

DOT/FMCSA - Noteworthy Updates

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On 8/23/19, the Federal Motor Carrier Safety Administration (FMCSA) published a notice of proposed rulemaking (NPRM) to alter hours of service (HOS) regulations. The comment period ended 10/21/19. The NPRM recommended the following changes.

- Provide drivers with greater flexibility for the 30-minute rest break by requiring a break after 8 hours of drive time, instead of “on-duty” time, and allowing the 30 minutes to occur as an on-duty break rather than an off-duty break.
- Extend on-duty time by 2-hours for adverse weather.
- Extend the “short haul” exception from 100 air-mile radius to 150 miles and increase allowable drive time from 12 hours on-duty to 14 hours.
- Allow drivers to split the required off-duty time into two periods: one period of at least 7 consecutive hours in the sleeper berth and a second period of not less than 2 consecutive hours either off-duty or in the sleeper berth.
- Allow one off-duty break of between 30 minutes and 3 hours that would pause the 14-hour driving window as long as the driver takes 10 consecutive hours off-duty at the end of the shift.

On 10/1/19, the FMCSA opened registration for Commercial Driver’s License (CDL) Drug and Alcohol Clearinghouse. Stakeholders can now visit <https://clearinghouse.fmcsa.dot.gov> to create an online user account at no cost. Drivers are not required to register with the Clearinghouse until responding to an employer’s request for consent prior to a query being conducted by the employer.

The Clearinghouse is an online data repository from which employers, state regulatory agencies, and law enforcement can check a CDL holder’s drug and alcohol violations. Beginning 1/6/2023, states must query the Clearinghouse in response to an application for a CDL. In the meantime, states may voluntarily query the clearinghouse beginning 1/6/2020. A second proposed rule is expected from the FMCSA, which will instruct states on how to use the information received from a Clearinghouse query.

On 9/13/19, the FMCSA amended its HOS restart rules for property-carrying commercial motor vehicles. The final rule removes the requirement that a 34-hour restart include two periods between 1 a.m. and 5 a.m. and limits use of a restart to once every 168 hours. The change comes after a 2017 study found no statistically significant benefits from the restart rule, which was promulgated in 2011. In 2017, Congress passed appropriations Acts that voided the restart provisions, which have not been enforced since that time. This final rule removes those restart provisions from hours of service regulations to avoid confusion for drivers and carriers.

Evidence Preservation Letters: How to Respond, Relevant Evidence, and Avoiding Future Discovery Disputes

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An evidence preservation letter is a written request that certain documents, electronically-stored information and data (“e-data”), and vehicles be preserved in anticipation of future litigation. One of the first questions we hear is, “What evidence is really necessary?” Although demands to preserve evidence may be onerous and burdensome, it is important to begin collecting this evidence as soon as possible.

Lawsuits may be initiated well after the triggering incident. The more time that passes before a suit is filed, the more difficult it will be to retrieve the necessary evidence for the motor carrier’s defense. Frequently, attorneys for plaintiffs send the evidence preservation letters in hopes that some of the evidence will not be preserved and the court will instruct a jury on the adverse implication of the motor carrier’s failure to preserve some of the evidence.

When a motor carrier receives a preservation letter, any response should be in writing to ensure that the discussions are memorialized and that there is no confusion as to each party’s obligations. Ideally, the carrier issues the response through its attorney or after the response is reviewed by an attorney. The response letter provides the opportunity to establish parameters for what is considered relevant to future litigation and can place the burden on the claimant’s attorney to provide support for broadening those parameters. The primary goal for the motor carrier is to limit the scope of what must be preserved to materials that will be relevant to an investigation and future litigation.

It is beneficial for the motor carrier to include in the response its goal of preserving relevant evidence and the measures the motor carrier is taking to identify and preserve the evidence. If the carrier disagrees with the parameters or scope of the preservation request, state the disagreement, explain the rationale for the disagreement, and offer to consider taking additional measures if the adverse party can provide a legal basis for their position.

The response letter gives the motor carrier the opportunity to request that the claimant’s attorney retain the claimant’s vehicle and e-data, photographs and videos, cell phone records, text messages, e-mails, and social media data. It is a nice reminder to the claimant’s attorney that the door swings both ways on the preservation of evidence, and the response can serve as a foundation for any motion practice later on. Establishing a proper foundation at the onset will be useful to avoid incurring costs and time-consuming detours for claims of spoliation and motions seeking discovery sanctions for failure to preserve relevant evidence.

When thinking about what evidence the motor carrier needs to preserve, the scope of the preservation letter will be driven by the relevant facts and circumstances of the accident at issue. Rule 401 of the North Carolina Rules of Evidence defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The most important task is gathering the information needed to defend the anticipated lawsuit in a way that minimizes potential discovery disputes, maximizes the ability to convey a strong defense, and avoids spoliation allegations.

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Because of the likelihood of litigation, it is crucial to gather certain documents following an incident. Relevant evidence to preserve frequently includes the following:

- Mobile phone records for the day of the accident and day prior to the accident;
- Data from any satellite system (GPS) you had for the subject tractor;
- Video from any camera you had in your tractor at the time of the accident;
- HOS logs for 3 months leading to the accident;
- Driver qualification and personnel files;
- Results of any drug/alcohol tests (both before and after accident);
- Any documents provided by law enforcement (e.g., citation, inspection reports, business cards, etc.);
- Service and maintenance records for the commercial motor vehicle for the past 3 years;
- Title and vehicle registration to the truck;
- All shipping documents related to the cargo being transported at the time of the accident (e.g., dispatch records, bill(s) of lading, instructions, etc.);
- Fuel receipts and reimbursement receipts (for meals, etc.) for the driver 30 days prior to the accident;
- Maintenance records for the truck.

We recognize that this is lot of information. However, it is very important to preserve this evidence at the onset to ensure it will be available when a suit is filed.



Attorney Spotlight: Katherine Escalante

Katherine practices civil litigation in the Charlotte office. She enjoys analyzing situations from multiple angles, leaving no detail overlooked. This dedication to learning about the many faceted issues in cases empowers her to better advocate on her client's behalf.

Q: What do you enjoy most about your practice?

KE: What I enjoy most about my practice is counseling my clients. I enjoy explaining what to expect from litigation and putting my client's mind at ease knowing their case is in good hands.

Q: What is your proudest moment?

KE: Completing my first half-marathon. After having to withdraw from my first race due to running injuries, I was more determined than ever to complete one. Finishing a race after having to start all over again showed me what I could accomplish once I set my mind on a goal. Having the willpower to get through a long race reminds me that I have the willpower to get through anything.

Q: What keeps you busy on the weekends?

KE: On the weekends you can find me exploring a new part of town with a coffee in my hand. I am always looking for something new to do and more to learn about this city I call home. I particularly enjoy supporting local artists.

Q: What is your favorite vacation destination?

KE: One I haven't been to yet. I enjoy traveling to new places. If I have been there once, it is rare you will see me there again.

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