



HAYS COMPANIES

The Top 5 Misperceptions About Use of Electronic Logging Devices for Businesses

Technological improvements have made it possible for a business to monitor nearly all aspects of a truck's daily activities. Speed, location, sudden braking and even the sharpness of turns may all be monitored and recorded. Electronic logging devices (ELDs) are prudent for businesses using commercial trucks to monitor the risky activities of drivers. The use of ELDs is mandatory in many circumstances under the Federal Motor Carrier Safety Regulations (FMCSR)¹.

Businesses required to use ELDs or those thinking of voluntarily using ELDs have two broad choices in systems. To meet the minimum requirements of the FMCSR, "location data must be recorded by an ELD at 60-minute intervals when the vehicle is in motion, and when the driver powers up and shuts down the engine, changes duty status, and indicates personal use or yard moves."² A number of ELD manufacturers sell systems that track and record only the minimum data required. Conversely, many manufacturers sell systems that track and record a much wider array of location, engine and driver behavior data at intervals of seconds. This data can be used to provide feedback to drivers and improve driver behavior. The potential to improve driver behavior and reduce what, in many cases, is the largest safety-related risk is incredibly attractive to many businesses. However, some businesses are hesitant to adopt these systems because of the perceived legal risk.

In litigation involving a commercial truck, a shrewd personal injury lawyer will cite an employer's failure to maintain ELD data and/or failure to take prompt action against hazardous drivers as evidence of negligence. Confusion exists regarding when ELD devices must be implemented, how the electronic data must be retained, and the liability exposure that possession of ELD data creates for the business. This article addresses the five most common points of confusion.



Top 5 Common Misunderstandings

1

ELD is permissive, not mandatory

2

Federal regulations do not apply if drivers never leave the state

3

There is no duty to preserve ELD data

4

ELD data cannot be discovered or used in civil litigation

5

There is no duty to audit ELD data



Common Misunderstanding No. 1 ELD is permissive, not mandatory.

Commercial drivers have long been required to keep and retain handwritten logs regarding their daily driving activities. Some businesses that transport goods have failed to implement ELDs, believing that the logs are sufficient to comply with federal requirements. The truth, however, is that federal law generally requires “motor carrier[s] operating commercial motor vehicles . . . [to] install and require each of its drivers to use an ELD to record the driver’s duty status[.]”³ “Motor carrier” is defined to include both “for hire motor carrier[s]” and “private motor carriers[.]”⁴ A “for hire motor carrier” is a “person engaged in the transportation of goods or passengers for compensation.”⁵ A “private motor carrier” is “a person who provides transportation of property or passengers, by commercial motor vehicle, and is not a for-hire motor carrier.”⁶

A “Commercial motor vehicle” means either:

- a. “a gross combination weight rating or gross combination weight of...26,001 pounds or more, whichever is greater, inclusive of a towed unit(s) with a gross vehicle weight rating or gross vehicle weight of more than...10,000 pounds, whichever is greater; or
- b. “a gross vehicle weight rating or gross vehicle weight of...26,001 pounds or more, whichever is greater.”⁷

A notable exception to the mandatory ELD requirement is if a driver is required to complete a “record of duty status [ROD] on not more than 8 days within any 30-day period.”⁸ A driver must generally complete a ROD for each 24-hour period.⁹ The purpose of this exception is to “provide relief for drivers who intermittently needed to use RODS, for example, drivers in short-haul operations who usually use time cards or occasional CMV drivers.”¹⁰ It is sufficient for these drivers to record their driving activities manually, rather than using ELD.¹¹

Common Misunderstanding No. 2 Federal regulations do not apply if drivers never leave the state.

It is a mistake to presume that, just because a particular driver travels exclusively in a single state, he or she is not subject to the FMCSR. On the contrary, if a driver is transporting product or material that is itself in the “interstate commerce stream,” a court may conclude the FMCSR applies to that driver.¹² The FMCSR broadly define interstate commerce to mean “trade, traffic, or transportation in the United States:”

- a. Between a place in a State and a place outside of such State (including a place outside of the United States);
- b. Between two places in a State through another State or a place outside of the United States; or
- c. Between two places in a State as part of trade, traffic, or transportation originating or terminating outside the State or the United States.¹³

Thus, the FMCSR may apply—and installation and use of ELD may be obligatory—regardless of whether a given truck or driver crosses state lines. If the cargo or property being transported has or will cross state lines, that is likely sufficient to require use of ELD.

Common Misunderstanding No. 3 There is no duty to preserve ELD data.

If the above prerequisites are satisfied and no other exception applies, businesses have a duty to preserve ELD data. At a minimum, the FMCSR requires that ELD data must be preserved and stored for six months.¹⁴ The Federal Motor Carrier Safety Administration rejected the assertion that a six-month retention obligation was overly burdensome based upon evidence that six months of data from a single device totaled only 10MB of data.¹⁵



If the business has reason to know litigation involving a truck with ELD is likely, failure to preserve the data beyond six months may lead to judicial sanctions for spoliation of evidence. Courts will look at the specific facts of the accident to analyze whether the carrier had reason to believe litigation was likely.¹⁶ Relevant facts include whether a traffic citation was issued, whether any person involved had physical injuries, the extent of property damage and who the carrier believed was responsible for the accident.¹⁷

Common Misunderstanding No. 4 **ELD data cannot be discovered or used in civil litigation.**

The FMCSR is silent about the use of ELD data in civil litigation. No statute or rule specifically discusses the subject. One erroneous inference from this omission is that ELD data has no place in private litigation. Courts that have considered use of ELD data in civil litigation have uniformly rejected that idea. Courts have permitted discovery into ELD data.¹⁸ Installation of ELD on a truck, though required by federal law, may be cited by a judge as evidence of a carrier's control over a driver supporting the carrier's vicarious liability or negligent supervision.¹⁹ Experts have been allowed to offer testimony in court premised upon ELD data.²⁰ Put simply, businesses should presume that ELD data may be discovered and used in court to the same extent as any other documents or record.

Common Misunderstanding No. 5 **There is no duty to audit ELD data.**

Although the FMCSR does not impose auditing requirements for ELD data, it is a significant mistake to conclude that a business cannot be punished for failing to do so. Neglect of ELD data may be used as evidence of the carrier's indifference supporting a claim for punitive damages. At a minimum, the absence of ELD audits may create an issue that must be resolved at trial—necessitating substantial time and expense and subjecting the carrier to the risk of a major damages award.²¹





ELD IMPLEMENTATION AND ONGOING MANAGEMENT

For businesses currently utilizing ELDs or that have interest in implementing a system to take advantage of the safety and compliance-related benefits, there are steps businesses can take to mitigate the legal risk related to recording and preserving ELD data.

As discussed in misconception number five above, choosing not to audit ELD data presents a legal risk to an organization. It is common for leadership at a business using ELDs to be apprehensive about adopting a system that tracks more than the most rudimentary data required to meet federal regulations. In the construction industry, it is common for the foreman of a construction crew to be the assigned driver for their crew. Leadership may worry that the ELD data might reveal that a foreman, who is a top performer, is an aggressive driver.

There are a number of ways to deal with this and other similar issues that may arise from tracking detailed ELD data. Many companies navigating these issues are starting to rethink their internal policies to strike a balance between the safety-related benefits of these systems and the legal risk of tracking extensive information.

In the construction company example above, many companies are starting to ask themselves, “If our foreman is an aggressive driver, why can’t another member of the crew be the driver?” If the employer typically has three to four people traveling in a truck every day, it might choose to assign the second most senior person on the crew to be the driver. A foreman is typically on the phone or needed to respond to emails and texts regularly, which can lead to distracted driving. In this example, it is probably best to have someone other than the foreman do the driving.

CONCLUSION

With a better understanding of the requirements related to ELDs and associated legal risks, the options businesses have when selecting ELDs, and the potential ELDs have to improve driver behavior and significantly reduce the safety-related risk for commercial vehicle fleets, corporate leadership should take time to analyze their current ELD strategy.

Reach out to your Hays representative or to the article authors with questions or to begin facilitating internal discussions about ELD. Most businesses can craft an ELD strategy that strikes a balance between gaining the safety-related benefits of ELDs while minimizing the legal risk they present.

ABOUT THE AUTHORS

Bryan Huntington is a member of the construction and surety team at the law firm of Larkin Hoffman.

Contact Bryan at
bhuntington@larkinhoffman.com

Justin Gillette is the Hays Companies Vice President and Construction Practice Leader at the Minneapolis office.

Contact Justin at
jgillette@hayscompanies.com





Sources:

¹ 49 C.F.R. § 390.1, *et seq.*

² <https://www.fmcsa.dot.gov/hours-service/elds/eld-functions>.

³ 49 C.F.R. 395.8(a)(1)(i).

⁴ 49 C.F.R. 390.5.

⁵ 49 C.F.R. 390.5T.

⁶ *Id.*

⁷ 49 C.F.R. § 383.5.

⁸ 49 C.F.R. 395.8(a)(1)(iii)(A)(1).

⁹ 49 C.F.R. 395.8(a)(1).

¹⁰ *Electronic Logging Devices and Hours of Service Supporting Documents*, 80 FR 78292-01, 2015 WL 8773414, (Dec. 16, 2015) pg. 78308.

¹¹ 49 C.F.R. 395.8(a)(1)(iii)(A)(1).

¹² *Thoms v. ABF Freight System, Inc.*, 31 F.Supp.2d 1119, 1125 (E.D. Wis. 1998) (examining whether the transportation of property is “part of the interstate commerce stream.”) (citation omitted); *Baez v. Wells Fargo Armored Service Corp.*, 938 F.2d 180, 182 (11th Cir. 1991) (concluding that armed security guards transporting financial instruments were engaged in interstate commerce, despite the fact the drivers never crossed state lines).

¹³ 49 C.F.R. § 390.5.

¹⁴ 49 C.F.R. § 395.22(i) (“A motor carrier must retain for 6 months a back-up copy of the ELD records on a device separate from that on which the original data are stored.”).

¹⁵ *Electronic Logging Devices and Hours of Service Supporting Documents*, 80 FR 78292-01, 2015 WL 8773414, (Dec. 16, 2015) pg. 78328.

¹⁶ *Lee v. Horton*, No. 2:17-cv-2766, 2018 WL 4600303, at **2-3(W.D. Tenn. September 25, 2018).

¹⁷ *Id.*

¹⁸ *Cabarris v. Knight Transportation, Inc.*, No. 17-CV-6259, 2018 WL 5650012, at *1 (W.D.N.Y. Oct. 31, 2018) (permitting discovery of ELD data).

¹⁹ See generally *Soto v. Shealey*, 331 F.Supp.3d 879 (D. Minn. 2018).

²⁰ See *Ferguson v. Nat'l Freight, Inc.*, No. 7:14-CV-00702, 2016 WL 1192702, at *4 (W.D. Va. Mar. 22, 2016) (“[T]he court has no difficulty finding that EDR data allows an expert to opine as to a vehicle’s speed at any given point in time.”).

²¹ See *Pracht v. Saga Freight Logistics, LLC*, No. 3:13-CV-529-RJC-DCK, 2015 WL 5918037, at *7 (W.D.N.C. Oct. 9, 2015).