



Recognizing and Managing Your Organization's Shipping Risks: Utilization of Third-Party Transportation Carriers



The current global litigation landscape holds organizations responsible for the negligent hiring of “for hire” motor carriers. What may have historically been seen as a responsibility only for freight brokers or logistics providers is now a responsibility for all organizations doing business with third-party carriers.

What is your risk?

Organizations may be at risk for claims from an accident involving a third-party transportation carrier they do business with. These claims could involve serious or fatal accidents in which plaintiffs bring in additional parties connected to the transportation activities of the at-fault party. Based upon the plaintiff's defense, many insurance lines may be impacted, including commercial auto, general liability, and umbrella. Because of this, shippers must exercise care in selecting a competent for-hire motor carrier, and a failure to do so could constitute negligence in hiring the motor carrier. Shippers may be charged with negligence when it is demonstrated that they should have known or might, by the exercise of reasonable care, have determined that the motor carrier was not competent.

Due diligence for selecting proper motor carriers to do business with begins with appropriate selection and vetting procedures and includes proper execution of contractual agreements clearly outlining the accountabilities and expectations of all parties involved in transporting goods.

Common Transportation Entities¹:

Shipper: The shipper is the entity that has ownership of the goods in transit. Transit activities and contractual agreements dictate who is legally considered the shipper; however, the shipper is typically considered the organization or individual that has requested transport of their goods. Ownership of the goods may be relinquished to another entity based on logistics needs, such as whether additional packaging or modification is required.

Motor Carrier: Any private or for-hire entity operating commercial motor vehicles to transport passengers or property. Motor carriers can operate interstate, intrastate or internationally and jurisdictional regulations may dictate whether exemptions exist in which registration is not needed. A National Safety Code (NSC)² registration is required for Canadian transport, and additional provincial commercial vehicle registration requirements exist based on the transportation activities of the carrier. In the US, organizations using owned fleet and hired drivers for transport and shipping purposes will have no operating authority. They will be listed as a “private” carrier under their Department of Transportation (DOT) registration.

Freight Broker: A freight broker (broker) is the relationship manager between the shipper and the motor carrier. When a shipper utilizes a broker, they entrust the broker to manage the logistics of getting their product from the shipper's location to the destination by motor carriers. However, brokers do not directly touch or move the product and generally take no responsibility for the actual transport of the goods. Freight brokers do not have a fleet of vehicles or hired



drivers. If they do, it is a good indication that they are acting in a capacity greater than a broker's responsibility and, as such, must be held accountable for safety and management protocol applicable to freight forwarders and/or motor carriers.

Freight Forwarders: Freight forwarders offer logistics solutions that include receiving and dispersing goods to their destinations. Under this relationship with the shipper, freight forwarders take ownership of the goods. They may complete additional activities such as breaking down bulk shipments and assembling and repackaging them before redistribution. Depending on the services a freight forwarder provides, they may transport the goods under their business profile, or this may be a contracted activity with other third-party carriers. In the US, in addition to the DOT registration number, freight forwarders will also have a freight forwarder (FF) registration number.

Owner Operator: Owner-operators are individuals who operate solo and are responsible for their licensing and credentials, as well as ensuring regulatory compliance with all elements pertinent to them and the vehicles they own. They may work independently, soliciting and selecting businesses they choose to work with. Owner-operators may also enter into a lease agreement to complete activities solely for one organization as a contracted operator, or they may have an established relationship with a freight broker to aid in managing their schedule and payments. Owner-operators may or may not have operating authority³, so due diligence is necessary to ensure proper qualifications are in place with hired individuals.

¹ FMCSA, [How to Identify Entity Types \(FMCSA Official Video\)](#), September 2022

² Canadian Council of Motor Transport Administrators, [National Safety Code](#)

³ FMCSA, [How to Know if You Need Operating Authority, an Overview for New Applicants \(FMCSA Official Video\)](#), February 2023

Connecting Liability:

In the event of an accident during the course and scope of the contracted duties, a hiring entity may be held liable for its responsibility in the shipping process. When accidents occur, the plaintiff's lawyers may look for one of the following elements to determine if the hiring entity should be held liable for any part of the accident.

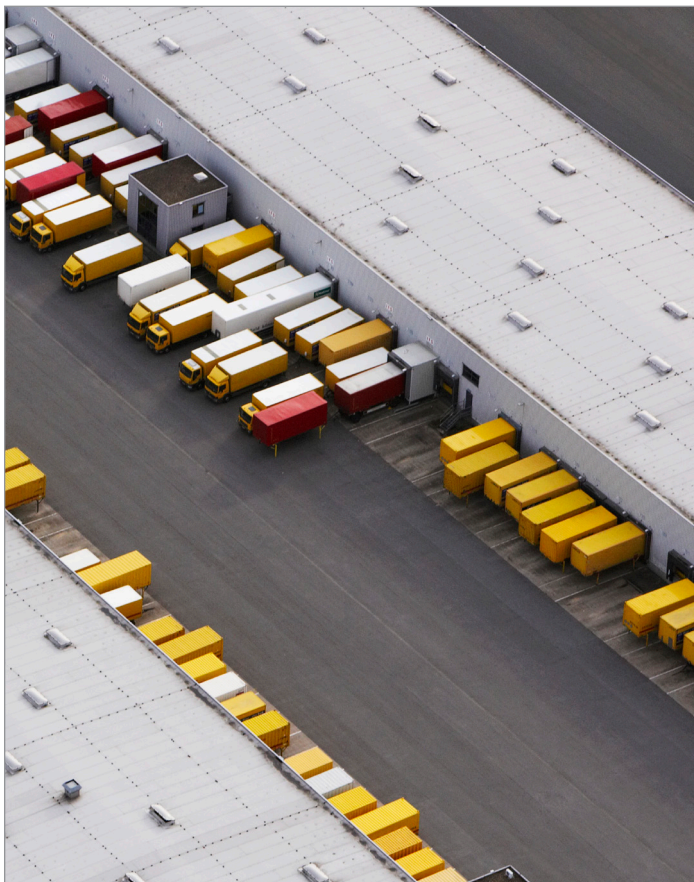
Agency: A condition created when a hiring company maintains sufficient control over another entity's operations that it becomes responsible (liable) for the actions of the hired company.

Negligent Hiring: A condition created when a company hires a third party to provide a service, but the hired company is not qualified to perform the service. While the hiring entity is not responsible for directly hiring the employees, negligent hiring may be brought in if the hiring entity did not properly qualify the third party for the services for which they were hired.

Defective Equipment: Faulty or poorly maintained equipment used for transportation can lead to accidents. This could also include issues with cargo securement.

Entities that hire third-party transportation companies to aid in the shipment of goods are at risk for litigation in the event the third party is involved in an accident during the course and scope of carrying out the shipping activities of the hiring entity.

Many scenarios could play a role and these elements represent a portion of possible scenarios. These scenarios were not based off any specific loss scenario experienced by CNA.

**Recognizing and Limiting Risk**

Clearly defined protocols that outline vetting and contracting practices may aid with defensibility in the event third-party carriers you do business with are involved in an incident. The intent of limiting liability is to manage your organization's risk from someone else's negligence. Review these five vetting practices to learn about steps your organization can take to vet third-party carriers.

1 Establish, implement, and maintain a sound motor carrier qualification process that fits your business needs.

Operational and logistical management duties are reduced when an organization utilizes third-party motor carriers. However, managing the vetting and selection process for third-party motor carriers is critical.

Verification of the protocol these carriers have in place can help ensure that your organization is protected in the event of an accident. The following elements are recommended when developing a protocol to vet and select third-party transportation carriers:

- Consult with legal counsel to determine the minimum liability limits your organization will require the third party to carry. Include minimum limits for both primary and excess coverages.
- Document the procedures and consistently adhere to them. If deviations are made from a procedure, document the justification for the reasoning and have it approved by executive management.
 - If deviations are consistently made, reevaluate the reasoning for the deviations and determine if the policies or specific controls need to be modified. Monitoring and reviewing deviations from protocol may identify improvement opportunities.
 - Consistent and undocumented or unapproved deviations may increase liability potential in the event of an incident. This practice is strongly discouraged.

Maintain a list of pre-approved motor carriers and review this list periodically. Reviewing on an annual basis, at minimum, ensures the scope of work is consistent with organizational needs and that all contracts and certificates of insurance are up to date. Adjust the list as your business needs change.

Verify Registration & Operating Authority Credentials:**2** When engaging with motor carriers for hire, it is recommended that proper operating authority exist.

Outline the scope of work necessary and any specific authority or endorsement requirements for the third parties being reviewed and selected. Confirm that your organization understands the business entities with which you are doing business and verify that they have the proper jurisdictional registration(s) and motor carrier numbers for the entity under which they operate.

In the event an owner-operator is hired, the operating authority may not exist with that individual. Verify whether the owner-operator will be utilizing their own authority or operating under your authority. In

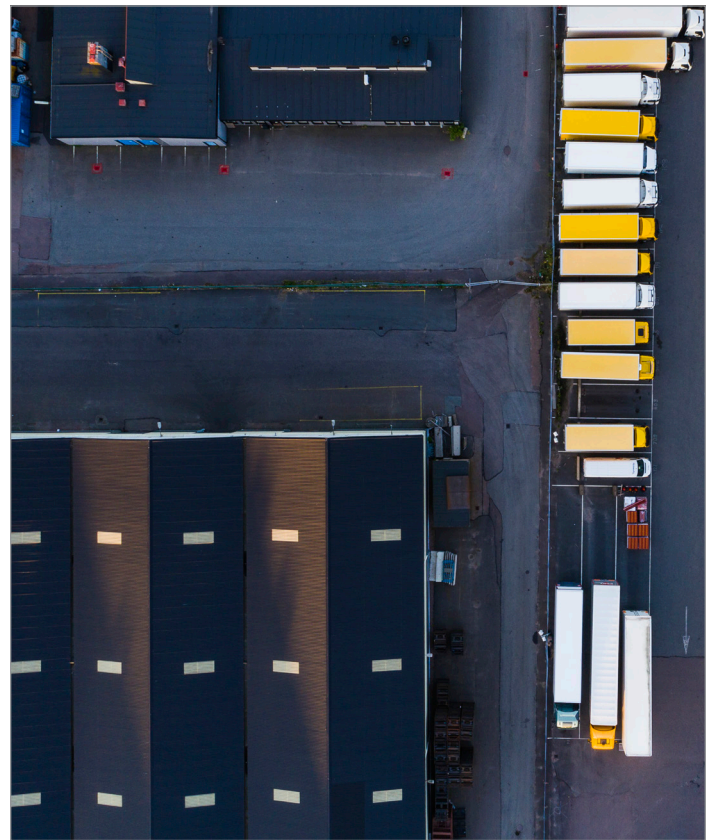
the US, operating authority can be verified by a US Department of Transportation (DOT) registration number search⁴.

3 Utilize National Resources to Verify Satisfactory Compliance Elements, Including Inspections, Testing, & Maintenance (ITM) Protocol and Driver Behaviors

Utilize portals and resources provided by federal entities to verify satisfactory compliance elements. Compliance checks can provide insight into how an organization manages its fleet from a driver qualification and operational management perspective. Reviewing an organization's inspection and violation information and comparing it against thresholds established by your organization aids in selecting the most appropriate and safest carriers for your transportation needs.

Recommended practices include:

- Review the motor carrier's safety rating. In the US, this is based upon the Department of Transportation Federal Motor Carrier Safety Regulations (FMCSR)⁵ and in Canada, this is outlined in the Canadian National Safety Code (NSC) standards⁶.
 - Only motor carriers with a satisfactory safety rating should be used.
 - If the MC has an unsatisfactory rating or violations, confirm that action has been taken to correct violations.
 - In the United States,
 - Do not use a carrier with any SMS (Safety Measurement System) percentile above the intervention level in any of the Behavior Analysis Safety Improvement Categories (BASIC).
 - Do not use a carrier with Driver Out-of-Service (DOOS) and Vehicle Out-of-Service (VOOS) rates above the national average.
 - Violation trends may indicate a poor regulatory compliance culture, and consideration should be made as to whether the risk of doing business with this carrier is warranted.
- Check public portals, such as the US FMCSA (Federal Motor Carrier Safety Administration) Safety Management System (SMS), periodically to verify that the motor carrier has not been issued new violations which would impact your willingness to do business with them.
- Confirm with the MC that they are actively monitoring and managing their drivers. While the MC is responsible for managing these drivers, it is recommended that you feel confident that they are taking action to employ safe drivers. A driver's history is a good indication of future performance, and elements such as background screening, motor vehicle records, and substance use testing and monitoring are key in qualifying drivers.
- Ask motor carriers if they complete the following action items with their drivers:
 - Maintain an updated list of drivers, including applicable licensing verification such as their certified driver's license (CDL) and Driver Qualification Files (DQF) in the US and referencing the Driver and Vehicle Licensing Agency (DVLA) database in the UK.
 - Run periodic motor vehicle record checks on all drivers.
 - Enroll all drivers in the United States FMCSA Drug & Alcohol Clearinghouse or adhere to jurisdictional requirements around drug and alcohol testing and monitoring.
 - Train all drivers on various elements such as driver distractions, cargo securement, accident reporting, and safe vehicle operations.
 - Monitor driving behaviors through the use of GPS, electronic logging devices (ELDs), or other telematics offerings.
- Verify that the motor carriers have protocols to manage mobile communications while driving, including mobile phones/ tablets and other portable entertainment devices.



The following [checklist](#), published by FMCSA, may aid in motor carrier selection. Making certain the carriers you contract with meet the elements outlined for management, recordkeeping, vehicles, and driver management helps ensure that they are an organization that complies with applicable regulatory elements.

⁴ FMCSA, [Safety Measurement System Carrier Search](#)

⁵ 49 CFR Subtitle B, Chapter III, Subchapter B, Federal Motor Carrier Safety Regulations

⁶ Canadian Council of Motor Transport Administrators, [National Safety Code](#)

4 Prohibition of Double-Brokering

Double-brokering is the act of the carrier you have contracted with subcontracting the transit of your goods without your awareness and agreement. Double-brokering can create legal challenges, especially if the subcontracted broker is not licensed⁷. These steps may help limit the potential for double brokering:

- Consult legal counsel to include a relevant statement in the contractual agreement prohibiting this act.
- Utilize government reporting agencies to compare the annual mileage and number of units associated with the motor carrier number. Review whether the reported metrics align with their scope of operations.
 - For example, if the company promises a cross-country trip, determine if the timeframe promise aligns with its operational profile and regulatory restrictions. If items are misaligned, this may be a flag that they are double brokering the load to meet the timeframe or transport promises.

5 Contractual Agreements and Financial Responsibility:

Written contractual agreements outlining the responsibilities of each party, including ownership of goods being transported during transit, responsibility of loading/unloading, and securement of goods, as well as required limits of liability for applicable lines of insurance coverage, are recommended. Include contractual elements specific to transit industry standards where applicable or as required by jurisdictional components.

As the hiring/shipping entity, confirm the following risk transfer mechanisms are in place:

- A signed contract by all parties involved in the shipment of your goods/materials/people, obtaining a bill of lading where applicable.
- Verification that all contracts include a hold harmless clause and indemnification language in your favor.
- Required minimum limits of liability for all entities your organization does business with, including the motor carrier and, where applicable, owner-operators, freight brokers, and freight forwarders. Where possible, obtain additional insured status under the motor carriers' policy.
- Contract language that specifies the motor carrier provides advance notice of insurance cancellation or a reduction in coverage.
- A system to track insurance expiration dates, limits of liability, and other contract nuances of all motor carriers you do business with.



- An enforced policy to only use a motor carrier after proof of insurance coverage is obtained and contracts are signed.

Financial responsibilities required for transporters of goods are outlined in many countries, including the UK^{8,9} and Canada. In some countries, such as the US, the regulatory body outlines the financial requirements necessary¹⁰ to obtain motor carrier registrations and the financial responsibilities for carriers domiciled in other countries who transport into, or through, the US¹¹.

While various regulatory bodies have established minimum limits, this does not restrict your organization from requiring higher limits as deemed appropriate for the shipping operations to be completed. Consult with legal counsel to determine the appropriate minimum limits required for MCs you hire.

In closing

Whether hiring third-party transportation carriers is a standard part of your organization's operations or a practice reserved for rare occasions, it is recommended that due diligence be exercised when identifying and selecting third-party transport carriers to hire. Continue the conversation with legal counsel and your insurance broker to help ensure your organization remains adequately protected.

CNA has identified industry-leading organizations that can assist organizations in implementing critical fleet safety program components. Our Allied Vendors offer a suite of services to improve your organization's overall fleet safety and driver management profile.

In addition to our Allied Vendors' services CNA Risk Control has developed several fleet-safety resources available at cna.com.

⁷ <https://www.englishlogistics.com/what-is-double-brokering/#:~:text=Even%20if%20a%20person%2Fcompany%20withhold%20payment%20from%20the%20carrier.>

⁸ Vehicle insurance: Overview - GOV.UK (www.gov.uk)

⁹ British International Freight Association, *Know Your Trading Conditions, 2021*

¹⁰ 49 CFR §387, Minimum Levels of Financial Responsibility for Motor Carriers

¹¹ FMCSR, Minimum Levels of Financial Responsibility for Motor Carriers