

Regulatory and Legislative Update

October 2020

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Regulation and Enforcement

Labor Department proposes to clarify independent contract status

The U.S. Department of Labor's Wage and Hour Division (WHD) has issued a notice of proposed rulemaking (NPRM) to clarify the definition of employee under the Fair Labor Standards Act (FLSA) as it relates to independent contractors. WHD's proposed rule would:

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- Adopt an “economic reality” test to determine a worker’s status as an FLSA employee or an independent contractor. The test considers whether a worker is in business for himself or herself (independent contractor) or is economically dependent on a putative employer for work (employee);
- Identify and explain two “core factors,” specifically the nature and degree of the worker’s control over the work, and the worker’s opportunity for profit or loss based on initiative and/or investment. These factors help determine if a worker is economically dependent on someone else’s business or is in business for himself or herself;
- Identify three other factors that may serve as additional guideposts in the analysis:
 - The amount of skill required for the work;
 - The degree of permanence of the working relationship between the worker and the potential employer; and
 - Whether the work is part of an integrated unit of production;
- Advise that the actual practice is more relevant than what may be contractually or theoretically possible in determining whether a worker is an employee or an independent contractor.

Although the NPRM, which takes up 40 pages in the September 25 Federal Register, includes some discussion of truck drivers as examples, the document does not specifically address application of the proposed rule to the trucking industry. The rule likely is on a very fast track, especially if the presidential election results in a change in administration. An incoming president can vacate any final rule issued within 60 days before the inauguration, so expect a rule by November 20 if that happens.

Comments on the WHD proposal are due October 26. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-21018>. For further analysis of the WHD’s proposed rule, see the article under “Advocacy and Comment” below.

OMB reviewing interim rule on agricultural commodity, livestock definitions

The Department of Transportation on September 30 submitted for White House Office of Management and Budget (OMB) review an interim final rule (IFR) to revise and/or clarify the definitions of the terms “agricultural commodity” or “livestock” in the hours-of-service regulations. During harvesting and planting seasons as determined by each state, drivers transporting agricultural commodities, including livestock, are exempt from hours-of-service (HOS) requirements from the source of the commodities to a location within a 150-air-mile radius from the source. FMCSA had issued an advance notice of proposed rulemaking (ANPRM) in August 2019 seeking comments on a potential change in the definitions.

Details will not be available until OMB clears the IFR and it is published in the Federal Register. For the ANPRM and comments submitted, visit www.regulations.gov/docket?D=FMCSA-2018-0348.

TIA seeks rulemaking to end transaction reporting mandate

The Transportation Intermediaries Association has filed a petition for rulemaking with FMCSA to eliminate the requirements of 49 CFR §371.3(c), which obligates brokers to maintain detailed records on transactions and to make those details available to parties to the transaction upon request. TIA said the proposed modifications and clarifications “would eliminate an outdated regulation that dates back to 1980 that is not applicable to the current marketplace.” FMCSA currently is inviting comments on separate petitions for rulemaking that would require brokers to distribute routinely the records required by 371.3. *See Regulatory Update, September 2020.*

TIA also is asking FMCSA to develop guidance “on what constitutes a legitimate ‘dispatch service’ and remove unethical and unscrupulous actors from the marketplace.” TIA said it believed that there are many illegal dispatch services that are operating illegally as unlicensed brokers and that FMCSA should prohibit these companies from offering such a service without a license.

FMCSA has yet to publish TIA’s August 4 petition for comment. The petition has been posted in the federal docketing system and is available at <https://www.regulations.gov/docket?D=FMCSA-2020-0194>.

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FMCSA rejects bid for HOS relief for drivers using Pronto.ai systems

FMCSA has denied an application by Pronto.ai, Inc. for an exemption that would have allowed drivers operating commercial vehicles equipped with its advanced driver assistance systems (ADAS) to drive up to 13 hours during a 15-hour driving window. Specifically, Pronto.ai had asked for the relief for 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.

FMCSA said the 14-hour driving window in the regulations is intended to reduce the risk of individuals experiencing fatigue during the work shift. The agency said it was not aware of data or information that would allow it to determine whether the advanced technology reduces the workload for CMV drivers enough that additional driving time should be allowed or that individuals should be allowed to operate an extended work shift. “The premise that the use of advanced technology should reduce the workload on drivers appears reasonable on the surface but the absence of data or information to quantify the impact on driver fatigue and alertness leaves the Agency with no choice but to deny the application,” FMCSA said. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-21324>.

UPS asks FMCSA to reconsider its denial of driver training exemption

FMCSA is requesting comments by October 23 on a petition for reconsideration from United Parcel Service, Inc. (UPS) for the agency’s denial of its application for exemption from provisions in the entry-level driver training (ELDT) final rule requiring two years of experience for training instructors. FMCSA had denied the UPS application in December 2019. UPS believes that its current process of preparing driver trainers exceeds any skill set gained merely by operating a tractor-trailer for two years. UPS also believes that a two-year experience requirement doesn't automatically equate to success as a CMV driver trainer. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-21025>

FMCSA rejects Ohio DPS request to modify skills test rules for veterans

FMCSA had denied an exemption application from the Ohio Department of Public Safety's (DPS) to modify the mandatory skills test requirements for qualified military veterans. Ohio DPS had proposed to allow the waiver for applicants who held a military position that required operation of a CMV for at least two years sometime during his or her career instead of the requirement that such operation be immediately prior to discharge from the military. FMCSA determined that the state agency did not provide an alternative to ensure that an equivalent level of safety would be achieved under the exemption. It also noted that although a majority of comments favored the exemption, none provided supporting data. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-21325>.

Firms receive exemption for mirror-replacement camera system

FMCSA has granted a limited five-year exemption to Robert Bosch LLC and Mekra Lang North America LLC to allow motor carriers to operate CMVs equipped with the CV [Commercial Vehicle] Digital Mirror System installed as an alternative to the two rear-vision mirrors required by the federal safety regulations. FMCSA’s approval included an explicit preemption against states enforcing any law or regulation that conflicts with the exemption. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-20470>.

FMCSA denies ELD exemption for pipeline services company

FMCSA has rejected 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. The agency said Right-A-Way did not show how it would maintain safety through an expanded exception and did not provide

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an alternative means of ensuring compliance if drivers rely on paper RODS for more than eight times in a 30-day period. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-21326>.

Exemption granted regarding fuel systems for stationary auxiliary equipment

FMCSA has granted an exemption to Charles Machine Works, Inc. to allow the use of gravity or syphon-fed fuel systems for auxiliary equipment installed on or used in connection with CMVs. The exemption applies to auxiliary equipment that operates only when the CMV is stationary. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-20440>.

Legislation

Stopgap funding bill also extends highway authorization for a year

President Trump on October 1 signed legislation (H.R. 8337) that continues funding for the federal government through December 11. Without the legislation, much of the federal government would have had to shut down. The continuing resolution ensures funding past the election. In addition to continuing funding, the new law extends the authorization for surface transportation programs through September 30, 2021. The prior authorization expired September 30. For details of H.R. 8337, visit <https://www.congress.gov/bill/116th-congress/house-bill/8337>.

Rep. Gibbs introduces hiring standard bill with remote audit program

Three months after introducing legislation (H.R. 7457) to establish a basic carrier selection standard, Rep. Bob Gibbs (R-Ohio) has introduced a similar bill (H.R. 8513) that basically adopts the same standard but also sets up a pilot program for remote compliance reviews to establish safety ratings. The text of H.R. 8513 is available at <https://gibbs.house.gov/sites/gibbs.house.gov/files/documents/CSAReformAct.pdf>. For further details on H.R. 8513, visit <https://www.congress.gov/bill/116th-congress/house-bill/8513>.

Sen. Fischer introduces bill to loosen restrictions on agricultural hauling

Sen. Deb Fischer (R-Nebraska), who chairs the Senate subcommittee that oversees trucking regulations, has introduced legislation (H.R. 4720) to modify certain agricultural exemptions for HOS requirements. The bill would eliminate the limitation that applies ag and livestock HOS exemptions only during state-designated planting and harvesting seasons. The bill also would amend and clarify the definition of “agricultural commodities” and authorize a 150 air-mile exemption from HOS requirements on the destination side of a haul for ag and livestock haulers. For details of H.R. 4720, visit <https://www.congress.gov/bill/116th-congress/senate-bill/4720>.

Courts

Ninth Circuit declines full court rehearing of Amazon decision

The U.S. Court of Appeals for the Ninth Circuit has turned down Amazon’s request for an en banc reconsideration of a three-judge panel’s decision in August that the e-commerce giant cannot compel arbitration of disputes with its delivery drivers just because they don’t cross state lines. In an August 19 ruling, the Ninth Circuit had said that delivery drivers operating under Amazon’s Amazon Flex app-based delivery

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program are exempt from the Federal Arbitration Act because they are making last-mile deliveries “of goods in the stream of interstate commerce.” The denial of an en banc rehearing would be the last step before an appeal to the U.S. Supreme Court should Amazon choose to pursue it. (*For more on the 9th Circuit decision, see Regulatory Update, September 2020.*)

FAAA does not preempt negligent selection lawsuit, Ninth Circuit rules

The U.S. Court of Appeals for the Ninth Circuit reversed a district court’s dismissal of a lawsuit against C.H. Robinson alleging negligent selection of a motor carrier resulting in injuries in a motor vehicle crash. The district court had ruled that the lawsuit fell within the Federal Aviation Administration Authorization Act of 1994 preemption because the claim was “related to” C.H. Robinson’s services and did not fall within the exception for “the safety regulatory authority of a State with respect to motor vehicles.”

Although the appeals court panel agreed that the claim was related to C.H. Robinson's broker services, it ruled that Congress intended to preserve the states’ broad power over safety, including not only through legislation and regulation but also through common law damages. The September 28 opinion is available at <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/09/28/19-15981.pdf>.

Open Dockets

Comment period still open on various FMCSA initiatives

In addition to newly published proceedings covered in this report, the comment period remains open for several FMCSA proceedings as follows:

- Availability of property broker transactions – Comments are due October 19 on separate petitions for rulemaking filed by the Owner-Operator Independent Drivers Association and the Small Business in Transportation Coalition. See *Regulatory Update*, September 2020. For the Federal Register notice and other materials, visit www.regulations.gov/docket?D=FMCSA-2020-0150. (*Note that TIA is asking FMCSA to eliminate the recordkeeping requirement altogether. See article above.*)
- Pilot demonstration program on pause in the 14-hour window – Comments are due November 2. See *Regulatory Update*, September 2020. For the Federal Register notice and other materials, visit www.regulations.gov/docket?D=FMCSA-2020-0098.
- Pilot demonstration program on interstate operation of CMVs by drivers under 21 – Comments are due November 9. See *Regulatory Update*, September 2020. For the Federal Register notice and other materials, visit www.regulations.gov/docket?D=FMCSA-2018-0346.

Advocacy and Comment

Independent Contractor Status NPRM

As noted above, the current Department of Labor proposes new independent contractor status criteria. Comments are due on October 26. See https://www.federalregister.gov/documents/2020/09/25/2020-21018/independent-contractor-status-under-the-fair-labor-standards-act?utm_medium=email&utm_source=govdelivery.

Under the proposed rule and similar proposals by the previous Obama Administration there is no carve-out for owner operators or recognition of the historical small business treatment given to contractors

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who own or lease equipment under the truth in leasing regulations. For over 50 years, federal statutes and regulations have afforded special treatment to owner operators to encourage blue collar entrepreneurship.

The trucking industry has done a poor job of pointing out to the press, the public or the Department of Labor that the owner operator model is vital to trucking and interstate commerce. Traditional independent contractors across the industry are now scrambling to explain that independent contractor status is a choice, not a burden.

The future of the independent contractor model cannot be left to Washington politics or the premise that some “new deal” is necessary to protect blue collar entrepreneurs who choose to operate their own businesses and form the back bone of many segments of the trucking industry.

Independent contractors, small and large carriers, and the shipping industry who use them should make comments and speak out in support of continuation of the independent contractor model under federal rules and regulations across federal agencies.

The ATRI Study

The annual poll of the most important issues facing trucking has been published by the ATA’s research arm. See <https://www.research.net/r/2020-Top-Industry-Issues>.

Industry is invited and should comment in length the issues they believe are most important. The results are often used in prioritizing trucking’s agenda for the coming year. With the possibility of a new Administration next year, a politically wild ride for trucking may be created. Efforts to increase bureaucratic overreach in the area of safety, employment law and misuse of SMS generated safety data by plaintiff’s bar is likely. The three available topics for selection which best address these issues and should be ranked in the first three by most respondents are:

- (1) Independent Contractor Status
- (2) Compliance, Safety, Accountability (CSA) (to watchdog possible bureaucratic overreach)
- (3) Insurance Availability/Cost (which is a manifestation of nuclear verdicts)

Proposed reform of broker regulations

Now pending are conflicting proposals to revise the broker regulations. The regulations have long required brokers to keep records of transactions showing who they billed, when they received funds, and when they transmitted the funds to the underlying carrier. These regulations are important for establishing the constructive trust obligation of brokers. Its existence levels the playing field between large and small brokers and affords protection that the balance sheet of every broker need not be considered in making decisions in the spot market.

Similarly, more rigid enforcement of the carrier’s “right to know” brokers’ margins on every transaction seems a bridge too far. Hopefully, new spot market pricing models which are based on standardized markups can ameliorate the problems of price gouging without tinkering with the existing broker regulations.