Trucking Alliance's membership showed that the current financial responsibility minimum for motor carriers that do not transport hazardous commodities is inadequate to cover the costs of many crashes.

Other studies undermined the FMCSA's tentative conclusion, including one demonstrating that while catastrophic accidents may be costly, they are still considered rare. A data study by the American Trucking Association focused on large trucks (over 26,000 pounds) indicated that insurance claims for injury, death and/or property damage exceeding the current minimum financial requirements are less than 1% for carriers transporting hazardous commodities and 2% for non-hazmat carriers. Additionally, the ATA study indicated that 83% of insurance policies for trucks over 26,000 pounds are written at \$1 million limits, already exceeding the minimum requirements for non-hazmat carriers.

Opponents of the FMCSA's proposed financial responsibility increases have voiced that small and medium-sized businesses will be pushed out of the industry if minimums are increased, based on findings that are ambiguous, at best. Others argue that the FMCSA's proposed rulemaking may cause more crashes because many carriers will be forced to cut costs elsewhere because of the increased insurance premiums they will face in connection with their augmented financial responsibility.

The FMCSA sought public comment, particularly concerning 26 questions posed in an Advanced Notice of Proposed Rulemaking, by February 26, 2015. These questions can be found at: <https://www.federalregister.gov/articles/2014/11/28/2014-28076/financial-responsibility-for-motor-carriers-freight-forwarders-and-brokers#p-68>. Regardless of your position concerning the proposed minimum financial responsibility and insurance changes, a review of the submitted comments can be illuminating. Freight motor carriers should stay tuned for and be prepared to absorb possible increases to their financial responsibility minimums and corresponding insurance premiums.

For more information, please contact **STEPHANIE S. PENNINGER** at spenninger@beneschlaw.com or (317) 685-6188.

BRITTANY SHAW is a law clerk in Benesch's Indianapolis office.

RECENT EVENTS

Private Equity Investing in Transportation, Distribution & Logistics Companies Capital Roundtable Conference

James M. Hill spoke. Marc S. Blubaugh, Richard A. Plewacki, Peter K. Shelton and Eric L. Zalud attended.

December 3, 2014 | New York, NY

Transportation Lawyers Association Webinar

Marc S. Blubaugh moderated a panel on *Shedding Light into the Dark Corners of Warehouse Law: What Every Transportation Attorney Needs to Know about Storing Freight*.
December 9, 2014

Transportation Intermediaries Association—Webinar

Eric L. Zalud spoke on *Thoughts on Minimizing Broker Liability*.
December 10, 2014

Winter Conference of Freight Counsel Meeting

Eric L. Zalud presented and Martha J. Payne attended.
January 10–12, 2015 | Sanibel Island, FL

Transportation Lawyers Association Chicago Regional Conference

Marc S. Blubaugh, J. Allen Jones, Christopher J. Lalak, Kelly E. Mulrane, Stephanie S. Penninger, Richard A. Plewacki and Eric L. Zalud attended.
January 15–16, 2015 | Chicago, IL

BGSA Supply Chain Conference

Marc S. Blubaugh, James M. Hill and Eric L. Zalud attended.
January 22–24, 2015 | Palm Beach, FL

Council of Supply Chain Management Professionals

Marc S. Blubaugh assembled and moderated a panel during the annual CSCMP Columbus Roundtable Transportation Panel.
January 23, 2015 | Columbus, OH

The Trucking Industry Defense Association Advanced Seminar

Eric L. Zalud attended.
January 29–30, 2015 | Tampa, FL

2015 National Tank Truck Carriers Winter Membership & Board Meeting

Richard A. Plewacki and J. Allen Jones attended.
February 5–7, 2015 | Las Croabas, Puerto Rico

BB&T Capital Markets 30th Annual Transportation Conference

Marc S. Blubaugh presented *Transportation Regulations: Turning Lemons into Lemonade*.
Eric L. Zalud and James M. Hill attended.
February 12, 2015 | Coral Gables, FL

Grocery Manufacturing Association's Annual Litigation Conference

Marc S. Blubaugh and Steven A. Oldham attended.
February 24–26, 2014 | Ft. Myers, FL

American Conference Institute's 4th Annual Forum on Admiralty & Maritime Claims and Litigation

Stephanie S. Penninger attended.
February 27–28, 2015 | Houston, TX

AirCargo 2015

Martha J. Payne and Eric L. Zalud attended.
March 1–3, 2015 | New Orleans, LA

TLA Webinar

Eric L. Zalud spoke on *Ouch, That Hurt! Shipper/Carrier Liability to Drivers and Third Parties For Improperly Loaded Freight (At The Liability Interstices Where Casualty and Cargo Collide)*.
March 4, 2015

Transportation & Logistics Group

For more information about the Transportation & Logistics Group, please contact any of the following:

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ON THE HORIZON

2015 Truckload Carriers Association Annual Convention

Aaron Mendelsohn, J. Allen Jones and Richard A. Plewacki will be speaking on *Legal Considerations Regarding Data Generated By Electronic Logging Devices*. **Richard A. Plewacki** will also be speaking on *Positioning Yourself to Avoid Worker Misclassification*.
March 8, 2015 | Orlando, FL

IWLA Annual Conference and Expo

Marc S. Blubaugh will be speaking on *Emerging Trends in Transportation and Logistics: Making Practical Sense of the Year Behind and the Year Ahead*. **Eric L. Zalud** and **Christopher J. Lalak** will be attending.
March 10, 2015 | Savannah, GA

25th Biennial Tulane Admiralty Law Institute Symposium

Stephanie S. Penninger will be attending.
March 11–13, 2015 | New Orleans, LA

TIDA 2015 Cargo & Skills Seminar

Eric L. Zalud will be speaking on freight damage and salvage issues and broker liability issues.
March 18–20, 2015 | Tempe, AZ

Transportation & Logistics Council 2015 Annual Conference

Marc S. Blubaugh will be speaking on *Freight Claims and Cargo Insurance*. **Stephanie S. Penninger** will be speaking on *Multimodal Shipments: Liability of Inland Carriers, Himalaya Clauses, Covenants not to Sue, Kirby and its Progeny*. **Eric L. Zalud** will be speaking on damage mitigation and freight salvage issues. **Martha J. Payne** will also be attending.
March 23–25, 2015 | Orlando, FL

Transportation Intermediaries Association Capital Ideas Conference and Exhibition

Eric L. Zalud will be speaking on *Brokers Going on the Offensive to Protect Their Interests*. **Stephanie S. Penninger** and **Martha J. Payne** will be attending.
April 15–18, 2015 | Orlando, FL

Transportation Loss Prevention & Security Association, Inc. Annual Trucking Industry Conference

Martha J. Payne will be speaking on *The Carrier Did Everything Right: Why Can't It Get Paid? Freight Charge Collection*. **Stephanie S. Penninger** will be speaking on transportation law topics.
April 19–21, 2015 | Chicago, IL

Benesch
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LABOR & EMPLOYMENT
29th Annual Labor & Employment Conference

Thursday, May 7, 2015 | 8:00 A.M. to 1:15 P.M.
Cleveland Metropolitan Bar Association (CMBA)
1301 E. 9th Street, Cleveland, Ohio

Join us for this free half-day conference covering hot Labor & Employment topics. Pending 3.0 CLE hours and SHRM credit. Visit www.beneschlaw.com/labor2015 for more information.

TLA Annual Conference and CTLA Midyear Meeting

Stephanie S. Penninger will be speaking on *Food For Thought: Safety and Security Issues in the Transportation of Goods*. **Eric Zalud** will be speaking on high-dollar freight charge and credit and collection issues. **Marc S. Blubaugh, J. Allen Jones, Eric L. Zalud, Martha J. Payne, and Richard A. Plewacki** will be attending.
May 12–16, 2015 | Scottsdale, AZ

TLA Executive Committee

Marc S. Blubaugh will be presiding as president. **Eric L. Zalud** will be attending as voting past-president.
May 13, 2015 | Scottsdale, AZ

For further information and registration, please contact **MEGAN PAJAKOWSKI**, Client Services Manager, at mpajakowski@beneschlaw.com or (216) 363-4639.