Regulatory and Legislative Update

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Regulation and Enforcement

FMCSA plans pilot programs on 14-hour window, younger drivers

In separate actions, the Federal Motor Carrier Safety Administration is proposing pilot programs to assess changes in regulations concerning the 14-hour driving window and the minimum age for operating a commercial motor vehicle (CMV) in interstate commerce. Neither change to be studied is a new idea for the agency, which previously has proposed one change and has suggested studying the other.

Pause in the 14-hour window

One pilot program would allow property-carrying drivers to pause their 14-hour driving window for 30 minutes to three hours by taking an off-duty break. The agency had proposed to change the hours-of-service (HOS) regulations to allow this relief, but it dropped the provision from the final rule published June 1 after various parties argued that carriers, shippers, or receivers might use the flexibility to pressure drivers into using the break to cover detention time, thereby depriving drivers of an optimal environment for restorative rest. The other changes made by the final HOS rule take effect September 29. (*For details of the final rule, see Regulatory Update, June 2020*.)

In a Federal Register notice, FMCSA said it still believes that such a break might allow drivers to avoid congestion, thereby making subsequent driving time more productive. A pause also might reduce the pressure to drive above posted speed limits in order to maximize driving within the 14-hour window, it said. The agency also believes that a rest break would reduce fatigue. Also, because drivers still would be required to take 10 consecutive hours off-duty at the end of the work shift, using the pause option would increase the drivers' off-duty time during the work week. However, under the final rule, drivers using sleeper berths for split rest also could pause their 14-hour windows for up to three hours without having to increase their total rest requirements.

The agency envisions a three-year program with a sample size of between 200 and 400 commercial driver's license (CDL) drivers. The study group would include drivers from small, medium, and large carriers and independent owner-operators. Some would operate using the "pause" while others would be the control group operating under current regulations. The Federal Register notice includes proposed eligibility criteria for motor carrier and driver participation.

Comments on FMCSA's proposed pilot program are due November 2. The Federal Register notice announcing the proposed pilot is available athttps://www.federalregister.gov/d/2020-19511.

CMV drivers under 21

FMCSA already is pursuing a pilot program that allows interstate CMV operations by drivers aged 18 to 20 with military experience operating heavy equipment – a program authorized by Congress in the FAST Act. In part because very few younger drivers would meet the very narrow qualifications of that pilot program, FMCSA in May of last year solicited comments on a possible second pilot program to allow non-military drivers aged 18 to 20 to operate CMVs in interstate comment. The agency specifically sought comments on the training, qualifications, driving limitations, vehicle safety systems and other issues that it should consider in developing a second pilot program for younger drivers.

On September 4, FMCSA announced that it is moving ahead with a proposed pilot program to assess the safety, feasibility, and potential economic benefits of allowing 18- to 20-year-old drivers to operate in interstate commerce.In order to have a statistically valid sample, about 200 drivers will need to participate in the program, FMCSA said. In announcing the proposed pilot, the agency noted that 49 states and the District of Columbia already allow 18- to 20-year-old commercial driver's license (CDL) holders to operate CMVs intrastate commerce.

The proposed pilot program adopts several elements that are proposed in proposed legislation (H.R. 1374) known as the DRIVE-Safe Act, including an apprenticeship for drivers lacking CMV experience and technology requirements for equipment being operated by younger drivers. For more on the DRIVE-Safe Act, visit https://www.congress.gov/bill/116th-congress/house-bill/1374.

In a draft Federal Register notice, FMCSA proposes to allow drivers to participate if they fall within one of two categories:

1. 18- to 20-year-old CDL holders who operate CMVs in interstate commerce while taking part in a 120-hour probationary period and a subsequent 280-hour probationary period under an apprenticeship program established by an employer; or
2. 19- and 20-year-old commercial drivers who have operated CMVs in intrastate commerce for a minimum of one year and 25,000 miles.

Study group drivers would not be allowed to operate vehicles hauling passengers or hazardous materials or special configuration vehicles. Participating drivers also would be required to have completed CDL training that meets the standards of the agency's rule on entry-level driver training. FMCSA also is proposing various restrictions on participation, such as no disqualifications, suspensions, or license revocations within the past two years and no convictions for various serious violations.

Similar to the DRIVE-Act, FMCSA proposes to require the following vehicle safety technologies on the CMVs operated by study group drivers:

- Active-braking collision mitigation systems;
- Forward-facing video event recorders;
- Automatic or automatic-manual transmissions; and
- Speed limiters set to 65 miles per hour.

The draft Federal Register notice also includes various qualifying criteria for motor carriers. FMCSA also said it would prioritize approval of those motor carriers that equip their vehicles with additional technologies, such as various collision avoidance systems, lane centering, etc.

The Federal Register notice announcing the proposed pilot program on younger drivers is available at https://www.federalregister.gov/d/2020-19977. For previous notices and comments related to this pilot program, see https://www.regulations.gov/docket?D=FMCSA-2018-0346.

OOIDA, SBTC seek rulemakings to expand broker transparency

FMCSA is requesting comments by October 19 on separate petitions for rulemaking filed by the Owner-Operator Independent Drivers Association (OOIDA) and the Small Business in Transportation Coalition (SBTC) to tighten the requirements on property brokers for the reporting of transactions. Current regulations (Part 371.3) require brokers to maintain transaction records and to allow parties to those transactions to review those records. However, the regulations do not specify a particular manner for providing the information. In addition to basic information about consignors and carriers, transaction records must include the compensation received by the broker for its services, the amount of freight charges collected by the broker, and the date of payment to the carrier.

OOIDA requested that FMCSA (1) require property brokers to provide an electronic copy of each transaction record automatically within 48 hours after the contractual service has been completed and (2) prohibit explicitly brokers from including any provision in their contracts that requires a motor carrier to waive its rights to access the transaction records. The group argued that some brokers allow a motor carrier to access records only at the broker's office during normal business hours, making it virtually impossible for motor carriers to access the records.

SBTC's petition is similar to the second portion of OOIDA's request. The group asked that FMCSA prohibit brokers from coercing or otherwise requiring parties to brokers' transactions to waive their right to review the record of the transaction as a condition for doing business. SBTC also requests that FMCSA adopt regulatory language indicating that brokers' contracts may not include a stipulation or clause exempting the broker from having to comply with the transparency requirement.

In publishing the petitions, FMCSA posed several specific questions to potential commenters, including how a rule restricting the rights of private parties from adopting certain contract terms aligns with the agency's authority; whether a rule should apply to brokers of all sizes; how much a system of automatic notification would cost and whether brokers could form networks to provide the information; and what would be the economic benefits to motor carriers and economic costs to brokers. For the Federal Register notice, visit https://www.federalregister.gov/d/2020-18130.

Proposed HHS guidelines on hair testing would require backup alternative

The Department of Health and Human Services (HHS) has proposed long-awaited mandatory scientific and technical guidelines for the inclusion of hair specimens infederal workplace drug testing programs, but HHS would require agencies to collect at least one other recognized specimen – e.g., urine or oral fluid – that could be used if necessary. Although the proposed guidelines specifically apply to the testing of federal workers, the FAST Act authorized the Department of Transportation (DOT) to use HHS guidelines, once available, to allow motor carriers to use hair testing of safety-sensitive workers instead of urine testing.

The proposed mandatory guidelines would require an alternate specimen if the donor is unable to provide enough hair due to faith-based or medical reasons or due to an insufficient amount or

length of hair. The alternate sample could be provided either simultaneously with the hair sample or later if the Medical Review Officer determines it is necessary after reviewing laboratory-reported results for the hair specimen.

The proposed guidelines are scheduled to be published in the Federal Register on September 10, triggering a 60-day comment period. A pre-publication version already is available at https://www.federalregister.gov/d/2020-16432, and the published version will be available at the same link.

FMCSA retreats on carrier size analysis in Beyond Compliance study

FMCSA apparently has dropped its plan to study the practices and technologies used by top safety performers specifically among small, medium, and large motor carriers and now will just give smaller carriers an opportunity to supplement a survey of motor carriers the agency invites to participate. FMCSA has requested comment by September 19 on its revised plan for a study that would help it implement the long-delayed Beyond Compliance program, which Congress authorized nearly five years ago.

The idea behind Beyond Compliance, which FMCSA had begun pursuing even before enactment of the FAST Act in December 2015, is that carriers would receive some type of recognition for voluntary use of advanced technologies or enhanced driver fitness measures. For example, recognition might include an improved Safety Measurement System percentile. Prior to the proposed study, the last official action FMCSA had taken regarding Beyond Compliance was a Federal Register notice in April 2016 requesting comments on the program.

FMCSA originally proposed the study in December 2019. As described in the December Federal Register notice, the agency said it would collect data "through an electronic survey of motor carriers who have safety performance records that are better than the national average" as defined by crash rates and driver and vehicle out-of-service (OOS) rates. "Only those carriers that perform near the top quartile (as determined by the selection criteria laid out below) across all three carrier size categories (large, medium, and small) are potential participants," FMCSA.

On August 18, FMCSA again published a proposed information collection that is nearly identical to the one published in December. Although the language is slightly different in places, the only fundamental change appears to be in backing away from ensuring study participation across carrier size categories. Now, FMCSA plans to collect data "through an electronic survey of a panel of industry experts" recruited from carriers with safety performance records better than the national average as identified by examining DOT-reportable crash rates and driver and vehicle OOS rates.

The sentence that previously included an assurance of carrier size representation now reads as follows: "Only those carriers that perform near the top quartile across all three categories are potential participants." In context, the "three categories" clearly refers to the three categories of safety metrics as the latest notice makes no reference at all to small, medium, and large carriers.

The interpretation that no commitment about representing carriers of different sizes in the formal study is reinforced by a new paragraph that did not appear in the earlier notice. It states that in addition to carriers invited by FMCSA, the agency will reach out to the National Association of Small Trucking Companies and Owner-Operator Independent Drivers Association to invite them to voluntarily survey members as a supplemental data collection to the structured design. "This would enable greater participation by smaller carriers and owner-operators, and would also enable a wider perspective of responses," FMCSA said.

The current Federal Register notice is available at https://www.federalregister.gov/d/2020-18014. The original notice is available at https://www.federalregister.gov/d/2019-27255. For prior notices and comments related to Beyond Compliance, see https://www.regulations.gov/docket?D=FMCSA-2015-0124.

Railroads seek broad HOS relief for unplanned events

FMCSA is requesting comments by September 21 on a an application from the Association of American Railroads and American Short Line and Regional Railroad Association on behalf of member railroads for an

exemption from various HOS requirements to allow railroad employees subject to the HOS rules to respond to unplanned events that occur outside of or extend beyond the employee's normal work hours. The request covers the regulations on mandatory minimum rest, the 14-hour driving window, the 11-hour driving limit, and cumulative work limits. The Federal Register notice is available at https://www.federalregister.gov/d/2020-18215. The exemption application is available at https://www.regulations.gov/docket?D=FMCSA-2020-0171.

IANA training now counts as intermodal inspector qualification

Individuals who complete a training program consistent with a set of intermodal recommended practices (IRPs) and associated requirements developed by the Intermodal Association of North America (IANA) now may be considered qualified inspectors or qualified brake inspectors for intermodal equipment (IME). FMCSA has granted IANA's request for an exemption from the regulation that requires a year of training of experience – or a combination of both – before becoming a certified inspector/brake inspector. For the Federal Register notice, visit https://www.federalregister.gov/d/2020-17957.

J.J. Keller, Netradyne seek windshield exemptions for cameras

FMCSA is requesting comments on two applications for exemptions to allow cameras to be mounted lower in the windshield of CMVs than currently is permitted. Comments on a request from J.J. Keller are due September 14. The Federal Register notice is available at https://www.federalregister.gov/d/2020-17708. Comments on a request from Netradyne are due September 21. The Federal Register notice is available at https://www.federalregister.gov/d/2020-18217.

Courts

More appellate courts address final-mile drivers and arbitration

Just weeks after *the* U.S. Court of Appeals for the First Circuit ruled that last-mile delivery drivers transporting goods moving in interstate commerce are exempted from coverage of the Federal Arbitration Act (FAA) even if they do not physically cross state lines, three judge panels of two other federal appeals courts have weighed in on the issue. (*For more on the July 17 ruling in Waithaka v. Amazon.com, see Regulatory Update, August 2020*.)

In an August 19 ruling, the Ninth Circuit essentially agreed with the First Circuit that delivery drivers operating under Amazon's Amazon Flex app-based delivery program are exempt from FAA became they are making last-mile deliveries "of goods in the stream of interstate commerce." As in the First Circuit decision, AmFlex drivers did not need to cross state lines in order to be engaged in interstate commerce, the appeals court said. They "pick up packages that have been distributed to Amazon warehouses, certainly across state lines, and transport them for the last leg of the shipment to their destination," it noted.

The appeals court contrasted that situation to one in a 1935 case Amazon had cited involving live poultry shipped from out of state to slaughterhouses. "Once the poultry reached the slaughterhouses, any further 'commerce' involving the poultry required new or subsequent transactions, all of which took place within the state of the slaughterhouse." The Ninth Circuit decision is available at http://bit.ly/Amazon-9th.

The other case addressing the arbitration issue revolved around a similar point. The Seventh Circuit on August 4 distinguished Grubhub workers who deliver food prepared at local restaurants from those, as in the First Circuit and Ninth Circuit cases, involved in the movement of goods in interstate commerce. The appeals court concluded that the plaintiffs had completely ignored the governing framework.

"Rather than focusing on whether they belong to a class of workers actively engaged in the movement of goods across interstate lines, the plaintiffs stress that they carry goods that have moved across state and even national lines," the court said. It noted that a bag of potato chips might have traveled across several states or a piece of dessert chocolate might have traveled from Switzerland before landing in meal prepared

and delivered by a Grubhub drivers. That's not good enough to qualify for the FAA exemption; workers most be involved in moving goods across state or national boarders, the Seventh Circuit said.

"By erasing that requirement from the statute, the plaintiffs' interpretation would sweep in numerous categories of workers whose occupations have nothing to do with interstate transport – for example, dry cleaners who deliver pressed shirts manufactured in Taiwan and ice cream truck drivers selling treats made with milk from an out-of-state dairy," the court said. The Seventh Circuit decision is available at http://bit.ly/Grubhub-7th.

Judge rules against Uber, Lyft in AB 5 case; Ninth Circuit hears CTA case

A California judge has ruled that Uber and Lyft must stop classifying their ride-hailing drivers operating in California as independent contractors as that practice is barred by state law as enacted in AB 5, which took effect at the beginning of the year. However, the ruling is on hold pending appeal.

In his August 10 ruling, San Francisco County Superior Court Judge Ethan Schulman rejected the plaintiffs' various arguments, including a motion to stay action in the case until the election when California voters will consider Proposition 22, which would exempt Uber and Lyft from AB 5. On that request, Schulman said that the fact that Uber and Lyft "are attempting to persuade voters to change that law, and effort that may or may not succeed, is no reason for this Court to refrain from deciding the issues currently before it." For a copy of the preliminary injunction and other documents in the Uber/Lyft case, visit https://webapps.sftc.org/ci/CaseInfo.dll and search Case No. CGC-20-584402

The decision does not directly affect motor carriers, which have been protected against enforcement of AB 5 requirements pending litigation over whether AB 5 is preempted by the Federal Aviation Administration Authorization Act of 1994. A preliminary injunction obtained by the California Trucking Association (CTA) has been in place since mid-January, but the State of California is appealing the injunction before the U.S. Court of Appeals for the Ninth Circuit. Oral arguments in the case, *CTA v. Xavier Becerra*, were held on September 1. A recording of the oral arguments is available at https://youtu.be/959SGrORb2I.

ATA files complaint against ocean carriers over intermodal charges

The American Trucking Associations has filed a complaint with the Federal Maritime Commission alleging that the Ocean Carrier Equipment Management Association and 11 ocean carriers have overcharged motor carriers and their customers for intermodal container chassis at ports and inland terminals throughout the U.S. By limiting motor carriers' choice of equipment providers, ocean carriers have forced trucking companies and their customers to subsidize nearly $1.8 billion of the ocean carriers' costs in just the past three years.

In an August 28 Federal Register notice, FMC said the initial decision of the presiding office in the proceeding would be issued by August 24, 2021 with a final decision to be issued by March 10, 2022. The ATA complaint and other documents related to the proceeding are available at https://www2.fmc.gov/readingroom/proceeding/20-14.

Advocacy and Comment

1. Expanded Broker Transparency. The "Expanded Broker Transparency" petition filed by OOIDA is well intended. The broker regulations which provide for disclosure of broker commissions are too easily waived along with other carrier rights in standard broker contracts presented to small carriers on a take it or leave it basis. Yet, the FMCSA has no appetite for making new rules of commerce. For 22 years, it has proclaimed that safety is its major, if not sole, job and has identified rules of commerce as "nothing burgers." Hopefully new and small carriers will come to recognize that chasing back haul freight for empty trucks at the price of non-compensatory rates is not sustainable.

2. Beyond Compliance Study. For 5 years, the Agency has been noodling about how carriers can get some type of improved safety fitness score for yet to be defined enhanced safety procedures and technology. This request for comment seems like SMS methodology all over again. There is no identification of what will be measured or how it would be used. To its credit, the Agency is reaching out to representative small carriers to obtain "a wide perspective of responses." Yet until the program is better identified with respect to the advance technologies to be used and the cost / benefit of the program, meaningful responses will be difficult.If SMS is the measuring tool, it is difficult to see how "beyond compliance" can be integrated into existing algorithms which themselves have not proven workable.

3. Misclassification and Final Mile Cases. Misclassification and final mile cases discussed above create vexatious legal issues. Uber and Lyft (the gig economy) and final mile delivery (Amazon et al.) share several things in common. Both typically provide services between two points in the same state and use non-commercial motor vehicles weight less than 10,000 pounds gvw. Also, both models are heavily dependent on the use of independent contractors which, unlike owner-operators in the big truck world, have traditionally been classified as independent contractors for both federal and state purposes. The cases discussed above make clear that final mile delivery of parcels, even when the service is provided between points in the same state is moving in interstate commerce when the shipment is sourced outside the state. Because of federal law, this means arbitration provisions in agreements with lease operators are invalid and class actions against many final mile upstarts can proceed. On the other hand, Uber and Lyft, and locally sourced home delivery providers like pizza and grocery delivery services, are not classified as interstate delivery services and face other challenges.

Under any form of control test, the Uber and Lyft load matching services and particularly their use of independent contractors would seem most easy to justify. Yet in blue states like California, without the federal preemption argument, truly intrastate service providers are left without the "federal preemption argument" which is organized trucking's strongest defense in pending litigation. At stake in the confusion is more than the parochial issue of the scope of state law versus federal law. The independent contractor model is blue collar entrepreneurship at its best but the future of the model has become a political football which threatens its continued viability.

These legal issues will be played out on the canvas of future politics at both the federal and state levels as well as in the courts.