

Regulatory and Legislative Update

November 2017

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Regulation and Enforcement

FMCSA nominee faces few questions at hearing

Appearing jointly with three other nominees to positions related to the Department of Transportation, Raymond Martinez, President Trump's pick to head the Federal Motor Carrier Safety Administration, received fewer than a dozen questions at an October 31 nomination hearing of the Senate Commerce Committee. Martinez currently heads the New Jersey Motor Vehicle Commission.

A vote on Martinez's nomination is expected November 8, and there appears to be no opposition to his confirmation.

Perhaps the most controversial question Martinez fielded was from Sen. Ted Cruz (R-Texas) regarding whether FMCSA should delay the upcoming electronic logging device (ELD) mandate in light of an anticipated cost of \$2 billion to the motor carrier industry.

"Senator, first of all, I believe regulatory reform should be an ongoing process," Martinez responded. "My understanding with regard to ELDs is that they are now legally required and there is a December deadline for implementation with a phase-in and an ultimate deadline of December 2019. If confirmed and in position, I would look forward to working with industry and all stakeholders – safety advocates and particularly impacted sectors of commerce. I have heard that this rule could cause serious hardship to some small, independent truckers, particularly those working in the agricultural sector. So I would want to meet with those involved in those areas who oppose the rule to learn more about their concerns. The goal is not to cripple commerce. The goal is to make our roadways safe. That is our mission, and everything we approach this with is through that lens of safety. So it would be my intention if confirmed to first and foremost abide by the law but also to have an open door policy and work with all the impacted stake holders."

Sen. Cory Booker (D-New Jersey) followed the Cruz question with one on why Martinez supports ELDs.

"What we experienced in the past, it was paper-based, which means that it was very susceptible to fraudulent entries and altered entries," Martinez said.

Asked by Booker whether he supports speed limiters on trucks, Martinez replied, "I think we have to look at the cost/benefit analysis on that, but I am willing to look at all opinions on it."

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Although Booker asked more questions of Martinez than any senator, his questions were not as confrontational as might be expected given Booker's role as one of the trucking industry's leading critics in the Senate. Perhaps the fact that Martinez is from Booker's home state of New Jersey softened Booker's edge in the hearing. Booker is fond of pointing out any connections that witnesses might have to the Garden State.

Sen. Ed Markey (D-Massachusetts) pressed Martinez for answers to when Safety Measurement System (SMS) metrics would be publicly available again on property carriers, arguing that trucking companies will have little incentive to improve their safety records if their scores are not made public.

"I am an advocate for transparency," Martinez replied to Markey. "On the state level, where I have specific oversight over school buses, we have a report card we do where we are transparent with regard to inspections. But the data does have to be accurate in order to be effective for the consumer to use and also to be fair for the industries that are regulated. I look forward, if confirmed, to working with the FMCSA staff to see what they have, what they are working on and working with your staff to see how best we can achieve the goal of transparency in reporting."

UCR registration delayed pending finalization of fees

The Unified Carrier Registration (UCR) board has delayed until further notice registration for 2018 because it anticipates that FMCSA soon will lower fees. FMCSA in September proposed to reduce the annual fees by about 9.1% from current levels in 2018, rising slightly to about 4.55% below current levels in 2019. Although the agency provided a very short comment period, finalization of those reductions has been delayed over legal problems with the process used to set the new fees. Due to this unanticipated further delay, UCR is recommending to all states that the enforcement period for 2018 compliance not begin until 90 days after the final rulemaking is published. For the latest information, visit <http://www.ucr.in.gov>.

Short-term rentals exempted from ELDs

FMCSA has granted an exemption from electronic logging devices for drivers of property-carrying commercial motor vehicles (CMVs) rented for eight or fewer days. The action represents a partial grant of a request by the Truck Renting and Leasing Association Inc. (TRALA) for an exemption on vehicles rented for 30 or fewer days. TRALA had argued that due to the significant number of different device platforms and subscription options, it is highly unlikely that a driver's device would be able to communicate properly with the rental company's telematics platform. The group was concerned not only about technical issues but also about liability for data.

FMCSA said that the requested exemption of up to 30 days "is unnecessarily long given the importance of ELDs to ensure the accuracy of HOS records." However, an exemption period of up to eight days "would give most carriers sufficient time to repair or replace their usual vehicles while minimizing any temptation to extend non-ELD operations," the agency said. It noted that the eight-day exemption allowing use of paper records of duty status (RODS) coincides with 49 CFR 395.34(d), which provides that a carrier receiving or discovering information about an ELD malfunction must correct it within eight days.

FMCSA is requiring that a copy of the rental agreement be carried on the vehicle and be made available to law enforcement. Also, a driver must have copies of RODS for the current and prior 7 days, if required on those days. Carriers operating under the exemption must notify FMCSA within five business days of any recordable accident involving any of the carriers' drivers operating under the exemption.

For the Federal Register notice, visit <https://www.federalregister.gov/d/2017-21892>.

FMCSA extends UPS partial ELD exemption to other drivers

Drivers who need to change their duty status away from their commercial motor vehicles (CMVs) will be able to do so if they are using portable electronic logging devices (ELDs) under a new exemption granted by the Federal Motor Carrier Safety Administration. In response to an exemption application by UPS, FMCSA grants

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exemptions to allow (1) all motor carrier and drivers that use portable, driver-based ELDs to record engine data only when the driver is in a CMV and the engine is powered, and (2) all motor carriers to configure an ELD with a yard-move mode that does not require a driver to re-input yard-move status every time the tractor is powered off.

However, FMCSA rejected a UPS request to apply an alternative method for grandfathering automatic onboard recording devices (AOBRD) and phasing in ELDs. The carrier had wanted to be able to treat entire locations as AOBRD-grandfathered so that individual UPS locations would not necessarily have to adopt two separate compliance systems as the carrier added trucks. FMCSA said that the rule's fleetwide approach to grandfathering already represents a compromise as the agency decided not to require full interoperability between ELDs and AOBRDs in the final rule because of the complexity and cost.

FMCSA also dismissed as unnecessary a UPS exemption request to allow vehicle movements of less than one mile on UPS property by non-CDL UPS drivers to be annotated as "on property—other." The agency noted wash and fuel employees who do not operate CMVs on public roads are not subject to the HOS regulations and, therefore, are not required to use ELDs anyway.

FMCSA's Federal Register notice is available at <https://www.federalregister.gov/d/2017-22833>.

FMCSA rejects ELD exemption for pipeline contractors

Drivers of pipeline contractor vehicles who must complete records of duty stats (RODS) and don't otherwise qualify for an exemption under the electronic logging device (ELD) rule will have to use ELDs, FMCSA declared October 27. That Pipe Line Contractors Association (PLCA) had asked for an exemption from ELDs for drivers that might occasionally be required to complete RODS for more than 8 days in a 30-day period.

FMCSA said it determined that the drivers covered by the application would not achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.

"When FMCSA published the rule mandating ELDs it relied upon research indicating that the rule improves CMV safety by improving compliance with the HOS rules," FMCSA said. "The rule also reduces the overall paperwork burden for both motor carriers and drivers. The primary reason for denying this exemption is that PLCA did not demonstrate how, without using ELDs, they would maintain a level of safety equivalent to, or greater than, the level achieved without the exemption."

For FMCSA's Federal Register notice, visit <https://www.federalregister.gov/d/2017-23348>

ELD exemptions sought for livestock haulers, filmmakers and others

With a legislative exemption uncertain, the National Pork Producers Council (NPPC) has applied for an exemption from electronic logging devices that would apply to all haulers of livestock, including poultry, aquaculture, and insects as well as traditional livestock (Docket No. FMCSA-2017-0297). Comments are due November 30 – less than three weeks before the ELD mandate takes effect. For more information, see <https://www.federalregister.gov/d/2017-23690>.

The House-passed version of the government funding bill (H.R. 3354) includes a measure that would exempt livestock haulers from ELDs, but the Senate version of the bill does not include such a provision. Current federal funding does not lapse until December 8 – 10 days before the ELD mandate kicks in -- and the long-term funding bill is unlikely to be completed much before then.

The NPPC application is one of several recent efforts by various parties to garner exemptions before the December 18, 2017 deadline. Among other recent exemption filings are:

- **Hub Group Trucking Inc.** – Exemption to permit an alternative grandfather period for any CMVs added to after the December 18, 2017, compliance date (FMCSA-2017-0277). Comments are due November 30. For more information, see <https://www.federalregister.gov/d/2017-23632>.
- **Motion Picture Association of America (MPAA)** – Exemption for all commercial motor vehicle (CMV) drivers providing transportation to or from a theatrical or television motion picture production site

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(FMCSA-2017-0298). Comments are due November 27. For more information, see <https://www.federalregister.gov/d/2017-23404>.

- **Western Equipment Dealers Association (WEDA)** – Exemption on behalf of several agricultural equipment dealer organizations and membership (FMCSA-2017-0296). Comments are due November 27. For more information, see <https://www.federalregister.gov/d/2017-23403>.

Most ELD exemption applications to date have emphasized unusual characteristics about applicants' operations that make ELDs or certain ELD requirements unnecessary or difficult to use. However, neither NPPC nor Hub Group Trucking make much effort to justify special circumstances. NPPC essentially argues that livestock haulers are not ready and presses arguments that are more about the underlying hours-of-service rules than ELDs themselves. The Hub Group basically complains that maintaining both ELD and automatic onboard recording device (AOBRD) platforms will be tedious and expensive.

White House eyes plan to repeal greenhouse gas restrictions on glider kits

The White House Office of Management and Budget is reviewing a proposed Environmental Protection Agency (EPA) rule that would exclude glider kits from the Obama administration's Phase 2 rule on greenhouse gas (GHG) reduction and fuel efficiency on medium- and heavy-duty commercial vehicles. EPA had announced its plan to revisit both the glider kit and trailer provisions in the 2016 rule. The proposed rule is one of at least two other actions the Trump administration has taken that supports glider kits. In July, FMCSA changed its stance on what vehicles qualified for an ELD exemption to allow one for glider kits fitted with an engine built before model year 2000. (*See Regulatory Update, August 2017.*)

Meanwhile, a federal appeals court on October 27 granted a stay to the Truck Trailer Manufacturers Association to block implementation of the GHG rule as it applies to trailers, citing EPA's plan to reconsider the rule's application to trailers.

Legislation

Bill would review independent contractors in port trucking

Rep. Grace Napolitano (D-California) and eight other House Democrats are co-sponsoring a bill (H.R. 4144) that would establish a task force to consider the effects on truck drivers of truck leasing requirements at ports. Under the bill, the Truck Leasing Task Force would examine "lease-to-own" agreements that commercial truck drivers have entered into, with a focus on (1) the operation of agreements that drayage drivers have entered into and (2) such agreements at the Port of Los Angeles and the Port of Long Beach. The bill's introduction follows a series of articles published by USA Today on port trucking.

After reciting a number of reasons for investigation, H.R. 4144 includes a "sense of Congress" that truck drivers, including drayage drivers, have the right to:

- be treated with honesty and respect;
- have full-time work guaranteeing a basic standard of living;
- be covered by Federal, State, and local labor and employment laws;
- be covered by workplace safety and health laws;
- be free from exploitative truck lease or rental arrangements;
- not be misclassified as independent contractors and denied legal protections, benefits, and pay; and
- bargain collectively for better wages and working conditions.

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A task force of up to 15 members would be appointed by the Secretary of Transportation and would include representatives of labor organizations, the motor carrier industry, consumer protection groups, safety groups, and members of the legal profession who specialize in consumer finance issues.

As a highly pro-labor bill backed exclusively by House Democrats, H.R. 4144 stands no chance of being advanced or enacted in the current Congress. For more information on H.R. 4144, visit <https://www.congress.gov/bill/115th-congress/house-bill/4144>.

Senate security bill includes TWIC relief

The Senate Commerce Committee has approved a surface transportation security bill (S. 763) that would make use of the Transportation Worker Identification Credential (TWIC) voluntary for individuals, who because of employment are regulated by the Transportation Security Administration, the Department of Transportation, or the Coast Guard. Another provision would allow states to use a valid TWIC as proof of a completed security threat assessment, saving an individual from having to pay a duplicative assessment fee when screened for a hazardous materials endorsement. The two provisions are similar to measures in a House-passed bill (H.R. 2825). For more information on S. 763, visit <https://www.congress.gov/bill/115th-congress/senate-bill/763>.

To keep up-to-date on regulatory and legislative developments related to motor carrier safety and compliance, visit www.transcomply.com/news