



# Policies To Prevent Nuclear Verdicts

Presented by Matthew Begley & Joelle Nelson

# Presenters

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# Presentation Focus

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- General information on Federal Motor Carrier Safety Regulations (FMCSRs).
- FMCSRs relating to:
  - Controlled substances/alcohol;
  - Inspections/repairs/maintenance;
  - Communications;
  - Hours of service; and
  - Driver qualifications.
- Evidence preservation by the company.
- Preparation for deposition of driver and corporate representative.
- Nuclear verdicts.

# UNDERSTANDING POLICES, PROCEDURES & COMPLIANCE

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# Significant Statistics

**Based on 2021 (most recent) statistics from the Federal Motor Carrier Safety Administration (FMCSA):**

- On average, fatal truck accidents occur nearly 11 times per day across the country, killing yearly almost 4,000 and injuring more than 100,000.
- There were 15.51 fatal large truck crashes per million people in the United States in 2021, a 46-percent increase from 10.6 in 2010.
- In 2021 there were 5,700 large truck fatalities, which was an increase of 18% over the prior year.

# General Information & Definitions re FMCSRs

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## What are the FMCSRs:

- Regulations are written and issued by the Federal Motor Carrier Safety Administration (FMCSA)
- Compiled in the U.S. Code of Federal Regulations under 49 CFR Parts 300-399.
  - Federal law
- Where can they be found
  - Up to date regulations found at [www.fmcsa.dot.gov/regulations](http://www.fmcsa.dot.gov/regulations).

# General Information & Definitions re FMCSRs

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## Importance of the FMCSRs:

- Provide a rules approach to safety (who, what, where, when and how of safely operating a commercial motor vehicle (CMV).
- Why is this significant in what we do:
  - Rule breakers;
  - Framing a case; and
  - Try to establish a “higher” standard of care.

# Who Is Required To Comply With FMCSRs

## Motor Carrier:

- In general, the truck driver's employer is the motor carrier and its officers and agents.
- 390.5 - Employer is any person engaged in a business affecting interstate commerce who owns or leases a CMV in connection with that business or assigns employees to operate it.
- 390.5 – *Motor Carrier* is a for-hire motor carrier or a private motor carrier.
  - Including the following:
    - Agents;
    - Officers;
    - Representatives;
    - Employees responsible for hiring, supervising, training, assigning or dispatching of drivers;
    - Employees concerned with the installation, inspection, and maintenance of motor vehicle equipment and/or accessories.



# Who Is Required To Comply With FMCSRs

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## Truck Driver:

- In general, the employee is the truck driver.
- 390.5 – Employee is any individual employed by an employer who in the course of his employment directly affects CMV safety.
  - Such terms include a CMV driver (including an independent contractor while in the course of operating a CMV), a *mechanic*, and a *freight handler*.
- 390.5 – Driver is any person who operates any CMV.

# Who Is Required To Comply With FMCSRs

## Duties of a Motor Carrier:

- 390.3(e)(1) – every employer is required to be knowledgeable of and comply with all regulations that are applicable to the motor carrier's operations.
- 390.11 – whenever a duty is put on a driver, it is the duty of a motor carrier to require the observance of the duty.
- Sec 390.3(e)(2) and (3) – every driver and employee shall be *instructed* regarding and *shall comply with all regulations* that are applicable to the motor carrier's operations and all motor vehicle equipment and accessories required by this subchapter shall be maintained in compliance with all regulations that are applicable to the motor carrier's operations.
- Sec 392.6 – no motor carrier shall schedule, permit, or require the operation of a CMV between points in such period of time as would require the CMV to speed.

# Who Is Required To Comply With FMCSRs

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## **Duties of a Driver:**

- 390.3(e)(2) – every driver and employee are required to be instructed in and comply with all applicable federal regulations.
- 383.111 – a truck driver is required to have knowledge in 20 general areas including: safe operations, safe vehicle control systems, basic control, shifting, backing, visual search, communication, speed management, space management, night operation, extreme driving conditions, hazard perception, emergency maneuver's, skid control and recovery, basic inspection, hazardous materials, mountain driving, fatigue, and awareness.

# Controlled Substances, Alcohol Use & Testing

- 382.101 – purpose is to establish programs to help prevent accidents and injuries from the misuse of alcohol or controlled substances by CMV drivers.
- 382.103 – applies to every person and all employers of all persons who operate a CMV.
- 382.201, 382.205 and 382.205 – no driver *shall report for duty* or remain on duty while having an alcohol concentration of .04 or greater while performing safety sensitive functions.
- 383.213 and 383.215 – no driver shall report for duty or remain on duty requiring the performance of safety sensitive functions when the driver uses any controlled substance except as instructed by a licensed doctor and the substance will not adversely affect the driver's ability to safely operate a CMV.
- 382.107 – “Safety Sensitive Function” means all time, from the time the driver begins to work or is required to be in readiness of work until he or she is relieved from work.
- 382.507 – an employer or driver who violates the requirements of this part (sec 382) shall be subject to civil and criminal penalties.

# Controlled Substances, Alcohol Use & Testing

## **Motor Carrier Duties for Drug and Alcohol Testing:**

- 382.601: Have a drug and alcohol testing policy in place.
- 382.601: Provide driver training on drug and alcohol use policy.
- 382.60: Provide supervisor training on drug and alcohol use.
- 382.413: Request alcohol and controlled substance information from prior employers.
- 382.305: Conduct a random testing policy.
- 382.307: Perform reasonable suspicion testing.
- 382.309: Perform return to duty testing.
- 382.311: Perform follow up testing.
- 382.303: Provide information, procedures and instructions for drivers regarding post-accident testing prior to conducting safety sensitive functions and perform post-accident drug and alcohol test.

# Drugs & Other Substances

- 392.1 – Every motor carrier employee responsible for the management, maintenance, operation, or driving of commercial motor vehicles, or the hiring, supervising, training, assigning or dispatching drivers, shall be instructed in and comply with the rules forbids drivers from using or being under the influence of drugs and alcohol while operating CMVs and for a period of time before operating a CMV.
- 392.5(a)(a) – No driver shall (1) use alcohol, as defined in Sec 382.107 or be under the influence of alcohol, *within 4 hours* before going on duty or operating or having physical control of a commercial motor vehicle; or (b) use alcohol, be under the influence of alcohol, or have any measured alcohol concentration or detected presence of alcohol, while on duty, o operating, or in physical control of a commercial motor vehicle.
- Note: 392.5(b)(1) and (2) – motor carrier may not permit a driver who appears to have used or is showing conduct suggesting use within preceding 4 hours.
- 392.4 – No driver shall be on duty and possess, be under the influence of, or use any of the following drugs or other substances:
  1. An amphetamine or formulation thereof including but not limited to “habit forming drug.”
  2. A narcotic drug or any derivative thereof; or
  3. Any other substance, to a degree which renders the driver incapable of safely operating a motor vehicle.

# Inspections/Repair/Maintenance

## 392.7 – Equipment Inspection and Use

- No CMV should be driven unless the driver is satisfied that the following parts and accessories are in good working order, nor should any driver fail to use or make use of such parts and accessories when and as needed:
  - Service brakes, including trailer brake connections;
  - Parking (hand) brake;
  - Steering mechanism;
  - Lighting devices and reflectors;
  - Tires;
  - Horn;
  - Windshield wiper or wipers;
  - Rear-vision mirror or mirrors; and
  - Coupling devices.

# Inspections/Repair/Maintenance

## 396.3 – Systematic Inspection, Repair and Maintenance

- Motor carriers, except for a private motor carrier of passengers (nonbusiness), must maintain or cause to be maintained, records for each motor vehicle they control for 30 consecutive days and must include:
  - identification of the vehicle including company number and if the vehicle is not owned the record shall identify the name of the person furnishing the vehicle.
  - a means to indicate the nature and due date of the various inspection and maintenance operations to be performed
  - a record of inspection, repairs and maintenance indicating their date and nature
  - a record of tests conducted on pushout windows, emergency doors and emergency door marking lights on buses.
- **Key distinction with record retention** - 393.3(c) states that records under this section shall be retained where the vehicle is either housed or maintained for a period of 1 year and for 6 months after the motor vehicle leaves the motor carrier's control (sold or otherwise discarded).



# Inspections/Repair/Maintenance

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## 396.13 – Pre-Trip Inspection

- Before driving a motor vehicle, the driver shall:
  - Be satisfied that the motor vehicle is in a safe operating condition.
  - Review the last driver's vehicle inspection report.
  - Sign the report, only if defects or deficiencies were noted by the driver who prepared the report to acknowledge that the driver has reviewed it and that there is a certification that the required repairs have been performed.

# Inspections/Repair/Maintenance

## 396.11 – Post-Trip Inspection

- Every motor carrier shall require its drivers to report, and every driver shall prepare a report in writing at the completion of each day's work on each vehicle operated. The report shall at least cover the following areas:
  - Service Brakes (including trailer);
  - Parking Brake;
  - Steering mechanism;
  - Lighting devices and reflectors;
  - Tires;
  - Horns;
  - Windshield Wipers;
  - Rear Vision Mirrors;
  - Coupling Devices;
  - Wheels and Rims; and
  - Emergency Equipment.

# Communication – Texting/Mobile

- **392.80 – Texting**

- No driver shall engage in texting while driving; and
- No motor carrier shall allow or require drivers to engage in texting while driving.

- **392.82 – Handheld Mobile Phone**

- No driver shall use a handheld mobile phone while driving a CMV; and
- No motor carrier shall allow or require its driver to use a hand-held phone.
- Emergency exception – using a handheld mobile phone is impermissible by drivers of a CMV when necessary to communicate with law enforcement officials or other emergency services.

# Driver's Hours of Service – Regulations

1. Hours of service regulations:
  - Sec 395 imposes guidelines for how long and how often drivers can operate a CMV.
  - Limits are placed for when and how long a driver may drive to ensure drivers stay awake and alert while driving to reduce the possibility of fatigue.
2. Who must comply:
  - ***All motor carriers and drivers that operate a CMV 10,001 pounds or more in interstate commerce.***
  - Must look to state's DOT and if it has adopted Sec 395 hours of service regulations for CMVs operated in interstate commerce.
3. Calculation of hours:
  - 395.3(a)(3) - 11 Hour Driving Rule
    - Driver is limited to 11 hours of driving time.
    - "Drive time" means: all time spent behind the wheel of a CMV.
    - After 11 hours of driving a CMV, a driver **MUST** have 10 consecutive hours off duty before he can resume driving.

# Driver's Hours of Service – Regulations

- **395.3(a)(2) – 14 Consecutive Hour Duty Rule:**

- Driver cannot drive beyond 14 consecutive hours ***after coming on duty.***
- The 14-hour window begins when the driver starts any kind of work.
- Once a driver has reached the end of the 14 consecutive hour period, then the driver cannot drive again until the driver has been off duty for another 10 consecutive hours.
- Driving is limited to the 14 consecutive hour period even if the driver takes some off duty time, such as a lunch break or nap during those 14 hours.

- **Mandatory Break Provision:**

- Truck drivers cannot drive for more than 8 straight hours without taking an off-duty break of at least 30 minutes.

# Driver's Hours of Service – Regulations

## Exceptions to Hours-of-service Requirements

- 395.1(b) – If unexpected adverse driving conditions occur, a driver may operate a CMV up to 2 extra hours to complete what could have been driven in normal conditions.
- 6/1/2020 amendment adds an additional 2 hours. This means that a driver could drive up to 13 hours (2 hours past the 11-hour rule (13 hours) within a 16-hour window).
- Adverse driving” conditions are:
  - Snow/ice/sleet;
  - Fog; and
  - Unusual road/traffic conditions not known/Lane shut down due to crash.

# Truck Driver Qualifications

## **391.1 – minimum qualifications:**

- Written application.
- 3-year driver history.
- Information from previous employers from the past 3 years.
- Documentation they meet minimum medical/physical qualifications.
- Drug screening.
- Documentation of road test completion.
- Ability to speak English.
  - Employer must maintain alcohol and drug testing records for prior employees.
  - May be a way for plaintiff attorney to gather potentially damaging information suggesting the applicant was not truthful.

# PRESERVATION OF EVIDENCE





# Preservation of Evidence

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- May be necessary to tow your client's truck so that ECM data is preserved
  - BEWARE... improperly towing truck risks loss of ECM data.
- Preserve truck and/or trailer for up to one (1) month.
  - Depending on need of company to put it in use.
  - 2-3 weeks is probably sufficient.
  - Place potential claimants on notice of intent to release and/or repair.
  - Check local jurisdiction law.
  - Avoid spoliation of evidence claims.

# Preservation of Evidence Letters

## *Potential Claimants*

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- Request preservation of:
  - Vehicle and contents;
  - GPS and ECM equipment;
  - Cell phone and records (including texts);
  - Photos and videos;
  - Social media accounts (perform search first); and
  - Blood and urine samples.
- Request opportunity to inspect (vehicles, cell phones, etc.).

# Preservation of Evidence Letters

## *Insured – Driver & Motor Carrier*

Tractor/Vehicle  
and Contents

Logbooks  
(now e-logs) –  
6 months

Trip reports

Personnel and  
DQ Files

Cell Phone  
Records  
(including texts)

ECM

Tracking and  
GPS Data

Maintenance  
Records

DOT Inspection  
Reports

Manuals,  
Policies and  
Procedures

Load documents  
(bills of lading,  
gate receipts,  
etc.)

Contracts

# DEPOSITION PREPARATION: DRIVER & CORPORATE REPRESENTATIVE



## Avoid Endangering the Motoring Public

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Safety compliance and accident record;

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Fleet safety and driver training programs; and

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Ability to demonstrate compliance with the FMCAAs

# What Will The Jury Hear About Your Company?

Features to help you feel safe and secure while you ride

Our community's safety is our top priority.

Your peace of mind is our peace of mind.

Safety Advisory Council

Ongoing monitoring

## We want every ride to be a safe ride.

We're committed to the safety of our community.

**SAFETY BUILT IN**

WE SCREEN AND EDUCATE EVERY DRIVER

We prioritize safety

KEEPING SAFETY A PRIORITY

We've got you — 24/7

Predicting when someone needs help

We're all in this together

We don't stop after just one background check

safety is built into every stage of your journey

Safety education

We're here for you every step of the way

# Identify Your Witness Before You Need a Witness

Applies to companies of all sizes.

Is formal witness training appropriate?

# Witness Education & Consistency

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- Educate the Witness(es);
- Determine Witnesses Mental Status – Know it All/Pliable/Terrified;
- Cover Legal Issues Present;
- What Does the Witness Actually Know; and
- Cover Documents, Regulations, Policy, Procedures, and Website.



# The Corporate Representative

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- Determine Strengths.
- Determine Weaknesses.
- Determine Inconsistencies.
- Prepare, Test, Continue to Prepare.
- GOAL = No Surprises!

# SOLUTIONS FOR COMBATTING NUCLEAR VERDICTS



# Nuclear Verdicts

- Nuclear verdicts – defined as jury verdicts of \$10 million or more – are on the rise.
- They are most commonly awarded against corporate defendants.
- The sums being awarded by juries are largely comprised of “punitive damages” – intended to punish the defendant/corporation.
- The trend is that only a small portion of nuclear jury awards consist of “compensatory damages” i.e., compensation to the plaintiff for the physical/economic injuries claimed (Ex: a \$400 million verdict is awarded, \$15 million in compensatory damages and \$385 million in punitive damages).

# The Monopoly Money Effect

- Jurors' perceptions of value have changed *dramatically*:

- Younger jurors carrying significant student loan debt.
- Powerball is currently \$875 million.
- Large sports contracts.
- Companies now worth *billions and trillions*:
  - Facebook
  - Google
  - Companies often avoid taxes



- **THE RESULT?**: Jurors have become desensitized to large numbers and massive dollar awards. They are already wired to distrust big companies and their lawyers. Combined with shorter attention spans and a belief the system is rigged = Nuclear Verdicts.

# WHY? A Perfect Storm...

- Have *negative* opinions regarding corporations and businesses.
- Have *heightened expectations* for a healthy lifestyle and workplace.
- They are *desensitized* to large numbers.
- They are *financially strained*.
- They have *short attention spans*.
- Have a “*change the world*” mentality and are *susceptible* to the so-called “Reptile Effect.”

# Combating Jury Views of Corporations

- To combat anti-corporation biases, weave positive company themes into the trial.
- Try to have a company representative present at trial but be strategic in your selection of this representative.



Julie M. Beckley, Esq., Ethical Considerations for Selecting and Catering to Millennial Jurors, Dentons, June 2019

## Issues Unique to a Gen Z Juror

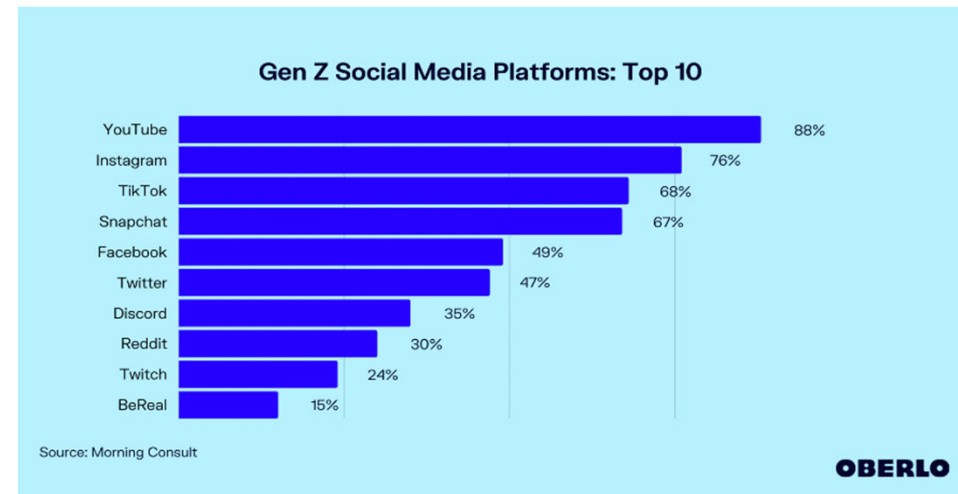
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- The “googling juror.”
- Their level of civic engagement may suggest they actually want to serve on a jury, unlike other generations.
- Due to the increased use of short-form video apps, such as YouTube and TikTok, they have an even shorter attention span than Millennials, an average of 8 seconds.

# Strategic Jury Selection Regarding Millennial & Gen Z Jurors

## In Jury Selection:

- Identify and strike the worst jurors who are most likely to be susceptible to the Reptile Strategy, such as those with anti-corporate sentiments and a strong desire to enact social change.
  - Check social media (don't forget Baby Boomers!);
  - Hire Jury Consultants;
  - Utilize Jury Questionnaires; and
  - Beware the juror who really wants to serve.





# At Trial, Bridge the Gap Between Counsel Table & Millennial/Gen Z's Jurors

- Be fluent in technology – lack of skill in using technology will be perceived as a weakness.
- Your trial team should be diverse, where possible: women, minority, and younger attorneys should be given a meaningful role during trial.
- If you don't have evidence, explain why:
  - Younger generations expect everything to be accessible online or captured by video surveillance.

[www.isaacwiles.com](http://www.isaacwiles.com)  
Julie M. Beckley, Esq., *Ethical Considerations for Selecting and Catering to Millennial Jurors*, Dentons, June 2019  
Kimberly Carlton Bonner, *What Do Judges Need To Know About Gen Z?*, Duke L. Rev, 2023

- Bite-sized, concise information with a strong hook – these generations are accustomed to quick, on-demand information.
- Key themes should be short and in simple language:
  - These are generations that tweet, post, and use Emojis; and
  - If possible, the entirety of the defense case should be short and succinct, including the cross-examinations and opening statements/closing arguments
- Keep Millennial and Gen Z jurors focused and interested throughout the trial
  - Do not want to be viewed as wasting their time
  - Remember, Millennials' and Gen Z's attention spans average 12 seconds or less. 🤖

Julie M. Beckley, Esq., *Ethical Considerations for Selecting and Catering to Millennial Jurors*, Dentons, June 2019

# Questions?

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## LEWIS BRISBOIS LOCATIONS NATIONWIDE

### ARIZONA

Phoenix

### CALIFORNIA

Indian Wells  
Los Angeles  
Orange County  
Sacramento  
San Bernardino  
San Diego  
San Francisco  
Temecula  
Walnut Creek

### COLORADO

Denver

### CONNECTICUT

Hartford

### DISTRICT OF COLUMBIA

Washington, D.C.

### DELAWARE

Wilmington

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Fort Lauderdale  
Miami  
Tampa

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Atlanta  
Savannah

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Madison County

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Indianapolis  
Northwest Indiana

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Wichita

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Lexington

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Roanoke

### WASHINGTON

Seattle

### WEST VIRGINIA

Charleston  
Weirton



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