

DOT/FMCSA - Noteworthy Updates

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On 5/16/2018, the Fiscal Year 2019 transportation bill advanced through the House funding subcommittee and was debated by the full committee on 7/19/2018. The bill would de-fund Electronic Logging Device (ELD) enforcement for livestock haulers through 9/30/2019. The current exemption for livestock haulers expires on 9/30/2018.

On 5/23/2018, Representatives Greg Gianforte (R-Mont.) and Collin Peterson (D-Minn.) introduced H.R. 5959, the Agriculture Business Electronic Logging Device Exemption Act of 2018, which would completely exempt agricultural carriers from the ELD and Hours-of-Service (HOS) rules. The bill was referred to the subcommittee on Highways and Transit on 5/24/2018.

Similarly, on 6/21/2018, Representatives Rick Crawford (R-Ark.), Bruce Westerman (R-Ark.), and Sanford Bishop (D-Ga.) introduced the Honest Operators Undertaking Road Safety (HOURS) Act that seeks a year-round HOS exemption for commercial carriers hauling livestock or agriculture products operating within 150 air-miles of the load's source. Currently, the exemption only applies during certain seasons or on limited trips to/from wholesalers. In the Senate, Ben Sasse (R-Neb.) introduced a companion bill, the Transporting Livestock Across America Safely Act that would set a 300 air-mile radius within which HOS and ELD rules would not apply.

On 5/31/2018, the Federal Motor Carrier Safety Administration (FMCSA) announced guidance on the HOS exemption for carriers of agriculture commodities traveling up to 150 air-miles from the source of agriculture goods during planting and harvesting seasons. The FMCSA indicated that the HOS exemption applies to empty commercial vehicles traveling to complete delivery or pick up of agriculture commodities as well as loaded vehicles. Further, that "source" of commodities is broader than where the commodity is grown or raised and includes points of origin where commodities may be aggregated for transport, such as grain silos. Where multiple pick-ups are performed, the 150 air-mile radius starts at the first source or pick up point and does not reset with additional stops.

On 5/31/2018, The FMCSA also issued guidance describing the circumstances a commercial driver may operate the truck or bus for personal conveyance after the driver has reached the daily HOS limit. The FMCSA will allow a driver to travel from a shipper or receiver to the nearest safe resting area, even if the direction of travel is toward the next dispatch point, as long as the purpose of the movement is solely to obtain a safe rest place. As a general rule, drivers may not perform movements that improve operational readiness or provide commercial benefit to the carrier once the HOS are exhausted. Travel en route to lodging/home, restaurants, or entertainment facilities are examples of permissible movements. Additionally, movements required by a safety official or law enforcement officer are exempt from the HOS rules.

On 7/2/18, the FMCSA denied the Owner-Operator Independent Drivers Association's (OOIDA) request for a five-year exemption to the ELD rule, which took effect December 2017. OOIDA's request specifically targeted motor carriers considered small businesses under the Small Business Administration's definitions and which had no at-fault crashes and a safety rating higher than "unsatisfactory." The FMCSA has previously granted waivers to Old Dominion Freight Line and the Motion Picture Association of America. In Congress, H.R. 5948, the Small Carrier Electronic Logging Device Exemption Act of 2018, was introduced on 5/23/2018 and seeks to exempt carriers with 10 or fewer trucks from the ELD mandate. The bill was referred to the subcommittee on Highways and Transit on 5/24/2018.

On 6/21/2018, the Federal Motor Carrier Safety Administration (FMCSA) issued an interim final rule that sets a three-year delay for implementation of a program to eliminate the need

for commercial drivers to carry their medical certification cards. The new compliance deadline is June 22, 2021. The final rule requires the FMCSA to electronically transmit to state agencies the driver identification information, examination results, and restriction information. One cause of the delay was an attempt by a hacker to compromise the medical examiner's website. On 4/20/2018, the FMCSA issued a statement that no personal information was stolen in the attempt.

On 5/22/18, the Senate's Committee on Commerce, Science, and Transportation committee approved a bill that would require the Department of Health and Human Services (DHHS) to explain the 15-month delay in issuing mandatory federal hair testing guidelines. This bill further requires the DHHS to report to Congress every 30 days and set measurable benchmarks for completing the guidelines. Currently, urinalysis is the only approved drug-testing method.

On 7/16/18, the FMCSA delivered its Correlation Study Corrective Action Plan to Congress and has announced that the FMCSA will not complete enhancements to the SMS that were previously proposed and that the preview is removed from the SMS website. The enhancements were proposed by the FMCSA in June 2015 and again in October 2016. However, following the June 2017 National Academy of Sciences (NAS) report critiquing the SMS, the FMCSA undertook a review of its proposals. The SMS system will revert to its pre-June 2015 methodology while the FMCSA works to implement the NAS report's recommendations, including developing a new statistical model to support the SMS. Specifically, the FMCSA is required to develop and implement a small scale Item Response Theory (IRT) model by September 2018 with a full scale IRT model by April 2019. IRT models are used in educational, psychological, and political science research and would evaluate commercial carriers by determining the frequency of each violation and whether the violation is a good marker for identifying a carrier's safety culture. The intention is that an IRT will provide a more accurate safety assessment for carriers based on the types of violations committed.

Opioid Utilization Rules Enacted by Industrial Commission

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Glidewell

On 5/1/18, the Rules for the Utilization of Opioids, Related Prescriptions, and Pain Management Treatment in Workers' Compensation Claims (hereafter "Opioid Utilization Rules" or "Rules") went into effect in connection with North Carolina Workers' Compensation claims. The purpose of the Rules is to ensure that employees receive proper care, adequately contain medical costs, and facilitate timely and effective medical treatment for pain management. The Rules generally apply when an employer is providing medical compensation and the employee is being prescribed targeted controlled substances ("opioids") and/or other pain management for the outpatient treatment of non-cancer pain. Employers in all industries including trucking need to understand when and how the Opioid Utilization Rules apply in order to ensure that the Rules are properly enforced.

The Opioid Utilization Rules affect opioid prescriptions differently depending on how long pain management has been ongoing and how long the treatment continues, and the Rules divide a course of pain treatment into three phases for that purpose: (1) the first prescription of pain medication in an acute phase; (2) the remainder of the acute phase; and (3) the chronic phase. The "acute phase" consists of the 12 weeks of pain treatment following an injury by accident, occupational disease, surgery for the compensable injury or occupational disease, or subsequent aggravation of the compensable injury or occupational disease. The chronic phase begins if the prescription of opioids continues beyond the 12-week "acute phase."

The Rules specifically address what can be prescribed, how much can be prescribed, and when it can be prescribed. For instance, during the 12-week acute phase, an employee can only be prescribed one opioid and the opioid must be short-acting, defined as having a quick onset of action which provides relief for 2-6 hours. An employee may be prescribed two opioids simultaneously in the chronic phase, but only one of the opioids may be an extended-release opioid which provides relief for over 8 hours. An employee cannot be prescribed more than a 50 mg morphine equivalent dose (MED) per day for the first prescription (unless previously prescribed opioids) or more than a 90 mg MED per day with documentation in the remainder of the acute phase. Some opioids, such as fentanyl, can only be prescribed in the chronic phase after receiving preauthorization from the carrier, and benzodiazepines are generally prohibited for prescription in tandem with opioids.

Cont. Next Page

The Rules also provide for regular drug testing when opioids are prescribed for an extended period of time. A presumptive urine drug test, such as a drug test cup or a dipstick test, is required before an employee can be prescribed an opioid after (1) the first prescription plus 30 days in the acute phase and (2) entering into the chronic phase. If the presumptive urine drug test is positive for non-disclosed drugs or negative for prescribed opioids, then a confirmatory urine drug test may be required. While waiting for the confirmatory urine drug test results, the health care provider can order a limited supply of the opioid or wait to prescribe the opioid until the results are received. An employee must also undergo 2-4 presumptive urine drug tests every year he or she remains in the chronic phase of opioid prescription. Additional drug tests can be administered with the permission of the carrier, and all drug tests can be administered by the provider randomly and unannounced.

The Rules also address requirements associated with opioid antagonists, nonpharmacological treatment and the discontinuation or tapering of opioid use. For example, when an employee has a history of substance use disorder or is prescribed an opioid exceeding a 50 mg MED per day, the health care provider must consider co-prescribing an opioid antagonist. Whenever an employee presents to a health care provider for pain treatment, the provider must consider prescribing nonpharmacological treatment, including physical therapy, massage and chiropractic treatment. Finally, an employee can be referred to a specialist for an evaluation for discontinuation or tapering of an opioid or for substance use disorder treatment if the health care provider believes it may be beneficial to the employee. Employers and carriers can inquire for more information about a health care provider's recommended nonpharmacological treatment, opioid discontinuation or tapering and/or substance use disorder treatment by any method allowed by the Workers' Compensation Act.

For more information on the application of the Opioid Utilizations Rules and how the rules affect your interests, please contact the lawyers at Hedrick Gardner.



Attorney Spotlight: Thomas W. Page

A partner in the firm's Charlotte office, Tom represents a variety of employers, from small businesses to large Fortune 500 companies. He also lends his skills in workers compensation law, trucking and transportation law and employment law to a number of professional employer organizations, insurance administrators, and carriers.

Q: Why did you become a lawyer?

TWB: I wanted a career that involved people and new challenges almost daily. I did not want to do the same thing day in and day out, and I knew I wanted to help a variety of people.

Q: What is your proudest moment?

TWB: Though I have many proud moments, being a father to three wonderful children (24, 21, & 19 years old) stands out most. The oldest just graduated college, and the other two are excelling with high grade point averages. All three are well on their way to becoming responsible members of society.

Professionally, I am proudest when one of the associates I mentored achieves their goal of partner or special counsel with our firm.

Q: What is your favorite part about getting a new case?

PJB: New cases affirm the trust my clients have in the legal service I provide them. When the file is opened, I look forward to not only looking at the legal issues, but also the big picture for my client. I enjoy figuring out the Plaintiff's motivation in order to formulate the best way to bring the claim to a successful conclusion.

Q: What is your favorite vacation destination?

TWB: Thus far, the Mexican Riviera, just south of Cancun, tops the list of favorite destinations. However, with a trip to London scheduled at the end of this summer, that list could change.

Q: What motivates you?

TWB: My professional motivation derives from the need to please my client. I want them to know I have their best interests in mind and strive to maintain the trust they place in me.



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