

DOT/FMCSA - Noteworthy Updates

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On 1/18/18, the comment period ended for the Federal Motor Carrier Safety Administration's (FMCSA) proposed regulatory guidance regarding driving commercial motor vehicles (CMV) for personal use while off-duty. The guidance affects those drivers who are required to record their hours of service (HOS) while operating a CMV. A driver may record time operating a CMV for personal use only when the driver is relieved from duty and all responsibility for performing work. Personal use may include traveling *from* a driver's permanent residence or temporary lodging to restaurants and then back to the residence or lodging. Personal use may also include commuting from the last on-duty location to the driver's residence or lodging and returning to that last on-duty location the following day. However, driving for personal use outside the HOS would not include moving the CMV to improve the next day's operational readiness or at the instruction of a motor carrier, such as driving closer to the next loading or unloading point; continued travel after unloading (e.g., traveling back to the home terminal, lodging, or permanent residence); or traveling with an empty trailer to pick up a new load.

On 12/29/17, President Trump designated January 2018 as a month dedicated to combatting human trafficking. In keeping with this directive, President Trump signed the Combating Human Trafficking in Commercial Vehicles Act on 1/3/18. This Act requires the DOT to appoint an official to coordinate human trafficking prevention efforts; establish an advisory committee on human trafficking; and expand the scope of the FMCSA's Outreach and Education Program to include human trafficking prevention. Further, on 1/8/18, President Trump signed the No Human Trafficking on Our Roads Act, which requires the DOT to issue a lifetime disqualification without reinstatement to those truck drivers who are convicted of using a CMV in the commission of felony human trafficking.

Beginning 1/1/2018, the Department of Transportation (DOT) began including tests for semi-synthetic opioids hydrocodone, hydromorphone, oxycodone, and oxycodone in urine drug screens for truck drivers and "safety-sensitive" transportation employees. The DOT mandate comes as the nationwide opioid epidemic continues to garner attention.

The list of drugs tested by the DOT is determined by the department of Health and Human Services (HHS), which added the semi-synthetic opioids to the list of list of drugs approved for testing in May 2015.

On 12/15/17, the Electronic Logging Device (ELD) mandate became fully implemented, and the FMCSA reports that the agency and local law enforcement are prepared to enforce the rule. However, violations between 12/18/17 and 4/1/18 will not count against a carrier's Safety Measurement System (SMS) score, and CMVs will not be placed out-of-service for ELD violations until after 4/1/18. A number of limited exceptions have been granted with many more still under review by the FMCSA. Current exemptions apply to the United Parcel Service (UPS), which already uses a portable ELD module; a 90-day exemption to Old Dominion Freight Lines, Inc. and other carriers due to issues integrating PeopleNet's ELD software (a grandfathered program); a 5-year exemption from the ELD rule for rented CMVs for rentals of up to 8 days; a 90-day exemption for rented CMVs for rental periods less than 30-days; a 5-year exemption for the Motion Picture Association of America for transportation to/from a production site; grandfathered Automated On-Board Recording Devices (AOBRD); and a 90-day waiver for those transporting agriculture commodities as defined by the FMCSA, including livestock.

On 11/27/17, the FMCSA announced its intention to seek approval from the Office of Management and Budget (OMB) to study the safety effects of excessive truck driver work commutes (those exceeding 150 minutes). The FMCSA seeks approval to send out a 20-minute, email/web-based survey to a random sample of 12,000 drivers. The study was mandated by the 2015 FAST Act and will supplement the FMCSA's research on driver fatigue.

On 10/26/17, the FMCSA closed the comment period on the National Tank Truck Carriers' request for a 5-year exemption from the 30-minute rest break rule. The current rule requires drivers of property carrying CMVs to take a rest break of at least 30 minutes if 8 hours have passed since the end of the last 30-minute off-duty or sleeper-berth period. The exemption would allow tanker drivers to use the 30 minutes attending the load while the vehicle is parked. Currently, tanker drivers are required to attend to the parked tanker because they carry hazardous materials. The exemption request remains pending with the FMCSA without a clear decision deadline.

Handling a Death Claim: What to do When Tragedy Strikes

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Over the years, driving trucks has consistently been rated one the most deadly occupations in the country. While employers are taking steps to reduce the risk faced by their drivers, the nature of the business inevitably leads to circumstances in which drivers lose their lives. In this article, we will take a look at how a death claim should be handled in accordance with the provisions of the North Carolina Workers' Compensation Act and the Workers' Compensation Rules of The North Carolina Industrial Commission.

N.C.G.S. § 97-38 describes, in general, (1) when workers' compensation benefits are due to an employee whose death results proximately from a compensable injury or occupational disease; (2) the amount of benefits to be paid; and (3) the persons entitled to receive those benefits. According to N.C.G.S. § 97-38, if an employee's death results proximately from a compensable injury or occupational disease, certain dependents are entitled to 500-weeks of weekly payments (paid at the employee's compensation rate) and up to \$10,000.00 in burial expenses. In determining who is entitled to the benefits, the Act specifically defines certain individuals as being wholly dependent or partially dependent. A person who is "wholly dependent" is someone that is "wholly dependent for support upon the earnings of the deceased employee at the time of the accident..." According to N.C.G.S. § 97-39, a widow, widower, or child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. If an individual is deemed to be "wholly dependent," then that individual will be entitled to all benefits due to the exclusion of all others, including those considered partially dependent. If there is more than one individual considered to be "wholly dependent" then the benefits due will be split among those individuals.

If there are no individuals who are "wholly dependent," then any person who is partially dependent for support upon the earnings of the employee at the time of the accident shall be entitled to benefits. If there are no individuals either wholly or partially dependent on the employee at the time of the accident, then benefits will be paid to the Employee's "next of kin" as defined by N.C.G.S. § 97-40. If there is no individual that is wholly dependent, partially dependent or "next of kin" then no benefits are due, except for the burial expense of up to \$10,000.00.

While N.C.G.S. § 97-38 describes when benefits are due, in what amount, and to whom, Rule 409 of the Workers' Compensation Rules of The North Carolina Industrial Commission details the specific procedure that needs to be followed when handling a death claim.

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According to Rule 409, within 5-days of knowledge of an occurrence of a death resulting from injury or occupational disease allegedly arising out of and in the course of employment, an employer shall file a Form 19 with the Commission. Since that provision of the Rule includes the word “allegedly,” I believe that a Form 19 should be filed even if the death claim is going to be denied. In addition to the Form 19, an employer, carrier or administrator shall file a Form 29, *Supplemental Report for Fatal Accidents*, within 45 days of knowledge of a death or allegation of a death resulting from injury or occupational disease arising out of and in the course of employment. Of note, the Form 29 includes a section wherein Dependents are to be listed, and Rule 409 specifically states that an employer, carrier, or administrator shall make a good faith effort to discover the names and addresses of potential beneficiaries under N.C.G.S. § 97-38.

If the death claim is going to be accepted as compensable and there are no questions as to the identity of the proper beneficiaries, Rule 409 allows the parties to submit a Form 30, *Agreement for Compensation for Death*, to the Commission. In addition to the Form 30, the parties must submit a death certificate and any relevant marriage certificates or birth certificates for any dependents. Of note, if the death claim is going to be accepted as compensable but there is doubt as to the correct beneficiaries, then Rule 409 permits the employer, carrier, or administrator to file a Form 33, *Request for Hearing*, for a determination by a deputy commissioner as to the correct beneficiaries. We suggest that if there is any question at all with regard to the correct beneficiaries, that a Form 33 be filed and a full evidentiary hearing be held before a deputy commissioner.

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Rule 409 also gives parties the option of submitting a written opinion and award to be reviewed and approved by the Commission in lieu of presenting testimony at a hearing before a Deputy Commissioner. Documentation must be submitted with a proposed opinion and award, including, but not limited to, a Form 22, affidavits regarding the identity of dependents, and medical records.

If the death claim is going to be denied, then an employer, carrier, or administrator must send a letter of denial stating the reasons for the denial and advising of the right of a hearing to all potential beneficiaries, their attorneys of record, and any healthcare providers that have submitted bills. Any potential beneficiary can then request a full evidentiary hearing.

Some cases involving death benefits are inevitably going to include potential beneficiaries who are minors or incompetents. Rule 409 states that a guardian *ad litem* must be appointed in any cases involving potential beneficiaries who are minors or incompetents. Payments due to beneficiaries who are minors must be paid directly to the parent as natural guardian of the minor for the use and benefit of the minor if the minor remains in the physical custody of the parent. If the minor is no longer in the physical custody of the parent, payments must be made to some other person appointed by a court of competent jurisdiction.

While we hope to never have to handle a claim involving the death of an employee, the nature of truck driving necessitates that we be aware of our duties, responsibilities, and options should such an unfortunate event occur.



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