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## How Electronic Logging Devices Needlessly Invade Commercial Truckers' Privacy

By Charles R. Stinson

**T**he nature of the commercial trucking industry puts operators in their trucks and on the road for huge chunks of their lives. Long-haul drivers experience this more acutely than most: They spend their lives in their trucks, which frequently serve as an office, a kitchen table, a place to lay their heads. In short, for many, a truck is a driver's home away from home.

One would expect, given its significance, that the government would only invade this space for a good reason and with the utmost care. Unfortunately, governmental electronic logging device (ELD) mandates fall short of both of these commonsense standards. No government has ever demonstrated a need for the reams of location data collected by ELDs or that ELDs meaningfully improve highway safety. Instead, the federal government has acted from the position that it is entitled to track drivers' location without practical justification. The upshot: Existing ELD mandates fail to meaningfully improve hours of service (HOS) compliance—or highway safety—yet force drivers to sacrifice their privacy and let the government dig deep into their personal lives.

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### **How Did We End Up with ELDs?**

Since 2017, the federal government has required almost all heavy-duty truck drivers to stop recording their working time manually on paper logbooks and instead record hours of service with ELDs. ELDs use Global Positioning System (GPS) technology to track trucks' location every hour of the day, giving government officials access to substantially more personal information than was the case under the previous system—and than is required to enforce the rules.

#### *Drivers Must Track Their Time to Demonstrate Compliance with Work Time Limits*

The rules governing the motor carrier industry limit the amount of time drivers can spend behind the wheel of heavy-duty trucks. For instance, drivers can operate a vehicle only after ten straight hours off-duty (i.e., not working) and only for a maximum of 11 hours per day (49 C.F.R. § 395.3(a)(1), (3)). And once the workday starts, a driver has only 14 hours to finish the 11 hours of driving (§ 395(a)(2)). Section 395.8 includes other limits and requirements, resulting in a complicated HOS framework. To facilitate the government's oversight of their HOS, drivers must keep a record of their time that is subject to search by federal, state, and local inspectors.

Before 2017, most drivers (particularly drivers hauling cargo as or for small carriers) recorded their hours of service on paper logbooks. That process involved using a chart to record duty status (driving, on-duty not driving, off-duty, or sleeper berth) each hour of the day (49 C.F.R. § 395.8(b), (d), (h)). At each change of duty status, drivers also recorded their general location (usually city and state) (§ 395.8(c)).

Drivers also kept documents that backed up their stated HOS (such as toll and fuel receipts, bills of lading, etc.) (§ 395.8(k); § 395.11). Because logbooks did not record truck movements automatically, inspecting officers could use location information and backup documents to verify the accuracy of manual logbook entries. A bill of lading and location entry, for example, could help an inspector make a rough determination as to whether a driver could have completed the trip in the recorded driving time.

Before ELDs, some drivers recorded their hours of service on automatic onboard recording devices (AOBRDs). AOBRDs, as their name implies, automatically recorded certain data relevant to calculating hours of service, including date, time, and engine use. Notably, AOBRDs did not use GPS to monitor location and instead relied, like logbooks, on the driver's manual location recording at changes of duty status. The Federal Motor Carrier Safety Administration (FMCSA) phased out AOBRDs as part of the ELD implementation (*see* 49 C.F.R. § 395.15(a)(1)), leaving them outside the scope of this article.

#### *Congress Required the Department of Transportation to Find an Automated Replacement for Manual Logbooks*

As one might expect, the logbook system was not without its flaws. For example, carriers frequently coerced their drivers to falsify their records and drive beyond their time limits. Accuracy suffered due to both intentional and inadvertent conduct, and Congress acted to replace manual recording with an automatic alternative through the Moving Ahead for Progress in the 21st Century Act (MAP-21) (Pub. L. No. 112-141, § 32301(b) 126 Stat. 405, 786–87 (2012) (codified at 49 U.S.C. § 31137(a))). MAP-21 directed the Secretary of Transportation to require most interstate trucks to “be equipped with an electronic logging device” for drivers to record their hours of service. The law required these ELDs to integrate with a vehicle's engine and computer to record a truck's movements for the purpose of recording the driver's hours of service. FMCSA eventually promulgated a rule requiring most interstate drivers to record their HOS with ELDs (*see* [Electronic Logging Devices and Hours of Service Supporting Documents](#), 80 Fed. Reg. 78,292 (Dec. 16, 2015)).

Electronic HOS recorders followed a complicated path to fruition, and their history dates back at least to 1998, when FMCSA's predecessor, the Federal Highway Administration, considered such devices in its proposed changes to the HOS rules (*see* [Hours of Service of Drivers; Supporting Documents](#), 63 Fed. Reg. 19,457 (Apr. 20, 1998); *see also* [Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations](#), 68 Fed. Reg. 22,456, 22,460 (Apr. 28, 2003); for a thorough accounting of FMCSA's attempts to introduce electronic HOS recording, see the Seventh Circuit's vacatur of a previous ELD mandate in *Owner-Operator Indep. Drivers Ass'n., Inc. v. Fed. Motor Carrier Safety Admin.*, 656 F.3d 580, 583–85 (7th Cir. 2011)).

## Do ELDs Improve Safety?

### *ELDs Still Rely on Manual Driver Input and Do Not Provide 100 Percent HOS Accuracy*

ELDs automatically record the movements of a commercial truck, which is information that informs drivers' hours of service. But movements alone answer only part of the HOS question. Hours of service also depend on a driver's duty status. What has the driver been doing, and for how long? For instance, a driver's daily 14-hour driving window starts when the driver begins *working*, even if that work is not driving a truck (*see* 49 C.F.R. § 395.3(a)(2), "A driver may not drive after a period of 14 consecutive hours after coming on-duty following ten consecutive hours off-duty"). Likewise, drivers can't start driving until they've been off for 10 hours—that means ten hours not working, driving or otherwise (§ 395.3(a)(1)).

The upshot of these rules is that hours of service depend on "when" and "what" drivers are doing. And ELDs only automate the "when" of the equation—they record when a truck has been moving. They don't automatically record a driver's duty status, which drivers provide manually. Thus, although ELDs provide an improvement in compliance, HOS recorded by ELDs, ultimately, are only as accurate as the information entered by their users. Moreover, significantly, increased ELD use has also been associated with increased occurrences of specific undesirable driving behaviors, undoing any safety gains that increased HOS compliance might have provided.

### *ELDs Have Not Been Shown to Make the Highways Safer*

Increased HOS compliance does not necessarily lead directly to better highway safety. *Even if* HOS enforcement combats driver fatigue, the knock-on effects of widespread ELD use must be considered when weighing the effectiveness of ELD mandates. Principally among those are the obstacles drivers face when balancing their ELD-tracked service time with the real-world practicalities of delivering loads. None of their options improve highway safety. Drivers using ELDs may be forced to stop in an unsafe location or cut other corners to ensure that they do not run out of driving time per their ELDs (*see, e.g.,* Alex Scott et al., *Unintended Responses to IT-Enabled Monitoring: The Case of the Electronic Logging Device Mandate*, 67 J. OPERATIONS MGMT. 152, 162 (July 2020)). Importantly, these practices (such as speeding and failing to stay in lanes) generally cause more accidents than does fatigue (*see* RALPH CRAFT, FED. MOTOR CARRIER SAFETY ADMIN., [2009: HISTORIC TRUCK CRASH DECLINES](#) 21 (Sept. 29, 2010)).

ELDs aim to reduce crashes by combating fatigue through increased HOS compliance. Thus, they are (at least) two steps removed from impacting highway safety, and they fail at each step: (1) Fatigue is not among the top causes of truck accidents, and (2) fatigue "is not necessarily tightly coupled with compliance to HOS rules" (Scott et al., *supra*, at 158)). By design, therefore, ELDs offer a weak connection to improved highway safety. This tenuous link, coupled with the increase in potentially unsafe driving behaviors associated with widespread ELD use, undermines the principal policy justifications cited by Congress and FMCSA.

All this is to say that mandating ELDs across the industry lacks convincing support in terms of highway safety policy. But ELD problems do not stop there: They represent a substantial increase in the government's invasion of trucker privacy over the systems they replaced.

### **What about Driver Privacy?**

Not only do ELDs fall short in their goal of substantially improving highway safety, but they do so while needlessly invading drivers' personal lives through GPS location tracking. Neither Congress nor FMCSA (or its state partners) has demonstrated that enforcement officials need extensive location information to enforce the hours of service recorded by ELDs. Indeed, ELDs don't need to know "where" a truck is to compute hours of service.

As noted above, the previous manual recording system required drivers to record location information (usually city and state) when they changed from one duty status to another (e.g., from "off-duty" to "driving") (*see* 49 C.F.R. § 395.8(h)(5)). This information, along with backup documentation, while not directly relevant to the HOS calculation, could be used by enforcement officials to verify a driver's recorded time. That is, an inspector could verify whether the driver could have made the trip reflected on the bill of lading and in the locations noted in the logbook within the time recorded by the driver.

But ELDs obviate the need for this location information. Driver hours of service depend on "for how long" a driver has been in a particular duty status, not "where" a driver has been in a duty status. Because ELDs automatically record *when the truck moves*, backup location information is unnecessary. Still, ELDs record location not only at each change of duty status but also at every hour between changes, even when the driver is off duty (*see* 49 C.F.R. § 395.26(b)(3), (c)–(d)). And ELDs generally collect location information more precisely than merely city and state: ELDs record location to within half a mile for on-duty time and within ten miles for off-duty time. Thus, ELDs record *more* location data (more frequently and more precisely) than did drivers using logbooks. Yet, the government has *less* need for location than it did under the previous system—indeed, it doesn't need this data at all. Moreover, FMCSA has proposed collecting even more location data: The agency requested comment on whether ELDs should record location up to every 15 minutes between status changes ([Advance Notice of Proposed Rulemaking; Request for Comments](#), 87 Fed. Reg. 56,921, 56,924 (Sept. 16, 2022)).

The only proffered justification for collecting mountains of driver location information is to give enforcement personnel the ability to verify that drivers have not used the "personal conveyance" duty status, which permits some driving beyond the HOS limits, to circumvent the HOS rules. However, the government has never shown that such a scenario is anything beyond a theoretical concern or that drivers use this subterfuge with any frequency. One would hope that the government would not justify keeping tabs on private citizens' locations every hour (or, indeed, every 15 minutes) of every day for the mere theoretical possibility of rule breaking.

The bottom line: ELDs record driver location information more precisely and more frequently than did previous HOS systems, yet the government has never demonstrated a need for *any* location information to compute HOS with ELDs.

### **Does Driver Privacy Matter?**

Of course driver privacy matters—one need only consider common sense and the Constitution. Yet, the federal government has operated as if it is *entitled* to use GPS to track, continuously, the location of nearly every interstate truck driver in the country. Instead of justifying why it needs this information at all, the government points to limitations on the use and scope of driver locations that attempt to curtail

the invasion of Fourth Amendment rights. But these measures offer little comfort if the government can't justify its tracking in the first place.

Make no mistake: Reducing driver fatigue and decreasing the number of highway accidents are worthy policy objectives. But merely citing important goals does not suffice. The government must connect its invasion of personal rights to those goals. Privacy invasions unmoored to a policy objective, and therefore lacking any benchmark against which to evaluate their need, run the risk of becoming permanently embedded without question. Government agencies then accept these intrusions as the status quo, working from a starting point of being entitled to the personal data—for example, FMCSA's proposal to require ELDs to record up to four times more location information. Congress and FMCSA must do better to protect truckers' rights.

*Charles R. Stinson ([charles@cullenlaw.com](mailto:charles@cullenlaw.com)) practices law at the Cullen Law Firm, PLLC, in Washington, D.C. He focuses primarily on constitutional and administrative issues, particularly those relevant to the transportation industry. This work brings him to state and federal courts, both at the trial and the appellate levels, and state and federal administrative agencies throughout the country.*