The Federal Motor Carrier Safety Administration’s (FMCSA) new Comprehensive Safety Analysis (CSA) 2010 promises to have a significant impact on motor carriers and drivers, as well as the insurance industry. Improvements in the reliability of safety data under CSA 2010 may have important ramifications to the legal field. Therefore, it is imperative that carriers and drivers, insurers, litigants, and those in related fields be aware of these impending changes and their potential impact on the state of Florida.

CSA 2010 is currently being tested in several states and is scheduled for nationwide implementation by the end of 2010. Under the current predecessor system, SafeStat scores are determined based on four broad Safety Evaluation Areas (SEAs): Accident, Driver, Vehicle, and Safety Management. The Federal Motor Carrier Safety Administration uses the scores in these categories to identify carriers with sufficient violations for a Compliance Review (CR). The scores are based on accident reports, state-reported data, and violations discovered during roadside inspections. However, only Out-Of-Service (OOS) and moving violations discovered during roadside inspections conducted by Safety Investigators (SI) are counted toward a carrier’s score; drivers themselves are not assigned a score. Violations counted toward a carrier’s SafeStat score are not weighted based on their correlation to crash risk; therefore, a violation for reckless driving would have the same negative influence on a carrier’s score as a minor, less dangerous OOS violation.

However, the proposed CSA 2010 Safety Measurement System (SMS) makes critical changes that will likely have a significant impact on the trucking industry. CSA 2010 is an improvement upon the CR and SafeStat model in the way it assesses and measures the safety performance of motor carriers and drivers and intervenes to address specific problems. Under CSA 2010 SMS, scores are determined based on six well-defined Behavior Analysis Safety Improvement Categories (BASICs) plus a Crash Indicator. Definitions and violation examples of the six (6) BASICs and the Crash Indicator are as follows:

1) **Unsafe Driving**: Operation of Commercial Motor Vehicles (CMV) by drivers in a dangerous or careless manner. Examples include speeding, reckless driving, improper lane change, and inattention.

2) **Fatigue Driving (Hours-of-Service)**: Operation of CMVs by drivers who are ill, fatigued, or in non-compliance with the hours of service (HOS) regulations. Examples include HOS violations, log book violations pertaining to HOS entries, operating a CMV while ill or fatigued, and crash reports with driver fatigue as a contributing factor. This is to be distinguished from crashes caused by the driver’s unconsciousness or inability to react due to use of alcohol, drugs or other controlled substances.
Liability

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3) **Driver Fitness**: Operation of CMV by drivers who are unfit to operate a CMV due to lack of training, experience or medical qualifications. Examples include failure to have a valid CDL or required medical or training documentation, a crash report indicating a lack of experience or medical reason as a cause of the accident, or a carrier’s failure to maintain proper driver qualification (DQ) files or use qualified drivers.

4) **Controlled Substances and Alcohol**: Operation of CMV by drivers who are impaired due to alcohol, illegal drugs, and misuse of prescription or over-the-counter medications. Examples include use or possession of controlled substances or alcohol, crash reports indicating alcohol or drugs as a cause of the accident, positive drug or alcohol tests, or deficiencies in motor carrier controlled substances and alcohol testing programs.

5) **Vehicle Maintenance**: CMV failure due to improper or inadequate maintenance. This is usually a common target in trucking litigation. Examples include violations for brakes, lights and other mechanical defects, crash reports indicating a mechanical failure as a contributing factor, failure to make required repairs, and violations regarding pre-trip inspections, maintenance records and repair records.

6) **Cargo Related**: CMV incident resulting from shifting loads, spilled or dropped cargo, and unsafe handling of hazardous materials. Examples include improper load securement, cargo retention, size and weight violations, and hazardous material handling.

7) **Crash Indicator**: Histories or patterns of high crash involvement, including frequency and severity. It is based on information from state law enforcement crash reports that are reported by the carrier and discovered during on-site investigations. This BASIC will presumably be disposed of when a system is established for determining crash accountability.

Unlike the current SafeStat system, instead of identifying a carrier for a comprehensive, resource-intensive, and unfocused Compliance Review, the CSA 2010 SMS scores will be used to identify particular safety issues and determine which carriers to investigate and where to focus the investigation such as Vehicle Maintenance or Improper Cargo Loading/Securement.

Safety investigators will continue to conduct road-side investigations under CSA 2010, with one important change: all safety-based roadside inspection violations will negatively affect the score in the appropriate BASIC, not just OOS and moving violations. Additionally, CSA 2010 will make carriers’ and drivers’ BASIC results available to roadside SIs, allowing them to target carriers and drivers with poor scores for inspections and enabling them to focus their inspections on the most relevant problem areas.

Under SMS, recent violations and violations most associated with crash risk will be weighted more heavily than others. Scores will then be compared with those of peer carriers and drivers and ranked on a relative scale to determine which carriers have specific safety problems. Carriers and drivers with the most dangerous behaviors will be assigned the poorest scores.

Under the current predecessor SafeStat system, a carrier’s SafeStat score has no direct impact on its safety rating; a poor score simply helps to identify the absolute worst carriers for a Compliance Review. There are three possible safety ratings that can be assigned to carriers under SafeStat: Satisfactory, Conditional and Unsatisfactory. It’s important to note with SafeStat, a safety rating is issued only after a compliance review is performed. However, very few motor carriers, about 2%, undergo a compliance review and are issued a SafeStat safety rating due to limited resources, according to the Government Accountability Office.

Like SafeStat, there are three rating labels in CSA’s 2010 new Safety Fitness Determination (SFD) system: Continue to Operate, Marginal, and Unfit. These new ratings clarify the FMCSA’s position that a “satisfactory” rating does not constitute an official endorsement, and emphasize the serious consequences associated with being declared “unfit” to continue operations. Notably, a carrier’s score under CSA’s 2010 SMS will be used in a SFD process to assign a safety rating to every carrier with sufficient data, without the arduous process of performing a CR.

In its most recent Industry Briefing posted on the FMCSA’s website, the FMCSA ended much speculation by announcing that individual drivers will not be assigned safety ratings under the SFD system.

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(to be distinguished from the drivers’ scores or results under the SMS) similar to the carrier safety ratings of Continue to Operate, Marginal, or Unfit. However, driver safety performance will be evaluated and monitored via the SMS separately from carriers’ performance. According to the FMCSA, drivers’ SMS scores are for law enforcement use only as an investigative tool to identify unsafe drivers during carrier investigations, and are not currently available to carriers, the drivers themselves, or the public. However, that same driver safety data will be made available to carriers through the FMCSA’s Commercial Drivers Pre-Employment Screening Program (PSP), which is not part of CSA 2010. Under the PSP, carriers will be able to request a driver’s safety profile which will likely include information relating to prior crashes, safety violations, and inspection results with previous employers.

The purpose of making such driver safety information available to potential employers is to assist the carrier in making informed employment decisions through pre-hiring screening of drivers, prevent drivers with poor driving histories from changing employers to avoid safety programs, and to encourage carriers to investigate and consider driving history when making employment decisions in order to protect their own safety rating. While driver participation in the PSP is “voluntary” and the release of a safety profile to a potential employer requires a driver’s written consent, liability-conscious motor carriers and their insurers will almost certainly demand such information as a pre-requisite to employment. Therefore, although drivers will not potentially be exposed to an “unfit” or “marginal” rating, the negative effects of a poor safety record on their employment and employability may be the same, despite the FMCSA’s attempts to assuage drivers’ concerns. However, it should be noted that the FMCSA continues to modify its proposed initiative based on industry feedback.

There are several more important distinctions between the current predecessor safety fitness rating process and SFD. As previously mentioned, under the old system a rating was only issued or changed via an on-site CR; therefore, a carrier’s rating, good or bad, would only reflect the carrier’s compliance on the date of the CR. The rating did not expire, so a carrier could revert to poor safety practices but still coast on the laurels of a good rating until the next CR took place. Under the new proposed procedure, a carrier’s BASICS scores will be calculated and a SFD will be issued on a monthly basis based on the previous two years of data and can change (for better or worse) solely based on data collected through roadside inspections. The new procedure will therefore provide an updated, more accurate estimation of a carrier’s current safety compliance.

Further, an SFD of “marginal” or “unfit” may be issued with a single area of deficiency; previously, an adverse rating was generally issued only when multiple areas of deficiency were discovered during a CR. Finally, an adverse rating under the old system was based on “critical and acute” violations and vehicle OOS violations discovered during CRs. When CSA 2010 is fully implemented, the SFD will be based on evaluation in six BASICS and the crash indicator, and all safety-related violations discovered during roadside investigations. Simply put, there will be more areas for carriers to commit a violation that will negatively affect their SFD, and more opportunities for investigators to look for and discover such violations.

Once a carrier’s SFD has been adversely affected, there are very limited opportunities to improve poor BASICS scores and secure a “continue to operate” rating. It is important for both carriers and drivers to educate themselves regarding FMCSA regulations and the requirements of CSA 2010 and to discover and remedy ongoing violations now to avoid a negative impact on the carrier’s SFD and possible interruption in business activities in the near future. Carriers should begin to review their inspections and violation history for the past 24 months, apply the CSA 2010 proposed methodology to determine whether they are at risk to be labeled “marginal” or “unfit”, and develop a plan of action to correct violations. The new process will require greater vigilance and stricter adherence to safety regulations in order to maintain a favorable safety rating.

When CSA 2010 is implemented nationwide by the end of 2010, SMS will assess the previous 24 months of roadside inspection and crash data, completely re-evaluate the carrier’s safety scores based on the new methodology, and issue a new SFD rating which may or may not bear any resemblance to the carrier’s previous SafeStat rating. Driver and carrier violations committed today will negatively affect the carrier’s SFD down the road, even if these violations are not currently considered when determining whether to
perform a CR of a particular carrier or when calculating a carrier’s SafeStat rating. Obviously, the retroactive effects of CSA may have due process ramifications for both carriers and drivers.

It is important to note that SafeStat data has been subjected to intense criticism over its unreliability and is often excluded from evidence upon defense motion as inherently unreliable. Because CSA 2010 has only been introduced in a limited number of test states and is essentially brand new, there are questions as to the extent of public access to carrier and driver safety data and how Florida state and federal courts will treat the admissibility of such evidence. However, according to the FMCSA, there is no current plan to make the Crash Indicator available for public viewing, just as data relating to the SafeStat Accident SEA is no longer public information.

If and when the FMCSA releases safety data collected under CSA 2010 to the public, there will likely be consequences to drivers and trucking carriers, as well as their insurers and defense attorneys. Not only will courts potentially be more willing to admit improved safety data into evidence against carriers in negligent hiring and retention cases, but more reliable data may also affect whether punitive damages are assessed against carriers for the negligent acts of their drivers. A carrier may be held vicariously liable for punitive damages for its driver’s negligence where the carrier “knowingly condoned, ratified, or consented to such conduct” or where the carrier’s own gross negligence contributed to the alleged damages.

The plaintiff’s bar most certainly will attempt to use the safety data underlying SMS scores and safety ratings as well as driver safety reports available to employers through the PSP when seeking punitive damages, as additional fuel to prove that a carrier knew of and condoned its driver’s poor safety history, or that the carrier’s own failure to abide by recognized safety standards constitutes gross negligence. Even if improved safety data under CSA 2010 continues to be excluded by the courts as inherently unreliable to prove the plaintiff’s case in chief, it will likely be considered by the courts when determining whether a plaintiff has made a sufficient proffer of evidence to assert a claim for punitive damages. Therefore, even if a carrier ultimately is not held liable for punitive damages, more reliable safety data may result in exposure to extensive financial worth discovery. It is important that carriers and insurers alike consider the possibility of increased exposure to punitive damages, financial worth discovery, and negligent hiring/retention claims when evaluating risk and for insurers, determining whether to extend coverage to particular carriers or drivers with problematic safety records.

The implementation of CSA 2010 will likely also have an effect on the document trail during litigation. Often, state courts permit plaintiffs to embark on fishing expeditions that seek much broader information than the carrier or driver at issue. Particularly when punitive damages are plead, discovery of a trucking company’s prior similar incidents will be permitted. In those cases, it should be anticipated that cross-referencing safety information available to the public and documents produced in discovery may reveal omissions by defense counsel, whether inadvertent or intentional, of relevant, non-privileged information. This could lead to an increase in sanctions for discovery violations and/or an increase in punitive damages awards and should be taken into consideration by defense counsel.

For further discussion on CSA 2010 and its impact on Florida truck claim handling, please request a copy of our 30 page Law Alert CSA 2010 by e-mailing Client Relations (mdonnelly@LS-LAW.com).