TRANSPORTATION matters
Fall 2015

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DOT/FMCSA - Noteworthy Updates

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On 6/9/2015, H.R. 2577, the Transportation, Housing and Urban Development and Related Agencies Appropriates Act, 2016, passed the House with a vote of 216-210. On 6/25/2015, the bill was referred to the Senate Appropriations Committee. Notably, the bill permits use of twin 33-foot trailers on the Interstate System and defunds enforcement of a number of regulations, including the 34-hour hours-of-service (HOS) restart provision, which took effect 7/1/2013. The bill withholds funding until the Secretary of Transportation and the Department of Transportation (DOT) Inspector General determine that the restart provision has (1) met statutory requirements and (2) demonstrated improvement in safety, driver fatigue, driver health, and work schedules. Further study of the 34-hour restart provision will be required to fulfill the mandate.

H.R. 2577 also defunds enforcement of regulations that increase the minimum levels of financial responsibility for interstate transportation of passengers or property until a study can be completed on the impact of raising the minimum coverages, including investigating the number of crashes where the damages exceeded insurance limits, the impact on carriers, and the impact on insurance underwriters.

On 7/30/2015, the Federal Motor Carrier Safety Administration (FMCSA) released the 2014 Government Accountability Office's (GAO) study on the HOS 34-hour restart provision. The 18-month study found that the new HOS rules resulted in decreased driver fatigue and fewer fatal crashes. However, because FMCSA citations and investigations did not adequately target high-risk behaviors and carriers, the GAO recommended that the DOT adopt formal guidelines for researching driver schedule data. The FMCSA is expected to issue a detailed response to the GAO recommendations in October 2015.

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Motor Carrier Exemption Can Be Applicable to Drivers Who Are Reasonably Expected to Drive Interstate Routes

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Under the Federal Labor Fair Standards Act (FLSA), employees who work over 40 hours are entitled to overtime. There is, however, a Motor Carrier Act (MCA) exemption to the FLSA that creates an overtime exemption for employees in trucking and transportation employment who are covered by the Secretary of Transportation's authority to regulate the safe operation of motor vehicles in interstate or foreign commerce.

In the case of *Resch v. Crapf's Coaches, Inc.*, the Court of Appeals for the Third Circuit found that the MCA exemption to the FLSA applied to drivers who rarely or never cross state

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The Impact Of Controlled Substances On Driver Qualifications

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With the recent prevalence of drivers utilizing medications to treat certain medical conditions, both physical and emotional, the question of what medications can be safely used pursuant to the Code of Federal Regulations has come to the forefront. In order to answer this question, we must first look to 49 CFR § 391.41, which details the physical qualifications for Drivers.

49 CFR § 391.41 (b)(12)(i) states that a person is physically qualified to drive a commercial motor vehicle if that person, "does not use any drug or substance identified in 21 CFR 1308.11 Schedule I, an amphetamine, a narcotic, or other habit-forming drug." 21 CFR 1308.11 Schedule I contains an exhaustive list of approximately one-hundred seventy-five (175) controlled substances, which are considered Schedule I Controlled Substances. These Controlled Substances are broken down into categories of Opiates, Opium Derivatives, Hallucinogenic Substances, Depressants, Stimulants, Cannabimimetic Agents and a Temporary Listing of Substances Subject to Emergency Scheduling. Pursuant to 49 CFR § 391.41, a person is not physically qualified to drive a commercial motor vehicle if he is taking a Schedule I Controlled Substance, an amphetamine, a narcotic, or other habit-forming drug.

Drivers are permitted to use certain controlled substances when prescribed by a licensed medical practitioner. 49 CFR § 391.41 (b)(12)(ii) states that a person is physically qualified to drive a commercial motor vehicle if that person "does not use any non-Schedule I drug or substance that is identified in the other Schedules in 21 part 1308 except when the use is prescribed by a licensed medical practitioner, as defined in § 382.107, who is familiar with the driver's medical history and has advised the driver that the substance will not adversely affect the driver's ability to safely operate a commercial motor vehicle." There have been disputes as to what qualifies as a "licensed medical practitioner." 49 CFR § 382.107 defines "licensed medical practitioner" as "a person who is licensed, certified, and/or registered, in accordance with applicable Federal, State, local, or foreign laws and regulations, to prescribe controlled substances and other drugs." This definition must be considered when one learns that a driver is taking a non-Schedule I Controlled Substance. Best practices indicate that when a company learns that a driver is taking a non-Schedule I Controlled Substance, a copy of the prescription should be requested along with a letter from a "licensed medical practitioner" stating that he is familiar with the driver's medical history and has advised the driver that the substance will not adversely affect the driver's ability to safely operate a commercial motor vehicle.

21 CFR 1308 contains lists of Controlled Substances defined as Schedule II, Schedule III, Schedule IV and Schedule V (21 CFR 1308.12-1308.15). Again, these are the Controlled Substances that are applicable under 49 CFR § 391.41 (b)(12)(ii) and which can be used when prescribed by a licensed medical practitioner.

The next logical question is how will a company know if a driver is taking a controlled substance as defined in Schedule I-V if not admitted by the driver?

According to 49 CFR § 382.301(a), a pre-employment test for controlled substances must be administered and a negative test result must be obtained prior to a driver performing any safety-sensitive functions. Pursuant to 49 CFR § 382.301(b),

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a pre-employment test for controlled substances is not necessary when the driver has participated in a controlled substance testing program within the previous 30-days and was tested for controlled substances within the past 6-months or participated in the random controlled substances testing program for the past 12-months and the employer ensures that no prior employer of the driver of whom the employer has knowledge has records of a violation. If an employer is not going to conduct a pre-employment test, it must contact the controlled substance testing program in which the driver participated and must obtain and retain testing information.

Post-accident testing for controlled substances and alcohol is required when a driver was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life. 49 CFR § 382.303(a)(1). Additionally, testing is required if, within 8-hours of the occurrence, the driver receives a citation under state or local law for a moving traffic violation arising from the accident. This provision applies only if the accident involved bodily injury to any person who immediately receives medical

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DOT Physicals Part II: Industry Opinions

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In Part I of this series, we examined the requirements for physicals under the Federal Motor Carrier Safety Regulations. To build on that foundation, we have now reached out to an industry-side executive to provide a practical perspective on DOT physicals. Namely, our discussions focused on the overall effect the DOT physicals with regard to business operations as well as the efficiency and effectiveness of physicals in promoting safe operation of commercial motor vehicles on public roads.

The industry-side interviewee that we spoke with is the owner and CEO of a freight and cargo trucking company with operations based in western North Carolina. The interviewee has owned his company for 10 years and is very familiar with FMCSA rules and regulations regarding DOT physicals. Generally, it is his view that much more responsibility has been placed on the medical examiners that certify the drivers. This increase in responsibility has led to more stringent criteria for obtaining DOT physicals and stricter oversight of the drivers who have obtained physicals. In terms of both his company and other motor carriers, the interviewee commented that most employers now will only hire drivers with a current medical certificate. Additionally, these employers are implementing policies to ensure the medical certificate is kept up to date in order to maintain compliance with the FMCSR provisions related to physicals.

One notable effect on the stringent DOT physicals that the interviewee discussed is that the commercial trucking industry is currently lacking in good, qualified drivers. He believes the younger generation is opting not to choose the trucking profession and that the stringent DOT physicals is a factor in these individuals' career choice. At the same time, older truck drivers are unable to meet the requirements required by the FMCSA and are forced into retirement. Many older drivers are affected by regulations involving high blood pressure and diabetes. Although his business expenses and costs have not been significantly affected, commercial drivers' rates and compensation has increased based, at least in part, on supply and demand as informed by mandatory DOT physicals.

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Motor Carrier Exemption *cont. from page 1*

lines on the grounds that they worked in jobs that could reasonably have been expected to drive interstate routes. This case holding clarified the applicability of the MCA to employees who work over 40 hours in businesses regulated by the Department of Transportation.

The court in *Resch* examined a U.S. Supreme Court case from 1947 that dealt with the jurisdiction of the Department of Transportation's predecessor, the Interstate Commerce Commission (ICC). In *Morris v. McComb,* the Supreme Court found that a group of truck drivers and mechanics fell within the exemption even though a small percentage (3.64%) of the truck drivers' trips were interstate transport, and generally those trips were mingled within jobs that were interstate driving. The analysis in the *Morris v. McComb* case centered on the Supreme Court reviewing the drivers' activities and noting that 41 of the 43 drivers had made at least one interstate trip and that the average truck driver had made 16 interstate trips during the time period measured. The Supreme Court held that the MCA exemption applied because interstate trips were actually taken and had to be performed under the requirements of the ICC. None of the drivers or mechanics, therefore, were entitled to overtime under the FLSA because both the drivers and mechanics performed work of the character directly affecting the safety of interstate trips that would be under the safety requirements of the ICC.

In *Resch*, the plaintiffs were employees of a motor coach company that was based in Westchester, PA, that had a transit division that provided bus and shuttle services for set routes. The defendant employer operated 32 such routes, four of which crossed state lines. The defendant employer employed between 36 and 62 drivers in a given month and trained its drivers on multiple interstate and intrastate routes. The employer retained discretion to assign a driver to any route for which he had been trained, including interstate routes, but from the years 2009 – 2012 the share of total transit division revenue generated by interstate routes fluctuated between 1% and 9.7% of the total revenue of the transit division. The plaintiffs were the transit division drivers who had worked more than 40 hours in a week without receiving overtime pay. An analysis showed that of 13,956 total trips that the driver plaintiffs had made, 178 or 1.3% required them to cross state lines. In fact, 16 of the drivers who were members of the plaintiffs' class had never crossed state lines. Eight had crossed state lines only once, and five had crossed state lines fewer than five times. The driver Resch brought the action to recover overtime pay.

In coming to its decision, the Third Circuit cited to the Code of Federal Regulations 29 C.F.R. § 782.2(a), which states that if the duties of a driver are such that he or she is (or is likely to be) called upon to perform activities that impact the safety of interstate transportation, the employee comes within the motor vehicle carrier exception. That regulation notes further that it applies "regardless of the proportion of the employee's time or of his activities which are actually devoted to such safety affecting work in a particular work week and the exemption will be applicable, even in a work week when the employee happens to perform no work directly affecting safety of operation."

The Third Circuit found that the plaintiff drivers could be expected to drive interstate since the company drivers regularly drove such routes and, in fact, were trained on those routes. The Court also noted that the company defendant retained the discretion to assign drivers to either intrastate or interstate routes and had to adhere to federal regulations regarding these drivers. Based upon this finding, the Court found that the plaintiffs were covered by the MCA exemption.

When applying the exemption, employers need to be aware of the time employees devote to interstate transportation, but also need to recognize that it is not the sole factor determining the applicability of the exemption from the FLSA. If an employee performs work that affects the safety of transportation operations that could reasonably be expected to cross state lines, then the employer should consider the applicability of the exemption from the FLSA, and whether there is a requirement to pay overtime for work in excess of 40 hours.

Impact Of Controlled Substances *cont. from page 3*

treatment away from the scene of the accident, or if one or more of the vehicles sustains damage from the accident that requires the vehicle to be towed from the scene. If a test for controlled substance is required but not administered within 32-hours following the accident, the employer must cease attempts to administer a controlled substance test and prepare and maintain a file on record stating the reasons the test was not properly administered. Testing for alcohol is to be administered within 2 hours; if not, the driver qualification file is to contain an explanation for the delay. If the alcohol test is not administered within 8 hours, the employer is to cease efforts to test. Of note, the results of a urine test for the use of controlled substances, conducted by federal, state or local officials having independent authority for the test, shall be construed to meet the requirements of a post-occurrence test.

In addition to pre-employment and post-occurrence testing for controlled substances, an employer is also required to conduct random testing for controlled substances. Pursuant to 49 CFR § 382.305 (b)(2), the minimum annual percentage rate for random controlled substances testing shall be 50% of the average number of driver positions. The annual percentage rate with regard to random tests is determined by the results of the testing for the entire industry and can be lowered to 25% depending on the results. The selection of drivers for this random testing must be made by a scientifically valid method, such as a random number table or a computer-based random number generator. These random tests must also be unannounced.

An employer can also conduct reasonable suspicion testing for controlled substances pursuant to 49 CFR § 382.307(b). The determination that there is a reasonable suspicion must be based on "specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver." The observation can include indications of the chronic and withdrawal effects of controlled substances. These observations must be made by a supervisor or company official who is trained under the provisions of 49 CFR § 382.603, which required persons designated to supervise drivers to receive at least 60 minutes on alcohol training and at least an additional 60 minutes of training on controlled substance use. A written record must be made of the observations leading to a reasonable suspicion test within 24 hours of such observations and must be completed by the person who made the observations.

One other issue that must be addressed is an employee admission of controlled substance use pursuant to 49 CFR § 382.121 under an employer-established self-identification program. Pursuant to 49 CFR § 382.121(b), a qualified voluntary self-identification program must state that the employer is prohibited from taking any adverse action against an employee making a voluntary admission of controlled substance use. Additionally, it must allow the employee sufficient opportunity to seek evaluation, education or treatment to establish control over the employee's drug problem, and to return to safety sensitive duties only upon successful completion of an educational or treatment program. The employee must obtain a negative result on a controlled substance test prior to returning to the safety sensitive function.

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Advancements in Collision Avoidance Technology Mean Regulations are Just Around the Corner

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On May 19, 2015, the National Transportation Safety Board (NTSB) released a Special Investigation Report on the preventability of rear-end collisions and recommended that all newly manufactured commercial trucks be equipped with forward collision warning systems. As part of the NTSB study, 100 Volvo Trucks were equipped with Eaton Vorad collision warning systems (CWSs), which are able to detect vehicles up to 350 ahead of the truck. Over a 3-year period, the CWS contributed to a 37% decrease in braking situations with the potential of resulting in a rear-end collision. The NTSB correlates this result to an increased awareness of following distances, which were 15 feet greater on average in trucks equipped with the CWS.

In a similar study by Con-way, which collected data from approximately 12,600 trucks over a 30-month period, trucks equipped with a range of safety technologies, including automated braking, collision warning system, and lane departure warnings, were 71% less likely to be involved in a rear-end collision. Further, like the NTSB study, Con-way found a 63% decline in unsafe following distances. Ultimately, the NTSB expects that the technology, paired with active braking, will mitigate the severity of rear-end accidents and decrease the more than 1,700 deaths each year from rear-end collisions. Currently, use of warning systems is optional for commercial motor carriers, but proposed rules mandating CWSs are likely in our future.

Some carriers are ahead of the curve on implementing the new technology. On July 21, 2015, UPS, Inc. announced its plan to include Bendix Commercial Vehicle Systems in every new truck it orders, including an expected 2,600 new Class 8 trucks purchased for 2015. The Bendix systems include lane-departure warnings, electronic stability control and air disc brakes.

The impact of the collision avoidance technologies on the legal landscape is uncertain. In 2012, the U.S. Court of Appeale for the Ninth Circuit decertified a class action against American Honda Motor Company in a case alleging a product defect of Honda's collision-avoidance technology in the model years 2005-2008 Acura RL. In that case, over 20,000 plaintiffs alleged that the avoidance systems failed to prevent accidents as advertised and Honda failed to inform the drivers of system limitations. More recently, actor and comedian, Tracy Morgan, settled his lawsuit with Wal-Mart Stores, Inc. over a New Jersey crash that involved a Wal-Mart truck equipped with a collision warning system. The allegations against Wal-Mart and the driver, included an hours-of-service violation and failure to maintain the CWS, which allegedly malfunctioned prior to the collision.

In past articles of this series, we have reported on the development of autonomous vehicles and the manufacturer's duty of care to avoid defective devices. Now that thousands of commercial trucks are equipped with CWS technology, the same concerns arise regarding a driver and carrier's duty of care to maintain the CWS and to avoid undue reliance on the system. Although the promise of new technology that will curb the frequency and severity of rear-end collisions is attractive, carriers should continue to emphasize that it is the drivers who are ultimately responsibility for observing the rules of the road.

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On 7/15/2015, the Senate Commerce Committee passed S. 1732, the Comprehensive Transportation and Consumer Protection Act of 2015. The 6-year bill mandates a study by the Transportation Research Board to analyze the Compliance, Safety, and Accountability (CSA) program and requires that Safety Management System (SMS) data be removed from public view until the study is completed. The bill establishes a 6-year pilot program permitting appropriately licensed drivers between ages 18 and 21 to operate commercial vehicles on interstate highways and allows industry-wide use of hair testing for certain pre-employment drug screenings. S. 1732 is awaiting a vote by the full Senate.

On 6/29/2015, the FMCSA published a notice in the Federal Register with proposed enhancements to the SMS that will assist in targeting high-risk motor carriers. The SMS changes, include altering intervention thresholds to better reflect Behavior Analysis and Safety Improvement Categories (BASICs), separating the Hazmat Compliance BASIC into cargo tank (CT) and non-CT carriers, reclassifying out-of-service violations as unsafe driving, and increasing the maximum Vehicles Miles Travelled to more accurately reflect operations of high-utilization carriers. The comment period for the proposed rules changes ended on July 29, 2015.

The FMCSA expects to issue a number of final rules before the end of 2015, including a final rule on electronic logging devices (e-logs) and a speed-limiter proposal for heavy trucks. In early 2016, the FMCSA is expected to release rules regarding a drug and alcohol clearing house.

DOT Physicals Part II *cont. from page 3*

Overall, the interviewee believes that DOT physicals are a necessary and effective means for obtaining a minimum health standards for commercial truck drivers. Commercial trucking is a challenging profession and one must be physically fit and alert to operate vehicles in this industry. The interviewee expressed confidence that the medical examiners certifying DOT physicals ensure that the driver is physically fit. Further, he strongly believes that the roads and the drivers are safer due to the FMCSA rules and regulations. The FMCSA rules and regulations not only require commercial drivers to obtain a medical certificate but are also promoting that employers continuously regulate the health of their drivers.

By and large, the interviewee expressed optimism about industry side compliance with current FMCSR regulations related to physicals, as well as the corresponding effect of promoting safety on the highways. The only negative items noted during our interview was a potential reduction in workforce due to a "filtering" effect of the DOT physical requirements.

In the next part in this series, we will examine the driver side perspective on DOT physicals with the continuing objective of gaining a practical perspective on how the rules affect day-to-day operations and safety within the industry.