**2018 Year-End Regulatory and Legal Summary**

Six major regulatory issues dominated the year in review and set our foreseeable agenda for the coming year:

1. Implementation of ELD and Hours of Service implications. Rigid enforcement of hours of service through implementation of the ELD created unforeseen issues and widespread panic in the industry. Although the number of roadside inspections for hours of service violations cratered, it became clear that truckload carriers in particular would be straightjacketed in making time delivery appointments. Loss of productivity, not fatigue, resulted. Major issues became the efforts by many trucking segments to get HOS relief, a reconsideration of sleeper berth rules and defining the concept of “personal conveyance” more generally to permit some driver flexibility. We made extensive comments in response to these initiatives. See <https://www.regulations.gov/document?D=FMCSA-2018-0248-4731>.

In general we support more flexible rules across the industry and note that the ELD measures truck movement, not fatigue. We demonstrated (1) that the circadian rhythm theory and the restorative sleep concept baked into the existing HOS rules have been repudiated; and (2) actual fatigue detection devices are under development and are being used as HOS alternatives by other federal agencies. Next year we will continue to advocate more flexibility in hours of service as applied to all industry segments while focusing on the need to measure fatigue.

2. Regulatory Reform. Consistent with Executive Orders 13771 and 13777, we launched a regulatory reform agenda which was presented to the Agency, its MCSAC and the U.D. Department of Transportation. These recommendations can be found at <https://www.regulations.gov/document?D=FMCSA-2006-26367-0154>.

Most relevant is the proposal to assign a safety rating of satisfactory to all carriers which successfully complete the new carrier audit and to existing carriers which would be subject to the same desktop audit biennially when their two year carrier profile is updated. This alternative is proposed for the following reasons:

(1) Congress required the Agency to provide a safety rating to all carriers.

(2) The absence of a actual safety rating opens the door for plaintiff’s bar mischief and the claim that shippers and brokers must vet small carriers who do not have safety ratings.

(3) The new carrier audit is a proven cost-effective way to measure actual compliance and can be easily adapted as a biennial desktop audit for all registrants.

(4) The desktop audit is a proven cost-effective way to measure actual compliance and to end the mischief that the 500,000 carriers not assigned a current safety rating are somehow fit to operate but not fit to use.

Next year we will continue to push for a biennial audit and other reform issues in meetings with the Agency, before the Small Business Administration, and with Congress as part of its regulatory oversight function.

3. Publication of Roadside Data in MCMIS. Rather than seek broad-based comments about the unintended consequences of publishing roadside data, the Agency attempted to troll for support that industry consultants and insurers wanted or needed the Agency to publish a more robust MCMIS system containing roadside data. To avoid allowing the Agency to develop a limited record which ignored our six year effort to demonstrate why publication of the data is harmful, we submitted a well-documented summary referring to over 40 previously filed affidavits and including current affidavits to disabuse the Agency that the idea that insurers or the shipping community wanted or needed this information. See <https://www.regulations.gov/document?D=FMCSA-2017-0226-0021>.

4. FAST Act Compliance and Corrective Action Plan. In the FAST Act, Congress required removal of SMS scoring and that the National Academies of Science and FMCSA address specific data sufficiency and accuracy issues we have raised in Congressional hearings and/or which have been adopted by federal oversight agencies.

Neither the NAS Report nor the FMCSA’s corrective action plan address these issues. This year, we filed extensive comments, pointing out the omission of the Congressional prerequisite. See <https://www.regulations.gov/document?D=FMCSA-2017-0226-0021>

These comments make the record for opposing any effort by the Agency to ignore the data sufficiency argument and the adverse consequences on small carriers of using limited and inaccurate data. The systemic flaws in SMS methodology must be addressed before the Agency can obtain approval to develop a new safety measurement system by another name, or republish roadside data.

In the new year, an article demonstrating why data collected by the Agency cannot be used to demonize carriers in accident suits will be published. We will be active in reviewing and commenting on the Agency’s corrective action plan currently under review by the OIG and will request the Small Business Administration to assist in our efforts.

5. Item Response Theory (“IRT”). The National Academies of Science was presented with all of our underlying studies and data showing that SMS methodology was systemically flawed. Rather than address these issues, it stated that an alternative method of gathering carrier data, the IRT, could create a model for measuring a carrier’s “culture of safety.” The NAS did not predict how many carriers could be rated, what correlation the data would have to ultimate carrier compliance or like SMS methodology, how the resulting scores could be used to measure individual carrier compliance with existing regulations.

In its corrective action plan, the FMCSA without further analysis, pivoted the future of its big data system to the IRT model. In terms of data accuracy and sufficiency, it appears that the IRT model will use the same crash data, roadside inspection and traffic violations baked into SMS even though NAS members are careful to point out that the IRT model does not address data issues.

The NAS suggested that the Agency should consider data not remotely tied to safety compliance such as method of pay, amount of pay, driver pay, and possibly whether nighttime driving is involved in a formula to determine “the culture of safety.” So far, these suggestions, which have been widely criticized, have not manifested themselves. Monitoring of IRT prototypes being developed by a third party vendor so far has not shown how the systemic enforcement anomaly and data sufficiency and accuracy issues of SMS will be ameliorated.

In the new year, we will be offering a peer review of the IRT model and its efficacy when, unlike the standard aptitude test or SAT test, where it is now used, each scored participant is evaluated on different data.

6. Preventability. The denominator in any mathematical assessment of future crash “predictability” must be driven by a demonstration that current crash data is accurate and correlates to a failure of carrier management to comply with existing regulations.

Traditionally, the FMCSA has used all reportable crashes as the denominator, knowing full well that ATRI reports 65% or more of the reported crashes are not the carrier’s fault. The concept of “preventability” is an arbitrary construct which the Agency is trying to define in an effort to scrub reportable crashes. There are over 300,000 reportable crashes a year and trying to establish a system for the Agency to call balls and strikes under DataQ would seem to be a fool’s errand – particularly when the patrolman preparing the accident report has no first-hand knowledge of the crash, and cannot determine causation much less whether a systemic flaw in carrier management is responsible.

In the coming year we will continue to oppose use of the term “predictability” and a non-judicial determination by the Agency of crashes as useful or proper for publication. This issue, we believe, has no place in accident litigation. Determining causation is within the province of the National Highway Transportation Safety Administration and publication of recordable or allegedly “preventable” crashes is particularly unfair and prejudicial to small carriers.

AN article will be published in the first quarter discussing the statutory prohibition of using FMCSA gathered crash data in civil litigation.

7. Misclassification/Preemption. The use of independent contractors under the so-called “owner-operator model” is a long recognized small business paradigm sanctioned by the so-called truth-in-leasing regulations at 49 C.F.R. 376. The Federal Government can pass statutes and laws under the Commerce Clause preempting state laws which would result in lack of uniformity and impede interstate commerce. A particular statute passed as part of deregulation provides expressed preemption of state laws which interfere with routes, rates and services.

Yet, the independent contractor model has come under increased attack as states have attempted to vitiate the model and reclassify owner-operators as employees, subject to state welfare benefits including worker’s compensation. A conflict between the Ninth Circuit and the First Circuit recently led to a petition that the Supreme Court decide the issue in a pending case and make a ruling that would apply nationwide. The Court recently declined to do so.

As a result of the midterm elections, the chance for limited relief from the California meal and rest break from Congress has been effectively thwarted. The FMCSA is being asked to affirm the industry’s argument that the meal and rest break interferes with interstate commerce.

Clearly, class action lawsuits against major carriers over misclassification are running amuck. In the new year, we will continue to support the independent contractor model, filing amicus curiae in pending litigation if requested and working with other small business groups to ensure that the independent contractor model is properly portrayed as a benefit to blue collar, small business entrepreneurs.