

# The Role of Load/Driver Tracking Applications in the 3PL Environment—Legal and Practical Considerations

By Nathaniel Saylor, Scopelitis, Garvin, Light, Hanson & Feary, P.C.

**W**e are seeing an increase in the number of non-asset based logistics companies being approached by providers of tracking services, allowing the logistics company to track the location of the cell phone of the motor carrier's driver. The services typically rely on a cell phone app that is downloaded by the driver. In addition to location information, such apps may also allow the driver to provide proof of delivery and other information. These services can be a great customer service tool for the logistics provider, because they allow instant access to accurate shipment information without having to contact or rely on the motor carrier's dispatch. Use of any such service, however, triggers important legal and practical implications that should be considered when deciding whether and how to use a tracking service. As explained below, use of such services potentially increases the likelihood of a logistics provider being found liable for various claims, including auto accidents caused by the underlying carrier. As such, careful consideration should be given to the use of any such service, and controls should be implemented to limit a host of potential liabilities.

Perhaps the biggest concern with tracking services is the possibility that they will increase the logistics provider's exposure for highway accident liability. Much has been made in recent years of potential exposure whereby it is alleged that the logistics provider was negligent in selecting an unsafe motor carrier. Recent cases, particularly out of Illinois, are of no lesser concern as they are based on the theory that the logistics provider so controlled the driver/motor carrier's operations that the logistics provider should itself be found liable for the conduct of the underlying motor carrier's driver. Likewise, any evidence that purports to increase the logistics provider's control over the driver could also be used against the logistics provider in various employment claims made by the driver directly against the logistics provider. Logistics providers should attempt to limit the likelihood of the tracking service creating a risk of distracted driving. For instance, the driver should

not be required to access his or her cell phone at any point when a vehicle is in motion. While it is the driver's and motor carrier's responsibility to comply with U.S. Department of Transportation regulations regarding use of cell phones and other electronic devices while operating commercial motor vehicles, a logistics provider may have civil liability related to an accident if the logistics provider caused or contributed to a claim of distracted driving.

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Use of driver cell phone tracking services also increases the risk of highway accident liability and driver reclassification claims by increasing both the appearance of control over the driver, as well as the opportunities for control. The logistics provider can mitigate these risks to some extent through contractual indemnities with the motor carrier, but in the event of a catastrophic accident that exceeds insurance limits, those indemnities may not provide practical protection.

A logistics provider should have strict policies in place prohibiting its personnel from using information provided by tracking software to influence driver conduct to minimize the likelihood of claims. Stated more plainly, the logistics provider should not be using the tracking services as a mechanism to directly interact with the driver (for instance, telling the driver that it is not moving fast enough or is taking the wrong route). Such evidence would be particularly damaging in a case alleging that the logistics provider exercised excessive control over the carrier/driver.

There are business practicalities that should also be considered in managing the availability of load tracking service offerings made by the logistics company to the shipping community. These services quite often require advanced planning starting with

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contractual agreements with the motor carrier and consents provided by the driver (especially when the driver is an owner-operator independent contractor) that the driver is using the appropriate app and that it is fully functional. This sort of advance planning is often not feasible in a spot move scenario and even if it is performed, the service still depends on the driver remaining enrolled and having his or her phone on during the trip. Consequently, to the extent that the logistics provider advertises the availability of the tracking service, it should consider limiting load tracking service offerings to prearranged shipping situations or should consider indicating that the service is only available within certain markets and/or select routes. Simply put, any advertisements addressing the service must be handled carefully to ensure that the logistics provider is not contractually bound to provide tracking in all situations.

As referenced above, the logistics provider should ensure that the drivers consent to having their information disclosed to the logistics provider. While the concern of whether the tracking provider has authority to disclose information to the logistics provider

would primarily fall on the tracking provider, the logistics provider should still take steps to ensure that it is obtaining driver information with consent. Otherwise, it is possible that the driver might have privacy related claims against the logistics provider under various state privacy laws. This is especially true if the tracking service tracks the location of the driver and his or her phone as opposed to the location of the load itself (this driver tracking versus load tracking distinction can also have real consequences with respect to the concerns regarding control noted above).

There are benefits and risks to the use of driver tracking services by logistics providers. The decision of whether to use such a service should not be made lightly, and if the decision is made to do so, steps should be taken to minimize the associated risks. While it may be impossible to completely eliminate risks related to such a program, if implemented carefully, those risks may be outweighed by the attendant benefits.

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