



MARCELLO & KIVISTO

LLC

TRANSPORT CENTER UPDATE

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CSA UPDATE

August brought more fine-tuning of the CSA program. Input from trucking companies, law enforcement, and others have brought changes to refine the scorecard that will measure our industry.

These changes include the following:

-Power Units and Vehicle Miles Travelled will be the measure of exposure in the Unsafe Driving BASIC and Crash Indicator, replacing the use of only Power Units;

-Similarly, these two groups will no longer use Power Units to determine "peer groups" (now called "safety event grouping"), but will use number of crashes for the Crash Indicator and number of inspections with a violation for the Unsafe Driving BASIC;

-In the Controlled Substance/Alcohol

BASIC, the measure of exposure will now be the number of relevant inspections and no longer the number of Power Units;

-Adjustments will be made in the weighting of several roadside inspection point assessments;

Additionally, carriers may now preview their individual safety assessments on the Data Preview Website effective August 16, 2010. To visit the Data Preview website click [here](#) and for frequently asked questions click [here](#).

Keep up with the ongoing changes to CSA 2010 on our [Blog](#), [Twitter](#), and [Facebook](#).

Review of Personnel Files by Drivers

Whether a driver has the right to review his/her personnel file depends on the circumstances. Under FMCSA regulations, a driver has the right to review investigation information provided to a prospective employer by a previous employer under 49 CFR 391.23. Also, some states have enacted laws that provide employees with the right to review their personnel files while other states have not.

49 CFR 391.23 provides a driver the right to review and challenge documents provided by a previous employer to a prospective employer during the prospective employer's investigation into the driver's prior employment during the application process.

For drivers who have had DOT regulated employment for the preceding three years, a prospective employer must notify the driver that the driver has the following rights:

(i) The right to review information received by previous employers;

(ii) The right to have errors in the information corrected by the previous employer and for that previous employer to re-send the

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CSA 2010 Resources

- **FMCSA CSA 2010 Proposed Rule Making** click [here](#).

- **CSA 2010 Webpage** click [here](#).

- **Powerpoint presentation regarding CSA 2010** presented by ATA - to obtain a copy contact us.

- **Powerpoint presentation regarding CSA 2010** presented at Marcello & Kivisto webinar on CSA 2010 - to obtain a copy contact us.

- **CSA 2010 Frequently Asked Questions** click [here](#).

- **CSA 2010 Outreach** click [here](#).

- **CSA 2010 Safety Analysis Checklist** developed by R&L Carriers - to obtain a copy contact us.

- **CSA 2010 Spreadsheet of Violation Points** - to obtain a copy contact us.

corrected information to the prospective employer;

(iii) The right to have a rebuttal statement attached to the alleged erroneous information, if the previous employer and the driver cannot agree on the accuracy of the information. (49 CFR 391.23(i)(1)).

A driver must submit a written request to the prospective employer requesting the driver be permitted to review the investigative file provided by the previous employer. This written request may be submitted at the time of application or within thirty (30) days after hire or notification of denial of employment by the prospective employer. (49 CFR 391.23(i)(2)).

When a written request is submitted, the prospective employer must provide the requested information within five (5) days of receiving the written request from the driver. However, if the requested information was not yet received by the prospective employer at the time of the written request, the prospective employer must provide the information within five (5) days of its receipt of the requested information from the previous employer.

If a driver believes that any of the investigative information provided is incorrect, he/she may 1) submit a request to the previous employer that the previous employer correct the information and/or 2) submit a rebuttal to be maintained as part of the safety performance information (following the procedures laid out in Sec.386.12.).

In determining whether or not an employee has a right to view his/her personnel file, one must also look to state law. Several states have enacted statutes providing employees with the right to review their personnel file. For instance, Pennsylvania has enacted the Personnel Files Act (43 P.S. §1321, et. seq.). Pennsylvania's Personnel Files Act provides both private and public employees the right to inspect their personnel files.

The Personnel Files Act does provide some limitations to an employee's review of the records. An employer may require an employee submit a written request for inspection in order to aid the employer in determining what documents are relevant to the employee's request for inspection. Also, the employer does not need to permit the employee to copy the file and a

- CSA 2010 Webinars by Marcello & Kivisto's Doug Marcello click [here](#).

M&K Upcoming Events

- M&K's Annual Seminar - Keep a lookout for information regarding M&K's upcoming seminar.

Upcoming Events in the Industry:

Sept. 8th-1pm-4pm CT Carriers in CSA pilot states will share there experiences with CSA through a live webinar. For more information or to register click [here](#).

Sept. 19th-25th - National Truck Driver Appreciation Week

Sept. 20th-23rd - CVSA Annual Conference, Anaheim, CA

Sept. 21st - USDOT Distracted Driving Summit, Washington, DC

Updates for Previous Newsletter Article Topics

representative of the employer may be present during the inspection. Although, an employee will not be permitted to make copies of the file documents, he/she may take notes.

Under the Act, "employee" does not refer to terminated employees. However, case law does suggest that if a terminated employee requested to see his/her personnel file contemporaneously with the termination or within a reasonable time after being terminated they may be entitled to see the file.

Therefore, even though an employee may have the right to inspect a personnel file the same does not necessarily hold true for a terminated employee. However, a terminated driver may have access to the investigative information provided to a prospective employer pursuant to 49 CFR 391.23 by a previous employer.

Discovery Matters

Discovery is one of the most important steps in the litigation process. Discovery can set the tone for the litigation. For instance, responses to discovery may be used against a party at trial. We take the aggressive approach of serving discovery upon opposing parties as soon as the Complaint and Answer have been filed in an effort to lock the party into a set of facts before they really have a chance to develop their version of the case with the assistance of counsel.

Methods of discovery include; depositions, interrogatories, request for production of documents, independent medical examinations, subpoenas and requests for admissions. All of these are important tools in determining the position and support for the opposing parties' claims/defenses in their case.

Discovery is broad. Parties are permitted to discover any matter, not privileged, which is relevant to the subject matter of the action. Generally, the courts allow discovery, however, discovery is not to be used as a fishing

- **Updated ATRI Compendium on Idling Regulations**- available by clicking [here](#).

- **Updated ATRI Cab Card with Idling Regulations** - available by clicking [here](#).

- **Updated State Laws Regarding Handheld Cell Phone and Texting Bans** - available by clicking [here](#).

Documents and Resources Available From M&K

If you are interested in obtaining copies of the following, please call or email.

- **Hours-of-Service Rules Safety Impact 2010 Analysis** compiled by ARTI in May 2010

- **Accident preparedness DVD and/or forms**

- **Powerpoint presentation regarding CSA 2010** presented by ATA

expedition. In fact, the information sought in discovery does not necessarily need to be admissible at trial, it simply needs to be reasonably calculated to lead to admissible evidence.

Documents and information may be protected from discovery if the information is privileged. The most common privileges applicable to the litigation of motor vehicle accidents are attorney client privilege and attorney work product. Attorney client privilege protects confidential communications between a client and his/her attorney. Work Product Privilege protects the mental impressions of a client's attorney, which may include the attorney's notes, opinions, research, memos and legal theories of the case. Neither of these privileges are absolute and the court may order disclosure despite the existence of either privilege.

In responding to discovery, a party cannot fail to disclose a document or information, simply because the document or information is not favorable to that party's case. Thus, when documenting an accident and keeping general records, it is important to be aware of the possibility that those documents and records will most likely be discoverable, which is one of the reasons we recommend not taking a driver's statement following an accident. The statement will be discoverable and may be used against the client later in litigation.

Also, keep in mind, that company emails concerning the accident are generally discoverable, unless they fall under a privilege. Therefore, the content of company emails regarding the accident should be limited to relevant information.

Free Presentations for Your Driver Meetings

We provide FREE presentations at driver's meetings geared toward our client's topics of interests. Recently, we finished filming a mock trial cross-examination of a driver as part of a new presentation.

Please let us know if you are interested.

- Powerpoint presentation by Dr. Hickman regarding Distracted Driving Study presented at M&K Seminar

To see M&K's recent case results and articles click [here](#).

Other Resources

To get construction and accident updates for Pennsylvania roadways click [here](#).

FMCSA Distracted Driving Instructional Videos click [here](#).

[PA Motor Trucking Association](#)

[American Trucking Association](#)

[Trucking Industry Defense Association \(TIDA\)](#)

[Federal Motor Carrier Safety Administration](#)

[PA Travel Information To-Go](#)

For more resources click [here](#)

Instructional Video from FMCSA and PHMSA for Cargo Tank Drivers

FMCSA in association with PHMSA has produced an instructional video to be used as a training aid for operators of cargo tank motor vehicles that transport hazardous materials. The video discusses four potential causes of roll-overs; 1) vehicle design and performance, 2) load effects, 3) highway factors and 4) driver factors, with the focus on driver factors.

The videos can be accessed through FMCSA's website (click [here](#)) and PHMSA's website (click [here](#)).

About Our Firm

Founded in 2005, **M&K, LLC** is dedicated to and focused upon transportation law and the needs of their transportation clients. Since opening in 2005, **M&K, LLC** has expanded its office to provide clients with the attention and availability they deserve.

CONGRATULATIONS TO THE 2010

NATIONAL TRUCK DRIVING

CHAMPIONSHIP WINNERS

M&K would like to congratulate Carl Krites, a Con-way Freight professional truck driver, who was named Grand Champion.

Congratulations to all of the competitors and winners!

For more information or to see a list of this year's winners click [here](#).

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LET US KNOW WHAT YOU THINK

We want to focus our articles on the issues and concerns of our subscribers. If you have suggestions for our newsletter please do not hesitate to contact us.

QUOTE OF THE MONTH

"Football is an honest game.
It's true to life. It's a game
about sharing. Football is a
team game. So is life."

~Joe Namath



DISCLAIMER: The Information Contained in this Newsletter is NOT Legal Advice.

