

# MEMORANDUM

To: File  
From: Bob Church, Orem City Attorney's Office  
Date: November 6, 2012  
Re: CDL Drivers

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A plea in abeyance and diversion agreement are not allowed for CDL holders under the CFR's. "Hiding" or masking these types of convictions are prohibited under federal guidelines. A conviction does not include a non-moving violation; i.e. parking.

CDL Rules and Regulations webpage:

<http://www.fmcsa.dot.gov/rules-regulations/rules-regulations.htm>

## CFR 383.3 Definitions

Conviction means an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or by an authorized administrative tribunal, an unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court, a plea of guilty or nolo contendere accepted by the court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated."

Conviction does not include a parking violation. CFR 383.31

Disqualification (CFR 383.51) means any of the following three actions:

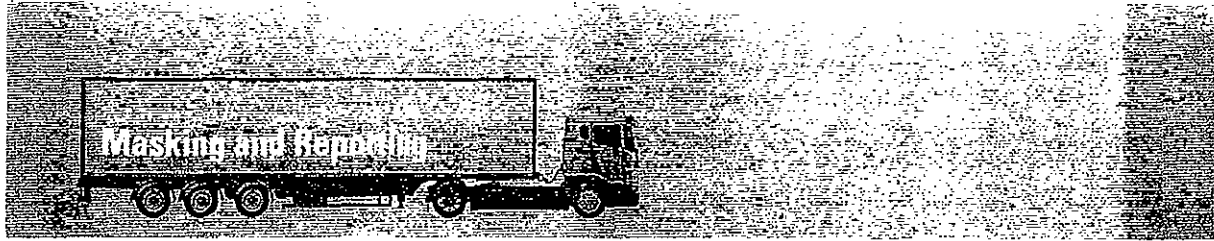
- (1) The suspension, revocation, or cancellation of a CLP or CDL by the State or jurisdiction of issuance.
- (2) Any withdrawal of a person's privileges to drive a CMV by a State or other jurisdiction as the result of a violation of State or local law relating to motor vehicle traffic control (other than parking, vehicle weight or vehicle defect violations).
- (3) A determination by the FMCSA that a person is not qualified to operate a commercial motor vehicle under part 391 of this subchapter.

Driving a commercial motor vehicle while under the influence of alcohol means committing any one or more of the following acts in a CMV—

- (a) Driving a CMV while the person's alcohol concentration is 0.04 or more;
- (b) Driving under the influence of alcohol, as prescribed by State law; or
- (c) Refusal to undergo such testing as is required by any State or jurisdiction in the enforcement of §383.51(b) or §392.5(a)(2) of this subchapter.

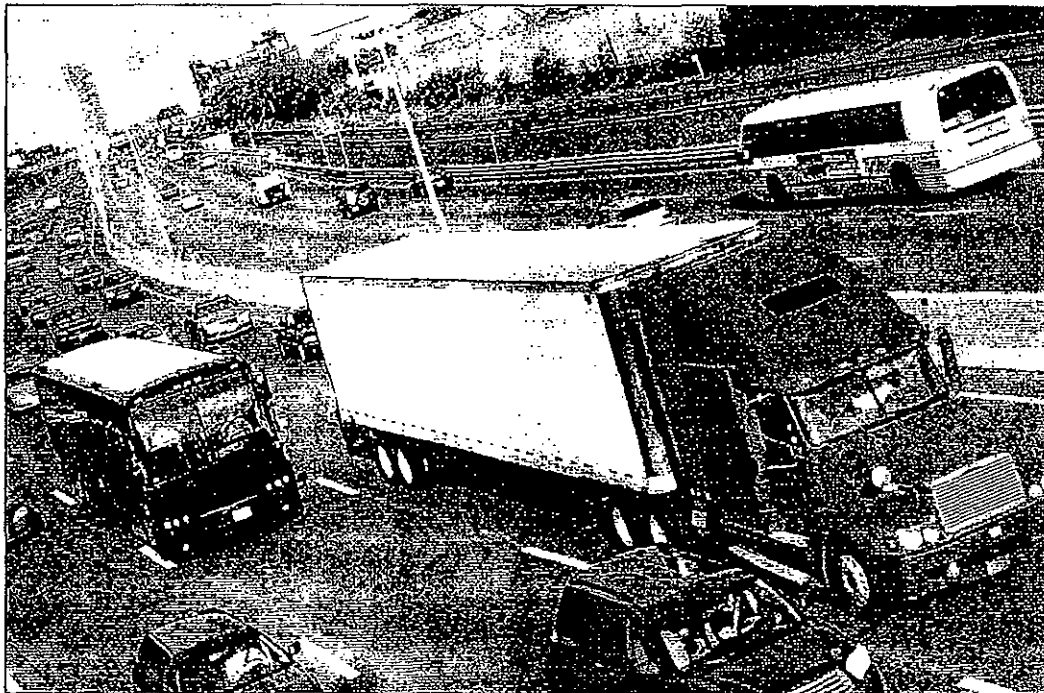
§ 384.226 Prohibition on masking convictions.

The State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CLP or CDL holder's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (other than parking, vehicle weight, or vehicle defect violations) from appearing on the CDLIS driver record, whether the driver was convicted for an offense committed in the State where the driver is licensed or another State.



**IT IS ESSENTIAL** for all professionals in the criminal justice system to work together to ensure that only safe and responsible CDL drivers are licensed and allowed to operate large vehicles. Submitting high quality and timely data to licensing authorities helps keep unsafe drivers from obtaining or renewing CDLs. Clearly the proper operation of a CMV is more difficult and, arguably, even more important than driving a passenger vehicle safely. Some in the criminal justice system, however, adopt a "give the working man a break" mentality. This mentality is well-meaning but it may endanger lives. Law enforcement officers, prosecutors, or judges may feel that commercial drivers deserve

"another chance" after violating traffic laws (this can result in multiple violations without serious consequence). Defense attorneys argue that penalties for CDL traffic violations unfairly affect commercial drivers and assert that CDL holders should receive a reduction, dismissal, or deferral of a charge or penalties. That argument, however, is illogical when considered in terms of the increased likelihood of a serious injury or death occurring if one of those drivers is involved in a crash while behind the wheel of a commercial vehicle. Logic dictates that commercial drivers, with their extensive training and experience, fully understand the potential consequences that violating the law by driving dangerously in any



vehicle can have on their CDLs. CDL holders do not deserve multiple chances to break the law. Commercial motor vehicles may be hauling hazardous materials, multiple trailers, or even numerous passengers. These drivers are operating huge vehicles at significant speeds and they, therefore, have an increased duty to the public with whom they share the roads.

## MASKING

When prosecutors or judges treat CDL holders differently, allowing their convictions to be deferred, dismissed, or to go unreported, this may be considered masking which is prohibited by the FMCSRs and some state statutes. The federal government recognizes the vital role that state and local authorities play in safe-guarding the nation's roads and has even passed legislation intended to guarantee that every jurisdiction fulfills that duty equally. This legislation is intended to support CDLIS and the accuracy of its records. To help maintain that accuracy, effective September 30, 2002,<sup>102</sup> CDL holders were no longer eligible for deferral of moving violations under the federal statutory structure. The code forbids any masking of convictions by state authorities (court systems, licensing authorities, etc.). The code is explicit in the prohibition and 49 CFR 384.226 states:

The State must not mask, defer imposition

of judgment, or allow an individual to enter into a diversion program that would prevent a CDL driver's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (except a parking violation) from appearing on the CDLIS driver's record, whether the driver was convicted for an offense committed in the State where the driver is licensed or in another State

This prohibition carries penalties that can be assigned to states failing to abide by the no masking rule. The Motor Carrier Safety Improvement Act of 1999<sup>103</sup> required the agency to withhold Motor Carrier Safety Assistance Program grant funds from the states if they did not comply with the regulations.<sup>104</sup> Further, the Act allows federal authorities to withhold certain portions of a state's federal-aid highway funds, potentially amounting to millions of dollars, for non-compliance. Additionally, the federal government retains the right to prohibit states falling out of compliance with federal safety regulations from issuing valid CDLs. It is the in every state's best interest to follow all federal mandates relating to CDLs. Some states have gone so far as to adopt the anti-masking language exactly or very closely in their own state codes.<sup>105</sup>

While the prohibition is clear, the complexity of some cases makes it difficult for prosecutors to know whether or not a potential disposition would be considered masking. To that end prosecutors

<sup>102</sup> 49 CFR 384.226 (2010).

<sup>103</sup> Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 49 U.S.C. § 113. The stated purposes of the Act was to (1) establish a Federal Motor Carrier Safety Administration and (2) reduce the number and severity of large-truck involved crashes through more CMV and driver inspections and carrier compliance reviews, stronger enforcement, expedited completion of rules, sound research, and effective CDL testing, record keeping, and sanctions.

<sup>104</sup> 49 CFR 384.401 (2010): First year of non-compliance: 5% of the federal-aid highway funds; second year of non-compliance: up to 10% of federal-aid highway funds

<sup>105</sup> Minnesota (MINN.STAT.ANN. § 171.163); Colorado (COLO.REV. STAT.ANN. § 42-4-1719); Kansas (KAN.STAT.ANN. § 8-2, 150).

MASKING SCENARIOS			
DRIVER CHARGES	PROSECUTOR ACTIONS	COURT ACTIONS	MASKING?
Failure to Yield	NONE	Court convicts but allows Traffic School in lieu of reported conviction	YES
DUI	Dismisses case	NONE	NO
Reckless Driving	NONE	Court accepts defendant's plea of 'no contest', removes the case from the docket for 6 months and then dismisses citation based on driver's clean history.	YES
Speeding 20 mph over the limit while in a CMV	Driver agrees to pay speeding fine and costs.	Court collects fines then dismisses case and does not report as a conviction to the state licensing authority	YES
Driving while Suspended	Driver pleads to charge	Allows withdrawal of Guilty plea	NO

struggle with what they can and cannot do when dealing with persons that hold commercial drivers' licenses. Masking, at its core, is allowing a conviction that will affect a CDL holder's (or a driver of a CMV who should have held a CDL at the time of his offense) driving history to be deferred or diverted so as not to be reported.

Generally, masking as contemplated by 49 CFR 384.226, requires adjudication or, at least, factual finding of guilt followed by some action that intends to avoid the record or mandated consequences of conviction. The anti-masking provision does not prevent plea bargaining or dismissal of charges. Prosecutors should consider carefully the purpose of entering into a plea agreement or allowing any type of diversion. Prosecutorial discretion may always be exercised in support of due process or constitutional rights. Sometimes, the state's case is factually or practically weak on some point. Reducing CDL violations for the sole reason of

avoiding potential impact on a driver's license, however, acts to contravene the intent and function of state and federal safety regulations. The purpose of the anti-masking federal and state rule is to ensure that licensing authorities have an accurate picture of a CDL holder's driving history. The increased penalties for multiple violations work to disqualify unsafe drivers. The only tool courts and prosecutors have to determine how serious a driver's pattern of traffic violations has been is the official driver's history. If that history is artificially preserved one time, or over and over again, the next prosecutor or judge has no way to know.

When confronted with defense counsel arguing against the imposition of penalties or the reporting of convictions, prosecutors should keep in mind the anti-masking prohibition is not an arbitrary rule. This legislation was passed strictly as a safety measure intended to keep the most dangerous offenders off the roads. A 2007 study assessed which

factors played a role in CMV crashes.<sup>106</sup> Up to 87% of the studied attributable factors in fatal crashes were driver related. Most involved failure to correctly assess the situation or poor driving decisions. The most common associated factors recorded included driver-based factors such as legal drug use, traveling too fast for conditions, lack of familiarity with the roadway, inadequate surveillance, fatigue, and feeling under pressure from motor carriers. The propensity to commit traffic violations has been shown as a good predictor of which drivers will cause crashes. A 2005 study by the American Transportation Research Institute found that violations from speeding (more than 15mph over) to reckless driving correlate to an increased chance of future crash involvement. The chance of future crash involvement increases significantly for traffic violators and can go up by as much as 56% to 325%.<sup>107</sup> The research clearly shows that enforcement of CDL violations is critical to identifying and removing the drivers who pose the most potential danger from the road.

If a defense attorney raises any type of equal protection argument by asserting that the imposition of harsher penalties on CDL holders is constitutionally prohibited, a prosecutor can rely on multiple cases addressing that argument. The most frequent appeals based on this equal protection argument have come from states that treat CDLs differently than a non-commercial license when the holder is convicted of impaired driving. These states permit a restricted or probationary license for a non-CDL but do not extend the same privilege to a driver's CDL. Multiple courts have examined and

upheld these different standards for commercial vs. non-commercial drivers. Virginia's appellate court (*Russell Lee Lockett v. Commonwealth of Virginia*, 438 S.E.2d 497(Va. App. Ct. 1993)) upheld a state's authority to refuse to issue a restricted CDL to an offender convicted of DUI, even if a non-commercial driver could get a restricted license. The California Court of Appeals (*Peretto v. Dep't of Motor Vehicles*, 235 Cal. App. 3d 449 (App. Ct. 1991)) upheld differing periods of license suspension for CDL vs. non-CDL holders.

Essentially, these courts are finding no equal protection violation in differences of penalties for commercial vs. non-commercial drivers as long as there is a rational basis for the discrepancy. That rationale can logically be extended to differences in CDL driver qualifications, hours-of service requirements and testing. Because of the greater size, weight and potential danger of their vehicles as well the CMVs more complicated operating systems, these drivers can be legitimately held to higher standards.

## REPORTING

Consistently reporting convictions serves many purposes. Drivers may be affected by multiple sources of pressure and influence to move faster and perhaps cut-corners in terms of equipment or operational safety. If law enforcement does not enforce regulations and the court systems do not hold drivers responsible for violating them, then the entire framework of state and federal safety

<sup>106</sup> The Large Truck Crash Causation Study (LTCCS) was based on a three-year data collection project conducted by the Federal Motor Carrier Safety Administration (FMCSA) and the National Highway Traffic Safety Administration (NHTSA) of the U.S. Department of Transportation (DOT). LTCCS was the first-ever national study to attempt to determine the critical events and associated factors that contribute to serious large truck crashes allowing DOT and others to implement effective countermeasures to reduce the occurrence and severity of these crashes.

<sup>107</sup> RONALD R. KNIPLING, PHD., SAFETY FOR THE LONG HAUL: LARGE TRUCK CRASH RISK, CAUSATION & PREVENTION 105 (2009).



regulations is ineffective. Conversely, strong enforcement can serve as the balancing influence that provides the incentive for CDL drivers to operate within the bounds of the law.

Prosecutors who avoid masking and always report CDL convictions are supporting other prosecutors and law enforcement officers across the country who may deal with the same offender in the future. It is important to report all relevant convictions including drug trafficking or any felony committed in any vehicle if the defendant holds or should have held a CDL. Without a clear picture of a driver's history, a prosecutor, judge, or even a perspective employer will be unable to determine the threat posed by that driver and what remedial actions should be taken to correct his poor driving. Drivers' histories are also used by traffic prosecutors who handle impaired driving cases as well as the serious or fatal crashes caused by impaired or reckless

driving. Those prosecutors may rely on a driver's history at a bond or sentencing hearing.

The bottom line for prosecutors is that allowing convicted traffic offenders to "modify" a conviction or keep it off their record in an attempt to circumvent driver license action is masking. While there may be very good reasons to amend or plea bargain to a lesser charge, all prosecutors are subject to an ethical obligation to follow the law and avoid any perception of a failure to do so. Moreover, it is impossible to predict with 100% accuracy which offender may go on to commit a more serious offense or guess which traffic violations will receive scrutiny from higher authorities or media interest. In such cases, a prosecutor who has documented his reasons for any reduction, deferral, or dismissal of a CDL-related violation will be in the best position to explain his decision.