

Don't Let the Future of Trucking Leave Your Practice Behind (Part 1)



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The rapidly approaching and radically different future of the trucking industry will bring new challenges and opportunities to nearly every corner of the Arkansas legal community.

From interstates and highways to city streets, from the 18-wheeler “big rig” to the garbage truck outside your house, commercial vehicles are the lifeblood of our state’s economy. The food we eat, the clothes we wear, the gasoline we need to drive, and anything we buy in store or online gets hauled from its source to us, usually in a truck.

And just as the trucking industry permeates nearly every supply chain in our nation’s economy, so it also permeates the legal profession. The trucking industry impacts legal practices including litigation, taxation, regulatory consulting, transportation and logistics, labor and employment, privacy rights, the environment, intellectual property, cybersecurity and more. And Arkansas, with vibrant farming, national retailers, numerous transportation and oil companies, and more, is no different.

The world of trucking is undergoing a technological revolution. Self-driving cars carry the headlines and are the talk of Congress right now, but make no mistake, the industry with the most incentive to get driverless vehicles on the road involves 18-wheelers, not family sedans. The trucking industry in this country projects a shortage of more than 100,000 truck drivers by 2022.^[i] And those truck drivers still on the road require sleep, food, and climate control – all things that impact the industry’s bottom line.

The result is that the trucking industry is sprinting into the future. In order to keep your practice current, and to strategically plan for the changing legal environment surrounding this industry, you need to keep up.

In this first article, we discuss what’s happening now in the trucking industry – driver monitoring, as well as what’s coming soon. In the second installment coming next, we will our article will delve into the not-so-distant future of self-driving trucks.

Happening Now: Driver Monitoring

The trucking industry, partially on its own and partially due to government mandate, is dramatically increasing its monitoring of drivers on the road. The result so far has been a heated privacy debate, a battle of regulatory interests, new and radical labor and employment issues, and a dramatic increase in the amount of sensitive data that is being recorded and distributed to and from our highways and interstates.

On December 18, 2017, the Congressionally mandated requirement that all commercial motor vehicle operators implement electronic login devices (ELDs) went into effect.^[ii] The mandate requires interstate

and intrastate motor carriers and drivers who are required to maintain records of duty status (driving hours) to do so electronically.^[i] This method will replace the paper log books previously utilized by truck drivers.

The ELDs will track when a truck is running, its movement, the miles driven, its speed, and how long the engine is running. The idea behind the mandate is to replace paper logs, which were subject to human error or even intentional “fudging” by drivers known to be under intense pressure to meet deadlines more and more efficiently. The hope is that ELDs will more accurately and effectively enforce the “Hours of Service” requirements issued by the Federal Motor Carrier Safety Administration (FMCSA) to govern how many hours truck and other commercial drivers are permitted to spend driving, working and resting.

Also beginning in December, Department of Transportation officers at Arkansas weigh stations, and across the country, will have the power to issue citations for trucks without ELDs in use. Notably, fleets that already had ELDs equipped in their trucks will have until December of 2019 to ensure that the systems comply with the published specifications.

Not surprisingly, the ELD mandate has been met with concern and criticism by some, including the truck drivers themselves. Many truck drivers consider the ELDs to be an invasion of privacy. Generally, many drivers dislike the idea of speed, location and movement being constantly tracked because it restricts the ability of the driver to use his or her own professional judgment to ensure delivery of the cargo safely and efficiently, both to the economic benefit of the driver and his customer. There are also concerns that the system has flaws, such as requiring a driver to take another 30-minute break simply because he or she turned on the engine to move the truck 15 feet, or forcing a driver to stop for hours only five miles from his destination even if the driver is not tired. And of course, the ELDs cost money to install, utilize and maintain.

All this detailed information regarding the movement of commercial vehicles creates a number of legal issues that touch on a variety of Arkansas legal practices. For example, how is the data protected for the benefit of employee privacy? How will companies ensure that data is stored and transmitted in compliance with cyber security standards? What are the implications of a hacker obtaining, or perhaps worse, altering the information, when it comes to privacy, data security and regulatory compliance? And finally, what if any of this information will be discoverable during litigation or admissible in court?

These questions could go on and on, and their answers will play out in state and federal court over the next few years. But one thing is certain now: a lot more data about how commercial trucks are being operated on Arkansas streets and highways is going to be available electronically, and it needs to be reliably stored, secured and transmitted.

Regardless of the formats for data transfer used in ELDs^[iv], the data must be protected from wireless access. Perhaps equally concerning is the practical reality that a would-be hacker could easily identify the locations of frequent transfers – trucking weigh stations and other DOT checkpoints.

For attorneys who represent the trucking industry or its employees, who regularly engage in trucking-related personal injury litigation, or those practicing in the areas of privacy rights or data security, the ELD mandate will open up a variety of legal and regulatory issues in the coming months and years regarding the availability, protection, and limitations on how the collected data will be used, how it will be transferred, and how access to that information, both before and during data transfer, will be restricted and protected.

^[i] <https://www.usatoday.com/story/money/2018/04/26/truck-driver-shortage-raises-prices/535870002/> (citing American Trucking Associations) (last visited May 15, 2018).

^[ii] <https://www.fmcsa.dot.gov/hours-service/elds/implementation-timeline> (last visited May 15, 2018).

[iii] Federal Register/Vol. 80, No. 241; available at <https://www.gpo.gov/fdsys/pkg/FR-2015-12-16/pdf/2015-31336.pdf>

[iv] According to the ELD rule technical specifications from the FMCSA, the data can be transferred either wirelessly on demand or by e-mail to an authorized safety official, or using USB2.0 or Bluetooth®. <https://www.fmcsa.dot.gov/faq/what-are-options-electronic-logging-devices-elds-electronically-transfer-data>

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