

# Regulatory and Legislative Update

May 2020

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For the latest FMCSA guidance related to COVID-19, visit <https://www.fmcsa.dot.gov/COVID-19>.

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## Regulation and Enforcement

### FMCSA relaunches Crash Preventability Program

The Federal Motor Carrier Safety Administration (FMCSA) has decided to resume ruling on the preventability of certain categories of commercial motor vehicle (CMV) crashes in a new program that expands on the categories of crashes to be reviewed beyond those in the pilot program; excludes crashes deemed not preventable from the Safety Measurement System (SMS); and streamlines the review process. Motor carriers that have an eligible crash that occurred on or after August 1, 2019 may submit a request for data review (RDR) with the required police accident report and other supporting documents, photos, or videos through the agency's DataQs website (<https://dataqs.fmcsa.dot.gov>).

Although FMCSA rejected the Motor Carrier Regulatory Reform Coalition's (MCRR) position that the proposed changes be made through notice and comment rulemaking, the agency acknowledged in a draft Federal Register notice the concerns expressed by MCRR and the National Association of Small Trucking Companies (NASTC) that preventability would be conflated with fault and that this confusion could lead to negative outcomes in insurance rates and private litigation.

FMCSA emphasized that determinations on crash preventability do not establish legal liability, fault, or negligence by any party. "Fault is generally determined in the course of civil or criminal proceedings and

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results in the assignment of legal liability for the consequences of a crash,” FMCSA said in the draft notice. “By contrast, a preventability determination is not a proceeding to assign legal liability for a crash. Under 49 U.S.C. § 504(f), FMCSA’s preventability determinations may not be admitted into evidence or used in a civil action for damages and are not reliable for that purpose.”

In response to MCRRC and NASTC concerns about the potential conflation of preventability and fault – and the Commercial Vehicle Safety Alliance’s concerns about the impact on state criminal proceedings – FMCSA has added a disclaimer to the SMS website that states:

A crash preventability determination does not assign fault or legal liability for the crash. These determinations are made on the basis of information available to FMCSA by persons with no personal knowledge of the crash and are not reliable evidence in a civil or criminal action. Under 49 U.S.C. § 504(f), these determinations are not admissible in a civil action for damages. The absence of a not preventable determination does not indicate that a crash was preventable.

The agency also will provide language in its notifications to submitters, as it did in the demonstration program, that determinations are not appropriate for use by private parties in civil litigation and that they do not establish legal liability, fault, or negligence. The language also confirms that crash preventability determinations will not affect safety ratings or result in any penalties or sanctions.

For more information on the CPP, including a link to the draft Federal Register notice, visit <https://www.fmcsa.dot.gov/crash-preventability-determination-program>.

### **NPRM would downgrade CDLs, CLPs for positive drug tests**

FMCSA is requesting comments by June 29 on a notice of proposed rulemaking (NPRM) that would require states to query the drug and alcohol clearinghouse before issuing, renewing, upgrading, or transferring a commercial driver’s license (CDL) or commercial learner’s permit (CLP). The agency would prohibit states from taking such actions for individuals prohibited from driving a CMV due to drug and alcohol violations.

FMCSA also proposes to change how reports of actual knowledge violations, based on citations for driving under the influence (DUI) violations are maintained in the clearinghouse. Under the NPRM, a driver who is issued a citation for a DUI would still be flagged in the clearinghouse as such even if the driver is not ultimately convicted of the offense. Although the citation would remain in the record, drivers who are not convicted of a DUI could petition FMCSA to add documentary evidence to that effect to their clearinghouse record.

The December 2016 final rule on the drug and alcohol clearinghouse required state driver’s licensing agencies (SDLAs) to query the clearinghouse before issuing, renewing, transferring, or upgrading a CDL. The American Association of Motor Vehicle Administrators (AAMVA) petitioned for reconsideration of that requirement, saying that the authority for acting based on federal clearinghouse records should remain with FMCSA and the employer. In response to AAMVA petition, FMCSA in December extended the compliance date for the mandate that SDLAs query the database until January 6, 2023 so that it could consider a rulemaking on what role SDLAs would play in the process.

In the NPRM, FMCSA proposes that SDLAs be required to downgrade CDLs and CLPs once notified by the clearinghouse that a driver is prohibited from operating a CMV due to a positive drug test. Under the rule in place today, such drivers are prohibited from operating CMVs, but there is no mechanism for changing their CDL or CLP status.

The NPRM also proposes to change how an employer’s report of actual knowledge of a driver’s drug or alcohol use is maintained in the clearinghouse. The current rule allows drivers to petition FMCSA to remove such notifications from the clearinghouse if a DUI citation does not result in a conviction. The NPRM instead would retain an employer’s report regardless of whether the driver is ultimately convicted, although drivers

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can petition FMCSA to add the fact that they were not convicted to the record. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-08230>.

### **Safety technology firm seeks HOS relief for drivers using its systems**

FMCSA is requesting comments by May 20 on an application by Pronto.ai, Inc. on behalf of its interstate motor carrier customers for an exemption from the 11-hour driving limit and 14-hour driving window in the hours-of-service (HOS) regulations. Specifically, Pronto requests that drivers operating CMVs equipped with the Copilot by Pronto advanced driver assistance systems (ADAS), the SmartDrive Video Safety Program, and operating under certain other safeguards, be allowed to drive up to 13 hours during a period of 15 consecutive hours after coming on duty following 10 consecutive hours off duty. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-08343>.

### **SBTC seeks reconsideration of broker bond exemption denial**

FMCSA is requesting comments until June 3 on an SBTC petition for reconsideration of the March 2015 denial of an application by the Association of Independent Brokers and Agents (AIBA) for an exemption from the \$75,000 bond requirement for all property brokers and freight forwarders. In a Sept. 10, 2019 letter, SBTC submitted its current request for a five-year exemption from the \$75,000 broker/freight forwarder financial responsibility requirement for those brokers and freight forwarders with revenues under \$15.01 million.

The initial April 10 Federal Register notice requested comments until May 11, but that notice included an incorrect docket number. A May 4 Federal Register notice corrects the docket number (FMCSA-2020-0130) and extended the comment period to June 3. For the original Federal Register notice, visit <https://www.federalregister.gov/d/2020-07539>. For the correction and extension of the comment period, visit <https://www.federalregister.gov/d/2020-09467>.

### **FMCSA again denies SBTC's bid for ELD exemption reconsideration**

FMCSA on April 13 rejected the Small Business Transportation Coalition's (SBTC) request for reconsideration of its application for an exemption from electronic logging devices (ELDs) for all motor carriers with fewer than 50 employees. The agency, which denied the application in July 2019, said that after reviewing the petition for reconsideration and public comments received it "has determined that neither the applicant nor the commenters provided information that would change the Agency's previous decision to deny the exemption." For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-07730>.

### **Pipeline services company seeks ELD exemption**

FMCSA is requesting comments by May 28 on an application from pipeline services contractor Right-A-Way, LLC for an exemption from the requirement that its short-haul drivers use electronic logging devices (ELDs) when they are required to prepare records of duty status (RODS) more than eight days in a 30 consecutive day period. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-09013>.

### **Werner seeks limited ELD data exemption for transition to new supplier**

FMCSA is requesting comments by May 13 on Werner Enterprises' application for an exemption from the requirement that certain data fields be included in electronic RODS files presented by ELDs. Specifically, Werner requests that, during the first eight days that each of its drivers transitions to an ELD from its new supplier, Platform Science, five specific data fields in the RODS files accessible through the in-cab ELD unit be left blank due to file compatibility issues between the suppliers' systems. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-07731>.

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### **Samsara seeks windshield placement exemption for dash camera**

FMCSA is requesting comments by May 13 on the application by Samsara Networks Inc. for an exemption to allow its AI Dash Cam to be mounted lower in the windshield on CMVs than is currently permitted. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-07729>.

### **McKee Foods Transportation sleeper berth exemption renewed**

FMCSA has renewed McKee Foods Transportation, LLC's exemption allowing its team drivers to take the equivalent of 10 consecutive hours off duty by splitting sleeper-berth time into two periods totaling 10 hours, provided neither of the two periods is less than 3 hours. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-08207>.

### **FMCSA requests comments on DOE, SCRA exemption renewals**

FMCSA is inviting comments on requests for renewal of existing exemptions from the 30-minute rest break provision of the HOS regulation. Comments are due May 26 on an exemption held by the U.S. Department of Energy that treats DOE-contracted motor carriers and drivers transporting security-sensitive radioactive materials similarly to drivers of shipments of explosives. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-08579>.

Comments are due June 1 on an exemption held by the Specialized Carriers & Rigging Association covering drivers for all specialized carriers transporting loads that exceed normal weight and dimensional limits that require permits issued by a government authority. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-09171>.

## Advocacy and Comment

### **Crash Preventability Program and Paycheck Protection Program 2**

Two recent administrative actions this past month may have a continuing effect on the trucking industry.

1. Preventability study approval. As discussed above, the FMCSA, while rejecting rulemaking, has issued important policy statements that make clear that the agency's decision to call balls and strikes on crash predictability is not a finding of fault or legal liability. By drawing this clear distinction and citing the federal statute (49 U.S.C. 504(f)) hopefully the agency has put an end to plaintiff's bar's mischief that FOIA information gleaned from the agency concerning past crashes is admissible in court or to troll for nuclear verdicts. Defense bar take note. These findings should be useful in opposing the admissibility of crash preventability findings to exacerbate judgments against carriers.

2. Payment Protection Program Part 2. Across industries PPP has been roundly criticized as not reaching the neediest small businesses affected by the pandemic. Distributed by gatekeeper banks which, with unfettered restrictions, showed preference for their preferred customers, funds were quickly exhausted with large payments often to well-heeled recipients with no evidence of correlation to the pandemic quarantine or loss of business.

Particularly shut out were small motor carriers, sole proprietors, and owner-operators, which were not preferred borrowers and which were frustrated by changing Treasury rules that prejudiced pass through to sole proprietors, commission sales agents, anyone paid on a Form 1099, and independent contractors and owner-operators in particular.

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In the second round of funding, Congress created a carve-out for community banks in the hope that more stimulus would reach the neediest businesses. Also, the threat of claw-backs and post audit by Treasury may result in voluntary or forced return of loans by recipients whose warranty of true need and necessity has been questioned.

With the second round of reauthorization all but committed, it is clear there will be more grants made in the coming months. Best advice appears to be for those with the greatest need to prepare the self-executing application, seek your own counsel and get their application in line through a cooperating bank. The banks which will receive a commission and have no obligation under the loan should be willing to cooperate.