

SHIELD

a quarterly publication from Protective Insurance

Medical
financing victory

Nuclear verdict
case study

TOP 10 Trucking Industry Issues

WINTER 2023

 PROTECTIVE
INSURANCE

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NEWS & NOTES

New EEOC poster available

The Equal Employment Opportunity Commission (EEOC) has released a new version of the “Know Your Rights: Workplace Discrimination is Illegal” poster.

The law requires an employer to post this notice, which describes the Federal laws prohibiting job discrimination based on race, color, sex (including pregnancy and related conditions, sexual orientation, or gender identity), national origin, religion, age (40 and older), equal pay, disability or genetic information (including family medical history or genetic tests or services), and retaliation for filing a charge, reasonably opposing discrimination, or participating in a discrimination lawsuit, investigation, or proceeding.

The poster summarizes these laws and explains how employees or applicants can file a complaint if they believe that they have experienced discrimination.

What’s different about this poster?

The new poster uses plain language and a bulleted format to explain employee rights under anti-discrimination laws. The poster:

- Clarifies that sex discrimination includes discrimination based on pregnancy and related conditions, sexual orientation, or gender identity,
- Notes that harassment is a prohibited form of discrimination,
- Adds a quick response (QR) code that links to a webpage on how to file charges with the EEOC, and
- Provides information about equal pay discrimination for federal contractors.

Protective Insurance customers can purchase the new poster from J. J. Keller at a discount. The product ordering page is at jjkeller.com/protectiveinsurance.



Marketplace

POWERED BY ROADZ

Protective Marketplace keeps growing

Since its launch in November of 2020, the Protective Marketplace has continued to grow. More partners are joining the platform. That means more safety solutions at discounted prices for Protective insureds.

NEW PARTNERS IN 2022

Embark Safety: MVR Monitoring and MVR Online

Proactively identify and remove risky drivers from roadways with the most comprehensive motor vehicle record solutions in the industry.

Paychex: HR and Payroll Services

Fully integrated HR, payroll and benefits solutions with the convenience of managing all aspects of HR processes however and whenever it’s convenient.

PressurePro: PressurePro Pulse

Tire pressure monitoring services.

Shell Fleet: Maintenance Hub, Telematics, Telematics with Camera, Telematics with Asset Tracking

A full suite of solutions customized to meet your individual needs.

GPS Trackit: VidFleet (camera), Asset Monitoring, ELD HOS Compliance, GPS Fleet Tracking and Management

Make better decisions with real-time data and get peace of mind with 24/7 visibility.

Protective Free Solutions: J. J. Keller Video on Demand, Zywave Content Library

Ask your Protective representative how to access these tools.

Voxx Electronics: Rostra DVR, Rostra Trailer Camera Harness Kits

Two new offerings from Voxx.

Driver Technologies: Driver Dash Cam App

Turn your phone into an AI-powered dash cam.

NEW PARTNERS IN 2023

CarriersEdge – Driver Training System

Comprehensive, but not complicated. Understandable, but not patronizing.

CarriersEdge courses translate complex regulations into real-world context that drivers understand, providing an interactive learning experience that’s equally effective regardless of learning style, language skills, or educational background.

Webinars will continue and are available on the Marketplace at marketplace.protectiveinsurance.com.

OSHA OVERVIEW



OSHA Injury and Illness Recordkeeping and Reporting Requirements

Many employers with more than 10 employees are required to keep a record of serious work-related injuries and illnesses. Minor injuries requiring first aid only do not need to be recorded. This information helps employers, workers and OSHA evaluate the safety of a workplace, understand industry hazards, and implement worker protections to reduce and eliminate hazards – preventing future workplace injuries and illnesses.

Maintaining and Posting Records

The records must be maintained at the worksite for at least five years. Each February through April, employers must post a summary of the injuries and illnesses recorded the previous year. Also, if requested, copies of the records must be provided to current and former employees, or their representatives.

Injury Tracking Application

OSHA provides a secure website that offers three options for injury and illness data submissions. You can manually enter your data, upload a CSV file to add multiple establishments at the same time, or transmit data electronically via an API (application programming interface).



More information and links to the ITA can be found at [osha.gov/recordkeeping](https://www.osha.gov/recordkeeping).



Medical financing knowledge aids in win for Protective customer

The utilization of Letters of Protection and medical financing in truck accident cases are significant contributors to the rise in outsized settlement demands and jury awards in our industry. Protective Insurance's Senior Vice President of Claims, Nathan Lundquist, is an industry-recognized expert in this space, having spent the last several years researching and developing comprehensive strategies to expose the biases and impact associated with these practices.

Lundquist shares that knowledge with Protective's claims team and speaks at conferences around the country to educate attorneys and others in the industry.

A recent court win shows that Protective's efforts are working.

The case involved claims for personal injury that resulted from an accident caused by one of Protective's insureds. The plaintiff alleged lifetime loss of earning capacity. Key aspects of the defense focused on the bias of the treating doctors and the retained experts based on extensive relationships with the plaintiff's law firm. Medical financing and letters of protection were central to the defense and demonstrated the bias of the treating doctors.

The plaintiff cited almost \$300K in past medical expenses, \$150K in future surgical costs, \$1.9M in loss of earning capacity, up to \$4M in pain and suffering, and up to \$4M in physical impairment. The jury was asked to award damages of more than \$10M.

The trial team successfully challenged the injuries and damages, including whether the surgeries were medically necessary. As requested during closing argument by the defense, the jury awarded only \$88,500 for reasonable and necessary past medical expenses, pain and suffering, and three months of lost wages. No future damages were awarded. The defendants' retained experts were successful in showing the medical care and billing was excessive, unnecessary, and unreasonable.

The adjuster on the claim, Steve Kuklish, has more than 40 years of insurance experience and was familiar with the plaintiff's firm and its tactics. "What these attorneys are doing is wrong," he said. "It's an issue of fairness. We want to pay claims that are owed – do it every day. Occasionally you get claims where they are trying to make a name for themselves. Those are the wrong motivations."

Nathan welcomes the opportunity to share Protective's experience in this space. If you would like to setup a call with him, please reach out to your territory manager.

NUCLEAR VERDICT CASE STUDY

Nuclear verdicts refer to exceptionally high jury awards—generally, those exceeding \$10 million. Such verdicts have become increasingly common in the past decade. In fact, the National Law Journal reported the average jury award among the top 100 U.S. verdicts more than tripled between 2015 and 2019, skyrocketing from \$64 million to \$214 million. Furthermore, 30% more verdicts surpassed the \$100 million threshold in 2019 compared to 2015.

A variety of factors have contributed to this trend, including rising litigation funding, medical financing, eroding tort reform and, above all, deteriorating public sentiment toward businesses. Amid growing corporate distrust, businesses have not only been expected to meet higher standards within their operations but have also been held more accountable for their wrongdoings.

Upon being sued and taken to court, businesses have frequently encountered juries that are sympathetic to plaintiffs.

Compounding this issue, there's a rising perception that businesses (especially large ones) can always afford the cost of damages. This means juries are likely to have fewer reservations when awarding substantial damages to plaintiffs, resulting in nuclear verdicts.

Nuclear verdicts can carry significant consequences for businesses of all sizes and sectors, causing lasting reputational harm, posing underinsurance concerns and wreaking large-scale financial havoc. That's why it's vital for businesses to better understand these verdicts and how to prevent them.



>> Case details

In September 2017, an 18-year-old college student at the University of North Florida was killed in a motor vehicle crash while driving on Interstate 95. When the crash occurred, the victim had been held up in standstill traffic for more than an hour.

This traffic buildup resulted from a truck driver employed by AJD Business Services getting distracted by his phone and running into another vehicle, subsequently flipping his truck and igniting a fire. Further investigation revealed the truck driver lacked the necessary licensing to operate a commercial vehicle and had been involved in multiple other crashes in the past—information AJD Business Services was unaware of because the company failed to conduct a background check before hiring him.

While stopped in traffic due to the accident, the victim was fatally struck by another truck driver employed by Kahkashan Carrier Inc. The truck driver had the vehicle's cruise control set to 70 mph and didn't brake until just before ramming into the victim. Further investigation revealed the truck driver was on his 25th hour behind the wheel when the crash occurred, significantly surpassing the maximum driving time permitted under the Federal Motor Carrier Safety Administration's (FMCSA) hours-of-service (HOS) rules. The truck driver also couldn't read English, preventing him from understanding electronic warning signage in the miles leading to the traffic congestion.

In the aftermath of the fatal crash, the victim's parents filed a wrongful death lawsuit against AJD Business Services and Kahkashan Carrier Inc. for their respective roles in the incident. In August 2021, after five days of testimony and four hours of deliberation, a Nassau County jury awarded \$100 million to the victim's parents for pain and suffering related to their loss as well as \$900 million in punitive damages against AJD Business Services—contributing to a total verdict of \$1 billion.

These damages substantially exceeded AJD Business Services' insurance policy limit of \$1 million. According to the FMCSA, both carrier companies are no longer active.

>> Factors that led to the verdict

DISTRACTED DRIVING

The truck driver employed by AJD Business Services was looking at his phone when he ran into another vehicle, causing the initial traffic buildup. This incident is an example of distracted driving. According to the Centers for Disease Control and Prevention, distracted driving refers to any activity that may divert a motorist's attention from the road. These distractions could be visual (e.g., staring at navigation systems), manual (e.g., texting) or cognitive (e.g., daydreaming). Regardless of distraction type, distracted driving is a serious safety hazard that contributes to a significant number of accidents on the road. In fact, the National Highway Traffic Safety Administration reported that more than 2,800 people are killed and 400,000 are injured in crashes involving a distracted driver each year—equating to approximately eight deaths and 1,095 injuries per day.

NEGLIGENT HIRING

AJD Business Services opting not to conduct a background check on its truck driver and Kahkashan Carrier Inc. employing a driver who couldn't read important road signage—employment decisions that both played a role in the fatal incident—constitute negligent hiring. Such hiring entails a business failing to exercise adequate care in the employment, retention or supervision of its workforce, thus resulting in “reasonably foreseeable harm” to another party. In other words, a business could be held liable for damages if it knew or should have known (had it taken appropriate measures) that an employee was unfit for their role upon hiring them, and this unsuitableness results in illness, injury or other damages to another party.

>> Compliance considerations

HAND-HELD CELLPHONE RESTRICTIONS

The FMCSA prohibits the use of hand-held cellphones among drivers of commercial motor vehicles (CMVs). This prohibition includes using at least one hand to hold a cellphone while making a call, dialing on a cellphone by pressing multiple buttons and reaching for a cellphone in a way that requires substantial maneuvering or moving from a seated position behind the wheel.

HOS RULES

Under the FMCSA's HOS rules, property-carrying CMV drivers can drive a maximum of 11 hours at a time after 10 consecutive hours off duty and cannot drive past the 14th consecutive hour after coming on duty.

LANGUAGE REQUIREMENTS

The FMCSA requires all CMV drivers be able to speak and read the English language sufficiently enough to communicate with the public, comprehend road signage, respond to law enforcement officials, and complete driving- and vehicle-related reports.

>> Risk mitigation measures

MINIMIZE DISTRACTED DRIVING CONCERNS.

Train employees on the main types of distractions behind the wheel and how to avoid them. In addition, create a distracted driving policy that prohibits various activities on the road—including personal grooming, eating, drinking, reading, fumbling with the radio or GPS, and using hand-held devices.

Have employees review and sign this policy to acknowledge they understand it. Be sure to enforce and update this policy as needed. Consider providing positive reinforcement (e.g., companywide recognition) to those who uphold this policy. It may even be useful to implement certain forms of vehicle technology, such as telematics and in-cab video cameras, to further monitor employees and warn them of potentially distracting behaviors behind the wheel.

PREVENT NEGLIGENT HIRING.

Implement vigilant hiring processes for all positions. These processes should include having job candidates fill out detailed applications, verifying their employment and educational history, contacting provided references, leveraging in-depth interviews and conducting sufficient background checks.

Take note that additional screening steps may be necessary for high-risk job roles. For instance, when filling CMV driver positions, be sure to review candidates' motor vehicle records, required licensing and accident history.

Upon hiring employees, provide them with proper training and supervision to set them up for success. Perform required reviews to document employees' driving performances over time and take any complaints filed against staff seriously.

ENSURE COMPLIANCE.

Regularly assess driving policies and procedures to maintain compliance with FMCSA regulations and any applicable federal, state and local driving and employment laws (particularly relating to negligent hiring). Consult legal counsel for additional compliance assistance.

SECURE PROPER COVERAGE.

In this increasingly litigious environment, it's crucial to purchase adequate insurance. Reach out to your Protective representative to discuss your coverage needs



Source: Zywave



CRITICAL ISSUES IN THE TRUCKING INDUSTRY | 2022

For the past 18 years, the trucking industry has relied on the American Transportation Research Institute's (ATRI) Top Industry Issues analysis to prioritize the trucking industry's most critical issues and to identify preferred strategies for addressing each issue. Organizations such as the American Trucking Associations (ATA) and its Federation partners in the State Trucking Associations (STA) have leveraged ATRI's Top Industry Issues report to develop proactive industry-centric strategies and programs.

TOP 10

Trucking Industry Issues

LEARN



MORE

1 Fuel Prices

Fuel Prices moved ahead of the Driver Shortage to become the number one trucking industry concern in this year's survey. The last time fuel costs made the top 10 list was in 2013 when it ranked eighth overall, but record-high diesel prices this year left fleets of all sizes scrambling to identify ways to cut costs. ATRI's 2022 Operational Costs of Trucking found year-over-year increases in the fuel cost per mile of over 35 percent, with fleets operating in the west experiencing the highest fuel costs per mile at \$0.431. High diesel prices are especially challenging for owner-operators, many of whom operate in the spot market where there is less ability to negotiate fuel surcharges to cover the price volatility. This is now the second year in a row that owner-operator respondents to the survey have ranked fuel prices as their number one concern.

PROPOSED STRATEGIES:

- Advocate for federal actions that help stabilize the supply of fuel and minimize price volatility.
- Research potential factors that may be affecting fuel availability and pricing volatility.
- Promote financial incentives for alternative and renewable fuels to support growth and reduce costs during development and market expansion.

2 Driver Shortage

After reigning as the top industry concern for five years in a row, the Driver Shortage dropped one position this year to the second-highest concern. According to the American Trucking Associations, the industry's current shortage of over 80,000 truck drivers could grow to over 160,000 by 2030. There are a number of underlying factors contributing to the Driver Shortage, including a retiring driver workforce, the challenging lifestyle, and regulatory pressures leading some drivers to leave the industry. Industry stakeholders believe there are multiple ways to reduce the shortage including lowering the legal driving age to 18, improving the driving lifestyle – by expanding truck parking and reducing detention at customer facilities – and recruiting more women to the profession.

PROPOSED STRATEGIES:

- Support outreach initiatives targeting high school students and young adults.
- Work with industry insurers to identify ways to expand coverage for younger drivers as part of the Safe Driver Apprenticeship Program.
- Advocate for regulatory changes to allow a state to administer a driving skills test to any out-of-state Commercial Driver's License (CDL) applicant, regardless of where the applicant received driver training.

3 Truck Parking

The lack of available Truck Parking has been a perennial top-five issue in the annual survey since 2015, this year ranking third overall and, for the third year in a row, ranking as the top concern for truck drivers. The lack of available parking has been tied to driver recruitment and retention issues as well as efforts to attract more women to the profession. The truck parking issue is now gaining traction with federal leaders, including a recent announcement from the U.S. Department of Transportation awarding nearly \$40 million in grants to Florida and Tennessee to expand truck parking capacity.

PROPOSED STRATEGIES:

- Encourage local and regional governments to reduce the regulatory burdens limiting the construction and expansion of truck parking facilities.
- Create a new dedicated federal funding program designed to increase truck parking capacity at freight-critical locations.
- Research the relationship between truck parking availability and highway safety.

4 Driver Compensation

Since first appearing on the Top 10 list in 2019 as the third ranked issue, Driver Compensation has remained in the top five, this year as the fourth highest industry concern. Driven by post-pandemic freight demand and the growing driver shortage, fleets have increasingly turned to pay increases as a way to recruit and retain the best drivers. Data from ATRI's 2022 Operational Costs of Trucking research showed that driver wages increased 9.8 percent over the previous year, with the driver wage figure (\$0.809 per mile) achieving a record-high since the Operational Costs research first launched in 2008. Separate ATRI research found that compensation was a top motivating factor, with 83.1 percent of company drivers and 90.4 percent of owner-operators / independent contractors listing income as an important / very important motivating factor for why they chose a career in trucking.

PROPOSED STRATEGIES:

- Analyze truck driver compensation in relation to other competing employment sectors (e.g. construction).
- Quantify the relationship between driver compensation models and driver satisfaction and productivity.
- Research and assess the effectiveness of carrier retention programs that financially incentivize drivers for performance in the areas of safety, fuel economy, and trip productivity.

5 Economy

In 2008, in the midst of the Great Recession, Fuel Costs and the Economy were the top two industry concerns. The Economy continued as the number one concern for three more years, after which it started to drop in ranking and eventually fell out of the top 10 in 2017. This year, with skyrocketing inflation, equipment and parts shortages, record-high diesel prices, and continued wage pressures, the Economy is back as the fifth ranked industry concern. After peaking at 9.1 percent in June, inflation is down slightly to 8.2 percent as of September, but concerns about a global recession persist.

PROPOSED STRATEGIES:

- a) Promote reforming / repealing ineffective and burdensome regulations that add to industry costs without providing benefits.
- b) Advocate for legislation to establish an office within the U.S. Department of Commerce to protect the supply chains of industries crucial to the U.S. economy and national security.
- c) Identify the geo-political and economic vulnerabilities of international supply chains involved in truck parts and equipment manufacturing.

8 Compliance, Safety, Accountability (CSA)

Compliance, Safety, Accountability – FMCSA’s safety measurement system – continues as a perennial Top 10 concern, this year ranking eighth overall. Signed into law in December 2015, the Fixing America’s Surface Transportation Act included a requirement for a National Academies’ review of CSA. The subsequent report was issued June 2017 and included a number of recommendations for improving CSA scoring to better reflect a carrier’s risk profile. However, five years later, FMCSA has yet to implement the recommended Item Response Theory (IRT) approach and carrier frustration with how their safety performance is evaluated by CSA persists.

PROPOSED STRATEGIES:

- a) Work with FMCSA to update its carrier prioritization methodology, improve its accuracy, and enhance transparency in CSA.
- b) Advocate for FMCSA to regularly review and evaluate the list of crash types available for reclassification as non-preventable.
- c) Encourage FMCSA to improve internal processes for reviewing Request for Data Reviews (RDR) to improve turnaround time for RDRs related to the Crash Preventability Determination Program.

6 Detention / Delay at Customer Facilities

Now in its fourth year as a Top 10 industry concern, Detention / Delay at Customer Facilities is up one spot to be the sixth ranked concern overall. Like many of the issues on the Top 10 list, Detention / Delay intersects with many other issues. It is challenging to recruit and retain truck drivers when they know that detention will reduce their pay due to lost hours spent waiting at customer facilities. Often truck drivers do not have access to important amenities like drinking water or restrooms. They may expect safe parking at the customer’s facility due to the delay, only to be told to leave and look for parking elsewhere. It is not surprising, then, that Detention / Delay at Customer Facilities consistently ranks as a top concern among drivers.

PROPOSED STRATEGIES (IN RANK ORDER):

- a) Identify best practices, technologies, and strategies that reduce or eliminate driver detention at shipper / receiver facilities.
- b) Support research to examine detention impacts on industry safety and productivity.
- c) Quantify the value of “Shipper of Choice” designations for incentivizing shippers and receivers to reduce detention times.

9 Speed Limiters

Earlier this year, FMCSA issued a Notice of Intent (NOI) to move forward with a speed limiter rulemaking in 2023. This NOI ultimately generated over 14,500 comments to the Federal Register notice, and led to Speed Limiters ranking in the Top 10 list of industry concerns for the first time in the survey’s history. Speed Limiters have been an issue on the drivers’ list of top concerns for several years now and in this year’s survey, drivers ranked Speed Limiters as their fifth overall top concern, with more than one out of every five driver respondents ranking Speed Limiters as a top concern.

PROPOSED STRATEGIES:

- a) Quantify the impact of car-truck speed differentials on industry safety and productivity.
- b) Ensure that any future rulemaking on speed limiters is based on real-world data inputs from industry operations.
- c) Support research to better understand truck crash increases by causal factors and vehicle type.

7 Driver Retention

Driver Retention is the seventh ranked issue this year, dropping from a second place ranking in 2021. Many in the industry believe that the Driver Shortage, Driver Compensation and Driver Retention are all inextricably linked and therefore challenging to separate into individual rankings. However, the ATRI Top Industry Issues Survey keeps these as three separate issues because the strategies for addressing each are distinct. In ATRI’s 2022 Operational Costs of Trucking research, while average annual starting bonuses were up 26 percent over four years, retention bonuses were up 57 percent over the same time period, showing fleets’ increased focus on retaining their best drivers.

PROPOSED STRATEGIES:

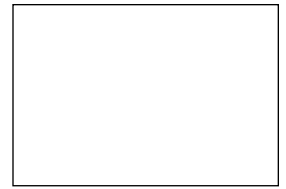
- a) Research and prioritize retention strategies, based on driver feedback and driver tenure data.
- b) Evaluate the impact of truck driver benefits, including health insurance and retirement benefits, on driver retention.
- c) Quantify the relationship between safety technology deployment (e.g. cameras, speed limiters, active braking systems) and driver satisfaction and retention.

10 Lawsuit Abuse Reform

For the third year in a row, Lawsuit Abuse Reform, previously termed “Tort Reform,” is a Top 10 issue, however it dropped six places this year to rank tenth overall. ATRI research has quantified the negative impact of excessive litigation on the industry’s insurance costs, and this year motor carrier respondents ranked Lawsuit Abuse Reform and Insurance Cost / Availability as their sixth and seventh top concerns, respectively. Continued state-level advocacy is resulting in legislative wins for the trucking industry.

PROPOSED STRATEGIES (IN RANK ORDER):

- a) Advocate for elimination of “phantom” damages.
- b) Encourage Congress to expand federal court jurisdiction to allow motor carrier defendants to take their highway accident cases into federal court as appropriate.
- c) Educate motor carriers and law enforcement on how to identify staged accidents, and advocate for legislation that makes it a criminal offense to stage an accident with a commercial motor vehicle.



We want to know what you think!

Shield magazine has been a part of Protective Insurance's identity for more than a decade. In these pages we share safety insights, OSHA regulations, stories about our industry and the good work of our customers. And while Shield is a fixture in our minds, it may not be in yours.

As we develop our plans for the next few years, we would like your thoughts on this publication. We work hard to make the best use of our resources; your input can help us make decisions that will mean the most to you.

Please complete a short survey about this publication at protectiveinsurance.com/survey

Enter your name and email address at the end of the survey and you could win a \$500 gift card!