

Regulatory and Legislative Update

September 2019

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Regulation and Enforcement

HOS NPRM would loosen 14-hour rule, expand short-haul exception

The Federal Motor Carrier Safety Administration has proposed changes to the hours-of-service (HOS) regulations that would provide drivers more flexibility. The notice of proposed rulemaking was published in the August 22 Federal Register. For the Federal Register notice, visit <https://www.federalregister.gov/d/2019-17810>.

The deadline for comments is October 7, but at least three parties – the Commercial Vehicle Safety Alliance, the American Trucking Associations, and the Teamster union – already have asked FMCSA to extend the comment period. Meanwhile, the agency has scheduled a September 17 public listening session on the NPRM. For more information, see the Federal Register notice at <https://www.federalregister.gov/d/2019-18978>.

The NPRM addresses the four areas covered by the advance NPRM (ANPRM) issued in August 2018: (1) adverse driving conditions; (2) the short-haul exception; (3) the 30-minute rest break; and (4) split rest using sleeper berths. FMCSA also proposes to allow drivers a new “split-duty” option to pause their 14-hour window for driving by up to three hours by taking an off-duty break.

14-hour rule relief

Three of FMCSA’s propose changes would allow drivers to operate beyond a 14-hour window in certain situations. The NPRM is the first time since the major rewrite of the HOS rules took effect in 2004 that FMCSA

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has proposed relief from a strict 14-hour window for most drivers. The three proposals are (1) a new “split-duty” option; (2) more flexible split sleeper berth use; and (3) an extension of the driving-time window during adverse driving conditions.

The NPRM’s split-duty provision would allow drivers to take one off-duty break of at least 30 minutes but not more than 3 hours and use that break to extend the 14-hour driving window by the length of the break. Drivers still would have to take at least 10 consecutive hours off duty at the end of the work shift.

FMCSA also proposes to give drivers more flexibility when they use sleeper berths to split their mandatory rest. Since October 2005, drivers have been able to use sleeper berths for split rest only if the longer rest period is at least 8 hours and is taken in the sleeper berth. That 8-hour period is excluded from the 14-hour duty period, but the shorter off-duty break of at least 2 hours counts against the clock. Under the NPRM, drivers could take a break as short as 7 hours in the sleeper and have it count toward the mandatory rest requirement. The other off-duty rest period would have to be at least 2 hours. However, FMCSA proposes to allow drivers to exclude those 2 hours from the 14-hour clock.

Finally, current regulations allow drivers 2 more hours of driving time for “adverse driving conditions” as defined in Sec. 395.1(b)(1). However, current regulations do not also extend the driving window, so the NPRM would add 2 hours to the window. The proposal would apply both to property-carrying drivers and passenger-carrying drivers who operate under slightly different limits.

30-minute rest break

Under current regulations, drivers must take an off-duty break of at least 30 minutes if more than eight hours have passed since the last off-duty or sleeper berth period. Although FMCSA had floated the possibility that it might eliminate the 30-minute break altogether, the NPRM retains the requirement. However, FMCSA is proposing two changes that likely make the 30-minute rest break irrelevant as a regulatory mandate.

First, instead of 8 hours of on-duty time triggering a break, FMCSA proposes to require a break only if the driver has driven 8 hours without an interruption of at least 30 minutes. Second, the NPRM would allow drivers to satisfy the 30-minute break with an on-duty, not driving period of at least 30 minutes as well as an off-duty or sleeper berth period. The proposed changes to the 30-minute rest break were the only aspects of the NPRM that FMCSA could quantify. The agency estimates that the changes will save the industry about \$275 million a year.

Short-haul exception

Current regulations allow certain short-haul operations to use time cards rather than records of duty status (RODS) to track driver hours. Current regulations stipulate that the short-haul exception is available to drivers with commercial driver’s licenses (CDLs) only if they are on duty for not more than 12 hours and do not drive beyond a 100 air-mile radius. The NPRM would expand the on-duty limitation to 14 hours and allow for driving within a 150 air-mile radius.

The key effect of these proposed changes would be to expand the number of drivers who would be able to operate without electronic logging devices (ELDs). However, FMCSA does not know how many drivers operation under the short-haul exception today or how many drivers would be affected by the proposed expansion of the exception.

Political considerations

The NPRM comes as time is running out on President Trump’s first term. In past administrations, the goal has been to issue a final rule no later than mid-November following the election because a new president can vacate regulations issued less than 60 days before Inauguration Day. However, in early 2017 with the White House and both houses of Congress in Republican control, the Congressional Review Act was used to overturn rules that had been issued within a certain number of legislative days before the end of the prior Congress. With Congress taking so much time off in 2016 to campaign, this tactic expanded the window for invalidating rules to cover rules issued as far back as May 2016.

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Given this precedent, FMCSA might try to issue a final rule by next spring so that the changes would not be vulnerable to a potential Democratic takeover of the White House and Congress. If so, the implementation date for the changes likely would be mid-2021. Of course, this assumes that the rule is not stayed or vacated by a federal appeals court following what is certain to be a court challenge of the final rule by various groups. That risk could be greater than usual unless FMCSA is able to obtain more data to support certain aspects of the NPRM.

Drug and alcohol clearinghouse queries to cost \$1.25 each

FMCSA announced further details on the costs and process for motor carriers to access information on individual drivers in the upcoming drug and alcohol clearinghouse. Individual queries will cost \$1.25, and carriers can purchase bundles at that rate in numerous increments up to 7,500 queries at a cost of \$9,375. The agency also is providing an unlimited plan costing \$24,500 a year for high-volume users. For more information, visit FMCSA's clearinghouse home page at <https://clearinghouse.fmcsa.dot.gov>.

States may get more time to begin accessing clearinghouse

FMCSA has proposed to give state driver licensing agencies (SDLAs) three more years to comply with the requirement that they query the drug and alcohol clearinghouse before issuing, renewing, upgrading, or transferring a commercial driver's license (CDL). However, FMCSA is not proposing any extension of the January 6, 2020, compliance date for reporting all violations to the clearinghouse and for motor carriers to query the database for prospective and current drivers.

The agency said the extension for SDLAs only would allow it to complete a forthcoming rulemaking addressing SDLAs' access to and use of driver-specific information from the clearinghouse. Among other things, FMCSA plans to propose regulations on actions SDLAs must take after receiving notice that a driver licensed in their states are subject to a ban on operating a commercial motor vehicle until they comply with return-to-duty requirements. The upcoming NPRM also would review how reports of actual knowledge violations – based on citations for driving under the influence in a CMV – would be maintained in the clearinghouse.

Comments on the proposed extension are due October 7. For the Federal Register notice, visit <https://www.federalregister.gov/d/2019-18986>.

Transco gets 30-minute rest break exemption for certain drivers

FMCSA has granted Transco, Inc. an exemption allowing certain drivers to comply with the 30-minute rest break requirement by performing on-duty not-driving tasks. The exemption, which is similar to those granted other motor carriers, is in line with FMCSA's proposed changes to the 30-minute rest break requirement. The exemption applies to all Transco drivers in its grocery division who make wholesale deliveries to grocery and convenience stores. For the Federal Register notice, visit <https://www.federalregister.gov/d/2019-18568>.

Reduction planned for UCR fees

FMCSA plans to reduce the annual registration fees states collect from motor carriers, motor private carriers of property, brokers, freight forwarders, and leasing companies for the Unified Carrier Registration (UCR) Plan and Agreement for the 2020 and beyond. The proposed fees for the 2020 registration year would be reduced by nearly 13% below the 2018 registration fee level. Fees for 2021 would be reduced below 2018 by a little more than 4%. For the Federal Register notice, visit <https://www.federalregister.gov/d/2019-18418>

FMCSA proposes amendments to MCSAP

As required by the 2015 highway act, FMCSA is proposing amendments to its financial assistance programs, including amendments based on the funding formula recommendations derived from the Motor Carrier Safety

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Assistance Program (MCSAP) Formula Working Group (working group). This proposal would reorganize the agency's regulations to create a standalone subpart for the High Priority Program and would include 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. Comments are due October 7. For the Federal Register notice, visit <https://www.federalregister.gov/d/2019-17763>.

FMCSA revises bus lease and interchange rule

Following number petitions for reconsideration and several notices announcing plans to revise it, FMCSA finally has changed certain elements of its May 2015 final rule on regarding lease and interchange of passenger commercial motor vehicles. The final rule narrows the applicability of the 2015 final rule by excluding certain contracts and other agreements between motor carriers of passengers that have active passenger carrier operating authority registrations with FMCSA from the definition of lease and the associated regulatory requirements.

For passenger carriers that remain subject to the leasing and interchange requirements, FMCSA (1) returned the bus marking requirement to its July 1, 2015, state with slight modifications to add references to leased vehicles; (2) revised the exception for the delayed writing of a lease during certain emergencies; and (3) removed the 24-hour lease notification requirement. FMCSA said the changes would reduce regulatory costs on the industry by more than \$8 million a year.

The changes are effective October 15. The compliance date for certain elements of the rule is January 1, 2021. For the Federal Register notice, visit <https://www.federalregister.gov/d/2019-17342>.

Comment periods reopened on New York, Chicago interstate bus rules

Having issued several preemption declarations recently, FMCSA has reopened the comment periods on two preemption proceedings that were launched during the Obama administration.

In 2013, FMCSA requested comments on petitions by Motor Coach Canada and the American Bus Association on a potential determination that extensive regulations imposed by the state of New York on interstate passenger operations were preempted by federal law. No action was taken after the comment period closed, but ABA recently asked FMCSA to reopen the docket for comments. FMCSA is giving parties until October 3 to comment. For the Federal Register notice, visit <https://www.federalregister.gov/d/2019-18949>.

In January 2012, Allerton Charter Coach, Inc. petitioned FMCSA for a determination that the Chicago Ground Transportation Tax registration emblem display requirement is preempted by federal law. The agency published a notice of Allerton's petition in March 2012, but FMCSA took no action. Apparently on its own initiative, the agency is reopening the comment period. Comments are due October 3. For the Federal Register notice, visit <https://www.federalregister.gov/d/2019-18983>.

MCSAC meeting to focus on automated driving systems

FMCSA announced that the Motor Carrier Safety Advisory Committee (MCSAC) would meet September 30 and October 1 at Department of Transportation headquarters in Washington, D.C. The meeting will focus on the topic of automated driving systems (ADS) for commercial vehicles. MCSAC issued preliminary recommendations at its last meeting in July 2018. Given the Department's publication of its ADS 3.0 document subsequent to that meeting and other developments in the agency's ADS efforts, FMCSA is seeking specific recommendations on regulatory provisions it should revise and on workforce issues and other concerns FMCSA should address in a potential rulemaking. For the Federal Register notice, visit <https://www.federalregister.gov/d/2019-18578>.

Advocacy and Comment

Comment deadline approaching on crash preventability, other proceedings

Aside from proceedings covered elsewhere in this report, FMCSA has several significant regulatory proceedings on which comments are due soon, including the agency's plan to revise and make permanent its crash preventability review program. The following is a list of those proceedings, the issue of Regulatory Update that outlines the regulatory FMCSA document in question comment dates, and links to Federal Register notices and online dockets.

- **Crash Preventability Determination Program.**
August 2019 Regulatory Update. Comments due October 4. Federal Register notice: <https://www.federalregister.gov/d/2019-16693>. Docket: <https://www.regulations.gov/docket?D=FMCSA-2014-0177>
- **Hours of Service of Drivers; Definition of Agricultural Commodities.**
August 2019 Regulatory Update. Comments due September 27. Federal Register notice: <https://www.federalregister.gov/d/2019-15960>. Docket: <https://www.regulations.gov/docket?D=FMCSA-2018-0348>.
- **CDL Out of State Knowledge Test.**
August 2019 Regulatory Update. Comments due September 27. Federal Register notice: <https://www.federalregister.gov/d/2019-15963>. Docket: <https://www.regulations.gov/docket?D=FMCSA-2018-0332>
- **New Information Collection: Crime Prevention for Truckers.**
August 2019 Regulatory Update. Comments due September 23. Federal Register notice: <https://www.federalregister.gov/d/2019-15609>. Docket: <https://www.regulations.gov/docket?D=FMCSA-2018-0278>

Petition for Rulemaking - Crash Preventability Determination Program

On August 21 FMCSA Administrator Martinez denied MCRR's Petition for Rulemaking and placed the Petition in the Agency's Notice and Request for Comment docket at <https://www.regulations.gov/document?D=FMCSA-2014-0177-0147>.

His letter signals the Agency's intent to proceed with the adoption of the crash preventability test program through guidance. The Agency has attempted to control the narrative by seeking comments to a handful of structured questions which do not address the requirements of rulemaking or the FAST Act prerequisites which must be addressed concerning SMS methodology into which the proposed "Nonpreventable" crash would be inserted.

Adoption of the preventability standard could exacerbate up-supply chain liability, misuse of guidance as an alternative vetting criteria for shippers and brokers, and increase insurance costs. Based on the test study, the Agency would adopt after the arbitrary preventability standard was applied as many as 80,000 drivers and the thousands of small carriers they control could be identified as too toxic to hire, retain, or insure. Ignoring the important protections of rulemaking, particularly in light of the bureaucratic overreach experienced by publication and use of SMS guidance must be addressed. In light of the statutory requirements imposed by Congress and the Executive Orders issued by the Trump Administration, to do anything else would establish bad precedent. Requiring findings of fact and conclusions of law establishes the avenue for court review and due process of ad hoc policy changes which affect the trucking industry.

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Hopefully the Agency will reconsider its denial of the Petition for Rulemaking. MCRR will seek an extension of time for making comments and ensure that a critical analysis of the Agency's proposal is presented to build the record and preserve the rights of judicial review.

For further information about problems with the preventability proposal and the need for rulemaking visit <https://vimeo.com/358892468>. Unless the Agency reconsiders the need for rulemaking and cancels or extends the current October 4 deadline for comments, it is important that a record be made for judicial review given the possible misuse of guidance to circumvent otherwise unaddressed issues concerning the efficacy and adverse consequences of the proposal.