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February 10, 2022

ATTORNEY GENERAL OPINION NO. 2022- 2

The Honorable Dinah H. Sykes
State Senator, 21st District
State Capitol, Room 318-E
Topeka, KS 66612

Re: Automobiles and Other Vehicles—Drivers Licenses—Definitions;
Disqualification from Driving Commercial Vehicle; Diversion Agreements
Not Allowed; Plea Agreements: Driving Under the Influence

Cities and Municipalities—Code for Municipal Courts; Proceedings After
Arrest and Prior to Trial—Municipal Diversion Agreements; Provisions of
Diversion Agreements

Criminal Procedure—Procedure After Arrest—Definitions; Diversion
Agreements

Synopsis: A driving under the influence (DUI) diversion is statutorily defined by K.S.A. 2021 Supp. 8-1567 as a “conviction,” meets the definition of “conviction” in K.S.A. 2021 Supp. 8-2,128 (h) and 49 C.F.R. § 383.5, appears on a commercial driver’s license (CDL) holder’s record and is posted on the Commercial Driver’s License Information System (CDLIS) by the Department of Revenue, Division of Vehicles, and therefore is lawful. Plea bargaining of a DUI charge that results in the avoidance of the numerous mandatory penalties of K.S.A. 2021 Supp. 8-1567 is prohibited. An amendment of a DUI charge committed by a CDL holder, pursuant to plea bargaining, irrespective of the merits, violates the masking prohibition in 49 C.F.R. § 384.226.

Diversion of a traffic control law violation committed by a CDL holder, other than DUI, is not defined as a “conviction,” does not appear on a person’s

record, and is not posted to the CDLIS, and therefore is prohibited. Plea bargaining or charging amendments of non-DUI traffic control law violations, committed by a CDL holder, that result in convictions for lesser or fewer violations are not prohibited by K.S.A. 2021 Supp. 8-2,150 but would violate 49 CFR § 384.226's masking prohibition, unless done to conform with the evidence. Cited herein: K.S.A. 2021 Supp. 8-249; 8-2,128, 8-2,142, K.S.A. 8-2,148, K.S.A. 2021 Supp. 8-2,150, 8-1567, 12-4413, 12-4414, 12-4415, 12-4416, K.S.A. 22-2907, K.S.A. 2021 Supp. 22-2908, 22-2909.

* * *

Dear Senator Sykes:

As State Senator for the 21st District, you request our opinion on whether 49 C.F.R. § 384.226 or K.S.A. 2021 Supp. 8-2,150 prohibits the holder of a commercial driver's license (CDL) from receiving diversion, or an amendment, of a traffic charge.

As we are unsure of the meaning of "traffic charge" in your question, we will first evaluate driving under the influence (DUI)¹ charges and the city ordinances and county resolutions prohibiting the same conduct. Later, we will address non-DUI traffic control law violations.

Before we begin our analysis, it is important to understand the specialized dangers of commercial motor vehicles, the history of licensure of commercial drivers, enforcement struggles, and the recordkeeping of violations. Due to a commercial motor vehicle's large size, delayed ability to stop, reduced visibility, and sometimes hazardous cargo, commercial motor vehicles are much more likely to be involved in fatality and injury crashes. The most recent data from the U.S. Department of Transportation reports that from 2018 to 2019, fatality crashes involving large trucks² increased by 2 percent, from 4,909 to 5,005, and injury crashes involving large trucks increased by 6 percent, from 112,000 to 119,000.³

Prior to 1986, no minimum federal standards existed to ensure drivers with a CDL were properly qualified to operate a commercial motor vehicle (CMV). During this time, each state government had exclusive authority to license commercial drivers and establish its own standards for the skills and qualifications necessary to receive a CDL. The result was that many drivers carried multiple licenses and could selectively decide which license to present if stopped by law enforcement, which caused enforcement confusion.⁴ To

¹ K.S.A. 2021 Supp. 8-1567.

² A large truck is defined in the Fatality Analysis Reporting System as a truck with a gross vehicle weight rating greater than 10,000 pounds. *Large Truck and Bus Crash Facts 2019*, U.S. Department of Transportation, Federal Motor Carrier Safety Administration Analysis Division, October 2021.

³ *Large Truck and Bus Crash Facts 2019*, U.S. Department of Transportation, Federal Motor Carrier Safety Administration Analysis Division, October 2021.

⁴ *Commercial Driver's Licenses: A Prosecutor's Guide to the Basics of Commercial Motor Vehicle Licensing and Violations*, National District Attorneys Association, 2nd Edition, 2017.

combat these issues, Congress passed the Commercial Motor Vehicle Safety Act (CMVSA)⁵ in 1986. Regulations adopted under the authority of the CMVSA established uniform minimum knowledge and skill standards for commercial drivers. The purpose of creating the uniform standards was to help reduce truck and bus accidents, fatalities, and injuries by requiring drivers to have a single CMV license and by disqualifying drivers who operated CMVs in an unsafe manner.⁶ Under the CMVSA, states retained the authority to issue CDLs, but states must require a driver to show a minimum knowledge and skill set level before issuing a CDL.⁷

The CMVSA also established the Commercial Driver's License Information System (CDLIS).⁸ The CDLIS is a nationwide, centralized computer system that allows states to post and review a driver's record and prevents a driver from obtaining multiple licenses.

Consequences of Noncompliance

Kansas, like all states, must exert diligent efforts to assure compliance with the Federal Motor Carrier Safety Administration's regulations under the CMVSA. Penalties for noncompliance can be swift and costly. 49 C.F.R. § 384.401, Withholding of funds based on noncompliance, states:

(a) Following the first year of noncompliance. An amount up to 4 percent of the Federal-aid highway funds to be apportioned to any State under 23 U.S.C. 104(b)(1) and (2) shall be withheld from a State on the first day of the fiscal year following such State's first year of noncompliance under this part.

(b) Following second and subsequent year(s) of noncompliance. An amount up to 8 percent of the Federal-aid highway funds required to be apportioned to any State under 23 U.S.C. 104(b)(1) and (2) shall be withheld from a State on the first day of the fiscal year following such State's second or subsequent year(s) of noncompliance under this part.

A calculation of the financial impact on Kansas, considering the Federal Highway Administration's Apportionment of Federal-Aid Highway Program Funds for Fiscal Year 2022,⁹ would be a \$16,672,178.90 loss the first year and a \$33,344,357.80 loss in the second and subsequent years. In addition to federal fund withholding, noncompliance

⁵ 49 U.S.C. § 31311.

⁶ 49 C.F.R. § 383.1.

⁷ 49 C.F.R. § 384.202.

⁸ The commercial driver's license information system (CDLIS) was established by FMCSA pursuant to § 12007 of the Commercial Motor Vehicle Safety Act of 1986. 49 C.F.R. § 383.5.

⁹U.S. Department of Transportation, Federal Highway Administration, FY2022 Federal-Aid Highway Program Apportionments Under the Bipartisan Infrastructure Law, https://www.fhwa.dot.gov/legsregs/directives/notices/n4510858/n4510858_t1.cfm#note2 (Last accessed Feb. 1, 2022).

can result in decertification of a state's CDL program.¹⁰ Compliance with the CMVSA requires the efforts of many statewide entities and personnel. Duties are placed upon all jurisdictional levels of prosecutors, courts and the Department of Revenue, Division of Vehicles (Division) to assure Kansas is not at risk for loss of substantial federal funds.

Compliance Responsibilities

Prior to filing a complaint alleging DUI, a prosecutor must request and receive a record from the Division of all prior convictions of motor vehicle law violations and a Kansas Bureau of Investigation (KBI) central repository report of all criminal history.¹¹ Prior to sentencing, the court is required to request and receive from the Division a record of motor vehicle law convictions.¹² Courts are also required to electronically report a diversion agreement entered into in lieu of further criminal proceedings to the Division.¹³ A city attorney,¹⁴ county or district attorney or the Attorney General¹⁵ is required to forward to the Division a copy of the diversion agreement when filed. The Attorney General, a county attorney or a district attorney is required to forward to the KBI a copy of the diversion agreement.¹⁶ In municipal court, the city attorney has the duty to submit a copy of diversion agreements to the KBI.¹⁷

After the requirements placed on the Attorney General, district attorneys, county attorneys, city attorneys, and the courts are met, the reporting requirements then become the responsibility of the Division.¹⁸

The Federal Motor Carrier Safety Administration (FMCSA), through CMVSA regulations, requires states to report CDL convictions within 10 days.¹⁹ This requirement includes reporting to CDLIS and also to the home state of out-of-state drivers.²⁰

This duty to report is memorialized in 49 C.F.R. § 384.225, CDLIS driver recordkeeping:

The State must:

(a) CLP or CDL holder: Post and maintain as part of the CDLIS driver record:

¹⁰ 49 C.F.R. § 384.409.

¹¹ K.S.A. 2021 Supp. 8-1567(g).

¹² K.S.A. 2021 Supp. 8-1567(h).

¹³ *Id.*

¹⁴ K.S.A. 2021 Supp. 12-4416(f).

¹⁵ K.S.A. 22-2909 (l).

¹⁶ K.S.A. 22-2909(k).

¹⁷ K.S.A. 12-4412.

¹⁸ K.S.A. 2021 Supp. 8-249(b) requires the Department of Revenue, Division of Vehicles to file all accident reports and abstracts of court records of convictions received pursuant to state law.

¹⁹ 49 C.F.R § 384.225.

²⁰ K.S.A. 2021 Supp. 8-2,142.

(1) All *convictions*,²¹ disqualifications and other licensing actions for violations of any State or local law relating to motor vehicle traffic control (other than parking, vehicle weight, or vehicle defect violations) committed in any type of vehicle.

Driving Under the Influence, K.S.A. 2021 Supp. 8-1567, Diversion Agreements

To begin to answer your question, we first consider DUI diversion agreements and look to K.S.A. 2021 Supp. 8-2,150. K.S.A. 2021 Supp. 8-2,150(a) states:

A driver or a holder of a commercial driver's license may not enter into a diversion agreement in lieu of further criminal proceedings that would prevent such person's *conviction* for any violation, in any type of motor vehicle, of a state or local traffic control law, except a parking violation, *from appearing on the person's record*, whether the person was convicted for an offense committed in the state where the person is licensed or another state.²²

K.S.A. 2021 Supp. 8-2,150 was intended to align with 49 C.F.R. § 384.226, Prohibition on masking convictions.²³ 49 C.F.R. § 384.226 states:

The State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CLP²⁴ or CDL²⁵ holder's *conviction* for any violation, in any type of motor vehicle, of a State or local traffic control law (other than parking, vehicle weight, or vehicle defect violations) *from appearing on the CDLIS driver record*,

²¹ *Emphasis added.*

²² *Emphasis added.*

²³ Prior to 2010, K.S.A. 8-2,150 only prohibited a “driver” from entering into a diversion agreement that would prevent to such person’s conviction from appearing on their record. The Kansas Legislature amended K.S.A. 8-2,150 effective July 1, 2010 to include a “holder” of a commercial driver’s license as well as a “driver” in the diversion prohibition. K.S.A. 8-2,150 was further amended to clarify that the determination of whether a person was a “holder” of a commercial driver’s license relies on their commercial driver’s license status on the offense date. The amendment contemplated a scenario where a commercial driver’s license “holder” was charged with driving under the influence, however, at a later date, the “holder” relinquished or surrendered their CDL. Prior to the 2010 amendment, Kansas’ diversion prohibition on simply a “driver” placed Kansas out of compliance with requirements contained in the federal Motor Carrier Safety Improvement Act (Act) of 1999. In 2010, noncompliance with the Act placed Kansas in jeopardy of losing significant federal funds.

²⁴ Commercial learner's permit (CLP) means a permit issued to an individual by a State or other jurisdiction of domicile, in accordance with the standards contained in this part, which, when carried with a valid driver's license issued by the same State or jurisdiction, authorizes the individual to operate a class of a commercial motor vehicle when accompanied by a holder of a valid CDL for purposes of behind-the-wheel training. When issued to a CDL holder, a CLP serves as authorization for accompanied behind-the-wheel training in a CMV for which the holder's current CDL is not valid. 49 C.F.R. § 383.5.

²⁵ Commercial driver's license (CDL) means a license issued to an individual by a state or other jurisdiction of domicile, in accordance with the standards contained in this part, which authorizes the individual to operate a class of a commercial motor vehicle. 49 C.F.R. § 383.5.

whether the driver was convicted for an offense committed in the State where the driver is licensed or another State.²⁶

“Masking” is not defined in the CMVSA, the FMCSA’s associated regulations or Kansas statutes. Black’s Law Dictionary defines “masking” as “[t]he practice or an instance of a defendant's agreeing by plea bargain to plead guilty to a less serious offense than the one originally charged, as by pleading guilty to parking on the curb when one has been charged with speeding in a school zone”.²⁷

It is important to recognize plea bargaining, charge dismissal or an amendment by a prosecutor to conform with the sufficiency of evidence is not masking. A prosecutor is required to evaluate the sufficiency of evidence when pursuing a criminal charge. The Kansas Rules of Professional Conduct place specialized responsibilities on prosecutors.²⁸ One responsibility requires a prosecutor in a criminal case to refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.²⁹ If a prosecutor evaluates the evidence surrounding a CDL holders charge, determines probable cause does not exist and amends or dismisses the charge, masking has not occurred. Considering the significant and costly ramifications of CMVSA noncompliance, best practices would suggest prosecutors establish a method of documentation related to the dismissal or amendment of charges involving CDL holders based upon evidentiary issues.

When considering the masking prohibitions contained in K.S.A. 2021 Supp. 8-2,150 and 49 C.F.R. § 384.226, we first note that 49 C.F.R. § 384.226 prohibits masking, deferring imposition of judgment or allowing diversion, while K.S.A. 2021 Supp. 8-2,150 only prohibits a driver from entering a diversion agreement. Also different is the federal exception of parking, vehicle weight and vehicle defect violations, while Kansas only excludes parking violations. Lastly, while the federal regulation restricts a state’s action, our Kansas statute prohibits conduct by a driver or holder of a commercial driver’s license, not state action. Without delving into the various pitfalls of a prosecutor or court facilitating a CDL driver or holder entering into an unlawful diversion agreement, we simply note it would be unwise.

Considered together, K.S.A. 2021 Supp. 8-2,150 and 49 C.F.R. § 384.226 prohibit masking, deferred imposition of judgment, and diversion, if the outcome would prevent a conviction from appearing on the person’s record or CDLIS record. The definition of “conviction” is much different under federal CDL law than is typically understood in the criminal justice and traffic court systems. Typically, the term “conviction” describes a situation in which a judgment of guilt is rendered upon someone.³⁰ The federal definition, applicable to CDL holders, is much broader: The FMCSA defines “conviction” as:

²⁶ *Emphasis added.*

²⁷ *Masking.* Black’s Law Dictionary (11th ed. 2019) (accessible on Westlaw).

²⁸ KRPC 3.8.

²⁹ KRPC 3.8(a).

³⁰ *Commercial Driver’s Licenses: A Prosecutor’s Guide to the Basics of Commercial Motor Vehicle Licensing and Violations*, National District Attorneys Association, 2nd Edition, 2017 at 29.

An unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or by an authorized administrative tribunal, an unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court, a plea of guilty or nolo contendere accepted by the court, *the payment of a fine or court costs*,³¹ or violation of a condition of release without bail, regardless of whether the penalty is rebated, suspended or probated.³²

K.S.A. 2021 Supp. 8-2,128(h) contains the identical definition of "conviction." K.S.A. 2021 Supp. 8-1567(i)(3) contains an additional definition of "conviction" to be used in determining whether a DUI conviction is a first, second, third, fourth or subsequent for purposes of sentencing. This definition specifically includes entering into a diversion agreement.

Diversion agreements are further addressed in K.S.A. 22-2909 and its municipal court counterpart, K.S.A. 2021 Supp. 12-4416. These statutes apply to all diversion agreements; however, they contain specific requirements for DUI diversions. The requirements include a stipulation of facts, *specified fine amount requirements*,³³ and participation in a drug and alcohol evaluation. Recall that 49 C.F.R § 383.5 and K.S.A. 2021 Supp. 8-2,128 (h) list "the payment of fines or court costs" in their list of qualifiers resulting in a "conviction."

National CMVSA Compliance and Enforcement Efforts

A review of other states reveals two typical ways states have acted to enforce the federal definition of conviction and the prohibition on masking. Some states enacted legislation to prohibit a CDL holder or driver from participating in a diversion or deferral program. Kansas enacted K.S.A. 2021 Supp. 8-2,150 that prohibits diversions in criminal proceedings, but only if it would prevent the "conviction" from appearing on the person's record. Other states allow diversions or deferrals, but require that a notice of conviction be sent to the state's driver's licensing agency to be included on the driver's record. As discussed, in Kansas, a diversion is a "conviction," and if the statutory reporting duties are followed, will appear on a person's Kansas record and the CDLIS.

In 2015, the Supreme Judicial Court of Massachusetts considered its state's "Continued Without a Finding" (CWF) disposition.³⁴ Similar to a Kansas diversion, a CWF defendant stipulates to facts sufficient to warrant a finding of guilt and the case is continued without a finding of guilt being entered. Like a Kansas diversion, if the defendant successfully complies with the terms, the charge is dismissed. In Massachusetts, if the defendant is a CDL holder or driver, the state driver's licensing

³¹ *Emphasis added.*

³² 49 C.F.R § 383.5

³³ *Emphasis added.*

³⁴ *Tirado v. Board of Appeal on Motor Vehicle Liability Policies and Bonds*, 34 N.E.3d 334 (Mass. 2015)

agency treats the CWAF disposition as a conviction and disqualifies the defendant, triggering a posting to the CDLIS. The Supreme Judicial Court of Massachusetts affirmed the state driver's licensing agency's treatment of a CWAF, when granted to a CDL driver or holder, ruling the CWAF disposition fell within the definition of the term "conviction" as applied to CDL holders and drivers. A DUI diversion in Kansas, like a CWAF in Massachusetts, is treated as a conviction, is recorded and disqualifies a CDL holder or driver.³⁵

We now consider Attorney General Opinion No. 2003-32. In reaching its conclusion that DUI diversion was precluded for CDL drivers, the opinion evaluated conflicting statutory language:

We are aware that K.S.A. 8-1013 and K.S.A. 2002 Supp. 8-1567(l)(1), as amended by L. 2003, ch. 100, § 1 provide that for the purpose of determining whether an occurrence is a first, second or subsequent offense, an alcohol or drug-related conviction includes entering into a diversion agreement. Based on these statutes alone, a diversion for driving under the influence would not be precluded as such would count as a conviction. In relation to commercial drivers, however, K.S.A. 8-1013 and K.S.A. 2002 Supp. 8-1567(l)(1), as amended by L. 2003, ch. 100, § 1, conflict with L. 2003, ch.42, § 2, which precludes a commercial driver from entering into a diversion agreement. We thus turn to the well settled rule of statutory construction that where an irreconcilable conflict exists between statutes, the latest enactment will be held to supersede, repeal or supplant the earlier by implication to the extent of the conflict; the later enactment must prevail.

We note that although we agree the analysis in 2003 was legally valid, the conclusion of the opinion is no longer accurate. K.S.A. 8-2,128 was amended in 2014 and K.S.A. 8-1567 was amended in 2018. L. 2003, ch. 42, § 2, now codified as K.S.A. 2021 Supp. 8-2,150, has remained unchanged since its enactment in 2003. The recent changes to these statutes, combined with CMVSA regulations and the analysis in *Tirado v. Board of Appeal on Motor Vehicle Liability Policies and Bonds*³⁶ lead us to a contrary conclusion today.

A DUI diversion is statutorily defined by K.S.A. 2021 Supp. 8-1567 as a "conviction," meets the definition of "conviction" in K.S.A. 2021 Supp. 8-2,128(h) and 49 C.F.R. § 383.5, appears on a person's record and is posted on the CDLIS by the Division, and is therefore lawful. Although permissible, the granting of DUI diversion to CDL drivers or holders is not mandatory or likely prudent in all cases. A diligent prosecutor should use sound judgment and carefully consider the relevant diversion consideration factors

³⁵ The Department of Revenue, Division of Vehicles' form DC-9 (Rev. 12/19) contains an ACD code, DI8, with the description "entered diversion agreement after DUI arrest." The DC-9 form is used as a reference sheet for the numerous possible code types recorded on a Kansas driving record.

³⁶ 34 N.E.3d 334 (Mass. 2015)

contained in K.S.A. 2021 Supp. 12-4415 and 22-2908 when drafting their written diversion policies as required by K.S.A. 2021 Supp. 12-4414 and K.S.A. 22-2907.

Driving Under the Influence, K.S.A. 2021 Supp. 8-1567, Plea Bargaining

Next, we consider your question as it relates to plea bargaining of DUI charges and similar city ordinances and county resolutions. In addition to your cited authority, K.S.A. 2021 Supp. 8-2,150 and 49 C.F.R. § 384.226, K.S.A. 2021 Supp. 8-1567(n) governs plea bargaining of a DUI charge. K.S.A. 2021 Supp. 8-1567(n) states:

No plea bargaining agreement shall be entered into nor shall any judge approve a plea bargaining agreement entered into for the purpose of permitting a person charged with a violation of this section, or a violation of any ordinance of a city or resolution of any county in this state which prohibits the acts prohibited by this section, *to avoid the mandatory penalties*³⁷ established by this section or by the ordinance.

K.S.A. 2021 Supp. 8-1567(n) contains additional clarification language regarding plea bargaining and diversion agreements. The provision states that “entering into a diversion agreement pursuant to K.S.A. 12-4413 *et seq.* or 22-2906 *et seq.*, and amendments thereto, shall not constitute plea bargaining.”³⁸

It is important to note that the plea bargaining prohibitions contained in K.S.A. 2021 Supp. 8-1567 apply to all drivers, not just drivers or holders of a CDL. K.S.A. 2021 Supp. 8-1567(n)’s prohibition of plea bargaining to avoid mandatory penalties is clear. If a DUI charge were amended, pursuant to non-merit-based plea bargaining, yet contained all of the mandatory penalties, a violation of K.S.A. 2021 Supp. 8-1567(n) would not occur. However, if the charge of conviction was amended “to a less serious offense than the one originally charged,” this would constitute “masking” as defined by Black’s Law Dictionary.³⁹ Therefore, such an amendment would violate of 49 C.F.R. § 384.226’s prohibition on masking.

To conclude, K.S.A. 2021 Supp. 8-1567(n) only prohibits plea bargaining of DUI charges if the outcome is avoiding the numerous mandatory penalties of the statute. Although not a violation of K.S.A. 2021 Supp. 8-1567(n), a non-evidentiary based amendment of a DUI charge involving a CDL holder, regardless of whether mandatory penalties were avoided, would violate the masking probation in 49 C.F.R. § 384.226.

Non-DUI Traffic Law Violations

To answer your question as it applies to traffic law violations other than DUI, K.S.A. 2021 Supp. 8-2,150 prohibits CDL drivers and holders from entering a diversion agreement

³⁷ *Emphasis added.*

³⁸ K.S.A. 2021 Supp. 8-1567(n).

³⁹ *Masking.* Black’s Law Dictionary (11th ed. 2019) (accessible on Westlaw).

that would prevent a conviction from appearing on the driver's record. Typically, the purpose of a diversion is to avoid having a conviction appear on one's record. Unlike a DUI diversion, a traffic law violation diversion is not a "conviction" as defined by K.S.A. 2021 Supp. 8-1567 or K.S.A. 2021 Supp. 8-2,150. Even if it were considered a conviction, no reporting mechanism exists to report or record these types of diversions on a person's record.⁴⁰ These types of diversions are unable to be reported to or recorded by the Division. In turn, the Division is unable to post to the CDLIS, causing masking to occur.

K.S.A. 2021 Supp. 8-2,150 does not include the masking or deferred imposition prohibition that is included in 49 C.F.R. § 384.226. When considering the common scenario of a prosecutor amending, pursuant to non-merit-based plea bargaining, a reportable speeding ticket to a non-reportable violation, that action would not violate K.S.A. 2021 Supp. 8-2,150; however, it would violate the masking prohibition in 49 C.F.R. § 384.226.

It is important now to distinguish a second conclusion reached in Attorney General Opinion No. 2003-32:

In our opinion, since Section 2 of L. 2003, chapter 42 is written only in terms of a prohibition against a driver entering a diversion agreement, plea negotiations or amendments that result in convictions for lesser or fewer traffic infractions or offenses than originally charged are not precluded. While such plea negotiations could be considered a form of "masking," 49 C.F.R. § 384.226 does not clearly require States to prohibit plea negotiations and Kansas' L. 2003, ch. 42, § 2 clearly does not prohibit plea negotiations.

This conclusion was cited again in Attorney General Opinion No. 2011-10 and Attorney General Opinion No. 2011-11. Although we concur with the conclusion that K.S.A. 2021 Supp. 8-2,150, cited above as Kansas L. 2003, ch. 42, § 2, does not clearly prohibit plea negotiations, we clarify that plea negotiations can result in masking, such as the speeding ticket amendment example above. Additionally, an amendment that reduces the severity level of a reportable, disqualifying event to the CDLIS would result in masking.⁴¹ Plea bargaining or plea negotiations that result in masking are prohibited by 49 C.F.R. § 384.226.

If the various statutory responsibilities are met, neither 49 C.F.R § 384.226 nor K.S.A. 2021 Supp. 8-2,150 prohibits a CDL holder from receiving a DUI diversion. A DUI diversion is statutorily defined by K.S.A. 2021 Supp. 8-1567 as a "conviction", meets the definition of "conviction" in K.S.A. 2021 Supp. 8-2,128 (h) and 49 C.F.R. § 383.5, appears on a person's record and is posted on the CDLIS by the Division. Plea bargaining of DUI

⁴⁰ Kansas Division of Vehicles, Driving Record Codes, DC-9, (Rev. 12/19) only contains codes for three types of diversions, DUI (DI8), Chemical Test Refusal (RE8), and Vehicular Battery with DUI (RK8)

⁴¹ 49 C.F.R § 383.51 categorizes types of disqualifications into major offenses, serious traffic offenses, railroad-highway grade crossing offenses and violations out-of-service orders offenses. Depending on the type of offense and number of occurrences, disqualification can range from 60 days to lifetime.

charges that result in avoidance of the numerous mandatory penalties of K.S.A. 2021 Supp. 8-1567(n) is prohibited. In addition, plea bargaining or amendments, unrelated to the sufficiency of the evidence, of a DUI charge, regardless of whether the mandatory penalties are avoided, would violate the masking prohibitions of 49 C.F.R. § 384.226. Non-DUI traffic control law diversions are not defined as convictions and do not appear on a person's record and are therefore prohibited. Plea bargaining or charging amendments of non-DUI traffic control law violations, done irrespective of the merits, that result in convictions for lesser or fewer violations, are not prohibited by K.S.A. 8-2,144, but would violate the masking prohibition in 49 C.F.R. § 384.226.

Sincerely,

Derek Schmidt
Kansas Attorney General

Laine C. Barnard
Assistant Attorney General

DS:SS:LCB:sb