



# ASSOCIATION HIGHLIGHTS

**March-April 2016**

## **MOTOR-REGULATORY**

**Jameson B. Rice**

Holland & Knight LLP

Tampa

813.227.6402

Jacksonville

904.798.7371

[jameson.rice@hklaw.com](mailto:jameson.rice@hklaw.com)

### *FMCSA and FRA Seek Comment on Obstructive Sleep Apnea*

The Federal Motor Carrier Safety Administration (FMCSA) and Federal Railroad Administration (FRA) issued an Advance Notice of Proposed Rulemaking seeking comment on the safety and economic impacts of screening, evaluating and treating drivers and rail workers with obstructive sleep apnea. 71 Fed. Reg. 12642 (Mar. 10, 2016). Undiagnosed or inadequately treated moderate to severe obstructive sleep apnea can lead to drowsiness and inattentiveness that affects the ability to safely respond to hazards.

No specific FMCSA regulation currently addresses sleep apnea, although the FMCSA did issue a bulletin last year recommending that certified medical examiners refer drivers with obstructive sleep apnea and other respiratory dysfunction for further evaluation and therapy. The National Transportation Safety Board (NTSB) has also recommended that transportation workers be screened and treated for obstructive sleep apnea, which has been a factor in at least nine accidents across transportation modes, including a motor carrier accident that killed a state trooper in Tennessee in 2000 and the Metro-North derailment in 2013 in the Bronx that killed four people. It is estimated that 22 million Americans could be suffering from obstructive sleep apnea.

The FRA and FMCSA will host three public listening sessions to gather input on obstructive sleep apnea in Washington, D.C., Chicago, and Los Angeles.

### *FMCSA to Prioritize Investigation of Highest Risk Carriers*

The FMCSA has narrowed its definition of “high risk” carrier, allowing it to prioritize its resources on a smaller group of carriers and investigate them sooner. 81 Fed. Reg. 11875 (Mar. 7, 2016). Under the new definition, a property carrier is deemed “high risk” if in any month it scores in the 90th percentile or higher for two or more of the Behavior Analysis and Safety Improvement Categories (BASIC) of Unsafe Driving, Crash Indicator, Hours of Service Compliance and Vehicle Maintenance, and the carrier has not received an onsite investigation in the previous 12 months. The outgoing policy applied to more carriers, which leads to a long queue for investigations even of high risk carriers.

The Agency said that this change will not affect safety fitness ratings, authority to operate or Safety Measurement System (SMS) percentiles, and will not change the SMS methodology or how FMCSA makes enforcement decisions. The agency did, however, indicate that there will be more changes announced this year that will allow the FMCSA to prioritize intervention of the highest risk carriers. Comments will be accepted until May 6, 2016.

The new prioritization follows the finding of an NTSB investigation released in February involving two “high risk” carriers in which a commercial driver struck a disabled commercial truck, which resulted in one death and injuries to both drivers and a state trooper. As pointed out by the NTSB, despite having been labeled by the FMCSAs as high risk, neither carrier had meaningfully improved their safety or were prevented from operating. The NTSB found that the driver that caused the accident had slept very little leading up to the accident and had frequently falsified his logbook, and the carrier willfully ignored FMCSA regulations. Regulatory violations were rampant for the truck that was struck as well. That driver had falsified his logbook more than half of the time and did not have a valid Commercial Driver’s License, and the truck he was driving had unsafe brakes, tires and lights.

### *FMCSA Will Accept Mexican Annual Inspections*

Despite some differences between Mexican requirements and U.S. requirements for periodic inspections of commercial motor vehicles, the FMCSA announced that it will accept Mexican standards for periodic commercial vehicle inspections of Mexico-domiciled motor carriers. Mexico-domiciled motor carriers operating in the United States must ensure that their trucks are inspected annually by Mexican authorities in accordance with Mexican law, and must possess a copy of the inspection report and a decal must be affixed to the truck. Mexico instituted these inspections in May of last year. Such carriers may no longer rely on the currently accepted practices used to meet the periodic inspection requirement, which include having a carrier’s employees inspect its own trucks, using private garages, or using roadside inspections.

The FMCSA’s acceptance of Mexican standards for periodic inspections only affects the manner by which Mexican-domiciled motor carriers must comply with the period inspection requirement contained in 49 CFR 396.17. It does not affect the other requirements. Mexican-domiciled carriers must still comply with U.S. regulations when operating in the United States, such as 49 CFR Part 393 governing parts and accessories, even if the carrier is subject to a lesser or different standard under Mexican law.

### *FMCSA Issues Proposed Rule Requiring Training for Entry-Level Drivers*

The FMCSA issued a proposed rule requiring entry-level commercial drivers to receive training before obtaining a Commercial Driver’s License (CDL). 81 Fed. Reg. 11944 (Mar. 7, 2016). In order to receive a Class A CDL (required for large tractor-trailers), trainees would be required to receive a minimum of 30 hours of behind-the-wheel training, at least 10 hours of which must be on a driving range and nearly as long required on public roads, at a minimum. In order to receive a Class B CDL (required for large trucks without trailers, or with lighter trailers), trainees would be required to receive at least 15 hours of behind-the-wheel training, seven hours of which must be on public roads.

The rule would not apply to existing CDL holders (unless seeking an upgrade or additional endorsement), just first-time applicants and those who have been disqualified from holding a CDL seeking a new license. Military drivers, farmers and firefighters would be exempt. Providers of CDL training would be required to be listed on an FMCSA registry and meet certain minimum curriculum qualifications.

The rule was mandated by the 2012 Moving Ahead for Progress in the 21st Century Act (MAP-21). The FMCSA stated that it followed a consensus agreement from the Entry-Level Driver Training Advisory Committee, which was made up of stakeholders, “to the maximum extent possible consistent with its legal obligations.” 81 Fed. Reg. at 11953. Attempts to require that truck drivers receive training date back at least 30 years.

### *Drafting Error in Recent Hours of Service Law Would Reshape the Requirement if Not Fixed*

Since 2003, drivers have been able to restart the clock on the number of hours they are permitted to drive during a week by being off duty for 34 consecutive hours. In 2013, the FMCSA instituted a further requirement that this 34-hour period must include two consecutive periods between 1 a.m. and 5 a.m. Congress suspended the 1-5 a.m. requirement in 2014 pending further study amid concerns that the rule puts more drivers on the road during more heavily travelled times of the day and thus might have an adverse impact on safety (and traffic), among other complaints.

A law passed in December was intended to make it harder for the FMCSA to reinstate the rule, requiring that the FMCSA study the 1-5 a.m. requirement, and reinstate it only if the study shows "statistically significant improvement in all outcomes related to safety, operator fatigue, driver health and longevity, and work schedules," as compared to before the rule went into effect. But due to a drafting error, if the study does not demonstrate these outcomes, the FMCSA is instructed to jettison the restart system altogether, rather than just the 1-5 a.m. requirement. Legislators are looking for a bill in which to include a revision of the error.

### *For Self-Driving Cars, NHTSA Deems Artificial Intelligence to be the "Driver"*

National Highway Traffic Safety Administration (NHTSA) has provided a legal interpretation that may help self-driving vehicle manufactures fit their technology into existing regulations. In response to Google's request for an interpretation of safety standards with respect to autonomous vehicles, NHTSA stated that "[i]f no human occupant of the vehicle can actually drive the vehicle, it is more reasonable to identify the 'driver' as whatever (as opposed to whoever) is doing the driving." (emphasis in original). The interpretation does not relieve Google from meeting regulatory requirements, it merely indicates that the artificial intelligence will be the subject of references to the driver or operator in the regulations.

NHTSA urged Google to submit exemption petitions for certain regulatory hurdles. However, it stated that some issues raised by Google were beyond the scope of an interpretation of the regulations (which is to clarify regulations, not revise them), and that those issues would need to be resolved by "rulemaking or other regulatory means." The letter is available at <http://isearch.nhtsa.gov/files/Google%20--%20compiled%20response%20to%2012%20Nov%202015%20inter%20request%20--%204%20Feb%2016%20final.htm>

This is one step in what has been a larger emphasis from the Department of Transportation to support advancements in autonomous vehicle technology. NHTSA will hold two hearings in April to receive public input on self-driving cars, one in Washington, D.C. and the other in California. The agency is also in the midst of examining its current regulatory framework with respect to the tools it needs to advance and promote self-driving technology, which will culminate in a report slated to be finished in July.

### *Quick Takes:*

- Darling confirmed by Senate Commerce Committee – The Senate Commerce Committee has approved Scott Darling's nomination to be the Administrator of the FMCSA. He has served as acting administrator since August of 2015. A floor vote is required before he can be approved by the Senate.
- Comment period extended for Safety Fitness Determination rulemaking – The FMCSA is extending the deadline to comment on its proposed rule that would overhaul safety fitness determinations by replacing the "satisfactory," "conditional," or "unsatisfactory" ratings with a "fit" or "unfit" determination using Compliance Safety Accountability (CSA) data. The rule is at odds with the Fixing America's Surface Transportation Act of 2015 (FAST Act), which requires the FMCSA to study its CSA system, which critics contend are not valid for safety analysis. Comments will be received until May 23, 2016.
- EPA defends regulatory authority over trailers, glider vehicles and glider kits – The Environmental Protection Agency (EPA) has defended its regulatory authority over trailers, glider vehicles and glider kits in the Phase 2 heavy-duty truck greenhouse-gas emissions regulation. The defense was contained in

a legal memorandum released among more than two dozen documents under docket NHTSA-2014-0132. The EPA contends that despite the arguments of the Truck Trailer Manufacturers Association, trailer and glider manufacturers are reasonably classified as motor vehicle makers, giving the EPA regulatory authority over them.