

# Regulatory and Legislative Update

December 2018

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## Regulation and Enforcement

### Maritime agency approves further study on port detention and demurrage

The Federal Maritime Commission plans to assemble “innovation teams” in 2019 in response to a report by Commissioner Rebecca Dye regarding port detention and demurrage. FMC voted at its December meeting to approve the recommendations of Dye’s final report following an eight-month examination of the practices of vessel operating common carriers and marine terminal operators in levying charges on shippers related to equipment and land usage and free time granted between when a container is offloaded and when it must be picked-up by a trucker.

“The handoff of a container from carrier to terminal to trucker to destination is not a linear process,” Dye said in an FMC news release. “In reality, everything is happening at once and that is why it is so daunting a task to get a handle on these issues. The teams process is ideally suited to creating the engagement necessary between subject matter experts to allow for private sector driven process improvement.”

The teams of “private sector experts” will address four specific issues raised in the report:

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- Transparent, standardized language for demurrage and detention practices
- Clear, simplified, and accessible demurrage and detention billing practices and dispute resolution process
- Explicit guidance regarding the types of evidence relevant to resolving demurrage and detention disputes
- Consistent notice to cargo interests of container availability  
To read the final report on Fact Finding 28, visit <http://bit.ly/FMCreport>.

### **Comments due December 19 on security-related changes to hazmat endorsement**

Primarily in response to recent legislation on the issue, FMCSA plans to finalize provisions of interim final rules (IFRs) issued in 2003 and 2005 regarding limitations on issuing commercial driver's licenses (CDLs) with hazardous materials endorsements. As required by the USA PATRIOT Act, the May 2003 IFR barred states from issuing or renewing hazmat endorsements on drivers that the Transportation Security Administration had determined posed a security risk. The April 2005 IFR modified the effective date of the requirement and reduced the amount of notice that states had to provide to drivers that a security threat assessment would be performed when they renewed a hazmat endorsement.

In October of this year, Congress enacted the FAA Reauthorization Act of 2018 (Pub. L. 115-254), which includes a provision (Sec. 1977) stating that a driver who wants to obtain a hazmat endorsement on a CDL is an “applicable individual who is subject to credentialing or background investigation.” However, Sec. 1978 exempted individuals who hold valid transportation security cards, also known as TWICs. FMCSA said plans to incorporate that provision in finalizing the IFRs.

To view the Federal Register notice, visit <https://www.federalregister.gov/d/2018-26250>.

### **FMCSA announces prior denials of 10 ELD exemption bids**

On December 7, FMCSA published a Federal Register notice announcing that in June and July it had denied 10 applications for exemptions from the electronic logging device (ELD) mandate. The applicants were the Owner-Operator Independent Drivers Association, Inc.; Power and Construction Contractors Association; Western Equipment Dealers Association; Association of Energy Service Companies; Cudd Energy Services, Inc.; SikhsPAC and North American Punjabi Trucker Association; American Disposal Service; Towing and Recovery Association of America; National Electrical Contractors Association; and the Agricultural Retailers Association. To read the Federal Register notice, visit <https://www.federalregister.gov/d/2018-26597>.

### **DOT increases civil penalties about 2% to reflect inflation**

As of late November, civil penalties for U.S. Department of Transportation (USDOT) modal agencies were increased by 2.04% as an annual inflation adjustment. The November 27 Federal Register notice includes a comprehensive list of the new civil penalties, including some obscure penalties for violating some of the economic regulations that remain under FMCSA's jurisdiction, such as tariff violations. To read the Federal Register notice, visit <https://www.federalregister.gov/d/2018-24930>.

### **Compliance on bus lease/interchange rule pushed back to 2021**

As the agency proposed in September, FMCSA has extended until January 1, 2021, the compliance date for the May 2015 bus lease/interchange rule while it considers changes in the regulation requested by bus operators and others. Due to many petitions for reconsideration of the May 2015 rule, FMCSA had already extended the compliance date twice before, most recently to January 1, 2019. In September, FMCSA proposed several changes to the May 2015 rule to address concerns. (See the October 2018, Regulatory Update for details.) To read the Federal Register notice, visit <https://www.federalregister.gov/d/2018-26249>.

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### **SmartDrive seeks exemption for windshield-mounted system**

FMCSA requests comments until December 27 on an application from SmartDrive Systems, Inc. for an exemption to allow an advanced driver assistance systems (ADAS) camera to be mounted lower in the windshield than is currently permitted. To read the Federal Register notice, visit <https://www.federalregister.gov/d/2018-25825>.

### **Mobile services group seeks HOS relief when supporting forest firefighters**

FMCSA has asked for comments by December 27 on an application from the National Mobile Shower and Catering Association (NMSCA) for an exemption from various HOS provisions when member drivers are operating equipment to supply food and water services to Federally-contracted forest firefighters and similar emergency workers who establish temporary base camps and have immediate need of food and water services near fire scenes. To read the Federal Register notice, visit <https://www.federalregister.gov/d/2018-25821>.

### **FMCSA renews rest break relief for drivers operating large mobile cranes**

The Specialized Carriers & Rigging Association's (SC&RA) received a five-year renewal of its exemption from the 30-minute rest break rule of the HOS regulations for motor carriers and drivers operating mobile cranes with a rated lifting capacity of greater than 30 tons. To read the Federal Register notice, visit <https://www.federalregister.gov/d/2018-25820>.

### **FMCSA plans information collection related to younger drivers**

As part of its required pilot project to on using interstate drivers under 21 who have military experience with heavy equipment, FMCSA plans a three-year information collection to help determine whether the safety outcomes of such drivers are similar to those of freight-carrying CMV drivers aged 21 to 24. The information collection also would help determine how training and experience impact the safety of the 18- to 20-year-old driving population. Comments on FMCSA's plans to collect information are due December 28. To read the Federal Register notice, visit <https://www.federalregister.gov/d/2018-25846>.

## Legislation

### **Congress faces December 21 deadline to fund government**

Essentially all remaining federal legislation in the 115th Congress will be dealt with as part of a continuing resolution that currently must be completed by December 21. Last year, Congress essentially punted and put off the hard decisions until this last spring, but with Democrats taking over control of the House in January, that will not be an option if Republican lawmakers want to push through legislative items favorable to their constituency. In trucking, one issue that must be addresses is whether Congress will continue to exempt livestock and insect haulers from ELDs. That measure currently is tied to the current appropriation. Other issues that could arise are authorizing 33-foot twin trailers or preempting state regulation of rest and meal breaks for commercial drivers subject to federal hours-of-service regulations.

### **Two California bills would have opposite effects on classification**

Two contradictory bills have been introduced in the California legislature that address the California Supreme Court's ruling that Dynamex owner-operators are employees, not independent contractors and how it is to be applied – or not – to other carriers as well as Dynamex. AB-5 essentially would write the court's decision into state law. AB-71 would nullify the court's ruling and apply the multifactor test applied in S.G. Borello & Sons,

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Inc. v. Department of Industrial Relations instead of the strict ABC test the state's Supreme Court used. To read AB-5, visit <http://bit.ly/AB-5-CA>. To read AB-71, visit <http://bit.ly/AB-71-CA>.

### Courts

#### **Court rules Dynamex ABC test preempted by federal law**

U.S. District Judge S. James Otero ruled on November 15 that the Federal Aviation Administration Authorization Act (F4A) preempts the ABC test as applied by the California Supreme Court in the Dynamex case for use in determining whether owner-operators are deemed to be employees or independent contractors. The case involves litigation against XPO Logistics Cartage LLC. Judge Otero ruled that the situation is different than the one involved in Dilts v. Penske Logistics, LLC because the Dilts decision involved general laws that were within traditional state power and did not significantly impact carrier rates, routes, and services. "Here, the question is not whether the FAAAA preempts California wage orders; rather, it is whether the ABC Test — used to interpret the wage orders — is preempted."

Judge Otero ruled that the ABC test as adopted by the California Supreme Court in the Dynamex case "relates" to a motor carrier's services in more than a "tenuous" manner and is therefore preempted by F4A. He noted, however, that there is a distinction between a statutory cause of action and the test for interpreting the statute in question. "Thus, the Court would emphasize that it is the application of the Dynamex ABC test that is preempted by the FAAAA, not the underlying California Labor Code claims."

#### **Court weighs motions to dismiss WSTA challenge to Dynamex decision**

On the same day that Judge S. James Otero ruled that F4A preempted application of the Dynamex ABC test, U.S. District Judge Morrison England held a hearing on motions by the State of California and the Teamsters Union to dismiss the challenge filed by the Western States Trucking Associations. In July, WSTA challenged the imposition of an ABC test on the trucking industry on preemption and constitutional grounds, claiming that application of an ABC test violates F4A. As of the publication of this update, Judge England has yet to rule on the motions to dismiss. (*For more on the California Supreme Court ruling in the Dynamex case, see the May 2018 Regulatory Update.*)

Ultimately, litigation over the Dynamex ABC test would work its way to the U.S. Court of Appeals for the Ninth Circuit. Although a Ninth Circuit ruling favorable to carriers might be difficult given the circuit's track record, an unfavorable ruling would at least create a conflict with the First Circuit ruling in Schwann v. FedEx Ground Package System, Inc., which declared that F4A barred use of an ABC test for motor carriers in Massachusetts. A conflict among federal appeals courts in turn would improve the chances that the U.S. Supreme Court would agree to hear the case and settle the preemption issue.

#### **U.S. Supreme Court lets stand misclassification rulings in Washington**

In separate cases, the U.S. Supreme Court on December 3 denied writs of certiorari for three trucking companies that had challenged a Washington State Employment Security Department's requirement that they pay unemployment taxes to workers whom the carriers had deemed independent contractors. The three carriers are Hatfield Enterprises, Gulick Trucking and MacMillan-Piper. Although the Supreme Court's denial does not address the merits of the case, the effect is to uphold the state's declaration of a misclassification.