

# Regulatory and Legislative Update

November 2018

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## Regulation and Enforcement

### SMS reform requires more than what FMCSA plans, MCRR says

In extensive comments filed with FMCSA, the Motor Carrier Regulatory Reform (MCRR) coalition argued that the agency's decision to pursue a complex Item Response Theory (IRT) model – aside from being problematic in its own right – ignores the Congressional mandate to respond to a series of questions concerning the efficacy of the Safety Measurement System (SMS) and Compliance, Safety, Accountability (CSA). The coalition was one of a few parties to submit formal comments in the docket, although parties have participated in several narrowly-focused listening sessions since FMCSA submitted a brief plan to Congress this summer. (*For a summary of FMCSA's plan, see the August 2018 Regulatory Update.*)

“At the outset, MCRR objects to Agency procedures which establish limited and focused ‘listening opportunities’ in which input is narrowly defined outside the context of necessary rulemaking,” MCRR said. “In this request for comments, the Agency focuses on three narrow recommendations of the National Academies

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of Science (NAS). It has not divulged how the complex Item Response Theory (IRT) model will work, its projected cost or benefits. It has assumed that the Safety Measurement System (SMS) data should be made public without considering 15 years of well-documented opposition by MCRR members and others.”

MCRR said that it has established that FMCSA cannot provide safety ratings to 525,000 motor carriers using big data. Now the industry is being asked to accept “a multi-year invasive collection process seeking even bigger data evidently aimed at creating a ‘culture of safety.’ Yet, the Agency has not divulged in the notice how this ‘culture of safety’ would fit into the schema of the Agency’s obligation to provide safety fitness determinations based upon carrier compliance with FMCSA regulations.”

FMCSA still has not shown how its vague plans meet the rigors of the Administrative Procedure Act (APA) and the requirements of the FAST Act (Pub. Law 114-94), MCRR said. “Nor has it shown why its new areas of inquiry do not involve intrusion by the Agency into privileged carrier information, labor management relations and operational issues which are beyond the scope of its authority.”

To read the MCRR’s complete comments, visit <https://www.regulations.gov/document?D=FMCSA-2017-0226-0021>. To download a copy of the corrective action plan, visit <https://www.fmcsa.dot.gov/fastact/csa>. To review all comments, visit <https://www.regulations.gov/docket?D=FMCSA-2017-0226>.

In a related action, the U.S. Department of Transportation (DOT) Office of Inspector General (OIG) announced October 15 that it will immediately begin an audit to assess the extent to which FMCSA’s corrective action plan addresses the NAS recommendations and relevant OIG and Government Accountability Office (GAO) recommendations and to identify challenges FMCSA may face when implementing the corrective action plan.

### **FMCSA chief hints at preemption of California rules for HOS-regulated drivers**

The head of the Federal Motor Carrier Safety Administration recently suggested that the agency might follow the lead of another (DOT) agency in preempting California from regulating truck drivers’ meal and rest breaks. The Pipeline and Hazardous Materials Safety Administration (PHMSA) in September concluded that California’s meal and rest break requirements create an unnecessary delay in the transportation of hazardous materials and are preempted with respect to all drivers of motor vehicles that are transporting hazardous materials. Within days, the American Trucking Associations filed a petition with FMCSA for a preemption of those California requirements as they apply to all commercial motor vehicle (CMV) drivers whose work hours are regulated by DOT. *(For more on the PHMSA ruling and ATA petition, see the October 2018 issue of Regulatory Update.)*

Speaking at the American Trucking Associations annual meeting in Austin, Texas, on October 27, FMCSA Administrator Ray Martinez said that he is “very, very, very concerned about a patchwork system where every state gets to decide these issues.” He added that the issue is not merely interstate commerce. “That is an issue of safety. Everything we do is through the lens of safety, and that’s how we will be evaluating this.”

The comment period on the ATA petition officially closed on October 29, although the Teamsters union and the American Association for Justice (i.e., the trial lawyers) had requested exemptions. FMCSA has not publicly responded to those requests, but it is still possible to comment on the ATA petition. To date, 720 comments have been filed, and some seek an FMCSA interpretation that goes beyond what ATA specifically requested. For example, the Western States Trucking Association argued that the preemption should apply to intrastate carriers as well as interstate given that under 49 CFR 355.5 states must adopt motor carrier safety regulations that are compatible with federal regulations. To review or submit comments, view <https://www.regulations.gov/docket?D=FMCSA-2018-0304>.

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### **FMCSA grants exemptions for short-haul exception flexibility**

In separate actions, FMCSA has granted applications for exemptions from the American Concrete Pumping Association (ACPA) and Waste Management Holdings, Inc. (WMH) to allow drivers operating under the short-haul exception to return to their work-reporting locations within 14 hours instead of the usual 12 hours. The exemptions allow the covered drivers operations to work under rules that FMCSA is considering for all operations governed by the short-haul exception as part of an advance notice of rulemaking (ANPRM) issued in August regarding hours-of-service changes. (*For details of the ANPRM, see the September 2018 Regulatory Update.*) For more information on the ACPA exemption, visit <https://www.federalregister.gov/d/2018-23881>. For more information on the WMH exemption, visit <https://www.federalregister.gov/d/2018-23335>.

### **FMCSA plans further study on the effect of driver schedules on fatigue**

In the context of a typically routine notice of intent to get White House approval to collect information, FMCSA outlined its plan to study to how CMV drivers' schedules impact driver performance, fatigue and safety. The study, which already has finished its first phase, dates back to the preamble December 2011 hours-of-service rule in which the agency said it was committed to conducting “a comprehensive analysis of the relative crash risk by driving hour.” FMCSA said in that document that it planned to match data from driver logs with crash information to determine the level of crash risk by hours of driving. Also, a 2015 report from the National Academies of Sciences recommended that FMCSA incentivize the capturing of driver performance data to increase the availability of data.

The first phase of the project, which involved HOS data from nine carriers, focused primarily on carriers with more than 1,000 power units. The second phase will expand the data collection to 44 carriers and use these data to analyze how HOS provisions are being used and the impact of driver schedules on crash risk.

Comments on FMCSA’s notice are due December 24. For more information, visit <https://www.federalregister.gov/d/2018-23334>.

### **Comments due in November in financial responsibility, bus leasing dockets**

Deadlines to comment on two FMCSA rulemakings occur in November. Comments on FMCSA’s advance notice of proposed rulemaking (ANPRM) to implement requirements of a 2012 law related to the financial security requirements for property brokers and freight forwarders are due November 26. (*See the October 2018 edition of Regulatory Update.*) For a copy of the ANPRM, visit <https://www.federalregister.gov/d/2018-21052>. To review or submit comments, visit <https://www.regulations.gov/docket?D=FMCSA-2016-0102>.

Also, comments are due November 19 on a notice of proposed rulemaking (NPRM) to make several substantive changes in the bus leasing and interchange rule and to postpone the compliance date to January 1, 2021. (*See the October 2018 edition of Regulatory Update.*) For the Federal Register notice, visit <https://www.federalregister.gov/d/2018-20162>. To review or submit comments, visit <https://www.regulations.gov/docket?D=FMCSA-2012-0103>.

### **FMCSA updates personal conveyance guidance through website FAQs**

Along the lines of the approach it took with electronic logging devices, FMCSA is augmenting formal guidance published in the Federal Register with answers to frequently asked questions in response to questions received since publication of the guidance on June 7. The agency said that additional questions can be sent to [MCPSD@dot.gov](mailto:MCPSD@dot.gov) and that it will continue to answer questions and provide further clarification if needed. For more information, visit <https://www.fmcsa.dot.gov/regulations/hours-service/personal-conveyance>.

### **Exemption granted for sleeper berth in Ford F350 pickup bed**

FMCSA has granted Castignoli Enterprises’ application for a limited five-year exemption to allow a sleeper berth to be installed in the bed of a Ford F350 pickup truck that, when operated in combination with certain

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trailers, is a commercial motor vehicle (CMV). A sleeper berth installed in the bed of the pickup truck does not meet the regulatory requirements for access, location, exit, communication, or occupant restraint requirements for sleeper berths. One of the conditions of the exemption is that the sleeper berth can be used only by the solo driver of the F350 and that no other person use it while the truck is in motion. For the Federal Register notice, visit <https://www.federalregister.gov/d/2018-22704>.

### **Carrier seeks to increase short-haul exception to 150 air-miles**

FMCSA is requesting comments until November 19 on an application from RJR Transportation, Inc. (RJR) for an exemption to increase the 100 air-mile radius in “short-haul operations” to 150 air-miles for its drivers, allowing them to use time records instead of records of duty status (RODS) for that day. RJR is a local trucking operation based in Northern California operating on dedicated routes, with more than 98 percent of its trips within the 100 air-mile radius, short-haul exception. RJR said it services three areas outside the 100 air-mile radius, all between 100 to 140 air-miles from the normal work reporting location. RJR stated that it will be forced to make a substantial investment in updating its vehicle fleet to include electronic logging devices (ELDs) for just this short extension of the 100 air-mile radius. For the Federal Register notice, visit <https://www.federalregister.gov/d/2018-22702>.

### **Grocery distributor seeks relief from 30-minute rest break**

FMCSA is requesting comments until November 19 on an application from Transco, Inc. exemption to allow drivers to comply with the 30-minute rest break provision of HOS regulation while performing on-duty, not-driving tasks. The requested exemption would apply to all Transco drivers in its grocery and food service divisions who make wholesale deliveries to grocery and convenience stores. For the Federal Register notice, visit <https://www.federalregister.gov/d/2018-22706>.

### **Rota-Mill seeks relief on HOS rest break, workday provisions**

FMCSA is requesting comments until November 19 on an application from Rota-Mill, Inc. for exemptions from the 30-minute rest break and requirement that short-haul drivers using the record of duty status (RODS) exception return to their work-reporting location within 12 hours of coming on duty. The first exemption would allow drivers engaged in the transportation of milled asphalt and related materials and equipment to use 30 minutes or more of on-duty “waiting time” at a jobsite to satisfy the requirement for the 30-minute rest break, provided they do not perform any other work during the break. The second exemption would allow these drivers to use the short-haul exception but return to their work-reporting location within 14 hours instead of 12 hours. For the Federal Register notice, visit <https://www.federalregister.gov/d/2018-22703>.

### **Home mover seeks relief on cumulative HOS limit**

FMCSA is requesting comments until November 19 on a joint application from Wolfe House Movers, LLC and Wolfe House Movers of Indiana, LLC requesting an exemption from the HOS regulations to allow drivers operating CMVs that transport steel beams and dollies to and from various job sites for lifting and moving buildings to operate under the 70-hour/8-day rule even though the companies do not operate seven days a week. Wolfe does not operate on Sundays, but it said that the geographical spread of its operations mean that the 60-hour limitation creates a substantial burden. For the Federal Register notice, visit <https://www.federalregister.gov/d/2018-22707>.

### **CRST Expedited wins renewed exemption for certain CLP holders**

FMCSA has renewed CRST Expedited’s exemption that it allows the carrier to use a commercial learner’s permit (CLP) holder who has passed the commercial driver’s license (CDL) test but has yet to pick up the actual CDL document while a CDL holder is in the sleeper berth. Regulations allow CLP holders to drive with a CDL

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holder but only while the CDL holder is in the passenger seat. For the Federal Register notice, visit <https://www.federalregister.gov/d/2018-22836>.

### Legislation

#### **Analysis: Midterms won't change much except to give trucking critics a soapbox**

The Democratic takeover of the House coupled with a larger Republican majority in the Senate likely will lead mostly to the same legislative outcomes that we would have seen with a more narrowly split U.S. Senate and the House remaining in Republican control. However, the trucking industry should brace a sharp change in the tone of congressional oversight as Democrats now will control what hearings to schedule and investigations to conduct. Moreover, the change raises the stakes for the upcoming lame duck session of Congress as pro-business interests surely will jockey for favorable legislation before the train leaves the station in January.

#### **The flipping House**

Although the regulatory landscape changed dramatically with the election of President Trump, Republican control of Congress and the White House has not produced much significant legislation. In two years, there has been just one huge legislative triumph – tax reform. On trucking issues specifically, Republican control of both Houses has not yielded much legislation that the industry has sought. Carriers have been unable to win preemption of state regulation of driver hours of service. Nor have less-than-truckload carriers and shippers succeeded in getting approval for 33-foot twin trailers. The one group that has had some success is livestock haulers, which continue to enjoy an exemption from electronic logging devices that Congress granted this spring. It's possible that a more urban-oriented Democrat-controlled House would have balked at that provision.

So strictly from the standpoint of legislative activity, flipping the House to Democratic control will not change much – especially now that the GOP margin in the Senate is larger, rendering Republican centrists less powerful. Nor will a Democratic House have much power to impede the Trump administration's deregulatory efforts.

The change in House control hardly is meaningless, however. Under Republican control, House oversight was typically anti-regulation and pro-business, something that certainly will not be the case come January. For example, the coming months likely will bring two FMCSA actions generally sought by the trucking industry – a rulemaking on hours-of-service changes and a potential preemption of California's regulation of truck drivers' meal and rest breaks. Although the Democratic House will have virtually no ability to derail these efforts legislatively, the House Transportation & Infrastructure Committee could and likely will schedule hearings aimed at putting these efforts in the most negative light possible. This power to make things difficult could even lead to some watering down of deregulatory proposals, although that is not likely.

#### **Lame duck session**

Of course, the new Congress with a Democratic House majority will not be seated for a couple of months. In the meantime, Congress must continue funding for the federal government, which means that the current Congress still will be acting on legislation in what is known as a "lame duck" session.

For business interests, the stakes of the lame duck session could not be higher. While the Democratic House cannot push through damaging legislation since the Senate remains in GOP control, it's also true that business interests will find it far more difficult to obtain legislation they want. Expect the next couple of months to be an intense period of lobbying. Specific to trucking, we might see two issues discussed above – 33-foot twin trailers and preemption of state regulation of hours of service – addressed. However, those are just two requests out of thousands that Congress will have to weigh, and only so many can make it through.

### **Sen. Booker introduces employer notification bill**

Sen. Cory Booker (D-N.J.) in October introduced legislation (S. 3603) to require FMCSA to implement a national employer notification service that would automatically alert employers to changes in the status of commercial driving records or commercial driver's licenses (CDLs). Under the bill, the service would notify employers of workers with CDLs would be notified of convictions for moving violations or failure to appear or the suspension or revocation of CDLs. Because Congress is essentially done with its work for the year except for must-pass legislation in a lame duck session, the bill stands little chance of advancing unless it is reintroduced in the next Congress. For more information, visit <https://www.congress.gov/bill/115th-congress/senate-bill/3603>.

## Courts

### **Federal court ruling challenges most case law on driver compensation**

A federal judge in Arkansas in October ruled that in the absence of a contract to the contrary trucking companies can exclude only eight hours of sleeper berth time from drivers' compensation. Judge Timothy Brooks' October 19 appears to be an outlier in the jurisprudence on the issue. The judge's decision focused on subtle distinctions in Labor Department regulations, saying that "whether time spent sleeping or eating should be counted as hours worked has nothing to do with whether such time constitutes actual work; rather, it simply turns on whether the employee has been on duty for at least 24 hours, whether the employee and employer have agreed to exclude it from hours worked, and whether it exceeds 8 hours." For a copy of Judge Brooks' opinion, visit <http://bit.ly/arkansas-pay>.