

Regulatory and Legislative Update

July 2020

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Note: FMCSA's emergency declaration related to COVID-19 currently runs through July 14, but the latest extension curtails the coverage of the relief. For latest version, visit <https://www.fmcsa.dot.gov/COVID-19>.

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Legislation

Congress extends PPP through August 8

President Trump on July 4 signed legislation (S. 4116) that extends the application period for the Paycheck Protection Program through August 8. The program, which provides forgivable loans to businesses with 500 or fewer employees and certain other categories of businesses affected by the coronavirus (COVID-19) pandemic, had been scheduled to expire June 30, but Congress at the last minute extended the program. As of July 6, the Small Business Administration said that nearly \$132 billion remained to be loaned. For more information on PPP and other SBA lending programs related to COVID-19, visit www.sba.gov/coronavirus.

House passes infrastructure bill with major motor carrier provisions

In a highly partisan vote, the U.S. House of Representatives on July 1 passed a large package of infrastructure legislation (H.R. 2) that incorporates the highway reauthorization language approved on June 18 by the House Transportation & Infrastructure Committee. The bill addresses investments in a wide range of activities beyond transportation, including housing, broadband, drinking and wastewater systems, clean energy, health care, and more.

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During a marathon two-day session, the T&I Committee rejected Republican members' attempts to strip out various controversial provisions regarding motor carrier regulation and enforcement, including those that would push the Federal Motor Carrier Safety Administration (FMCSA) to accelerate restoration of public Compliance, Safety, and Accountability (CSA) metrics and delay the upcoming changes to hours-of-service rules. *(For other provisions included in the bill as introduced, see the June 2020 Regulatory and Legislative Update addendum distributed on June 12.)*

The committee did, however, adopt a couple of important amendments, including one that would increase motor carriers' minimum insurance coverage to \$2 million from the current \$750,000. The panel also adopted a measure that would require FMCSA to establish screening criteria for obstructive sleep apnea – an idea that even the Obama administration had relegated to a low priority before the Trump administration withdrew the rulemaking altogether in 2017.

Further Democrat-sponsored motor carrier-related measures were added to the bill during floor consideration. For example, the House adopted an amendment sponsored by Rep. Conor Lamb (D-Pennsylvania) requiring a study on the operational and safety performance of small commercial vehicles used in interstate commerce. Specifically, the study would address package delivery of goods moving in interstate commerce using vehicles with gross vehicle weight ratings below 10,000 pounds. Rep. Alan Lowenthal (D-California) sponsored an amendment that requires newly manufactured commercial motor vehicles (CMVs) to be equipped with universal electronic vehicle identifiers to be used by roadside inspectors. The bill also establishes a structured reporting system for data regarding the testing of automated commercial vehicles.

H.R. 2 contains a wide range of provisions that would be unacceptable to the White House or the Republican-controlled Senate, so the prospects for further action are unclear. The closest Senate counterpart to H.R. 2 is S. 2302, which was approved by the Senate Environment and Public Works Committee in January. However, that legislation focuses solely on transportation infrastructure and does not address motor carrier regulatory and enforcement, which is under the jurisdiction of the Senate Commerce Committee. Nor does it address the wide range of non-transportation provisions included in H.R. 2. Given how far apart the House and Senate are and how little time remains in the legislative session, the most likely outcome is either no action at all or a simple short-term extension of the FAST Act, which is set to expire September 30.

For more on H.R. 2, visit <https://www.congress.gov/bill/116th-congress/house-bill/2>. For more on S. 2302 visit <https://www.congress.gov/bill/116th-congress/senate-bill/2302>.

House bill would establish carrier selection standard

Reps. Bob Gibbs (R-Ohio) and Henry Cuellar (D-Texas) on July 2 introduced a bill that would require entities to ensure that any carrier they contracted to transport a load of freight on behalf of their customer (1) is properly registered with FMCSA; (2) has obtained the minimum required insurance; and (3) has not been placed out-of-service at the carrier level for any reason. For more information on the bill, visit <https://www.congress.gov/bill/116th-congress/house-bill/7457>.

House bill would expand HOS exemption for agriculture

In the latest of many bills to loosen the restrictions on ag haulers, Rep. John Joyce (R-Pennsylvania) introduced legislation (H.R. 7102) that would allow the HOS rules exemption regarding maximum driving and on-duty time for drivers transporting agricultural commodities and farm supplies to apply year-round. Current law provides an exception from the federal hours-of-service rules for the transportation of agricultural commodities within a 150 air-mile radius of the normal work reporting location only during planting and harvest periods which are determined by each state. The bill also would require the Department of Transportation to amend the definition of agricultural commodity to include specific commodities that are covered by the exception. For more information on the bill, visit <https://www.congress.gov/bill/116th-congress/house-bill/7102>.

Safety advocates/Teamsters, CVSA file petition for reconsideration of HOS changes

In a move that sets up an inevitable court challenge, several safety advocacy groups and the Teamsters union on June 30 submitted a petition for reconsideration of FMCSA's final rule modifying HOS regulations in several areas. At it stands now, the rule takes effect September 29. (*For details of the final rule, see the June 2020 Regulatory and Legislative Update.*) The groups seek a stay of the rule pending a decision on the petition for reconsideration.

The Commercial Vehicle Safety Alliance (CVSA) also submitted a petition for reconsideration, albeit one that is much narrower in scope. CVSA is concerned that while FMCSA apparently intended to prohibit use of the 150 air-mile radius exemption in combination with the adverse driving provision, the rule does not do so. CVSA also wants FMCSA to change its current personal conveyance guidance, under which "a driver could, in theory, drive hundreds of miles over the course of several hours all under the designation of personal conveyance," the organization said. Finally, CVSA asked that FMCSA review existing HOS exemptions before the rule takes effect as many of them will either become obsolete or require updating.

For the petitions for reconsideration (under Comments), the final rule, and other materials, visit <https://www.regulations.gov/docket?D=FMCSA-2018-0248>

MCSAC to address regulation of smaller vehicles, aging drivers

FMCSA's Motor Carrier Safety Advisory Committee (MCSAC) will hold a videoconference meeting July 13-14 to discuss several issues, including potential regulation of companies using vehicles with gross vehicle weight ratings of less than 10,000 pounds to deliver goods. MCSAC also will address the aging of the CMV workforce and the impact of the legalization of hemp on the safety oversight of CMV drivers.

In a Federal Register notice, FMCSA said that "there appears to be a gap in safety oversight of both drivers and vehicles" in operations that use small vehicles. MCSAC members will hear from agency experts on trends in crash and highway safety data. This issue has received increasing attention in recent years as e-commerce purchasing has soared. Indeed, the House-passed infrastructure bill (H.R. 2) requires a study of the safety of such operations.

In considering the impact of aging drivers, MCSAC will consider data on the distribution of CMV drivers by age. Finally, FMCSA will brief members on how legal transportation of hemp could affect the agency's view of what happens if drivers transporting hemp test positive for tetrahydrocannabinol.

The MCSAC videoconference is open to the public. For more information, visit the MCSAC's webpage at <https://www.fmcsa.dot.gov/advisory-committees/mcsac/welcome-fmcsa-mcsac>. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-13709>.

FMCSA finalizes changes to MCSAP

FMCSA issued a final rule finalizing its proposed changes to its financial assistance programs, including amendments based on the funding formula recommendations derived from the Motor Carrier Safety Assistance Program Formula Working Group. This rule, which is effective July 24, reorganizes the agency's regulations to create a standalone subpart for the High Priority Program and includes other programmatic changes to (1) reduce redundancies, (2) require the use of three-year MCSAP commercial vehicle safety plans (CVSPs), and (3) align the financial assistance programs with FMCSA's current enforcement and compliance programs. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-11464>.

Werner gets limited ELD data exemption for transition to new supplier

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FMCSA has granted Werner Enterprises a one-year exemption from the requirement that certain data fields be included in electronic RODS files presented by ELDs. Werner had requested 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/2020-14496>.

FMCSA renews DOE, SCRA exemptions

FMCSA has renewed existing exemptions from the 30-minute rest break provision of the HOS regulation held by the U.S. Department of Energy and the Specialized Carriers & Rigging Association. For the DOE renewal Federal Register notice, visit <https://www.federalregister.gov/d/2020-14497>. For the SCRA renewal Federal Register notice, visit <https://www.federalregister.gov/d/2020-13597>.

Advocacy and Comment

Three recent regulatory and legislative issues are worth commenting on this month.

(1) SMS and its misuse by plaintiff's bar is not a dead letter but it should be

The FMCSA has not complied with the FAST Act by submitting a corrective action plan. Both the NAS and the Inspector General declined to approve its efficacy. Even the Agency has acknowledged that data generated by the Agency for its own use is not admissible in court and a recent ATRI study highlights misuse of SMS as a significant contributing factor to nuclear judgments and higher insurance costs. Yet to date, the industry support has not coalesced in taking advantage of these findings.

In Section 7202 of its version of the new reauthorization bill, the House majority proposed to advance SMS as a new safety fitness rule, sunseting the FAST Act requirements without explanation. The FAST Act terminates on September 30 but its unfulfilled requirements are not automatically otherwise trumped.

While the House initiative is unlikely to be law in an election year, the industry should not be caught off guard. Given the uncertain outcome of the Fall election, this issue cannot be left to partisan politics particularly when the facts and law are on our side and useful due process rules have been implemented by the Department of Transportation. It is time to insist the FMCSA move on and abandon SMS as a viable basis for a Safety Fitness Determination and to ensure it is not misused in crash litigation.

(2) Final Mile Issues

The rise of Amazon and Uber has highlighted a regulatory dilemma. Home delivery of freight which is a continuation of an inbound pool shipment is interstate freight. Yet, sprinters and vans which make home delivery which weigh less than 10,000 pounds gvw and are not subject to any FMCSA safety regulation other than the filing of \$300,000 in auto liability insurance.

The abuses of the independent contractor model in the home delivery arena has made the regulatory dichotomy more apparent. The House of Representatives has expressed interest in the issue. On Monday July 13 and Tuesday July 14, the FMCSA's Motor Carrier Safety Advisory Committee – presumably at the Agency's urging – will consider the existing carve-out from safety regulations for smaller vehicles. This could prove interesting and divisive for vetting and credentialing purposes the industry uses the FMCSA to police carrier compliance. As one client said, home delivery is "the Wild Wild West." Whether the FMCSA can or should become the new sheriff in town remains to be seen. For more information see

<https://www.federalregister.gov/documents/2020/06/25/2020-13709/meetings-motor-carrier-safety-advisory-committee-mcsac-public-meeting>.

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(3) Payroll Protection Program

The barn door did not shut on the Federal Government's pandemic after big business grabbed up all the stimulus. There is money left in the Payroll Protection Program, small banks are now processing applications, and, as noted above, the time limits for qualifying for loan forgiveness have been extended for 24 weeks after the loan is received. Quite possibly there are more funds on the way.

Unfortunately, apparently carriers with independent contractors cannot qualify for loan forgiveness for using stimulus money to support independent contractors. Owner-operators must file their own application. Yet, sole proprietorships and owners of businesses who report Schedule C income can receive forgiveness by using loan proceeds as the Act requires.

Also, the government is under great pressure to answer for the hasty disbursement of large loans to businesses with no demonstrable need or necessity. As a result, the Administrator and SBA have continually issued interim rules making the loan process, and particularly the forgiveness program, more confusing, restrictive and complicated. Its most recent final rule was issued on June 26. See SBA-2020-0038-0001; Federal Register 2020-13782.

Clearly, the pandemic is far from over and the effects on the motor carrier industry are yet to be fully recognized by many niche carriers. Time restraints for spending stimulus grants and filing for loan forgiveness have been extended. For carriers who have not filed, there are now small banks which are willing to help.