**Regulatory and Legislative Update**

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**Regulation and Enforcement**

**HOS reform plan goes to White House for review**

The U.S. Department of Transportation (DOT) on March 28 sent to the White House Office of Management and Budget (OMB) a draft proposal for changes to drivers’ hours-of-service regulations. OMB review is the last step before publication of a notice of proposed rulemaking (NPRM) in the Federal Register

An advance notice of proposed rulemaking (ANPRM) issued last year requested comments on changes in four areas: (1) short-haul operations; (2) adverse driving conditions; (3) the 30-minute rest break; and (4) split sleeper berth time. Although the ANPRM did not directly propose any changes, the limited scope of the inquiry strongly suggested it was focusing on changes in those areas. In the area of short-haul operations, the Federal Motor Carrier Safety Administration (FMCSA) hinted that is considering harmonizing the limit on consecutive hours worked limit with longer-haul by increasing the 12-hour window to complete driving to 14 hours. Regarding adverse driving conditions, the agency noted that the current regulations allow for up to two more hours of driving time but not an increase in the 14-hour driving window to 16 hours. FMCSA also signaled that it is considering eliminating or modifying the requirement for a 30-minute rest break. Finally, the agency reaffirmed that it is considering restoring some flexibility in use of the sleeper berth to split mandatory rest.

FMCSA has indicated since last fall that HOS changes were on a fast track. For example, the agency had planned to conduct a pilot project on split rest that would not have even started until this year, but it cancelled that project and decided to rely on data provided during the rulemaking process. Given that the draft NPRM is considered a deregulatory action that reduces a burden on industry, OMB review could be swift, but it likely would take a few weeks at bare minimum. Once published, interested parties likely would have at least 60 days to comment. The proposal is certain to draw thousands of comments, so even an aggressive push to change the rules probably would not result in a final rule until at least the fourth quarter of 2019. Of course, the changes would not be effective immediately because of the training of drivers, carriers and roadside inspectors that would be needed as well as the necessary reprogramming of electronic logging devices. This all assumes that the rule survives the inevitable court challenge by safety advocates.

DOT Secretary Elaine Chao announced the sending of the draft NPRM to OMB on March 29 during a speech at the Mid-America Trucking Show. In the same speech she also announced that FMCSA intended to make permanent its demonstration program on crash preventability reviews.

**FMCSA clarifies application of preemption ruling in litigation**

FMCSA’s chief counsel office has issued an interpretation clarifying that it is the agency’s position that once the agency issues a preemption decision under Section 31141, the preempted state law or regulation may not thereafter be enforced regardless of whether the conduct at issue in the lawsuit occurred before or after the decision was issued. Nor does it matter whether the lawsuit was filed before or after the decision was issued, the chief counsel’s office said in the March 22 opinion.

 The opinion resulted from a question that arose related to FMCSA’s December 21 declaration that that California's meal and rest break rules are preempted under Section 31141 as applied to property-carrying commercial motor vehicle drivers covered by FMCSA’s HOS regulations. (*See Regulatory Update, January 2019*.) However, on January 7, an FMCSA attorney sent an email in response to an inquiry from a private attorney stating that the FMCSA determination did not have retroactive effect. “This statement, however, did not and does not represent the views of FMCSA,” the opinion states. On January 18 the FMCSA attorney sent another email clarifying that the agency would be giving the retroactivity issue further consideration.

For a copy of the FMCSA chief counsel office’s opinion, visit <https://www.fmcsa.dot.gov/safety/fmcsa-legal-opinion-applicability-preemption-determinations-pending-lawsuits>.

**DOL proposes to relax rules on treatment of certain employee payments**

The U.S. Department of Labor (DOL) in March proposed to clarify and update the regulations governing “regular rate” requirements, which haven’t changed in more than 50 years. Regular rate requirements define what forms of payment employers include and exclude in the "time and one-half" calculation when determining workers' overtime rates.

 Current rules discourage employers from offering more perks to their employees as it may be unclear whether those perks must be included in the calculation of an employees' regular rate of pay. The proposed rule focuses primarily on clarifying whether certain kinds of perks, benefits, or other miscellaneous items must be included in the regular rate. DOL proposes to confirm that employers may exclude the following from an employee's regular rate of pay:

* The cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services;
* Payments for unused paid leave, including paid sick leave;
* Reimbursed expenses, even if not incurred "solely" for the employer's benefit;
* Reimbursed travel expenses that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System and that satisfy other regulatory requirements;
* Discretionary bonuses, by providing additional examples and clarifying that the label given a bonus does not determine whether it is discretionary;
* Benefit plans, including accident, unemployment, and legal services; and
* Tuition programs, such as reimbursement programs or repayment of educational debt.

The proposed rule also includes additional clarification about other forms of compensation, including payment for meal periods, "call back" pay, and others.

Comments on the proposal, which was published in the March 29 Federal Register, are due May 28. For the Federal Register notice, visit <https://www.federalregister.gov/d/2019-05687>. For more information, visit [www.dol.gov/whd/overtime/regularrate2019.htm](http://www.dol.gov/whd/overtime/regularrate2019.htm).

**Waste haulers seek relief from 12-hour return requirement**

FMCSA is requesting comments until April 29 on an application from the National Waste & Recycling Association (NWRA) for an exemption from one of the criteria for using the “short-haul—100 air-mile radius driver” exception to the requirement for the preparation and retention of records of duty status. NWRA asks that all short-haul commercial motor vehicle (CMV) drivers in the waste and recycling industry be allowed up to 14 hours (instead of the current 12 hours) to return to the original work reporting location without losing their short-haul status. For a copy of the Federal Register notice, visit <https://www.federalregister.gov/d/2019-06094>.

**Helicopter firm seeks HOS relief for ground support drivers**

FMCSA is requesting comments by April 29 on a request from PJ Helicopters, Inc. (PJH) for an exemption from two provisions of the HOS regulations for its ground support equipment operators during times when drivers are responding to or returning from active incidents as requested by an officer of a public agency or utility. PJH requested relief from the 14-hour rule and the requirement that drivers have 10 consecutive hours off-duty at the end of the work shift. For a copy of the Federal Register notice, visit <https://www.federalregister.gov/d/2019-06097>.

**Aerodynamic device supplier seeks relief on rear lighting rules**

FMCSA requests comments by April 29 on an application from Laydon Composites Ltd. for an exemption to allow motor carriers to operate CMVs that are equipped with Laydon's OptiTailTM aerodynamic device with rear identification lamps and rear clearance lamps that are mounted lower than currently permitted by the agency's regulations. Current regulations prevent the OptiTailTM aerodynamic device from being mounted flush with the top of the vehicle, thereby reducing its fuel economy benefit, Laydon said. For a copy of the Federal Register notice, visit <https://www.federalregister.gov/d/2019-05946>.

**Firm seeks exemption regarding fueling of auxiliary equipment**

FMCSA requests by April 29 on Charles Machine Works, Inc.'s (CMW) application for an exemption from the agency's prohibition against the use of gravity or syphon-fed fuel systems for auxiliary equipment installed on or used in connection with CMVs. CMW believes that the use of gravity or syphon-fed fuel systems for auxiliary equipment that operates only when the CMV is parked is sufficient. For the Federal Register notice, visit <https://www.federalregister.gov/d/2019-05952>.

**CVSA’s International Roadcheck scheduled for June 4-6**

The Commercial Vehicle Safety Alliance announced that its annual International Roadcheck even will take place June 4-6. The 72-hour period of special scrutiny in commercial motor vehicle inspections this year will emphasize violations concerning steering and suspension systems. During International Roadcheck, CVSA-certified inspectors will primarily conduct the North American Standard Level I Inspection, a 37-step procedure that includes an examination of driver operating requirements and vehicle mechanical fitness. However, inspectors may opt to conduct other types of inspections.

**Courts**

**Federal court dismisses WSTA challenge to California Dynamex ruling**

U.S. District Judge Morrison England on March 29 dismissed a challenge to California Supreme Court’s 2018 ruling in the Dynamex case in which the state court had upheld a difficult ABC test for determining whether owner-operators are considered employees under the state’s wage orders. The Western States Trucking Association (WSTA) had challenged the decision, arguing that the Federal Aviation Administration Authorization Act (FAAAA) preempts the application of the Dynamex test. Judge England ruled that the general application of the term “employ” as used in the Dynamex case “does not run afoul of the FAAAA simply because that interpretation may have some effect on transportation services.” He concluded that any impact on carrier rates, routes, and services was indirect.

 In response, WSTA said that the ruling sets up an appeal over the question of federal preemption of Dynamex and over how a trucking company can use independent contractors without violating the ABC test. “There were no factual deficiencies in our complaint,” WSTA said. “We believe that recent Ninth Circuit decisions postdating the filing of our complaint gave us an opening for that court to reevaluate prior Ninth Circuit decisions regarding F4A preemption. While the judge felt constrained by prior Ninth Circuit precedent (such as Dilts v. Penske) we are looking forward to our legal arguments being heard on appeal.”

A copy of the March 29 decision is available on the WSTA website at <https://westrk.org/district-court-order-dismisses-wsta-complaint-3-29-19/>.

**U.S. Supreme Court lets stand ruling in California driver classification case**

The U.S. Supreme Court refused to hear an appeal by the California Trucking Association over how the California Department of Labor Relations determines whether a truck driver is a company employee or an independent contractor. CTA had sought a declaration that FAAAA preempts the so-called Borello test. The association contended that the Borello test conflicted with FAAAA’s prohibition against state laws that interfere with carriers’ prices, routes and services. The U.S. Supreme Court’s decision to deny a writ of certiorari means that the U.S. Court of Appeals for the Ninth Circuit’s ruling against CTA remains in place.

**Swift Transportation settles classification suit for up to $100 million**

Knight-Swift Transportation Holdings Inc. has agreed to pay up to $100 million to potentially more than 19,000 owner-operators who have worked for Swift Transportation since 1999 to settle a class-action lawsuit charging that the carrier misclassified the drivers as independent contractors. Members of the class include any drivers who, prior to January 1, 2019, entered into an independent contractor agreement with Swift and who also had a lease agreement with Swift subsidiary Interstate Equipment Leasing. The settlement was filed in Van Dusen, et al. v. Swift Transportation Co. of Arizona, LLC, et al., in the U.S. District Court for the District of Arizona (Case No. CV 10-899-PHX-JWS).

**Carriers appeal dismissal of federal lawsuit on Rhode Island tolls**

The American Trucking Associations and three motor carriers – Cumberland Farms Inc., M&M Transport Services Inc. and New England Motor Freight – have appealed a federal court’s ruling that litigation against Rhode Island’s truck-only toll regime could not proceed in federal court. ATA and the carriers charge the that plan, known as RhodeWorks, violates the Constitution’s Commerce Clause by discriminating against out-of-state trucking companies and by designing the tolls in a way that does not fairly approximate motorists’ use of the roads.

**Analysis**

**Preventability**

In this and future issues of the Regulatory Update, we will publish for subscribers an analysis of topical issues and responses to frequently asked questions of interest to association members. This month’s topic is preventability.

Preventability is an artificial construct established by the FMCSA and used as part of its carrier rating system. The term has become controversial because of the Agency’s pilot program to call balls and strikes on over 130,000 crashes per year, with it possibly ultimately publishing a notice that “The Agency has reviewed the crash and determined it to be” either preventable or non-preventable.

Under the Agency’s preventability standard, carriers could seek removal of a crash for limited reasons such as deer strikes, rear-end collisions, etc. The term as used by the Agency has no correlation to crashes, much less to identifying any systemic flaw in a carrier’s compliance system.

Moreover, there is no due process extended to the carrier. Under the proposed study, a carrier can file something akin to a DataQ, but a determination will be made by enforcement officials relying only on hearsay, testimony and police reports which Congress has otherwise said are not admissible in litigation. See 49 U.S.C. 504.

Numbers generated by ATRI show that the majority of reported crashes are not the carrier’s fault and that the light scrubbing which would be permitted under the proposed standard would still leave “alleged preventable crashes with no correlation to carrier safety performance.”

Rather than perpetrate a mock trial procedure on every recordable accident, the Agency’s efforts would be better spent conducting desktop audits as a predicate for assigning safety ratings.

**Frequently Asked Questions**

Readers who have questions on general transportation importance or that are of particular importance to association members, please address them to ASECTT@gmail.com and they will be answered and may be published in future issues.