

# REVIEW AND UPDATE: ALL THE LATEST REGARDING FEDERAL REGULATIONS

## I. Finding information on final and proposed rules

The interstate trucking industry is a highly regulated industry. In fact, much of your discovery will be focused on obtaining documents and testimony to reveal how the driver and motor carrier violated the Federal Motor Carrier Safety Regulations (“FMCSR”). These regulations are revised and updated constantly. Remaining current regarding the latest regulations, as well as monitoring proposed regulations, is vital.

Regulations are promulgated by the various Federal Departments and Agencies as part of their obligation to enforce the laws passed by Congress through the use of regulations. The regulations are developed through the rulemaking process. Generally, this requires the Departments and Agencies to publish proposed rules that are open for public comment. After the specified timeframe for comments, the Department or Agency publishes a final rule based on public comments and other information. When the final rules are published in the Federal Register, the rules will contain sections discussing the comments to the rules and, most likely, a section by section analysis of the rules which provides valuable insight into the manner in which the Agency intends to interpret the rules and how the affected industry reacted to the proposed rules.

The FMCSA lists its mission as follows: “Our primary mission is to reduce crashes, injuries, and fatalities involving large trucks and buses.” The FMCSA implements the following strategy to accomplish this mission:

- Develop and enforce data-driven regulations that balance motor carrier (truck and bus companies) safety with industry efficiency;
- Harness safety information systems to focus on higher risk carriers in enforcing the safety regulations;
- Target educational messages to carriers, commercial drivers, and the public; and
- Partner with stakeholders including Federal, State, and local enforcement agencies, the motor carrier industry, safety groups, and organized labor on efforts to reduce bus and truck-related crashes.

FMCSA regulations are central in meeting its obligations to keep the roads safe.

The Federal Motor Carrier Safety Administration website (<http://www.fmcsa.dot.gov>) contains an entire section entitled “Latest Rulemaking and Notices” which is devoted to new and proposed regulations. This section contains links to the final rules, interim final rules, interim rules, and notices. You can also access [://www.regulations.gov](http://www.regulations.gov), which is the site for all Federal regulations. This site links to the comments that were submitted should the need arise to research how the regulations developed.

## **II. Policy change on the use of advanced information technology**

On November 13, 2008, the FMCSA issued a Notice of Policy Change rescinding the 1997 policy concerning the use of advanced technology for motor carrier compliance with the FMCSR. Effective December 19, 2008, the prior policy was rescinded:

After more than a decade since the Agency established its policy, the use of advanced technology has become widely accepted and an integral component of the industry's logistics and operations management systems. The Agency's policy achieved its purpose; the once emerging technologies are today a common and essential component of the industry's logistics, operations and safety management systems to achieve the safe and efficient transportation of passengers and freight. Therefore, with this notice, the FMCSA rescinds the 1997 policy on Advanced Information Technology."

This policy change reflects the reality that most motor carriers are now using some type of technology, such as Qualcomm, in order to trace, route and manage their business. It is important to note that the FMCSA is not mandating the use of any type of advanced information technology; it is simply permitting its use. The practical effects of this policy change will become more apparent as carriers implement new information systems. For litigation purposes, we must recognize the interplay between these new electronic systems and the discovery of electronically stored information ("ESI").

In 2006, Rule 26 of the Federal Rules of Civil Procedure was amended to specify that ESI must be disclosed as well as traditional documents. Most businesses now conduct their work through electronic means, be it corresponding through email, making presentations using PowerPoint or other types of electronic data. The amendments to Rule 26 clarified that these electronic files are discoverable as well. The Rule 26 requirements will also apply to any electronic files used by a motor carrier.

In trucking litigation cases, these electronic files include GPS records, Qualcomm (or other types of electronic communications between the driver and dispatcher), computer generated waybills and bills of lading, fuel receipts, and all the other documents currently kept on paper. These electronic files will be subject to the same retention requirements as paper documents. Best practice is to include language requesting the retention of ESI as well as any hard copies in the initial retention letter.

At first glance, the move towards appears to be a positive development that should assist in demonstrating hours of service and other violations. GPS logs are difficult to falsify. Showing that the logs indicate that the driver was in one location while the GPS reveals that the vehicle was in an entirely different location is very powerful. Likewise, it is also difficult for a motor carrier to claim that it could not know that its drivers were over hours when the carrier is using software that is designed to automatically check for such problems.

Difficulties arise, however, when you attempt to obtain these electronic records. For instance, carriers might claim that the information was purged according to the computer system's

automatic destruction policy. Carriers are obligated to preserve ESI when litigation should be expected, exactly like any other document. However, the carriers and their counsel are likely to claim that the purging was inadvertent, that backups don't exist, or that the paper copies are just as good as the electronic data. Situations may also develop where a carrier made a hard copy of electronic data but that hard copy does not contain all the information in a certain electronic data field. For example, the software used by the carrier may allow for comments to be typed in a box that pops up when a certain key is pressed. If that key is not pressed when the information is printed, the hard copy will contain only a certain number of characters in that field and the remaining message is lost. At that point, the only recourse is the typical spoliation argument.

The move towards allowing carriers to use advanced information technology will be a net positive but requires particular discovery, such as how each carrier maintains the records as well as each carriers' process in maintaining records upon receipt of a retention letter. It will be equally important to determine the type of backup system used by the carrier as it is likely that the data may still exist on backup hard drives or some other type of backup system. Deposing the carrier's IT person should yield this information. Courts are becoming less accepting of the argument that the defendant did not know the information needed to be kept or that the data was purged inadvertently due to a routine process. The fact that the data is in bits and bytes instead of on reams of paper does not alter or negate the carrier's obligation to retain potentially relevant information.

### **III. Changes to the New Entrant Safety Assurance Process**

Amendments were made to the New Entrant Safety Assurance Process effective as of February 17, 2009 with compliance required by December 16, 2009. The New Entrant Safety Assurance Process is the program by which the FMCSA determines whether a new motor carrier is meeting the various safety requirements set out in the FMCSR. These regulations were designed to improve safety and the new safety requirements are stricter than those in the past. Approximately 68,700 motor carriers apply for interstate authority each year and 40,000 remain in the process through the safety audit.

#### **A. Chameleon carriers – 385.306**

These regulations come into effect whenever an application is made for a new DOT number. Note that the company may not be a brand new company, but an existing carrier be opening a new subsidiary or a prior company seeking to cease operations under one number and reopening under a new DOT number. The FMCSA uses the term "chameleon carrier" to refer to a carrier attempting to register as a new entrant and operate under a new DOT number in order to evade enforcement action and/or out of service orders issued against the carrier. It is not uncommon for a carrier with a bad safety record to shut down one corporate entity and open a new company involving the same individuals. The new company then files the application for, and starts operations under, the new DOT number, thereby effectively hiding the prior bad safety record.

In response, the FMCSA adopted section 385.306. These more stringent regulations strive to reduce the corporate shell games set up by unscrupulous motor carriers. Section 385.306 states that a carrier who provides false or misleading information or conceals material information in

connection with the application process is subject to revocation of the new entrant registration as well as civil and criminal penalties. An application requires the disclosure of inter-related companies and the individuals involved. The FMCSA now scrutinizes these applications for outstanding orders to cease operations. In the absence of such an order, the FMCSA will issue the new number and link the history of both companies by listing the old number in the database as a number under which the carrier has also done business. By cross indexing the prior company's safety history, (including any enforcement actions), with the new DOT number, the prior history remains available when accessing the new company's history.

#### **B. Obtaining operating authority – section 385.301 et seq.**

Based on a 99% pass rate, the FMCSA determined that its prior practices regarding safety audits were ineffective. Despite that pass rate, new carriers were still involved in a significantly higher percentage of accidents. The new regulations are designed to correct this problem.

Obtaining operating authority is a six step process. First, the applicant submits the appropriate type of form OP-1. This form is available online and may be submitted online. Second, a provisional MC or FF number is issued. Issuing this number does not grant the carrier operating authority, it is simply the initial number assigned. Third, the application must undergo a 10-day protest period during which time any person or entity has the opportunity to object to the issuance of that number. Fourth, the insurance company files the necessary forms with the FMCSA proving that the carrier has the minimum required insurance coverage. Fifth, the applicant or its agent files Form BOC-3 with the FMCSA. This form identifies the process agents located in each state that the carrier will pass through. Step six is the issuance of the certificate, permit, or license indicating that the carrier has received operating authority from the FMCSA. At that point, the carrier can begin operating.

#### **C. Safety audits and automatic failure – 385.308 and 385.321**

The initial grant of authority is provisional. There is an 18-month period during which that carrier is under stricter scrutiny. After the carrier has been in operation for a time period long enough to have sufficient records for review, (generally three months), a safety audit will be conducted.

A new carrier can still have its provisional authority revoked prior to the audit if any of the following are discovered through a roadside inspection or any other means:

1. Using a driver not possessing a valid CDL to operate a CMV. An invalid license includes one that falsified, revoked, expired or is missing a required endorsement.
2. Operating a vehicle placed out of service for violations of the FMCSR or compatible state laws and regulations without taking necessary corrective action.
3. Being involved in, through action or omission, a hazardous materials reportable incident involving a highway route controlled quantity of certain radioactive

materials, any quantity of certain explosives, any quantity of certain poison inhalation hazard materials

4. Being involved in, through action or omission, two or more hazardous materials reportable incidents involving any other type of hazardous materials;
5. Using a driver who tests positive for controlled substances or alcohol or who refuses to submit to required controlled substances or alcohol tests
6. Operating a CMV without the required levels of financial responsibility
7. Having a driver or vehicle out of service rate of 50% or more based upon at least three inspections occurring within a consecutive 90 day period

See 385.308

Any of the above violations will trigger expedited action. If a safety audit has not been done at the time the violation(s) is discovered, a safety audit will be scheduled as soon as possible. If the safety audit has already been performed, then the new entrant receives a notice mandating submission of evidence of corrective action within 30 days of the service date of the notice. The FMCSA retains the right to schedule a compliance review of any new entrant for any of these violations if the FMCSA determines that the violation warrants a thorough examination of the new entrant's operation. Failure to respond within 30 days of the notice results in revocation of the new entrant's registration.

The safety audit involves a review of the carrier's records and a review of the carrier's safety compliance practices. Under revised 385.321, the following 16 violations result in an automatic failure of the new entrant safety audit:

Violation	Guidelines for determining automatic failure of the safety audit
§382.115a/§382.115(b) - Failing to implement an alcohol and/or controlled substances testing program (domestic and foreign motor carriers, respectively)	Single occurrence
§382.201 – Using a driver known to have an alcohol content of 0.04 or greater to perform a safety-sensitive function	Single occurrence
§382.211 – Using a driver who has refused to submit to an alcohol or controlled substances test required under part 382	Single occurrence
§382.215 – Using a driver known to have tested positive for a controlled substance	Single occurrence
§382.305 – Failing to implement a random controlled substances and/or alcohol testing program	Single occurrence
§383.3(a)/§393.23(a) – Knowingly using a	Single occurrence

driver who does not possess a valid CDL	
§383.37(a) – Knowingly allowing, requiring, permitting, or authorizing an employee with a CDL which is suspended, revoked, or canceled by a State or who is disqualified to operate a commercial motor vehicle	Single occurrence
§387.51(a) – Knowingly allowing, requiring, permitting, or authorizing a driver to drive who is disqualified to drive a commercial motor vehicle	Single occurrence – this violation refers to a driver operating a CMV as defined under §383.5
§387.7 – Operating a motor vehicle without having in effect the required minimum levels of financial responsibility coverage	Single occurrence
§387.31(a) – Operating a passenger carrying vehicle without having in effect the required minimum levels of financial responsibility	Single occurrence
§391.15(a) – Knowingly using a disqualified driver	Single occurrence
§391.11(b)(4) – Knowingly using a physically unqualified driver	Single occurrence – this violation refers to a driver operating a CMV as defined under §390.5
§395.8 – Failing to require a driver to make a record of duty status	Requires a violation threshold (51% or more of examined records) to trigger automatic failure
§396.9(c)(2) – Requiring or permitting the operation of a CMV declared “out of service” before repairs are made	Single occurrence
§396.11(c) – Failing to correct out of service defects listed by driver in a driver vehicle inspection report before the vehicle is operated again	Single occurrence
§396.17 – Using a commercial motor vehicle not periodically inspected	Requires a violation threshold (51% or more of examined records) to trigger automatic failure

**D. Penalties for failing the safety audit – 385.319, 385.32, 385.331 and 385.337**

If the new entrant fails the safety audit, the FMCSA will provide written notice within 45 days that the registration will be revoked and its operations placed out of service if corrective action is not taken. The carrier is given 60 days to correct the inadequate safety management practices. If the carrier transports passengers or hauls hazardous waste, only 45 days are given. A carrier may be granted on 60-day extension if the carrier is making good faith steps towards compliance. A 10-day extension is available for carriers transporting passengers or hauling hazardous waste if that carrier submits evidence of corrective action and the FMCSA needs further time to review the adequacy of the correction. See 385.319.

If the new entrant fails to submit a written response demonstrating acceptable corrective action, the FMCSA will revoke the entrant’s registration and issue an out of service order on day 61

and/or day 46 respectively, or the day after any extension. See 385.325. Continuing to operate after the authority is revoked subjects the carrier to the penalty provisions at 49 USC 521(b)(2)(A) for each offense. See 385.331.

If the carrier refuses to permit the safety audit to be performed on its premises, the FMCSA will provide a written notice that the registration will be revoked and the operations will be placed out of service unless the new entrant agrees, in writing, within 10 days of the service date of the notice, to permit the safety audit to be performed. The refusal to permit a safety audit to be performed may also subject the new entrant to the penalty provisions of 49 USC 521 (b)(2)(A). See 385.337.

#### **E. Review process – 385.327**

The process to request an administrative review of a failed safety audit is set out in Section 385.327. If the carrier does not submit evidence of corrective action, this request must be made within 90 days after the date of notice that its basic safety management controls are inadequate. If evidence of corrective action has been submitted, the request is to be made within 90 days after the date the carrier is notified that its corrective action is insufficient and its basic safety management controls remain inadequate. In order to ensure that this process is complete before the prohibitions take effect, the carrier must submit the request within 15 days from the date of notice that its basic safety management controls are inadequate. Failure to submit the request within the 15 day period may result in revocation of the new entrant's registration and issuance of an out of service order before completion of the administrative review.

The FMCSA has to complete its review within 45 days for non-passenger/hazardous materials carriers and 30 days for passenger carriers/hazardous materials carriers. This decision is a final Agency action.

#### **F. Reapplication process – 385.329**

Under 385.329, a new entrant whose registration has been revoked and the operation placed out of service can reapply for a new entrant registration no sooner than 30 days from the date of the revocation. If the prior application was revoked due to a failed safety audit, the new entrant must:

1. submit an updated MCS-150;
2. submit evidence that it has corrected the deficiencies that resulted in revocation of its registration and will otherwise ensure that it will have basic safety management controls in effect; and
3. re-start the 18 month new entrant monitoring cycle again as of the date the re-filed application is approved.

If the new entrant registration was revoked because the FMCSA found the new entrant had failed to submit to a safety audit, it must do the following:

1. Submit an updated MCS-150;

2. re-start the 18 month new entrant monitoring cycle again as of the date the re-filed application is approved; and
3. submit to a safety audit.

If the new entrant is a for-hire carrier subject to the registration provisions under 49 USC 13901 and also has had its operating authority revoked, it must reapply for operating authority as set forth in 49 CFR 365.

#### **G. Implications of the increased safety requirements**

A carrier whose authority was granted in 2009 will not be able to argue that it was unaware of the need to have basic safety management controls in effect. The regulations also point to the specific areas that the FMCSA finds most likely to lead to accidents. This includes impaired drivers, failing to record duty status and allowing unsafe vehicles on the road. Initially, the FMCSA intended any of the 16 violations charted above to result in automatic failure. However, larger carriers submitted comments stating that it was unfair to disqualify a company for one faulty driver/vehicle. The compromise is the threshold level of 51%.

Applications for new carriers are generally coming from small businesses with only a few employees or perhaps an owner/operator. These new regulations stress that the FMCSR must be taken seriously, regardless of the size of the company.

A significant amount of information for carriers is available on the FMCSA website, including the ETA (Education and Technical Assistance) package and the pdf file entitled “the ETA – A Motor Carrier’s Guide to Improving Highway Safety” which provides overviews to the FMCSRs for both drivers and carriers. Use these guides to demonstrate that both drivers and carriers have easy access to both the regulations and direction from the FMCSA as to how the regulations will be interpreted.

Overall, the thrust of the new regulations is to heighten the scrutiny of new carriers and to weed out those carriers who do not meet at least minimal levels of safety. The FMCSA is focusing on those areas that most immediately impact safe driving, such as driving while intoxicated, or while physically unable to drive, or when the vehicle itself is unsafe. The FMCSA is also increasing its scrutiny of log-keeping practices. Taken in conjunction with the policy revision on use of electronic records, it appears that the FMCSA will take a dim view of a carrier’s contention that it would not know of its drivers’ log failures.

#### **IV. Medical certification requirements – parts 383 and 384**

Effective January 30, 2009, the medical certification requirements in parts 383 and 384 now require all states to maintain records regarding the medical certifications issued to non-exempt interstate CDL license holders. The states are also required to downgrade any CDL license if the driver does not have the required medical certificate. The driver’s qualifications requirements in 391.23 are also amended to require the motor carrier to obtain an original or copy of the medical examiner’s certificate and any medical variances upon which the certificate is based. A copy of these documents must be kept in the driver’s qualifications file.

Additionally, all states are now required to record in the Commercial Driver License Information System (CDLIS) the self-certification the driver made regarding the applicability of the Federal driver qualification rules and, for drivers subject to the requirements, the medical certification status information specified in the rule. The states must also record the name of the medical examiner in the CDLIS system. This information will then be available for cross-reference purposes and will permit the FMCSA to check for suspicious patterns of issuance. The burden is going to be on the driver to provide the required information to the drivers' license bureaus in sufficient time for the information to be processed.

There is a phase in process until January 30, 2012 for the new requirements. Section 383.71 requires anyone applying for a CDL prior to that date to certify that s/he meets the qualifications in part 391 or that s/he expects to operate only in intrastate commerce and is not subject to part 391. Post January 30, 2012, the new applicants must certify that they are non-excepted interstate, excepted interstate, non-excepted intrastate or excepted intrastate. Current CDL holders must provide to the state on or after January 30, 2012 but before January 30, 2014 the certification required by §383.71(a)(1)(ii). Starting on January 30, 2012, new CDL applicants will have to provide an original or a copy of the actual medical examiner's certificate. The CDLIS record for the driver will then be marked certified. Current CDL holders must provide the same by January 30, 2014. Their records will also be marked certified. After January 30, 2012, a CDL holder must provide a copy of each subsequently issued medical examiner's certificate to the state.

As of January 30, 2012, states must (1) check that the medical certification of a driver that self-certified is "certified; (2) provide a date-stamped receipt to the driver when the driver submits the medical certificate; (3) verify from the CDLIS that the driver's medical certification status is "certified;" and (4) comply with the following requirements:

1. Post the driver's self-certification of type of driving under §383.71(a)(1)(ii);
2. retain the original or a copy of the medical certification of any driver required to provide documentation of physical qualification for 3 years beyond the date the certificate was issued; and
3. post the information from the medical examiner's certificate within 10 business days to the CDLIS record including:
  - a. Medical examiner's name;
  - b. Medical examiner's telephone number;
  - c. Date of medical examiner's certificate issuance;
  - d. Medical examiner's license or certificate number and the issuing state;
  - e. Medical examiner's National Registry identification number (if the National Registry Medical Examiners mandated by 49 USC 31149(d) requires one);
  - f. The indicator of medical certification status, i.e. "certified" or "not certified;"
  - g. Expiration date of the medical examiner's certificate;
  - h. Existence of any medical variance on the medical certificate, such as exemption, Skill Performance Evaluation (SPE) certification, or grandfather provisions;

- i. Any restrictions (e.g., corrective lenses, hearing aid, required to have possession of an exemption letter or SPE certificate while on duty, etc.); and
- j. Date the medical examiner's certificate information was posted to the CDLIS driver record.

Beginning January 30, 2012, the state must update the medical status to "non-certified" within 10 calendar days of the driver's medical certification status expiring or a medical variance expiring or being rescinded. See 383.73

Also starting on January 30, 2012, if the medical certification or medical variance expires, or the FMCSA notifies the state that a medical variance was removed or rescinded, the state must notify the CDL holder that s/he has been marked "not certified" and that CDL privilege will be removed unless the driver submits a current medical certificate, updated variance information or changes the certification to intrastate only. The state must then initiate procedures to downgrade the CDL license. The method is left to each state but must be accomplished within 60 days. See 383.73. Section 384.206 requires the state to check its own record before issuing, renewing, upgrading or transferring a CDL to any person. If the check is adverse, then the state must implement the downgrade process. If there is no information on file, the CDL application must be denied and the downgrade process implemented.

The driver's qualification requirements also change on January 30, 2012. Under 391.23(m)(1), the carrier must obtain an original or copy of the medical examiner's certificate issued under 391.43 and any medical variance prior to allowing the driver to operate a CMV. These must be kept in the file. Under 391.23(m)(2), for drivers required to have a CDL under part 383, beginning on January 30, 2012, using the CDLIS motor vehicle record obtained from the current licensing state, the motor carrier must verify and document in the driver qualification file the following before allowing a driver to operate a CMV

1. The type of operation the driver self-certified that s/he will perform in accordance with §§383.71(a)(ii) and 383(g); or
2. if the driver has provided the motor carrier with a date-stamped receipt from the state driver's licensing agency for the medical examiner's certificate given to the driver in accordance with §383.73(a)(5), the motor carrier may use that receipt as proof of the driver's medical certification for up to 15 days after the date stamped on the receipt.

After January 30, 2014, if a driver operating in non-excepted, interstate commerce has no medical certification status information on the CDLIS MVR obtained from the current state driver licensing agency, the employing motor carrier may accept a medical examiner's certificate issued to that driver prior to January 30, 2012 and place a copy of it in the driver qualification file prior to allowing the driver to operate a CMV in interstate commerce.

The intent of these regulations is to prevent drivers who are not medically qualified from taking to the road and to prevent fraud in the issuance of the medical examiner's certificates. By creating a computerized system and requiring copies of the actual certificates, fraud will be more easily detectable. In theory, there will also be an automated system for checking that the medical

certificates are updated as required. The lead time is being given to permit the states to create their own procedures and to obtain the physical and technological capabilities to comply.

#### **V. Proposed rules on creating a National Registry of Certified Medical Examiners**

In conjunction with the new medical certification requirements, a National Registry of Certified Medical Examiners is being established. A proposed rule was published in the Federal Register on 12/1/08, Vol. 73, No. 231. The purpose of the rule is to establish and maintain a national registry of certified medical examiners and to require all medical examiners who conduct medical examinations for interstate commercial motor vehicle drivers complete certain training regarding FMCSA physical qualification standards, pass a test to verify their understanding of those standards, and maintain competence by periodic training and testing. Following the establishment of the NRCME and a transition period, FMCSA would accept as valid only those certificates issued by medical examiners listed on the NRCME. The FMCSA is developing the NRCME Program to improve highway safety and driver health by requiring that medical examiners be trained and certified to determine effectively whether a commercial motor vehicle's driver's health meets FMCSA standards.