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Chain of Responsibility solutions

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From Your Editor-in-Chief



Amidst the string of lockdowns and subsequent disruptions across Australia, the last thing you need on your plate is a prosecution.

This month's issue is packed full of articles to help you steer clear of penalties and avoid getting into trouble with the National Heavy Vehicle Regulator (NHVR).

Did you know that there is an alternative to prosecution? On several occasions, our clients have used enforceable undertakings to avoid charges or having a conviction recorded against them.

For any business facing prosecution head on, it pays to consider whether proposing an enforceable undertaking might be an appropriate course of action. We examine when to pursue an enforceable undertaking and how to know if it could be a viable option for your business.

We also revisit one of the most perilous on-road issues: fatigue and its associated risks. Fatigue is a problem throughout the supply chain, so it is important to include it in conversations about compliance. Steven Perlen of Fatiguefit talks us through the benefits of using validated, evidence-based tools to support your fatigue-management practices.

We love Steven's parting advice to anyone experiencing uncertainty or problems with Chain of Responsibility (CoR) regulation: "You better get a lawyer, son, better get a real good one!"

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The daily challenge of determining driver fitness for duty

Steven Perlen, COO, FatigueFit

Determining driver fitness for duty is a daily challenge in our industry. On the one hand, there are unending operational pressures to meet delivery schedules and contractual agreements. On the other, there is the requirement to take reasonable steps to ensure your drivers are fit for duty.

Every time you make the decision on how to balance these seemingly conflicting demands you could be called to account.

The gravity of these kinds of decisions was evidenced recently in a worst-case scenario example, where supervisor Simiona Tuteru is currently facing four counts of manslaughter. Mr Tuteru has been charged over allegations he knew or ought to have known that one of his employees, Mohinder Singh, was fatigued and not in a proper state to drive on the day that he fell asleep at the wheel. Singh recently pleaded guilty to culpable driving causing the death of four police officers in Victoria. Whilst incidents of this nature are rare, the decisions that led to them are very common. Consider how many times you have had to make a similar call.

For supervisors, this example highlights the major issue that many do not have a solid basis for decision-making in relation to driver fatigue. Without legally and scientifically defensible criteria for allowing or not allowing an individual to drive, supervisors will continue to make the best call they can based on their experience. Where this results in a major incident, the supervisor may well find themselves as the 'meat in the sandwich' left to justify their actions before the court.

Given that safety is a shared responsibility, what role should we expect of drivers themselves? Drivers also face the same challenges of not having legally and scientifically defensible criteria for determining fitness for duty.

In the absence of a solid basis for decision-making they will also rely on their experience. In the case of Singh, there is evidence that whilst he did not feel fit for duty, he was worried that he was going to be fired and insisted on going to work. This perception of a coercive environment adds an additional level of complexity to the way an employee weighs up the assessment of their fatigue.

So, when faced with the daily challenge of determining driver fitness for duty, what should you do? Let's consider the options.

1. You can look at the drivers' schedule and make a judgement based on what your experience tells you. But you don't really know what they did between shifts, they probably won't tell you and you're loathe to ask.
2. You can ask them if they think they are good to go. But this has its problems, especially if they're hungry for overtime.
3. You can try to judge if they look too tired to drive. But not even the researchers can do that reliably enough to convince a judge.
4. You can get them to sign a form indicating they are fine to drive. But how do they decide whether they are or not and how do you know that they are telling the truth?
5. Or you can decide it's all too hard and avoid the issue entirely.

The problem for most transport owners and managers is that in today's regulatory environment any one of those choices can potentially land you in jail.

To provide greater certainty around fitness for duty, businesses are turning to a growing suite of fatigue assessment tools and technologies. These range from evidence-based assessments such as Fatiguefit and Fatigue Guru that operate at a business and individual level respectively, to in-vehicle telematics and fatigue detection systems that act as the last line of defence in accident prevention.

As there is great variation in the efficacy of fatigue risk management tools, it's buyer beware when it comes to exercising due diligence in your selection. It is critical to understand whether the solution is a proven system and will be legally and scientifically defensible in court. You'll want to know that whichever approach you use, the technology or tool has been tested and the results have been independently verified. Failure to do so could leave you at risk of prosecution and jail time.

To keep yourself and your business safe, take the subjectivity out of fatigue risk assessment. Use validated, evidence-based tools to support your decision-making and implement them in cooperation with your team.

Otherwise, you better get a lawyer, son. Better get a real good one!

