



**TEANA**  
The Expedite Association of North America

## Regulatory and Legislative Update

December 2019

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### Regulation and Enforcement

#### CVSA confirms that full ELD enforcement will begin December 17

Unlike the initial implementation of electronic logging devices (ELDs), carriers will not see a period of soft enforcement for the December 17, 2019, deadline for transition from automatic onboard recording devices (AOBRDs) to devices meeting the full ELD standards, the Commercial Vehicle Safety Alliance announced. Also, the Federal Motor Carrier Safety Administration has stated that there will be no extensions or exceptions made to the December 17 deadline. After that date, a driver still using an AOBRD will be considered to have no record of duty status.

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Under the North American Standard Out-of-Service Criteria, a property-carrying driver who does not have a record of duty status in his or her possession when one is required will be declared out of service for 10 hours and a passenger-carrying driver without a record of duty status when one is required will be placed out of service for eight hours. Only self-certified devices listed at <https://eld.fmcsa.dot.gov/List> will be considered as meeting the ELD standard.

ELD-compliant devices differ from minimum AOBDR standards in several important ways, including automatic recording of driving once the vehicle crosses the 5 mph threshold and tighter controls on editing of electronic log data. ELDs also require position reports every hour while the truck is moving; AOBDRs require position reports only at changes of duty status. For more information on ELDs, visit the FMCSA ELD homepage at <https://eld.fmcsa.dot.gov>.

### **Registration required for January launch of drug and alcohol clearinghouse**

Carriers, drivers, and other key participants in the drug and alcohol testing process must register with the drug and alcohol clearinghouse in advance of the January 6, 2020, implementation date. There is no cost for registration. However, queries of the database will cost \$1.25 each. Under the rule, carriers must continue to request drug and alcohol testing results directly from prior employers for three years in addition to querying the database. The dual effort is necessary because the clearinghouse will capture only positive tests, refusals to submit to tests, and evidence of actual use that occur on or after January 6, 2020. For more information on the requirements for using the clearinghouse, visit <http://clearinghouse.fmcsa.dot.gov>.

### **FMCSA proposes to drop requirement for passenger carrier no-defect DVIRs**

FMCSA has proposed to rescind the requirement that drivers of passenger-carrying commercial motor vehicles (CMVs) operating in interstate commerce, submit, and motor carriers retain, driver-vehicle inspection reports (DVIRs) when the driver has neither found nor been made aware of any vehicle defects or deficiencies. The proposed rule would remove an information collection burden without adversely impacting safety, the agency said. The proposal would extend to passenger carriers relief that was granted to all property-carrying motor carriers in 2014 and previously to intermodal carriers in 2012. Comments are due January 13. For the Federal Register notice, visit <https://www.federalregister.gov/d/2019-24525>.

### **FMCSA grants waste haulers relief from 12-hour return requirement**

FMCSA approved an application from the National Waste & Recycling Association (NWRA) for an exemption from one of the criteria for using the “short-haul—100 air-mile radius driver” exception to the requirement for the preparation and retention of records of duty status. NWRA asks that all short-haul CMV drivers in the waste and recycling industry be allowed up to 14 hours (instead of the current 12 hours) to return to the original work reporting location without losing their short-haul status. For a copy of the Federal Register notice, visit <https://www.federalregister.gov/d/2019-25335>. Separately, FMCSA has granted a similar exemption request from Kimble Recycling & Disposal, Inc. For the Federal Register notice, visit <https://www.federalregister.gov/d/2019-25339>.

### **Refuse hauler seeks ELD exemption for affiliated companies**

FMCSA requests comments by January 2 on an application from Republic Services for an exemption from current ELD regulations for its affiliated companies. The company argued that that ELDs were not designed for short-haul CMVs and that application of ELDs to CMVs that operate within a 100-mile radius and make multiple stops represents an inefficient use of ELD technology. Republic also requested an exemption for drivers operating under the “short-haul” exception to return to the original work reporting location within 14 hours of coming on duty rather than the 12 hours specified in the regulation. However, this request apparently was granted, in effect, by FMCSA’s approval of an exemption requested by the National Waste & Recycling

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Association. For the Federal Register notice of the Republic Services application, visit <https://www.federalregister.gov/d/2019-26096>.

### **Firearms retailer seeks expanded radius under short-haul exception**

FMCSA is requests comments by December 16 on an application from Palmetto State Armory (PSA) for an exemption to increase the 100 air-mile radius in “short-haul operations” to 150 air-miles for its drivers. The exemption would allow two of PSA’s CMV drivers to use time records instead of record of duty status (RODS) when operating between 100 and 150 air miles. For the Federal Register notice, visit <https://www.federalregister.gov/d/2019-24722>.

### **FMCSA clears out various HOS exemption requests with denials**

In separate actions published during November, FMCSA rejected several long-pending applications for exemptions from the hours-of-service (HOS) regulations. Although the specifics of the denials vary slightly, they generally boil down to a lack of analysis of the safety impact of the exemption and/or lack of countermeasures to ensure a level of safety equivalent to, or greater than, the level that would be achieved under current regulations. The denied exemptions are as follows:

- American Bakers Association (ABA) and International Dairy Foods Association (IDFA) for a blanket HOS exemption for drivers engaged in the delivery of baked goods and milk products in anticipation of a natural disaster or emergency, such as extreme weather events, natural disasters, etc. For the Federal Register notice, visit <https://www.federalregister.gov/d/2019-25337>.
- Wolfe House Movers, LLC and Wolfe House Movers of Indiana, LLC to allow certain drivers to operate under the 70-hour/8-day rule even though the companies do not operate seven days a week. For the Federal Register notice, visit <https://www.federalregister.gov/d/2019-25330>.
- PJ Helicopters, Inc. (PJH) for an exemption that would have granted relief from two provisions of the HOS regulations for its ground support equipment operators during times when drivers are responding to or returning from active incidents as requested by an officer of a public agency or utility. For the Federal Register notice, visit <https://www.federalregister.gov/d/2019-25336>.
- HEPACO, LLC; Heritage Environmental Services, LLC; Lewis Environmental, Inc.; and Moran Environmental Recovery, LLC, for a blanket HOS exemption for drivers engaged in providing direct assistance in actual and potential environmental emergencies. For the Federal Register notice, visit <https://www.federalregister.gov/d/2019-24526>.

### **FMCSA grants Navistar exemption on ADAS, seeks comments on Lytx request**

FMCSA has granted Navistar's application for an exemption to allow an advanced driver-assistance system (ADAS) to be mounted lower in the windshield on Navistar's commercial motor vehicles than is permitted by regulation. For the Federal Register notice, visit <https://www.federalregister.gov/d/2019-25494>. Separately, the agency is requesting comments by January 2 on an application from Lytx, Inc. for an exemption to allow its ADAS to be mounted lower in windshields that allowed by regulation. For the Federal Register notice, visit <https://www.federalregister.gov/d/2019-26097>.

### **International air cargo liability limit set to increase**

The liability limit on lost or damaged international air cargo among most countries is scheduled to increase on December 28 to 22 Special Drawings Rights (SDRs) per kilogram from the current rate of 19 SDRs. Based on the current exchange rate of approximately \$1.38 per SDR, the limit will rise from approximately \$26 per kilogram to more than \$30 per kilogram.

### Legislation

#### **Restrictive legislation regarding independent contractors advances in New Jersey**

As part of a package of pro-labor bills moving through the New Jersey legislature, state lawmakers are close to enacting a bill (S4204) that would codify a restrictive employment test to make it very difficult for employers to treat as independent contractors ongoing workers engaged in the same business. The Senate Labor Committee approved the bill on November 14, but the Assembly Labor Committee made a few changes on November 18, requiring further action by the Senate committee. The Senate panel agreed to the Assembly's changes on December 5 after hearing about four hours of testimony, mostly in opposition to the bill.

At the latest hearing, Lisa Yakomin, president of the Association of Bi-State Motor Carriers, testified that while the original version of S4204 would have eliminated independent contractors in New Jersey completely, "this amended version isn't much better." Yakomin noted that the bill's sponsor, Senate President Stephen Sweeney, claims to have modified the bill so that it merely codifies the state's existing ABC test.

"But that test and the way it is being applied is precisely what is broken," Yakomin told the committee. "The ABC classification test is outdated, oversimplified, vague and is being interpreted in a dangerously subjective way by the New Jersey Department of Labor. Instead of addressing the confusion and putting an end to the Department of Labor's abuse of power, this bill gives them permanent license to do so and will end up harming the very same workers it aims to protect." Yakomin said that 77% of the truck drivers who work at the ports of New York and New Jersey are independent owner-operators – "not because they are misclassified but because the industry itself requires, and therefore attracts, a flexible work force."

The committee also heard several owner-operators as well as from individuals involved in several other vocations testifying that S4204 would make their legitimate arrangements as independent contractors or employers of independent contractors unworkable. Although the committee moved the amended bill, committee Chairman Fred Madden said that Sweeney remains open to further changes as the legislation moves toward passage. The bill potentially could be passed by the legislature and signed into law before the end of the year. For more information, visit <https://www.njleg.state.nj.us> and search S4204 under "Bill Search."

#### **House, Senate bills would establish an advisory board to promote women in trucking**

Legislation (H.R. 5145, S. 2858) aimed at increasing participation of women in various aspects of the trucking industry was introduced in both the House and Senate in September. Sponsors of the bills were Rep. Mike Gallagher (R-Wisconsin) and Sen. Jerry Moran (R-Kansas). The bills would require FMCSA to establish and facilitate an advisory board to promote organizations and programs that provide education, training, mentorship, or outreach to women in the trucking industry and that recruit women into the trucking industry. The board would report to FMCSA within 18 months of the legislation's enactment, and FMCSA would report to Congress outlining actions taken to adopt the strategies recommended by the board or explaining the reasons the agency did not adopt the strategies. For more information on the bills, visit <https://www.congress.gov/bill/116th-congress/house-bill/5145> and <https://www.congress.gov/bill/116th-congress/senate-bill/2858>.

#### **House panel approves bill addressing sexual assault in passenger transportation**

The House Transportation and Infrastructure (T&I) Committee on November 20 approved a bill (H.R. 5139) that attempts to address incidents of sexual assault and harassment in multiple modes of transportation by requiring certain transportation carriers to establish formal policies, training, and reporting structures regarding sexual assault and harassment. Among the various types of passenger carriers affected by the

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proposed legislation are Class 1 carriers that conduct regularly scheduled intercity service. For more information on the bill, visit <https://www.congress.gov/bill/116th-congress/house-bill/5139>.

### Courts

#### **California Trucking Association challenges AB 5 in federal court**

The California Trucking Association (CTA) and two California independent owner-operator truck drivers have expanded a previously filed federal lawsuit to include a challenge of the recently enacted legislation (AB 5) that greatly restricts use of independent contractors in many industries, including trucking. AB 5, which was signed into law in September and takes effect in January, essentially codifies the employment test established in the California Supreme Court's *Dynamex Operations West, Inc. v. Superior Court* decision. The original CTA lawsuit had challenged the *Dynamex* decision specifically. The amended lawsuit argues that the classification test in the *Dynamex* decision and AB 5 is preempted by the supremacy and commerce clauses in the U.S. Constitution and is in direct conflict with the Federal Motor Carrier Safety Act (FMCSA) and the Federal Aviation Administration Authorization Act of 1994 (FAAAA).

“AB 5 has implications that go beyond employment classification in California,” said Robert Roginson, an attorney for CTA. “With more than 350,000 independent owner-operators registered in the United States, the new test imposes an impermissible burden on interstate commerce under the U.S. Constitution’s commerce clause and infringes upon decades-old congressional intent to prevent states from regulating the rates, routes and services of the trucking industry.”

For a copy of CTA’s legal complaint, visit <http://bit.ly/CTA-AB5>. For the text of AB 5 and other information on the law, visit <http://bit.ly/AB-5-CA>.

### Advocacy and Comment

#### **ELD implementation**

Full ELD implementation starts in the next 10 days. As expected, many carriers who waited until the last minute are having technological implementation problems. Yet, no enforcement program is anticipated. The number of form and manner violations has crashed and as a result, a single violation can increase a carrier’s score from 0 to 77. The result can be loss of business and increased insurance rates before the carrier gets its day in court.

#### **Hours of service changes**

Thousands of comments have been filed. This appears to be a top priority of the Agency and it is possible that a rule addressing the proposed changes will be out soon after the first of the year.

#### **CSA / SMS methodology**

On this front, no news is good news. The Agency is walking back from its enthusiasm over the IRT program and is faced with a report from the Department’s Office of the Inspector General that is critical of the program. Although the test “preventability” program remains in place, the Agency has not addressed the criticism of the program or the need to conduct rulemaking.

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### **California legislation AB 5**

Although there is a pending lawsuit, it appears that California legislation AB5 will go into effect on January 1. Carriers with the independent contractor model in California are scurrying to respond with large carriers simply terminating the use of owner-operators there. New Jersey and other states do not appear to be far behind in passing legislation which deprives blue collar entrepreneurs of the ability to be treated as small businessmen. Although there is a conflict in the Circuits, the Supreme Court does not appear poised to answer this challenge and in the dysfunctionality of Washington there seems to be no appetite for finding that federal preemption trumps disparate state treatment of the contractor model.

Recipients of this newsletter are invited to listen to a complimentary webinar on this important issue which will affect the predominant way carriers obtain equipment with drivers in most long haul operations.

[TEANA MEMBERS VIDEO LINK \(https://forms.gle/qo2Nko4WWFSBTEL47\)](https://forms.gle/qo2Nko4WWFSBTEL47)