

By Patrick E. Foppe

The trucking industry encountered an active regulatory environment in 2014 and 2015 looks to be similarly eventful.

2014 News from the FMCSA and a Look Down the Road

The primary mission of the Federal Motor Carrier Safety Administration (FMCSA), an agency under the U.S. Department of Transportation (U.S. DOT), is to reduce crashes, injuries, and fatalities involving commercial

trucks and buses. FMCSA promulgates and enforces safety rules for commercial motor vehicles, known as the Federal Motor Carrier Safety Regulations (FMCSRs). The FMCSRs generally apply to motor carriers operating commercial motor vehicles, which transport property or passengers in interstate commerce. When applicable, the FMCSRs impose a complex and extensive set of rules requiring, among others, such things as registering and marking of commercial motor vehicles; maintaining minimum levels of financial responsibility; ensuring that drivers are qualified and physically able to perform their job; imposing maximum driving time rules; and keeping motor vehicles in proper repair.

2014 saw much activity and change at FMCSA, including new leadership, new regulations, and renewed debate over existing regulations. Also, FMCSA announced several new initiatives, which will likely affect the trucking industry significantly in the next couple of years. The following is

a summary of the 2014 news from FMCSA and a brief look at what is on the horizon.

New FMCSA Leadership

In August 2014, the longest-serving chief of the FMCSA, Anne Ferro, stepped down. In her term of almost five years she presided over implementation of the Compliance, Safety and Accountability (CSA) safety enforcement program, reform of the hours of service rule, and the final stages of the electronic logging mandate, among many other initiatives. T.F. Scott Darling, III, a lead attorney at the agency, is now the acting administrator.

New Rule to Shut Down Unsafe Carriers

In January 2014, FMCSA amended its regulations, 49 C.F.R. parts 385 and 386, to include a new patterns of safety violations rule, which implements the agency's authority to shut down a bus or truck company if the company, or a company officer,



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has a history of purposely violating federal safety regulations. The rule is designed to target “high-risk carriers that endanger travelers by avoiding or covering up their negative history of safety compliance.” FMCSA stated that it intends to apply the rule in “egregious cases” in which it finds that a motor carrier has committed a pattern of unsafe practices, even if that particular investigation alone does not result in a downgrade of the carrier’s safety fitness rating. The new rule is related to a rule adopted by the agency in 2012 to apply out-of-service orders to reincarnated or chameleon carriers and to consolidate their enforcement histories. The new rule goes one step further by authorizing a complete revocation of a motor carrier’s authority to operate.

National Registry of Certified Medical Examiners

All interstate commercial truck and bus drivers must pass a U.S. DOT medical examination at least once every two years to obtain a valid medical certificate, maintain their commercial driver’s license (CDL), and legally operate a commercial motor vehicle. The U.S. DOT medical examination looks at a range of conditions to assess a driver’s ability to operate a commercial vehicle safely, including cardiovascular disease, respiratory and muscular functions, vision, and hearing.

Effective May 21, 2014, under the FMCSRs, 49 C.F.R. parts 390 and 391, all new U.S. DOT medical examinations for interstate truck and bus drivers—both CDL and non-CDL drivers—must be performed by a medical examiner who has completed the required training and passed a certification test. The new program sets baseline training and testing standards for medical professionals who perform commercial driver physicals and for tracking driver medical certificates. Medical examiners on the National Registry of Certified Medical Examiners will also be required to maintain and to demonstrate competence through periodic training and recertification testing, and those that fail to maintain federal standards will be removed. Medical certificates held by CDL holders issued before May 21, 2014, will continue to be valid until the expiration date that is shown on the card.

Extension of Paper Medical Certificate Requirement

FMCSA extended until January 30, 2015, the requirement under 49 C.F.R. part 391 that interstate CDL holders retain paper copies of their medical examiner’s certificate and continue to make the document available for review upon request at the roadside by federal and state commercial motor vehicle inspectors. In December 2008, FMCSA issued new rules modernizing, streamlining, and simplifying record-keeping obligations for drivers, carriers, and state governments by requiring that a driver’s medical certification record be merged with state-issued CDLs. States received support from FMCSA to implement the necessary IT system upgrades and merge the records into one, online database: the Commercial Driver’s License Information System. FMCSA announced the extension because some states were not yet in full compliance with the new system.

Changes to Reporting of Adjudicated Citations

For citations occurring on or after August 23, 2014, motor carriers and drivers have been able to request the removal of roadside inspection violations and other traffic violations from agency data systems to reflect outcomes of judicial proceedings more accurately. The new FMCSA policy enables carriers and drivers to request, through the agency’s DataQs system, the removal of violations that were previously uploaded into the FMCSA Motor Carrier Management Information System (MCMIS) by state enforcement agencies when a driver is found not guilty or if a violation is dismissed by a court. The FMCSA systems will continue to retain and to display violations that result in a conviction or payment of a fine. Persons who plead to or are convicted of a lesser charge will also have that information reflected. The adjudication results will affect the use of roadside inspection violation data in other FMCSA data systems. These changes are intended to improve roadside inspection data quality.

Debate Concerning the Hours of Service Rules

In *Am. Trucking Associations, Inc. v. FMCSA*, 724 F.3d 243 (D.C. Cir. 2013), the U.S. Court of Appeals for the D.C. Circuit

largely upheld the most recent revisions to the hours-of-service (HOS) rules promulgated by the FMCSA, which went into full effect on July 1, 2013. The new rules added the following new provisions:

- **30-Minute Off-Duty Break**, which bars truckers from driving past eight hours unless they have had an off-duty break of at least 30 minutes;

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- **Once-Per-Week Restriction**, which allows truckers to invoke the 34-hour restart provision only once every 168 hours (or 7 days);
- **Two-Night Requirement**, which also mandates that the 34-hour restart include two blocks of time from 1:00 a.m. to 5:00 a.m.

The court struck down the 30-minute off-duty break for short-haul drivers only. After the ruling, the American Trucking Association (ATA) and others have continued to fight these new rules in Congress, arguing that the 2013 changes were not adequately studied and justified, as well as that they ultimately are bad for the trucking industry and public by forcing more trucks into rush hour traffic after 5 a.m. and by removing the flexibility to take time off when needed. To justify the new 34-hour restart rule, FMCSA purportedly used a study of 106 students that have nothing to do with the trucking industry. On the other hand, ATRI, ATA’s nonprofit research subsidiary, estimated that an adequate study should include at least 650 subjects and that study subjects should be actual truck drivers, not college students. Accordingly, ATA and others believed that the data to support these changes was not adequate.

In June 2014, the fight for changes to the HOS rules went before the U.S. Senate. Senator Susan Collins (R-ME) introduced legislation that sought to suspend the newest changes to the voluntary 34-hour restart provision and the requirement that any voluntary restart provision include two, 1 a.m. to 5 a.m. overnight periods and the restriction on using a restart only once every

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seven days, pending a new study. Nevertheless, consideration of the bill was pulled from the Senate floor after disagreements over procedural rules prevented the bill from moving forward for debate.

Update of the Financial Responsibility Rules on the Horizon

President Obama signed into law the Moving Ahead for Progress in the 21st Century Act (MAP-21) in July 2012. Section 32104 of MAP-21 directed the secretary of the U.S. DOT to issue a report to Congress regarding the appropriateness of the current minimum financial responsibility requirements for motor carriers of property and passengers and the current bond and insurance requirements for freight forwarders and brokers. Section 32104 also directed the secretary to issue a report on the appropriateness of these requirements every four years starting April 1, 2013. The U.S. Secretary of Transportation delegated the responsibility for this report to the FMCSA.

On April 18, 2014, FMCSA reported to Congress that current financial responsibility minimums for the commercial motor vehicle industry are inadequate to meet the costs of some crashes. The agency's report

to Congress includes findings from a recent study that weighed the benefits of increasing insurance minimums, including improved compensation for crash victims and reductions in commercial vehicle crashes, against the costs imposed on commercial motor vehicle operators and the insurance industry. The FMCSA analysis showed that the costs for catastrophic accidents often exceed \$1 million and concluded that the current insurance limits do not adequately cover these costs. The agency has formed a rulemaking team to further evaluate the appropriate level of financial responsibility for the motor carrier industry.

The April 2014 report did not examine the current bond and insurance requirements for freight forwarders and brokers since MAP-21 mandated these requirements to be \$75,000, effective October 1, 2013, and FMCSA indicated that it would report on the appropriateness of these levels after it has had the opportunity to observe their effects.

New Proposed Rule for Electronic Logging Devices

In March 2014, FMCSA announced some proposed amendments to the FMCSRs regarding electronic logging devices (ELDs), formally known as electronic onboard recorders (EOBRs). The proposed rule purports to address issues raised by the U.S. Court of Appeals for the Seventh Circuit in a 2011 decision vacating the FMCSA's April 5, 2010, final rule concerning ELDs in *Owner-Operator Indep. Drivers Ass'n v. FMCSA*, 656 F.3d 580 (7th Cir. 2011), as well as subsequent statutory developments.

The most recently proposed rule would amend the FMCSRs to establish (1) minimum performance and design standards for HOS electronic logging devices, (2) requirements for the mandatory use of these devices by drivers currently required to prepare HOS records of duty status (RODS), (3) requirements concerning HOS supporting documents, and (4) measures to address concerns about harassment resulting from the mandatory use of ELDs. Specifically, the proposed rule includes provisions designed to accomplish the following:

- Respect driver privacy by ensuring that ELD records continue to reside with the motor carriers and drivers. Elec-

tronic logs will continue to only be made available to FMCSA personnel or law enforcement during roadside inspections, compliance reviews and post-crash investigations.

- Protect drivers from harassment through an explicit prohibition on harassment by a motor carrier owner towards a driver using information from an ELD. It will also establish a procedure for filing a harassment complaint and creates a maximum civil penalty of up to \$11,000 for a motor carrier that engages in harassment of a driver that leads to an hours-of-service violation or the driver operating a vehicle when they are so fatigued or ill it compromises safety. The proposal will also ensure that drivers continue to have access to their own records and require ELDs to include a mute function to protect against disruptions during sleeper berth periods.
- Increase efficiency for law enforcement personnel and inspectors who review driver logbooks by making it more difficult for a driver to cheat when submitting their records of duty status and ensuring the electronic logs can be displayed and reviewed electronically, or printed, with potential violations flagged.

Public comment on the proposed new rule closed in June 2014. When MAP-21 was signed into law in 2012, it required the electronic logging device rule to be finalized by October of 2013 and to be fully implemented within two years, which is obviously behind schedule. ATA announced its general support for the proposed FMCSA mandate for the use of ELDs and called on FMCSA to swiftly issue a final rule.

Proposed Rule for National Drug and Alcohol Testing Clearinghouse

In February 2014, FMCSA announced a proposed rule to establish the Commercial Driver's License Drug and Alcohol Clearinghouse, a database under FMCSA that will contain controlled substances and alcohol test result information for the holders of CDLs. The proposed rule was also mandated by MAP-21 (Section 32402). The time period for public comment for this proposed rule has also closed. FMCSA asserts that the clearinghouse would help improve roadway safety by making it eas-

ier to determine whether a truck or bus driver is prohibited from operating a commercial motor vehicle for failing to comply with federal drug and alcohol regulations, including mandatory testing.

Current federal regulations require employers to conduct mandatory pre-employment screening of a CDL driver's qualifications based upon his or her driving record. However, there has not been a single federal repository recording positive drug and alcohol tests by CDL holders that employers would be able to search to ensure that the driver is able to perform safety-sensitive duties.

The proposed rule would create such a repository and require employers to conduct pre-employment searches for all new CDL drivers and searches on current employee drivers every year. Under the proposed rule, FMCSA-regulated truck and bus companies, medical review officers, substance abuse professionals and private, third-party U.S. DOT drug and alcohol testing laboratories would be required to record information about a driver who

- Fails a drug or alcohol test or both;
- Refuses to submit to a drug or alcohol test or both; or
- Successfully completes a substance abuse program and is legally qualified to return to duty.

Private, third-party U.S. DOT drug and alcohol testing laboratories also would be required to report summary information annually. This information would be used to help identify companies that do not have a testing program.

To ensure the privacy of the drivers involved, each CDL holder would need to provide his or her consent before an employer could access the clearinghouse. Drivers who refuse to provide this information could still be employed by a truck or a bus company, but they could not occupy safety-sensitive positions, such as operating a commercial motor vehicle.

Discussion of Standards for New Drivers and New Entrants

In March and April 2014, FMCSA held public listening sessions to solicit ideas and information on possible knowledge-testing requirements for those applying for new operating authority, whether they be passenger and property carriers, freight for-

warders, or brokers. In the future, FMCSA is expected to come up with a proposed rule that will require anyone applying for new authority—a carrier, a broker, a freight forwarder—to take a knowledge test.

In September 2013, FMCSA withdrew a previously released notice of proposed rulemaking for entry-level driver training standards and indicated that it would start over with a new proposal. The proposal would have required both classroom and behind-the-wheel training for applicants for a commercial license. The proposal was shelved in part because FMCSA received additional statutory direction on the issue of entry-level driver training from Congress via MAP-21. In August 2014, FMCSA invited representatives of interested parties that are likely to be affected by the regulation to work with each other and the agency on a negotiating committee to develop a consensus draft of a proposed rule. If a consensus is reached, FMCSA would then publish the proposal for public comment under customary regulatory procedures.

Proposed Rulemaking to Curtail Truck Driver Coercion

In May 2014, FMCSA proposed to adopt regulations that prohibit motor carriers, shippers, receivers, or transportation intermediaries from coercing drivers to operate commercial motor vehicles in violation of certain provisions of the FMCSRs—including drivers' HOS limits and the CDL regulations and associated drug and alcohol testing rules—or the Hazardous Materials Regulations. In addition, the agency proposed to prohibit anyone who operates a commercial motor vehicle in interstate commerce from coercing a driver to violate the FMCSRs. The FMCSA proposed procedures for drivers to report incidents of coercion to FMCSA, rules of practice the FMCSA would follow in response to allegations of coercion, and describes penalties that may be imposed on entities found to have coerced drivers. This proposed rulemaking was authorized by MAP-21(Section 32911). The public comment period expired in August 2014.

Sleep Apnea Legislation Mandates Rulemaking Process

FMCSA has been looking into how to address the sleep apnea problem facing

the trucking industry for several years. Previously, FMCSA indicated that it may issue guidance on the issue rather than going through the formal rulemaking process. The trucking industry was concerned that FMCSA guidance could have cost the trucking industry \$1 billion annually. Further, many trucking interests had expressed reservations about the FMCSA issuing guidance rather than going through the rulemaking process because mere guidance would not have involved a public comment period as rulemaking requires, and it often does not give employers a clear enough statement of their legal responsibilities.

In October 2013, Congress approved legislation to require FMCSA to undertake a formal regulatory process before implementing any future requirements with respect to sleep apnea, which President Obama signed into law. Rather than simply issuing guidance, FMCSA is now required to analyze the potential cost of sleep apnea before FMCSA can determine the applicable regulations. The purpose of the new law is to require that future policy issued on sleep apnea does not avoid a thorough analysis of the prevalence of obstructive sleep apnea among truck and bus drivers, the range of possible actions to address the problem, and the costs and benefits of any policy. The law does not require FMCSA to issue any policy or regulation regarding sleep apnea. Action regarding sleep apnea remains a stated priority for FMCSA.

Conclusion

The trucking industry encountered an active regulatory environment in 2014 and 2015 looks to be similarly eventful. In the past year, FMCSA instituted new regulations and announced several new initiatives that will likely have significant effects on the trucking industry in the coming years. The National Registry of Certified Medical Examiners has been implemented. Soon there will likely be mandatory electronic logging devices and a national drug and alcohol clearinghouse. Attention toward sleep apnea and standards for new drivers and new entrants into the trucking industry is expected to be a focus moving ahead.

