

Regulatory and Legislative Update

October 2018

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Regulation and Enforcement

ATA asks FMCSA to preempt California requirements for HOS-regulated drivers

The Federal Motor Carrier Safety Administration (FMCSA) is requesting comments until October 29 on an American Trucking Associations petition seeking a determination that that California's meal and rest break requirements are preempted to the extent they apply to commercial motor vehicle (CMV) drivers whose hours of service are within the jurisdiction of the U.S. Department of Transportation (DOT). ATA submitted its petition on September 24 – three days after the Pipeline and Hazardous Materials Safety Administration (PHMSA) issued a preemption determination on the California requirements as they applied to drivers transporting hazardous materials. *See article below.*

California's regulations are complex, but they generally require employers in the transportation industry to provide employees with an off-duty 30-minute break for every five hours worked, before the end of each five-hour period; and a ten-minute off-duty break for every four-hour period in the middle of each such period if possible.

Motor carriers have been battling California's regulation of drivers' meal and rest breaks and driver compensation for them for several years. Three years ago, the House adopted an amendment to what would become the Fixing America's Surface Transportation Act sponsored by Rep. Jeff Denham (R-California) that would prohibit state regulation of driver meal and rest breaks. The final version of the FAST Act did not include the measure, which has been inserted multiple times since in various appropriations and authorization bills but

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never adopted. Most recently, a provision to block state regulation of meal and rest breaks was included in both the House and Senate Federal Aviation Administration (FAA) authorization bills but was omitted from the final version. *See article below.*

For the Federal Register notice, visit <https://www.federalregister.gov/d/2018-21624>. For more information on FMCSA's website, including a copy of the ATA petition, visit <http://bit.ly/ata-preempt>. To review or submit comments, view <https://www.regulations.gov/docket?D=FMCSA-2018-0304>.

PHMSA preempts California's meal and rest break requirements for hazmat transport

In response to a petition filed by the National Tank Truck Carriers, Inc. (NTTC), the Pipeline and Hazardous Materials Safety Administration (PHMSA) has 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.

PHMSA also found that the California meal and rest break requirements are preempted with respect to drivers of motor vehicles that are transporting Division 1.1, 1.2, or 1.3 explosive material and are subject to the attendance requirements of 49 CFR 397.5(a). Regarding the latter preemption, PHMSA said it is not possible for a motor carrier employer's drivers to comply with the off-duty requirement of the California rule and the federal attendance requirement.

The California meal and rest break requirements also are preempted as to motor carriers who are required to file a security plan under 49 CFR 172.800, and who have filed security plans requiring constant attendance of hazardous materials, PHMSA said. California requirements are an obstacle to carrying out the requirements of 49 CFR 172.800 with respect to such motor carriers, it concluded.

For PHMSA's Federal Register notice, visit <https://www.federalregister.gov/d/2018-20542>.

FMCSA seeks comments on broker, forwarder financial responsibility

FMCSA on September 27 published an advance notice of proposed rulemaking (ANPRM) to implement the requirements of the 2012 law known as the Moving Ahead for Progress in the 21st Century Act (MAP-21), which raised the financial security amount for brokers to \$75,000 and established financial security requirements for freight forwarders. The agency is seeking comments and data on eight specific topics:

- Group surety bonds/trust funds
- Assets readily available
- Immediate suspension of broker/freight forwarder operating authority
- Surety or trust responsibilities in cases of broker/freight forwarder financial failure or insolvency
- Enforcement authority
- Entities eligible to provide trust funds for form BMC-85 trust fund filings
- Form BMC-84 and BMC-85 trust fund revisions
- Household goods (HHG)

The ANPRM includes 17 specific questions on which FMCSA seeks public response. Comments are due November 26. 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>.

Comments due October 10 on HOS ANPRM; public meeting to be held same day

FMCSA extended until October 10 the due date for comments on its advance notice of proposed rulemaking (ANPRM) on potential changes in the hours-of-service (HOS) regulations for commercial drivers. (*For details of the ANPRM, see the September 2018 Regulatory Update.*) Also, the agency has scheduled an October 10 public meeting at FMCSA headquarters in Washington, D.C., to obtain additional public feedback. FMCSA has held several public listening sessions since publishing the ANPRM on August 23. To read the ANPRM or to read or

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submit comments, visit <https://www.regulations.gov/docket?D=FMCSA-2018-0248>. For information on the October 10 public meeting, visit <https://www.federalregister.gov/d/2018-21628>.

Comments due October 22 on FMCSA's SMS corrective action plan

Interested parties have until October 22 to submit comments on FMCSA's Safety Measurement System (SMS) corrective action plan that was submitted to Congress in July in response to the National Academy of Sciences (NAS) study on reforming SMS and the Compliance, Safety, Accountability (CSA) program. As recommended by NAS, FMCSA plans to replace the current SMS methodology with one based on Item Response Theory (IRT). (For a summary of FMCSA's plan, see the August 2018 Regulatory Update.) To download a copy of the corrective action plan, visit <https://www.fmcsa.dot.gov/fastact/csa>. To review and submit comments, visit <https://www.regulations.gov/docket?D=FMCSA-2017-0226>.

Insulin-treated diabetics approved to operate CMVs

FMCSA has revised its regulations to allow individuals with a stable insulin regimen and properly controlled insulin-treated diabetes mellitus (ITDM) to be qualified to operate commercial motor vehicles (CMVs) in interstate commerce under certain conditions and a prescribed process. Previously, these individuals were required to obtain an FMCSA exemption in order to operate CMVs interstate. The final rule is effective November 19. For the Federal Register notice, visit <https://www.federalregister.gov/d/2018-20161>.

FMCSA proposes changes to bus lease and interchange rule

In response to numerous requests for reconsideration of its May 2015 rule, FMCSA on September 20 issued a notice of proposed rulemaking (NPRM) to make several substantive changes and to postpone the compliance date to January 1, 2021. The agency had previously extended the compliance date to January 2019 and had announced its intent to make certain changes in the rule. The NPRM narrows the applicability of the rule to:

- Exclude from the definition of lease and the associated regulatory requirements certain contracts and other agreements between motor carriers of passengers that have active passenger carrier operating authority registrations with FMCSA;
- Return the bus marking requirement for passenger carriers that would remain subject to the lease and interchange requirements to its July 1, 2015, state with slight modifications to add references to leased vehicles;
- Revise the delayed writing of a lease during certain emergencies; and
- Remove the 24-hour lease notification requirement.

Comments are due November 19. 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>.

CLP knowledge test waivers approved for recent military personnel

FMCSA on September 28 issued a final rule allowing state driver licensing agencies (SDLAs) to waive requirements for the commercial learner's permit (CLP) knowledge test for certain individuals who are, or were, regularly employed within the last year in a military position that requires, or required, the operation of a commercial motor vehicle (CMV). This rule includes the option for an SDLA to waive the tests required for a passenger carrier (P) endorsement, tank vehicle (N) endorsement, or hazardous material (H) endorsement, with proof of training and experience. The rule is effective November 27. For more information, visit <https://www.federalregister.gov/d/2018-21289>.

FMCSA publishes package of regulatory technical corrections

FMCSA on September 27 published various technical corrections throughout the Federal Motor Carrier Safety Regulations (FMCSRs) to correct inadvertent errors and omissions, remove or update obsolete references, and improve the clarity and consistency of certain regulatory provisions. For the Federal Register notice, visit <https://www.federalregister.gov/d/2018-21064>.

Legislation

Congress omits F4A, carrier selection from FAA bill

The U.S. Senate on October 3 gave final approval to a package of legislation (H.R. 302) that mostly reauthorizes Federal Aviation Administration programs. Although versions of the FAA bill working through the House and Senate had included language to preempt state regulation of commercial drivers' meal and rest breaks, the final compromise did not include any language on what is known as the F4A issue. Nor did the final version include language approved in the House version of the FAA bill that would have protected shippers and brokers in their selection of motor carriers as long as they verify carriers' operating authority and minimum insurance. *(For more on these provisions, see the May 2018 Regulatory Update.)*

New California law holds shippers accountable for drayage carriers' labor violations

California Gov. Jerry Brown on September 22 signed into law legislation (SB 1402) requiring that customers of port drayage carriers share liability for carriers' violations of state employment and labor laws regarding wages, payroll taxes, worker's compensation, worker misclassification, etc. The state's Division of Labor Standards Enforcement will publish a list of violating carriers on a website, and a customer that uses a carrier on the list would be jointly liable for unpaid wages, damages, expenses and penalties.

The legislation defines "customer" as "a business entity, regardless of its form, that engages or uses a port drayage motor carrier to perform port drayage services on the customer's behalf, whether the customer directly engages or uses a port drayage motor carrier or indirectly engages or uses a port drayage motor carrier through the use of an agent, including, but not limited to, a freight forwarder, motor transportation broker, ocean carrier, or other motor carrier." Among the exceptions for definition of "customer" are business entities with a workforce of fewer than 25 workers, including those hired directly by the customer or through a temporary employer or labor contractor.

For more information on SB 1402 from the California Legislative Information website, visit <http://bit.ly/ca-drayage>.