

# Regulatory and Legislative Update

November 2020

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The emergency declaration regarding enforcement relief for drivers and carriers involved in COVID-19 response is in place through December 31. For details, visit [www.fmcsa.dot.gov/COVID-19](http://www.fmcsa.dot.gov/COVID-19).

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## Regulation and Enforcement

### Coalition urges DOL to affirm that owner-operators are independent contractors

The owner-operator model in trucking would meet the Department of Labor's proposed economic control test, but the department should explicitly recognize the model as satisfying the independent contractor concept, a coalition of nine trucking-related organizations said. The coalition was among about 1,800 commenters on a DOL notice of proposed rulemaking (NPRM) to clarify the definition of employee under the Fair Labor Standards Act (FLSA) as it relates to independent contractors. (*For more on the NPRM, see the October 2020 Regulatory Update.*)

"Commenters do not criticize the Department of Labor's proposed economic control test as an appropriate standard of general application across industries," the coalition stated. "In fact, Commenters submit that the so-called 'owner operator model' is the backbone of interstate trucking and would meet the new proposed test. Commenters' concern is based upon the special characteristics and importance of the owner operator model. This model, consistent with judicial precedent, begs for its recognition of independent contractor treatment across federal agencies."

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The coalition's comments detail its members' position that a driver owning a truck and leasing it to an interstate carrier "is a recognized entrepreneurial option dependent on independent contractors established over 30 years ago." They argued that DOL's final rule should affirm the precedent and establish that owner-operators are independent contractors for FLSA purposes. "Issues involving the application of different labor law tests to the independent contractor standard have resulted in costly class action suits which undermine needed uniformity in interstate trucking."

The organizations participating in the coalition are the Air & Expedited Motor Carrier Association; Alliance for Safe, Efficient and Competitive Truck Transportation; American Home Furnishings Alliance/Specialized Furniture Carriers/Apex Capital Corp.; Auto Haulers Association of America; National Association of Small Trucking Companies; The Expedite Alliance of North America; Transportation and Logistics Council; and Transportation Loss Prevention & Security Association.

For the coalition's comments, visit <https://www.regulations.gov/document?D=WHD-2020-0007-1692>. For more information on the NPRM, including the proposal itself and other comments, <https://www.regulations.gov/docket?D=WHD-2020-0007>.

### **FMCSA seeks nominations for Motor Carrier Safety Advisory Committee**

FMCSA seeks nominations by November 30 for interested persons to serve on the agency's Motor Carrier Safety Advisory Committee (MCSAC). Composed of motor carrier safety stakeholders from the safety advocacy, safety enforcement, industry, and labor sectors, MCSAC provides advice and recommendations to the FMCSA on various issues related to motor carrier safety. Under its charter, MCSAC is composed of up to 25 members appointed for terms of up to two years. Committee members serve without pay, but they may be entitled to reimbursement of expenses. Committee members must be able to attend two to three meetings each year, either by videoconference or in person.

For qualification requirements and information on information needed for a nomination, see Federal Register notice at <https://www.federalregister.gov/d/2020-23969>. FMCSA said that nominations received after November 30 may be retained for future MCSAC vacancies after all other nominations received by the due date have been evaluated and considered. For more information on the work of MCSAC, visit [www.fmcsa.dot.gov/mcsac](http://www.fmcsa.dot.gov/mcsac).

### **Comment period extended until November 18 on broker transparency petitions**

FMCSA has extended until November 18 the deadline for submitting comments on 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. (*For details of the petitions, see the September 2020 Regulatory Update.*) FMCSA held a listening session on October 28 to take comments regarding the two petitions as well as a more recent petition submitted by the Transportation Intermediaries Association (TIA) for a rulemaking to eliminate the underlying reporting requirement altogether. (*See the October 2020 Regulatory Update.*) For the original notice of the OOIDA and SBTC petitions, visit <https://www.federalregister.gov/d/2020-18130>.

### **FMCSA to expand pool for military younger driver program**

FMCSA plans to expand its pilot program for individuals aged 18 to 20 to operate commercial motor vehicles (CMVs) in interstate commerce if they have received heavy-vehicle driver training in certain Military Occupational Specialties (MOS) while in military service. The agency proposes to add five more Army specialties and four more Marine Corps specialties to the list of seven MOS that were approved in 2018.

The training requirements for the nine new proposed MOS are equivalent to those required for the original seven MOS approved for the pilot program, FMCSA. The agency said that it previously was not aware that these classifications received heavy-vehicle training equivalent to the other MOS and that the nine MOS are being added at the recommendation of the Army and Marine Corps to provide additional service members

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with the opportunity to transition to commercial driving jobs. The expansion will make the pilot program available to 30,000 more drivers, FMCSA said. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-22401>.

### **FMCSA rejects ELD, HOS relief for drivers traveling with pets**

FMCSA has denied an application by the Small Business Transportation Coalition (SBTC) to exempt drivers who travel with domestic animals – i.e., pets – from electronic logging devices (ELDs) and to provide hours-of-service relief. Specifically, SBTC had asked that such drivers be allowed to extend their driving window to 16 hours from the current 14 hours and to drive a total of 13 hours during the period. SBTC cited the ELD relief Congress provided to haulers of livestock and the hours of service relief that has been requested by the National Cattlemen’s Beef Association.

FMCSA rejected the application on both procedural and substantive grounds. It said the application did not meet regulatory standards because SBTC failed to identify any carriers or individuals who would use the exemption or the number of drivers or commercial vehicles that would be involved. Also, SBTC proposed no countermeasures to ensure an equivalent or greater level of safety than would be achieved under compliance with the current rules, the agency said. For the Federal Register notice announcing FMCSA’s denial, visit <https://www.federalregister.gov/d/2020-22890>.

### **Knight-Swift wins limited exemption from MVR update requirement**

FMCSA has granted Knight-Swift Transportation Holdings, Inc.’s application for a limited exemption from regulations requiring carriers to obtain motor vehicle records (MVRs) of CDL drivers whenever drivers’ MVRs are updated by a new medical examination. Knight-Swift sought the exemption only when a newly hired driver undergoes a medical examination. Knight-Swift asked that in these cases it be permitted to satisfy this requirement by obtaining other proof of the results of the medical examination. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-24472>.

### **FMCSA approves tank truck group’s exemption allowing pulsating brake light**

FMCSA has granted an application from National Tank Truck Carriers, Inc. (NTTC) for an exemption to allow motor carriers operating tank trailers to install a red or amber brake-activated pulsating lamp positioned in the upper center position or in an upper dual outboard position on the rear of the trailers in addition to the steady-burning brake lamps required by the Federal Motor Carrier Safety Regulations (FMCSR). With a few exceptions, the FMCSRs require all exterior lamps (both required lamps and any additional lamps) to be steady-burning. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-22233>.

### **FMCSA rejects mobile medical operation request for HOS relief**

FMCSA has denied an application submitted by DPN USA, LLC, doing business as Matrix Medical Network, for an exemption to its employee-drivers to have a 16-hour window within which to operate CMVs during their work shift and to return to work with less than the mandatory 10 hours off duty. FMCSA concluded that the proposed terms and conditions of the exemption would not achieve a level of safety equivalent to or greater than would be achieved by compliance with the HOS rules. For the Federal Register notice denying the exemption, visit <https://www.federalregister.gov/d/2020-22560>.

### **Samsara, Nauto granted windshield placement exemptions**

FMCSA has granted exemptions requested by Samsara Networks Inc. and Nauto, Inc. for exemptions allowing their safety system devices to be mounted lower on CMV windshields than currently allowed by regulation. For the for an exemption to allow its AI Dash Cam to be mounted lower in the windshield on CMVs than is

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currently permitted. For the Samsara Federal Register notice, visit <https://www.federalregister.gov/d/2020-23894>. For the Nauto, Inc. Federal Register notice, visit <https://www.federalregister.gov/d/2020-22361>.

### Election

#### **Analysis: A Biden administration likely would pursue tighter safety regulations**

Although the votes have not been certified and litigation is ongoing, Vice President Joe Biden initially appears to have carried enough states with margins outside realistic recount reversals to give him more than the 270 electoral votes required to become the next president of the United States. If that situation holds, Biden will be inaugurated on January 20, 2021.

Meanwhile, the U.S. House of Representatives would appear to remain in Democratic control, albeit by a narrower margin. The Senate apparently will remain in Republican control unless both Democratic candidates win in two Georgia runoff elections slated for early January. If that happens, the Senate will split 50-50, and the Democrats would take control by virtue of Kamala Harris' tie-breaking vote as vice president, assuming the apparent outcome of the presidential election holds. Senate races in North Carolina and Alaska have not been declared, but the incumbent Republicans appear to be solidly in the lead.

Although a Republican Senate likely would thwart Democratic plans for sweeping legislative changes, a change in administration clearly would mean a major shift in regulatory policy. A Biden administration could be expected to reverse the deregulatory course taken by President Trump, but it is far too early to predict how quickly that will occur in terms of rulemaking. Any rules issued within 60 days prior to the inauguration are subject to being vacated by the incoming president. However, no major FMCSA rulemaking is expected during this time frame. The lone FMCSA rulemaking under review at the White House's Office of Management and Budget is an interim final rule to revise and/or clarify the definitions of the terms "agricultural commodity" and "livestock" in the hours-of-service (HOS) regulations. The broader HOS changes that took effect in late September are well outside the 60-day window. If the Biden administration wanted to undo them, it would have to initiate a completely new proceeding.

The Trump administration withdrew several rulemakings that had been initiated by the Obama administration, including (1) an NPRM that would have changed safety fitness determinations to incorporate Safety Measurement System metrics; (2) an advance rulemaking to consider changes in minimum public liability insurance levels for motor carriers; and (3) an advance rulemaking to consider setting requirements for safety-sensitive trucking and rail workers related to obstructive sleep apnea. Another rulemaking to mandate use of speed limiters was shelved, but it was not technically withdrawn. All these initiatives likely would receive a warmer reception in a Biden administration. Also, FMCSA is pushing some pilot programs regarding pausing the 14-hour clock in HOS regulations and allowing younger drivers to operate interstate. It is not a given that the Biden administration would scuttle these initiatives, but it would not be a surprise.

A Biden administration might be more aggressive on regulations affecting the trucking industry outside the realm of motor carrier safety. The Trump administration's fast-tracking of a proposed new economic control test for independent contractors is a recognition that a Biden administration – like the Obama administration before it – presumably will be hostile to broad use of independent contractor status. The Environmental Protection Agency certainly would push stronger environmental rules and probably would support, not oppose, efforts by California to adopt restrictions that go beyond federal standards.

#### **California voters approve 'gig driver' ballot measure**

Nearly 60% of voters in California on November 3 approved Proposition 22, which overrules part of AB 5 to define app-based rideshare and delivery drivers as independent contractors. The initiative had been backed by major firms in this industry, including Uber, Lyft, and DoorDash.

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Specifically, Proposition 22 defines app-based drivers as workers who (a) provide delivery services on an on-demand basis through a business's online-enabled application or platform or (b) use a personal vehicle to provide prearranged transportation services for compensation via a business's online-enabled application or platform. The narrow definition does not provide any legal support for the leased owner-operator model, although it does indicate that California voters are open to arguments against AB 5.

### Advocacy and Comment

#### The Next Four Years

As the analysis above suggests, the new Administration will undoubtedly be more aggressive on seeking new regulations affecting the trucking industry. Although SMS methodology has been discredited, plaintiff's bar continues to attempt to use it to gain nuclear judgments. If the Democrats control the Senate an attempt to roll back the affect of the FAST Act can be expected.

The continuation of the traditional owner operator model is in jeopardy. Federal legislation was introduced in both the House and the Senate last year which tracks California's AB 5 legislation and is intended as a "one size fits all" test for independent contractor status. Because of the B Prong of the test, if this standard were applied to owner operators, it would deprive 800,000 to 1,000,000 independent contractors of the opportunity to choose to operate their own trade or business.

AB 5, which became law in California last January, has disrupted the longstanding owner operator model in trucking there. It took an expensive referendum (Proposition 22) financed by Uber and Lyft, to get a carve-out from the effect of this legislation. In the Department of Labor filing mentioned above, advocates for continued independent contractor treatment of owner operators laid out similar, if not more compelling arguments for continued recognition of owner operators as independent contractors in the trucking industry.

Independent contractor status of owner operators is supported by Federal Leasing Regulations and the National Transportation Policy. There has been no change in truth in leasing regulations which protect independent contractor rights for over 30 years and established Federal Court precedent supports independent contractor treatment. Owner operators choose to be treated as independent contractors and should not be deprived of the entrepreneurial opportunity such treatment provides.

The President of Uber stated Prop 22 would have had no success if it was not supported by the Uber drivers. To make a compelling argument for an owner operator carve-out, a populist movement by owner operators themselves will be necessary to support continued unique treatment for the model.