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Transportation Companies Must Plan for and Implement Changes for 2013 to Comply with New Hours of Service Rules

By Michael Gregg

The Federal Motor Carrier Safety Administration (FMCSA) recently published a final rule establishing new Hours of Service (HOS) regulations for commercial motor vehicles (CMV). The 2011 final rule—which was preceded by years of litigation—institutes a new 30-minute rest break requirement for drivers, mandates that the 34-hour restart provision include two off-duty periods between 1:00 a.m. and 5:00 a.m., and revises the definition of on-duty time. The final rule also establishes penalties for egregious violations of the HOS regulations and revises log book requirements for drivers involved in oilfield operations.

New Rest Break Requirement

The 2011 final rule amends the regulations to prohibit a driver from driving if more than eight hours have passed since the driver's last off-duty or sleeper-berth break of at least 30 minutes. A driver can take the required break anywhere between the third and eighth hour after coming on duty. A driver who plans to drive until the end of the 14th hour and wants to take only one break will need to take the break between the sixth and eighth hour after coming on duty. Drivers who do not perform driving activities after their eighth hour on duty can dispense with the break altogether.

Drivers transporting certain hazardous materials (Division 1.1, 1.2 or 1.3 explosives) are exempt from the off-duty-break rule. Gasoline and fuel oil are considered Class 3 flammable liquids, so drivers transporting such liquids do not appear to be exempt from the break. Drivers transporting Division 1.1, 1.2 or 1.3 explosives may count on-duty time spent attending to the CMV toward the break as long as they are not engaged in other on-duty work. Under 49 C.F.R. section 397.5, a motor vehicle is "attended to" when "the person in charge of the vehicle is on the vehicle, awake, and not in a sleeper berth, or is within 100 feet of the vehicle and has it within his/her unobstructed field of view." For drivers who qualify under the exception, the 30 minutes will continue to be on-duty time and drivers will have to annotate their logs to indicate when the on-duty breaks were taken.

New Limitations on 34-Hour Restart

Under the pre-2003 regulations, drivers were prohibited from driving after having been on duty

for 60 hours in seven consecutive days or 70 hours in eight consecutive days, depending on whether the carrier operated every day. The 2003 final rule created a new provision called the 34-hour restart. The restart provision allows drivers to restart their weekly 60- or 70-hour on-duty limit whenever they take 34 consecutive hours off duty.

Since its adoption in 2003, the 34-hour restart provision has been the subject of on-going litigation. On July 16, 2004, the U.S. Court of Appeals for the District of Columbia vacated the 2003 final rule because the FMCSA had not considered the effects of the changes in the HOS regulations on drivers' health. The court also expressed concerns about the restart provision because it allowed drivers to exceed the maximum 60- and 70-hour weekly on-duty limit, up to an average of 82 hours. The FMCSA received temporary relief from the court's decision vacating the 2003 final rule when Congress passed the Surface Transportation Extension Act of 2004 and extended the 2003 final rule for one year to give the FMCSA time to address the issues raised by the court.

In response to the court's decision vacating the 2003 final rule, the FMCSA conducted an extensive review to determine the effect of the new provisions on drivers' health and published revised regulations in 2005. The 2005 final rule was challenged again, however, and in July 2007 the appellate court vacated the 34-hour restart provision and the new 11-hour driving limit discussed below. The court found that the FMCSA violated the Administrative Procedures Act by failing to provide an opportunity for public comments on the methodology of the operator-fatigue model (a crash risk analysis that was used as a justification for the 2005 final rule) with respect to the effects of time-on-task. The court also found that the FMCSA failed to provide a reasoned explanation for some critical elements of the methodology.

The FMCSA published a new final rule in 2008 after addressing the court's concerns. The new final rule was challenged again. In October 2009, the FMCSA reached a settlement with the petitioners and agreed to publish a final rule establishing new HOS regulations. The new limitations on the restart provision are a by-product of years of litigation.

The 2011 final rule amends the regulations to limit the use of the 34-hour restart provision to once every 168 hours (seven days) and to require that anyone using the 34-hour restart provision have as part of the restart, two off-duty periods between 1:00 a.m. to 5:00 a.m. The 1:00 a.m. to 5:00 a.m. time period is measured by the driver's home terminal, so drivers who travel in other time zones must keep track of the time at their home terminal in order to comply with the restart provision.

The express purpose of the limitations on the restart provision is to reduce the maximum weekly hours drivers may work. The FMCSA expressed concern that the introduction of the 34-hour restart provision in 2003 resulted in an increase in drivers' maximum weekly work hours from 70 to 82. The purpose of limiting the restart provision to once every 168 hours is to reduce the maximum number of weekly hours drivers can work from an average of 82 to 70. Only drivers who work nights and work more than 60 or 70 hours in a week will be affected by the new limitations on the restart provision. Certain drivers in construction, ground water drilling and oilfield industries are not subject to this rule, as they observe a 24-hour restart.

New Definition of On-Duty Time

The 2011 final rule revises the definition of "on-duty time" and excludes from that definition any time spent resting in a *parked* CMV. The revisions also allow team drivers to log as off-duty up to two hours spent resting in the passenger seat of a moving CMV immediately before or after spending the eight-hour period in the sleeper berth. Time spent "attending a commercial motor vehicle being loaded or unloaded, remaining in readiness to operate the commercial motor vehicle, or in giving or receiving receipts for shipments loaded or unloaded" will not qualify as "resting."

In adopting the revisions to on-duty time, the FMCSA said it was concerned that under the previous definition, a driver could be forced to spend his or her break between shifts out of the cab even if there was no safe place to do so.

While the revisions contain a maximum resting period of two hours for a team driver resting in a passenger seat of a moving CMV, there is no minimum or maximum time limit for drivers "resting" in a *parked* CMV.

11-Hour Daily Driving Limit / 14-Hour On-Duty Limit / Weekly On-Duty Limit

Under the pre-2003 regulations, CMV drivers were prohibited from driving more than ten hours daily without taking a required off-duty period.

The 2003 final rule increased the daily driving limit from ten to 11 hours. Since then, the increase in the daily driving limit has been the subject of litigation.

The FMCSA favored going back to the ten-hour daily driving limit, but ultimately maintained the 11-hour daily driving limit for property-carrying CMV drivers in the 2011 final rule. The FMCSA said it maintained the 11-hour limit because it has substantially higher net benefits, and the data do not show a “statistically significant distinction between the crash risk associated with any two adjacent work hours.” The FMCSA said, however, that “future research may provide a basis for reconsidering the daily driving limit,” and the agency will conduct further analysis of the relative crash risk by driving hour and the impact of the changes to the regulations.

Prior to the 2003 final rule, CMV drivers could not drive after being on duty for 15 hours in a day. Drivers could, however, take periodic off-duty breaks to extend the driving-eligible on-duty limit beyond 15 hours. The 2003 final rule reduced the daily on-duty limit from 15 hours to 14 hours and prohibited drivers from extending the on-duty limit by taking off-duty breaks during their shifts. The 2011 final rule maintains the daily 14-hour driving-eligible on-duty limit. Because of the break provision, drivers who are driving after the eighth hour on duty will be able to work a maximum of 13.5 hours in the 14-hour period. The 60- and 70-hour weekly on-duty limits were also not changed.

New Penalties for Egregious Violations

The 2011 rule defines and establishes penalties for egregious violations of the 11-hour daily driving limit. Driving or allowing a driver to drive a CMV for three or more hours beyond the limit will be considered an egregious violation of the rule and subject the violator to civil penalties. Employers will face a maximum penalty of \$11,000 per offense and drivers face a maximum penalty of \$2,750 per offense. This penalty provision also applies to drivers of passenger-carrying vehicles. The FMCSA said it will not impose the maximum penalty automatically and will take into account “special circumstances.”

Clarifications Relating to Oilfield Operations

Under the preexisting rule, waiting time at a natural gas or oil well site for vehicles specially constructed to service oil wells was considered off-duty, provided all such time was fully and accurately accounted for in records to be maintained by the motor carrier. The 2011 final rule clarifies that such waiting time must be shown on a logbook or electronic equivalent as off duty and identified by annotations in the “remarks” section of the log or a separate line added to the “grid.” The 2011 final rule also clarifies that such “waiting time” is not included in the 14-hour on-duty limit.

Effective Date & Compliance Date

The 2011 final rule’s changes to “on-duty time” penalties for egregious violations of the 11-hour driving limit, and the oilfield provisions take effect on February 27, 2012 (the “effective date”). The limitations on 34-hour restart and the rest break requirement are scheduled to take effect on July 1, 2013 (the “compliance date”). The FMCSA set a compliance date in 2013 to provide the industry and law enforcement extra time to train personnel and to adjust schedules and automated systems.

Impact of the 2011 Final Rule

The impact of the 2011 final rule will depend on many factors, including the size and nature of a carrier’s operations. The revisions likely will result in additional costs for carriers, reduced income for some drivers and an increase in the cost of goods.

According to the FMCSA, the cost equivalent of the amendments is less than a three-cent-per-gallon increase in the price of diesel fuel to the long-haul industry. The FMCSA does not believe the amendments will result in a significant increase to the consumer because transportation costs represent a relatively small part of the cost of any consumer item—two to six percent for each food and beverage dollar. The FMCSA estimates that even if the 2011 final rule increases transportation costs by ten percent, it would add less than a penny per dollar to food and beverage prices.

In comments submitted to the FMCSA prior to the adoption of the rule, many complained that the proposed changes would result in dire

economic consequences. The FMCSA said no supporting evidence was presented. The FMCSA said the limitations on the 34-hour restart will reduce maximum weekly *driving* time by “no more than five percent for the few drivers who drive longer hours.” The agency acknowledged that those drivers working the longest hours will lose income, as the rule is intended to reduce the hours of such drivers.

Many also opposed the two-night requirement for the 34-hour restart rule on the grounds that it would unduly burden carrier operations that include driving at night and would add more CMVs to an already overburdened highway system during rush hours. The FMCSA dismissed these arguments and said most drivers who regularly drive overnight do not work enough hours to require a restart of their hours and, therefore, would not be subject to the two-night requirement. The FMCSA believes that an increase in rush hour traffic because of the two-night requirement is unlikely.

Finally, the revisions may provide additional support for the argument that state laws regulating meal and rest breaks for drivers of CMVs are preempted. Specifically, the institution of a break requirement and the revision of “on-duty time” to exclude time spent resting in a parked CMV shows that the FMCSA comprehensively regulates certain drivers’ hours of service, and state laws regulating meal and rest breaks stand as an obstacle.

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