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HOS Rules Changes Do Not Make A Gift Worth Keeping

Right before Christmas, the Federal Motor Carrier Safety Administration announced the long anticipated changes to the truck driver hours of service regulations. It was a “Christmas Gift” long awaited. Since then FTL carriers, brokers and shippers have had the time to open the gift and reflect upon it, and most want to return it, with the American Trucking Associations (“ATA”) seeking its return by the filing of a lawsuit on February 14, 2012. Even the safety advocates, who forced the review to begin with, by filing a lawsuit challenging the existing 2004 HOS regulations, filed a new lawsuit challenging the new rules on February 24, 2012. This article gives you a summary of the changes and the issues being raised¹.

The effective date of the Final Rule was February 27, 2012, but the compliance date for the most significant changes is July 1, 2013. The chart prepared by the FMCSA setting forth the compliance date for the individual components of the rules changes embodied in the Final Rule is provided on page 4 of this article.

Although the FMCSA kept the 11 hour daily driving rule favored by truckers, other changes have long haul truckload carriers and their shipping customers concerned about the loss of productivity that will result after the compliance date for the most significant changes of July 1, 2013. The main concern is with the limitations placed on the 34 Restart Rule, whereby drivers may restart the 60 or 70 hour clock on the maximum number of hours under which a driver can be on duty within a 7 day or 8 day window. Under the new 34 hour restart limitations, which must be complied with starting July of 2013, there can be only one restart within a week’s 168 hour time frame and the 34 hours must span two periods between 1 AM and 5 AM. This provision, according to the FMCSA, is aimed at long haul FTL drivers who are now able to log over 70 hours of on-duty time within a 7 day period and thereby may be subject to chronic fatigue. There is also a new requirement that a driver may not drive longer than 8 hours without taking a 30 minute break (compliance required starting in July of 2013) and high fines for both drivers and their companies for serious violations (which has been under enforcement since February 27, 2012). On the positive side, the agency’s new HOS rules also allow for off-duty credit while a driver is in a parked tractor, but not in the sleeper berth and up to two hours of credit for team drivers in the passenger seat of a moving truck. Enforcement of these changes started with the effective date of February 27, 2012.

Nobody seems to be happy with these changes. Industry groups and shippers oppose these changes, as do the safety advocates who forced the review of the 2004 version rules to begin with, as reflected not

¹ The information upon which this article it is based was compiled from several news and regulatory sources, including, without limitation, *Transport Topics*, *The Journal of Commerce Online*, ATA’S *Truckline Website* the FMCSA web site and the Advocates for Highway and Auto Safety press release. The analysis and commentary are mine.

only in statements by and interviews of company and group leaders, but also by the recent filing of two lawsuits. This article will first address the articulated business and safety concerns, and then summarize the two lawsuits.

Supply chain company executives and association representatives have been highly critical of the HOS rules from a practical business standpoint. FTL Trucking executives believe that the rules changes will substantially reduce a trucking company's ability to generate revenue from each truck, will result in less pay for drivers paid by the mile, will accelerate the anticipated driver shortage already driven by CSA, and will result in more traffic congestion because of the need to utilize more trucks. Shippers are concerned about the loss of efficiencies across the supply chain, the need to reconfigure routes and delivery schedules and the increased shipping costs that will result.

On the other side of the coin, safety advocate representatives have voiced concerns over the retention of the 11 hour maximum daily allowable driving time. They have advocated a return to the 10 hour daily allowable driving time rule that was provided for in the pre-2004 HOS rules, purportedly as a means to reduce driver fatigue and reduce the number of accidents.

Although opposition by these groups has not been readily apparent, consumers and environmentalists should be concerned with the side effects of the lowered efficiency of hauling truck cargo along the supply chain resulting from the HOS rules changes. Consumers should be concerned because they would ultimately see higher prices for the goods shipped over the less efficient supply chain. Environmentalists should be concerned because the resulting increased truck traffic will increase carbon emissions and fuel usage.

Opposition to the new HOS rules has gone from the voicing of concerns to the filing of two lawsuits. The American Trucking Associations ("ATA") filed the first lawsuit on February 14, 2012 before the U.S. Court of Appeals for the District of Columbia. The ATA's lawsuit filing was followed by the filing of another lawsuit before the same court on February 24, 2012, by the Advocates for Highway and Auto Safety, Public Citizen and the Truck Safety Coalition (the same groups who challenged the 2004 rule), plus two truck drivers. The two cases have now been consolidated by order of the court. These lawsuits do not directly challenge the merits (or lack of merits) of the rules changes, but instead challenge the rule making process in order to invalidate the rules changes.

The ATA lawsuit will be based on the type of technical legal grounds that are necessary to challenge rulemaking. According to ATA President Bill Graves, "[t]he law is clear about what steps FMCSA must undertake to change the rules, and we cannot allow this rulemaking, which was fueled by changed assumptions and analyses that do not meet the required legal standards, to remain unchallenged." Graves also said: "FMCSA's own analyses show that even when they overstate the safety benefits of these changes, the costs created by their rule still outweigh those benefits. We need this issue to be resolved in a credible manner, taking into account the undisputed crash reduction since 2004, so we can focus limited government and industry resources on safety initiatives that will have a far greater impact on highway safety."

The new safety advocate suit primarily challenges the 11 hour daily driving rule (changed from 10 in 2004) on the basis of a purported lack of data to support the changing of the rule from 10 to 11 in 2004, to begin with and then keeping the 11 hour rule in the recent rule changes. According to the lawsuit, "[t]he agency's final rule failed to reduce the 11-hour limit on consecutive driving hours to 10 hours, despite the agency's statement in the proposed rule that 'the 10-hour rule is currently FMCSA's

currently preferred option' because it would be most effective in reducing driver fatigue. Although the agency had no data to support its adoption of the longer 11-hour limit in 2004, the agency decided to stand by that mistake even though it comes at the cost of numerous additional fatigue-related crashes." According to the press release made by the group, "[t]he research is clear and compelling. However, FMCSA's decision to keep the longer, more dangerous 11 hours of driving time rather than returning to the 10-hour limit will put the public and truck drivers at risk."

With the delay in the compliance date for the most significant rules changes to July of 2013, the specter of ongoing litigation, and the upcoming election, the HOS rules changes in their present form may never be fully implemented. The FMCSA has also indicated that it will continue to conduct studies to see if the 11 hour daily driving rule should be changed back to 10. Therefore, the trucking and shipping communities will be left with much uncertainty in coming months. As we get closer to July 1, 2013, and issues have not been satisfactorily resolved, it may become necessary for trucking companies, shippers and their IT and providers to perform some contingency planning.

(SEE THE PAGE 4 FOR THE FMCSA'S CHART SETTING FORTH THE COMPLIANCE DATE FOR THE COMPONENTS OF THE CHANGES MADE TO THE HOS REGULATIONS.)

This Journal is intended to give a unique perspective on the practical business impacts of developments in the law relating to transportation. The contents of this Journal are not intended to be and should not be relied upon as legal advice.

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WALT METZ BIO

Walt Metz was Vice President, General Counsel and Secretary of Americold Realty Trust/Americold Logistics in Atlanta for five years from 2005 to 2010, and has several years of experience working as in-house counsel for two major trucking companies. At Americold he directed the legal affairs for North America's largest provider of temperature controlled food distribution and logistics services, Americold Logistics, LLC. Before taking his position at Americold, Walt served in the legal departments of Sears, Roebuck and Company in the Chicago area and Werner Enterprises of Omaha. During Walt's seven plus years at Werner Enterprises he supervised the nationwide defense of high exposure trucking and transportation litigation for the large transportation carrier, and provided advice on claims, litigation and risk management issues, including the structure of self-insured liability and workers compensation programs and the associated layers of excess insurance policies. At Sears he continued to manage litigation, including high exposure commercial litigation and class actions. Walt also recently completed a short tenure at Old Dominion Freight Lines. Prior to going in-house, Walt was a member of two Omaha law firms, where he practiced primarily in Commercial Litigation and General Practice. He graduated from the University of Nebraska-Lincoln with High Distinction and was elected to membership in Phi Beta Kappa. He also earned his JD at Nebraska. Walt continues to be a huge Big Red fan!

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**THE FMCSA'S CHART OF THE COMPLIANCE DATE FOR THE COMPONENTS OF THE CHANGES
MADE TO THE HOS REGULATIONS**

PROVISION	PRIOR RULE	FINAL RULE - COMPLIANCE DATE JULY 1, 2013
Limitations on minimum "34-hour restarts"	None	(1) Must include two periods between 1 a.m.- 5 a.m. home terminal time. (2) May only be used once per week.
Rest breaks	None except as limited by other rule provisions	May drive only if 8 hours or less have passed since end of driver's last off-duty period of at least 30 minutes. [HM 397.5 mandatory "in attendance" time may be included in break if no other duties performed]
PROVISION	PRIOR RULE	FINAL RULE - COMPLIANCE DATE FEBRUARY 27, 2012
On-duty time	Includes any time in CMV except sleeper-berth.	Does not include any time resting in a <u>parked</u> vehicle (also applies to passenger-carrying drivers). In a moving property-carrying CMV, does not include up to 2 hours in passenger seat immediately before or after 8 consecutive hours in sleeper-berth.
Penalties	"Egregious" hours of service violations not specifically defined.	Driving (or allowing a driver to drive) 3 or more hours beyond the driving-time limit may be considered an egregious violation and subject to the maximum civil penalties. Also applies to passenger-carrying drivers.
Oilfield exemption	"Waiting time" for certain drivers at oilfields (which is off-duty but does extend 14-hour duty period) must be recorded and available to FMCSA, but no method or details are specified for the recordkeeping.	"Waiting time" for certain drivers at oilfields must be shown on logbook or electronic equivalent as off duty and identified by annotations in "remarks" or a separate line added to "grid."