

Regulatory and Legislative Update

June 2018

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Regulation and Enforcement

FMCSA issues guidance on personal conveyance, ag commodity exception

After months of review, the Federal Motor Carrier Safety Administration (FMCSA) on May 31 announced new guidance on two key issues that affect application of the electronic logging device (ELD) mandate: Personal conveyance and the agricultural commodity exception. Due principally to questions surrounding the agricultural commodity exception, transporters of covered goods have been operating under a temporary waiver from ELDs that currently is set to expire June 18. Transporters of livestock or insects are exempt at least until the end of the current fiscal year on September 30.

Personal conveyance

The personal conveyance issue has long been controversial because under longstanding guidance, a driver could not declare any movement of the vehicle to be personal conveyance if the commercial motor vehicle (CMV) moved were loaded, regardless of the reason for the move. This essentially eliminated straight trucks from using personal conveyance after picking up a load, and often made it impossible to use in many tractor-trailer operations because shipper, carrier, or insurer restrictions often prohibit loaded trailers from being

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disconnected from their associated tractors until final delivery. Often, drivers would run out of hours while waiting to be loaded and then could not move the truck without violating hours-of-service (HOS) regulations.

The new guidance, which was effective immediately, focuses on the reason the driver is operating a CMV while off-duty to determine if the movement is considered personal conveyance, regardless of whether the CMV is laden. Among the examples FMCSA gave as allowable personal conveyance were:

- When using personal conveyance to leave a shipper or receiver and travel to a safe location for rest is allowed;
- When commuting to and from work can be considered personal conveyance; and
- Use of personal conveyance does not impact on-duty time.

FMCSA's website includes a more extensive list of examples of situations that are allowed and not allowed to be claimed as personal conveyance. For details on the personal conveyance guidance, visit <https://www.fmcsa.dot.gov/regulations/hours-service/personal-conveyance>. The Federal Register notice is available at <https://www.federalregister.gov/d/2018-12256>

Agricultural commodities

The guidance clarifies the applicability of the 150 air-mile agricultural commodity exception in the HOS regulations, specifically 49 CFR 395.1(k)(1). The guidance clarifies that drivers operating unladen vehicles traveling either to pick up an agricultural commodity, as defined in § 395.2, or returning from a delivery point, while operating within a 150-air-mile radius of the source of the commodity are not subject to the HOS regulations. Also, drivers engaged in trips beyond 150 air-miles from the source of the agricultural commodity are not subject to the hours of service regulations until they exit the 150 air-mile radius.

The guidance also clarifies many longstanding questions about what can be considered a "source" of an agricultural commodity. A source can be not only the farm or ranch where the commodity originates but also intermediate storage and loading facilities, such as grain elevators or sale barns, if the product still meets the definition of an agricultural commodity. FMCSA also clarified that when agricultural commodities are loaded at multiple sources during a trip only the first loading point can be considered a source.

FMCSA noted that operators should consider the guidance when determining the applicability of the ELD mandate after the June 18 waiver or September 30 exemption, as the case may be. Motor carriers relying on the agricultural commodities exception will be able to take advantage of an exception from the ELD requirements if they do not operate outside of the 150-mile radius more than 8 days out of every 30. The Agency's Agriculture webpage at www.fmcsa.dot.gov/ag provides a variety of resources to help with understanding all agriculture exemptions, the applicability of the rule and regulations to agriculture, and how to use your ELD when operating under an agricultural exception. This guidance is effective immediately.

For details on the agricultural commodity exception guidance, visit <https://www.fmcsa.dot.gov/ag>. The Federal Register notice is available <https://www.federalregister.gov/d/2018-12250>.

CARB fines out-of-state brokers for truck violations

In an apparently groundbreaking action, the California Air Resources Board announced in April that it had fined two intermediaries – Marten Logistics and Roadrunner Transportation – for dispatching trucks into the state that were not compliant with the state's truck and bus regulation and for failing to keep adequate records. Previous enforcement action has been only against brokers who were based in California or at least had agents or offices in the state. The regulation requires all older heavy-duty diesel trucks operating in California to be either retrofitted with soot filters or replaced with a 2010 or later model year engine.

"Any company that hires or dispatches trucks for operations in California must verify the compliance of those vehicles with California law," said CARB enforcement chief Todd Sax in the news release. Marten Logistics was fined \$100,000 for not verifying that each truck hired or dispatched into California was compliant.

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Roadrunner Transportation was fined \$52,250 for that violation and also for failing to maintain required records.

FMCSA makes technical corrections in FMCSRs

FMCSA amends its regulations by making technical corrections throughout the Federal Motor Carrier Safety Regulations. The Agency makes minor changes to correct inadvertent errors and omissions, remove or update obsolete references, ensure conformity with Office of the Federal Register style guidelines, and improve the clarity and consistency of certain regulatory provisions. For the Federal Register notice, visit <https://www.federalregister.gov/d/2018-10437>.

SBTC seeks ELD exemption for carriers with fewer than 50 employees

The Small Business in Transportation Coalition (SBTC) has requested an exemption from the electronic logging device (ELD) requirements for all motor carriers with fewer than 50 employees. Comments are due July 5. For the Federal Register notice, visit <https://www.federalregister.gov/d/2018-12037>.

Legislation

Rep. Peterson introduces two bills to exempt certain carriers from ELDs

Rep. Collin Peterson (D-Minnesota) on May 24 introduced two bills (H.R. 5948 and H.R. 5949) to exempt small motor carriers and carriers hauling agricultural products from the ELD mandate. H.R. 5948 would allow motor carriers that own or operate 10 or fewer commercial motor vehicles to comply with the hours-of-service logging requirements with either ELDs or paper logs. CMVs owned or operated by all carriers affiliated with the carrier by common ownership, management, control, or familiar relationship, would count toward determining whether the carrier had 10 or fewer CMVs. For more information on H.R. 5948, visit <https://www.congress.gov/bill/115th-congress/house-bill/5948>.

H.R. 5949 would allow certain agricultural businesses to comply with the hours-of-service logging requirements with either ELDs or paper logs. The exception to the ELD mandate would apply to carriers transporting (1) an agricultural product as defined in section 207 of the Agricultural Marketing Act of 1946 (7 USC 1626) from the source of the product; and (2) farm supplies for agricultural purposes as defined in 49 CFR 395.2 from the distribution point. In both cases, the exemption would apply to the motor carrier when returning empty from the delivery. For more information on H.R. 5949, visit <https://www.congress.gov/bill/115th-congress/house-bill/5949>.

In addition to small carriers and agricultural haulers, both bills would expand the current driveaway-towaway exemption to include motor homes and recreation vehicle trailers. Under the current ELD regulation, driveaway-towaway operations are exempted only if the CMV being driven is part of the delivery.

Senate bill would change HOS rules for livestock haulers

Sen. Ben Sasse (R-Nebraska) on May 23 introduced legislation (S. 2938) to that would modify the HOS regulations as they apply to the transportation of livestock and insects. The bill, which has 16 co-sponsors, applies to drivers transporting livestock or insects within a 300 air-mile radius from the point at which the on-duty time begins. Under the bill, the on-duty time would exclude all time spent:

- At a plant, terminal, facility, or other property of a motor carrier or shipper or on any public property during which the driver is waiting to be dispatched;
- Loading or unloading a commercial motor vehicle;
- Supervising or assisting in the loading or unloading of a commercial motor vehicle;

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- Attending to a commercial motor vehicle while the vehicle is being loaded or unloaded;
- Remaining in readiness to operate a commercial motor vehicle; and
- Giving or receiving receipts for shipments loaded or unloaded.

The bill also would make significant changes to driving time limits in current regulations. In general, the driving time under section 395.3(a)(3)(i) is modified to a maximum of not less than 15, and not more than 18, hours within a 24-hour period. A driver could take one or more rest periods during the trip, which shall not be included in the calculation of the driving time. After completing the trip, the driver's mandatory minimum rest period would be 5 hours less than the maximum driving time. One exception to the 15-hour/18-hour maximum drive time limits kicks in when a driver is within 150 air-miles of the point of delivery. In those cases, any additional driving would not be included in the calculation of driving time.

For more information on S. 2938, visit <https://www.congress.gov/bill/115th-congress/senate-bill/2938>.

Funding bill would preempt state meal/rest regs, block bus lease/interchange rule

The House Appropriations Committee on May 23 approved a bill to fund the Department of Transportation and other agencies in fiscal 2019, adopting several measures of interest to the motor carrier industry. The bill includes language that would modify the Federal Aviation Administration Authorization Act of 1994 (F4A) to bar states from enacting or enforcing laws that prohibiting employees subject to federal hours-of-service regulations from working to the full extent allowed "or imposing any additional obligations on motor carriers if such employees work to the full extent or at such times as permitted" under federal law. A similar provision is in the FAA authorization bill (H.R. 4) passed by the House on April 27. (See *Regulatory Update*, May 2018.)

The funding bill also includes a provision that would block FMCSA from implementing or enforcing the May 2015 final rule "Lease and Interchange of Vehicles; Motor Carriers of Passengers." Also, the fiscal 2019 funding bill would retain the provision in the fiscal 2018 bill that exempts transportation of livestock and insects from the ELD mandate.

One major controversy in past funding bills resurfaced this year: 33-foot twin trailers. Lawmakers did not include a legislative provision in the bill, but the committee adopted an amendment sponsored by Rep. Chuck Fleischmann (R-Tennessee) to insert language in the committee report directing DOT to report on any updated findings on the impact of increasing the length of twin-trailer trucks to 33 feet.

House T&I panel holds hearing on FAST Act motor carrier provisions

On May 22, the highway subcommittee of the House Transportation & Infrastructure Committee held a hearing on implementation of the motor carrier provisions of the Fixing America's Surface Transportation (FAST) Act. Testifying were:

- Ray Martinez, administrator, FMCSA;
- Dale Krapf, chairman, Krapf Transportation;
- Mike VanMaanen, owner, Eastern Missouri Commission Company, on behalf of Livestock Marketing Association;
- Captain Christopher Turner, president, Commercial Vehicle Safety Alliance;
- Jennifer Tierney, board member, Citizens for Reliable and Safe Highways, on behalf of Truck Safety Coalition.

For links to the written testimony and to a recording of the hearing, visit <https://transportation.house.gov/calendar/eventsingle.aspx?EventID=402444>.

DeFazio bill addresses sexual harassment in passenger transportation

Rep. Peter DeFazio (D-Oregon), the top Democrat on the House Transportation & Infrastructure Committee, on May 17 introduced legislation (H.R. 5857) requiring passenger carriers, including Class 1 passenger motor

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carriers conducting regularly scheduled intercity service, to implement policies and procedures designed to protect transportation personnel and passengers from sexual assault and harassment. For more information on H.R. 5857, visit <https://www.congress.gov/bill/115th-congress/house-bill/5857>.

Courts

U.S. Supreme Court declines to review J.B. Hunt suit on F4A

A federal appeals court ruling upholding the application of California’s wage and labor laws so as to bar motor carriers from using incentive-based pay structures will remain in place as the U.S. Supreme Court on June 4 declined to hear an appeal. The case involves J.B. Hunt, which had argued that the state’s requirement for driver meal and rest breaks was preempted by the Federal Aviation Administration Authorization Act of 1994 (F4A). Language in both the House-based FAA authorization bill (H.R. 4) and the House version of the fiscal 2019 DOT appropriations bill would bar states from the type of wage and hour regulation imposed by California.

WSTA approves legal response to California Supreme Court ruling

The Western States Trucking Association (WSTA) Executive Committee has approved allowing association legal counsel to pursue a legal strategy to protect the use of owner-operators in trucking following an adverse ruling by the California Supreme Court. On April 30, the court upheld a lower court’s ruling that a wage order applied to drivers that Dynamex deemed to be independent contractors rather than employees. (See *Regulatory Update*, May 2018.)