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FMCSA Publishes Proposed HOS Rules in Federal Register

The Federal Motor Carrier Safety Administration's (FMCSA) proposed changes to the hours-of-service (HOS) rules have been published to the *Federal Register*, about a week after they were made public.

Publication means industry stakeholders have 45 days - until October 7, 2019 - to provide commentary on the five proposed changes. Comments can be submitted to the federal eRulemaking portal at regulations.gov at Docket Number FMCSA-2018-0248.

When the comment period closes, FMCSA will consider the latest comments before issuing a final rule. FMCSA previously hoped to finalize the rules before the December 16, 2019, electronic logging device (ELD) deadline, but the process is likely to take much longer.

The five proposed changes from FMCSA are:

- Changing the short-haul exception for certain commercial motor vehicle drivers from 12 to 14 hours and extending the distance limit from 100 air miles to 150 air miles.
- Extending the adverse driving conditions exception by two hours.
- Requiring a minimum 30-minute break before eight consecutive hours of driving time occurs. The break would be for at least 30 minutes and could be satisfied with on-duty, not driving time, or off-duty time, rather than just off-duty time.
- Modifying the sleeper-berth exception to allow drivers to split their required 10 hours off-duty time into two periods of at least seven consecutive hours in one period and not less than two consecutive hours either off-duty or in the sleeper berth.

Allowing one off-duty break of at least 30 minutes, but not more than three hours, that would pause a truck driver's 14-hour driving window, provided the driver takes 10 consecutive hours off-duty at the end of the work shift.

A Six-Page FMLA Eligibility/Rights & Responsibilities Notice?

Even though the current optional-use FMLA forms and notices do not expire until 8/31/2020, the Department of Labor (DOL) is looking at making some potential changes to them. The forms include the following:

- Eligibility/rights & responsibilities notice;
- Designation notice;
- Certification for employee's condition;
- Certification for family member's condition;
- Certification for qualifying exigency;
- Certification for military caregiver, current member; and
- Certification for military caregiver, veteran.

The DOL indicated that the goal in revising the forms is to increase compliance with the FMLA, improve customer service, and reduce the burden on the public by making the forms easier to understand and use. Some of the changes include the following:

Increasing the eligibility/rights & responsibilities notice from two to six pages, with the use of more check boxes and fewer blank lines for input, the addition of how many hours in the past 12 months the employee has worked (toward eligibility), a clearer statement that failure to provide information (e.g., certification) can result in leave being denied, greater explanation of the family relationship documentation/statement, more details on general leave entitlement, a bit more explanation of the rolling backward method, clearer location of key employee information, more detail and clearer location of substitution of paid leave information, clearer location of health benefits maintenance information, added information on other benefits, separation of return-to-work requirements, clearer location of periodic report information, a statement that if circumstances change the employee is to contact you within two days.

The designation notice would increase from one to four pages to include the reason for the leave, putting the determination of whether leave is approved or not closer together, setting off an entire section on whether additional information is needed, setting off information on second and third opinions, clearly delineating a section if leave is approved where the employer inputs information on how much leave is being counted, grouping information on paid leave, and separating requirements for fitness-for-duty certifications.

The certifications would also grow to six pages, but they better reflect the definition of a serious health condition and indicate that terms such as "lifetime" and "unknown" may be insufficient. The changes also include options for future treatment and incapacity. They include a place to indicate the date certification was requested, the date it is to be returned, more instructions for the employer, a spot for the doctor's email address, an option to include information on when a condition will start, and clearer information on how much leave is needed, particularly intermittent leave. Finally, they include the definition of a serious health condition. The latter helped increase the length of the form.

For family members, a list is provided to choose from instead of simply a blank space, including an explanation of those who stand/stood in loco parentis. A list is also provided regarding what care the employee will be providing.

While the use of lists can make completing the forms easier, doctors might check more than one box, lending to some confusion.

If FMLA forms have often left you less than satisfied, feel free to provide your input, as comments are being accepted until October 4.

OSHA and Health Canada Release Joint HazCom Guidance

OSHA and Health Canada announced that in keeping with the Regulatory Cooperation Council Work Plan for workplace chemicals, they have developed guidance on three subjects in order to support implementation of the Globally Harmonized System of Classification and Labeling of Chemicals (GHS).

The guidance includes:

- Comparison of U.S. and Canada's Regulatory Process for Hazardous Products in the Workplace,
- Label Comparison for Shipped Containers, and
- Labeling Pictogram for Hazards Not Otherwise Classified (HNOC), Physical Hazards Not Otherwise Classified (PHNOC) and Health Hazards Not Otherwise Classified (HHNOC).

The Canada - United States Regulatory Cooperation Council (RCC) was created in 2011 to reduce unnecessary differences between regulatory frameworks and better align the two countries' regulatory approaches, where possible.
The guidance can be found on the Hazard Communication topic page of OSHA's website and on the Occupational Health and Safety page on the Government of Canada's website.

FMCSA Declares Missouri Driver Imminent Hazard

The Federal Motor Carrier Safety Administration (FMCSA) declared a Missouri-licensed truck driver possessing a commercial driver's license an imminent hazard to public safety following a fatal crash near Indianapolis, Indiana. On July 14, 2019, the driver was operating a tractor-trailer in an active work zone along Interstate 465 eastbound near Keystone Ave. when his truck, traveling above the posted the speed limit, collided into the rear of a line of vehicles. The collision resulted in a fire that killed two children and their mother and sent seven other people to the hospital.

Indiana State Police arrested and charged the driver with three counts of reckless homicide and one count of reckless operation of a vehicle in a highway work zone.

Further investigation of the incident revealed that the man had a work background that included a history of careless driving and falsifications on his job application.

CSB Warns of Phone Scam: Callers Impersonating Federal Investigators

The U.S. Chemical Safety and Hazard Investigation Board (CSB) says it has been made aware of a recent wave of scams where callers identify themselves as a federal officer and instruct people to provide confidential information to avoid fines.

The CSB says the calls are fraudulent and that federal agencies do not call or e-mail individuals threatening them to provide personal information or send money.

If you have been contacted by someone claiming to be a representative from the CSB, the Agency asks that you contact public@csb.gov.

BLS Looks at Fatal Occupational Injuries to Independent Workers

In its first report on workplace injuries and illnesses of independent workers, the Bureau of Labor Statistics (BLS) identified 662 fatal occupational injuries in 2016 and 613 in 2017. Of the total 10,337 fatal occupational injuries for all workers occurring over the 2016-2017 period, data show that 1,275 (12 percent) were incurred by independent workers. The occupation with the highest number of fatalities was heavy and tractor-trailer drivers with 173, followed by first-line supervisors of construction trades and extraction workers with 95, and construction laborers with 79.

The report also found:

- Workers age 55-64 accounted for a greater number of worker fatalities;
- Violence, including homicides and suicides, is less frequent among independent workers than all other workers;
- Falls to a lower level accounted for 101 percent more independent worker deaths than all other workers' deaths; and
- Entertainers and sports workers had the highest ratio of fatalities, followed by workers in forest, conservation, and logging; supervision of construction and extraction work; fishing and hunting; grounds maintenance; and air transportation.

The report notes that while independent workers are found across many different types of occupations, they share some commonalities:

- Jobs are short-term, have a definite beginning and end, and payment is generally not made until the task has been completed.
- There is no guarantee of future work beyond the determined task.
- Work is not guaranteed to be available when the worker wants it.
- The worker and client must agree to the terms of the work.
- Nearly all independent workers are self-employed.

OSHA Seeks Information on Table 1 of Silica Standard for Construction

OSHA is requesting information on the effectiveness of engineering and work practice control methods not currently included for the tasks and equipment listed on Table 1 of the Respirable Crystalline Silica standard for construction, at 1926.1153.

In addition, OSHA seeks comments about whether to revise 1910.1053(a)(3) of the Respirable Crystalline Silica Standard for General Industry to broaden the circumstances under which general industry and maritime employers would be permitted to comply with Table 1 of the silica standard for construction.

OSHA says that information submitted will allow it to consider new developments and enhanced control methods for equipment that generates exposures to silica and provide additional data on exposures to silica from equipment and tasks using a variety of control methods under different workplace conditions.

Comments must be submitted by October 14, 2019, via regulations.gov using Docket No. OSHA-2010-0034, or by fax or mail.

Company Found in Contempt of Court for Failing to Pay OSHA Penalties

The U.S. Court of Appeals for the Third Circuit has found a New Jersey construction company and its president in contempt of court for failing to pay $412,000 in penalties assessed by OSHA. OSHA cited the company for numerous safety violations, including multiple willful violations of the Agency's fall protection standards. The court previously ordered the company and its president to pay the fine after the Occupational Safety and Health Review Commission (OSHRC) affirmed the violations.

The court's July 25, 2019, contempt judgment specifies that the company's president is liable for the full amount of the penalty if the company does not pay. If the company and its president do not fully pay within 30 days or show the court why they cannot do so, the Secretary of Labor is to propose a daily penalty for the court to assess.

The court's ruling is the result of lengthy litigation by the Department's Office of the Solicitor including multiple hearings before the OSHRC and the court of appeals to affirm the company's violations of OSHA's safety requirements and remedy the company's longstanding refusal to pay the associated penalties.

FMCSA Announces Regional Emergency Declaration for Hurricane Dorian

The Federal Motor Carrier Safety Administration announced a Regional Emergency Declaration for Hurricane Dorian.

The declaration means that motor carriers and drivers providing direct support to relief efforts related to the hurricane are granted emergency relief exemption from the hours-of-service rules, Parts 390 through 399, in Title 49 Code of Federal Regulations.

The emergency declaration does not include exemptions from drug and alcohol testing, commercial driver's license requirements, insurance responsibilities, and size and weight requirements.

The declaration remains in effect for the duration of the emergency or September 28, 2019, whichever is less.

States affected by the declaration are:

• Alabama	• Florida
• Georgia	• Kentucky
• Louisiana	• Mississippi
• North Carolina	• South Carolina
• Tennessee	• Virginia

International Roadcheck Inspections Sideline 12,000 CMVs

More than 12,000 vehicles and almost 2,800 drivers were removed from the roadways for violations during the annual International Roadcheck hosted by the Commercial Vehicle Safety Alliance (CVSA).

The Roadcheck is a 72-hour inspection and safety event that identifies and removes unsafe commercial motor vehicles (CMVs) and drivers from roadways in the U.S. and Canada. This year's event was June 4-6.

Inspectors conducted 67,072 inspections on CMVs, which represented a 17.9 percent out-of-service (OOS) rate for vehicles and a 4.2 percent OOS rate for drivers. Of the inspections conducted, 45,068 were Level 1, which consists of a 37-step procedure that includes an exam of the driver operating requirements and vehicle equipment.

A total of 12,019 vehicles were declared OOS and 2,784 drivers were declared OOS.

Braking systems ranked No. 1 on the list of OOS vehicle violations. A chart of the top 10 follows:

Rank	Vehicle Violation Category	Number of Violations	Out of Service Percentage
1	Braking systems	4,578	28%
2	Tires and wheels	3,156	19.3%
3	Brake adjustment	2,801	17.1%
4	Cargo securement	1,991	12.2%
5	Lighting devices	1,875	11.5%
6	Suspensions	703	4.3%
7	Steering mechanisms	408	2.5%
8	Frames	170	1%
9	Driveline/driveshaft	61	0.4%
10	Fuel systems	44	0.3%

Rank	Vehicle Violation Category	Number of Violations	Out of Service Percentage
1	Hours-of-service	1,179	37.2%
2	Wrong class license	714	22.5%
3	False logs	467	17.1%
4	Suspended license	232	7.3%
5	Drugs/alcohol	99	3.1%

Other inspection notes included:

- 748 seat belt violations,
- 13.7% of CMVs inspected for hazardous materials/dangers goods (527 of 3,851) were placed OOS, and
- 5.7% of motor coaches (47 of 823) were placed OOS.

Misclassifying Workers as Independent Contractors Doesn't Violate the NLRA

In an employer-friendly determination on August 29, the National Labor Relations Board (NLRB) held that employers do not violate the National Labor Relations Act (NLRA) solely by misclassifying employees as independent contractors. The NLRB majority held that an employer's communication to its workers of its opinion that they are I ndependent contractors does not, by itself, violate the NLRA if that opinion turns out to be mistaken. According to the decision, such communication does not inherently threaten those employees with termination or other adverse action if they engage in activities protected by the NLRA, nor does it communicate that it would be futile for them to engage in such activities.

The case involved is *Velox Express, Inc.*, 15-CA-184006, 368 NLRB No. 61. The employer, a courier company, classified some of its drivers as independent contractors. One employee felt she was an employee and not an independent contractor, in part because drivers did not have discretion to determine when and how long they work or to set their routes and the customers they service or had little opportunity for economic gain or loss. She indicated that, by misclassifying employees as independent contractors, an employer, regardless of its motive or intent, inherently interferes with, restrains, and coerces those employees in the exercise of their NLRA rights because the employer effectively conveys that the misclassified employees do not have any rights or protections under the NLRA when, in fact, they do.

In the case, the NLRB majority held that the employer's misclassification of its employees as independent contractors was not a separate, stand-alone violation.

The issue of whether an individual is an employee or an independent contractor has been evolving, and the NLRB is only one agency that has input on the matter. The U.S. Department of Labor (DOL) and the Internal Revenue Service (IRS) also have their definitions of the terms, so employers must consider a variety of independent-contractor standards under different federal, state, and local laws and regulations. With this latest decision from the NLRB, employers can at least cross the NLRA issue of independent contractors off their worry list. Employers would still need to be able to show that an individual is an independent contractor. This can be done by applying the common-law agency test.

Common law test of factors to be considered include:

The extent of control which, by the agreement, the master may exercise over the details of the work.

- Whether or not the one employed is engaged in a distinct occupation or business.
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
- The skill required in the particular occupation.
- Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
- The length of time for which the person is employed.
- The method of payment, whether by the time or by the job.
- Whether or not the work is part of the regular business of the employer.
- Whether or not the parties believe they are creating the relation of master and servant.
- Whether the principal is in business or not.

Federal Judge Orders Company, Owner to Pay $1M to Terminated Employees

A federal judge in the U.S. District Court for the Eastern District of Pennsylvania has awarded $1,047,399 in lost wages and punitive damages to two former employees of a Pennsylvania manufacturer after a jury found the company and its owner fired them in retaliation for their participation in a federal safety investigation.

On April 2, 2019, a jury determined that the company and its owner illegally fired the employees because they participated in a 2014 OSHA inspection. The inspection followed an incident in which one of the employees' coworkers suffered the amputation of three fingers.

The company fired one of the employees after OSHA began an onsite investigation, and fired the second employee shortly after OSHA issued citations and assessed the company with penalties. The acts of retaliation violated Section 11(c) of the Occupational Safety and Health Act (OSH Act). The court's award of $500,000 in punitive damages is the largest punitive award ever under Section 11(c) of the OSH Act. The court justified the award in light of the defendants' "deliberative flouting of the act."

In addition to damages, the judge awarded the former employees $547,399 in front and back pay, prejudgment interest, and additional amounts to compensate for the adverse tax consequences of their receiving a large, one-time payment. The judge also ordered that the company and its owner immediately post an anti-retaliation notice at the plant, and never again violate Section 11(c) of the OSH Act.

Encouraging Near Miss Reporting

You want employees to report near misses, but you aren't getting any reports. Does this mean that near misses never happen, or does it mean they simply aren't getting reported? If employees won't report to you, they might still report safety concerns to OSHA, and you don't want that.

Hopefully, you encourage near miss reporting by making the process simple. If employees have to write up a description on a special form, they might not bother. Easier options may range from smartphone apps to simply calling a number and leaving a description, or making a verbal report to a supervisor who will later fill out a form.

Making the reporting process easy is a good first step, but ultimately, you need employees to come forward and make reports. Employees shouldn't wait until someone causes an injury that must be reported. Maybe it's time to stop waiting and start asking.

Start asking

Can employees recognize a near miss? This may sound simple, but if an "oops" situation is common, they may think of it as simply part of the work environment — and that's not good. You may need to describe the type of reports you're seeking.

During your next safety meeting, describe some common near miss incidents and ask employees if they've seen anything similar. Someone may have a story to share. Even something that happened at a previous place of employment could generate a discussion.

Go over the situation and consider how the near miss could have caused a serious injury. Ask employees to discuss what could be done to prevent those incidents. If no one volunteers a story, give a few examples and discuss them. Then, remind everyone to report any near misses, and explain that you'll address the reports as needed.

Provide for anonymity

Some employees worry that the person they reported will be punished, or that the person they "rat out" for unsafe conduct will retaliate against them. If that's a concern, setting up anonymous tip lines for near miss reports may prove more fruitful.

Anonymous reports may prevent a discussion during a safety meeting because talking about the situation might compromise anonymity. Still, a generic discussion of related safety issues may help reassure the anonymous person that no adverse consequences resulted, and that the company is serious about addressing concerns — and help you to show that punishment won't necessarily follow.

Reward the first step

Rewarding employees who make reports can also be effective. The reward doesn't have to be large; even a $50 gift card can encourage reporting. Make sure the reward is delivered relatively quickly (not weeks or months later). And when announcing that a reward is available, remind employees that they can still use the anonymous tip line (if you have one) but point out that if the company cannot identify the person making the report, it cannot reward that person.

A Weighty Issue: Do I Stop at Weigh Stations?

Almost all truck drivers have stopped at a weigh station at one time or another to ensure their commercial motor vehicle (CMV) complies with size and weight regulations.

But confusion can exist about which vehicles are required to stop.

No fed regulation

Weigh stations are not federally regulated — but states must operate them and enforce size and weight limits to receive federal funding. Since the funds are important to maintain roads, states will enforce sizes and weights to ensure the funds keep coming. In addition to the federal regulations, states have their own size and weight rules to enforce. Most use a combination of permanent scale houses, portable scales, and weigh-in motion (WIM) scales.

How the states enforce size and weight limits, though, is entirely up to them.

States all over the map

States may enforce sizes and weights however they see fit. Some states, such as Pennsylvania and Indiana, require all CMVs to stop. Other states set a certain weight requirement. A common weight requirement for states is 10,000 pounds gross vehicle weight rating or actual gross weight. The weight could be for the power unit only or a combination.

Here's where the confusion can settle in. Take the case of three neighboring states and see the differences in their requirements.

- Nebraska: Excepting pickup trucks pulling a recreational trailer, all trucks over 1 ton must stop.
- Missouri: All commercial trucks with a gross vehicle weight rating over 18,000 pounds must stop.
- Kansas: All registered trucks must stop at the motor carrier safety and weight inspection stations when directed.

Preparation is key

A penalty for unlawfully bypassing a weigh station can be steep. Having drivers blindsided by different requirements when crossing state lines can turn into a major headache for him or her and the employer if law enforcement stops them.

As part of a driver's trip plan, the driver needs to know where the scales are located and if they need to stop. Before drivers head out, if necessary, have someone contact the states they will be traveling through and ask about requirements. Remind drivers to look for signs on the road leading up to the stations.

If none of those opportunities are possible, then have your drivers stop if there is any doubt about requirements. What may seem like a minor inconvenience could prevent a bigger problem down the road. It's always better to pull in and be waved or green-lighted through than to be chased down.

Do You Have a Plan Ready for Workplace Violence?

Workplace violence is recognized as a serious occupational hazard that, like other safety issues, can be mitigated if employers take protective measures. Employers who familiarize themselves with the General Duty Clause and develop a plan can reduce the risk of workplace violence.

The General Duty Clause

The General Duty Clause holds employers responsible for ensuring a place of employment that is free from recognized hazards that are causing or likely to cause death or serious physical harm to any employee — and that includes hazards related to workplace violence. Employers that recognize hazards and fail to address them can be cited by OSHA.

Abatement Methods

You can reduce the hazards of workplace violence by:

- Conducting a workplace violence hazard analysis.
- Providing employees with training on workplace violence.
- Encouraging employees to report any incidents of violence.
- Giving police physical layouts of facilities to improve response time.
- Keeping log books and reports of such incidents to help determine any necessary actions to prevent recurrence.
- Providing management support during emergencies.
- Setting up a trained response team to respond to emergencies.
- Using properly trained security officers to deal with aggressive behavior.
- Developing, or improving upon, written or comprehensive workplace violence programs.

Help your employees feel safe

OSHA also recognizes that many cases of workplace violence have gone unreported. In some cases, employees may feel hesitant to report an incident because they are afraid of any punishment or continued workplace violence against them.

Your employees should feel secure while reporting an incident. To help reduce the number of incidents that might go unreported at your workplace:

- Encourage employees to report all incidents and threats — and remind them that reporting threats is critical to stopping an incident before it happens.
- Inform your employees of their legal rights.
- Offer stress debriefing sessions and post-traumatic counseling services to help employees recover from a violent incident.
- Share information about ways to avoid similar situations in the future.

Although OSHA doesn't have a specific standard for workplace violence, it still requires employers to provide a safe working environment for all employees. Preventing workplace violence will depend on your honest efforts to identify and address any hazards in your workplace and ensure that employees are comfortable with reporting incidents that occur.

Recognizing Background Stressors in the Workplace

Everyone knows that the work environment can cause stress, and some causes (like the need to meet production demands) may be outside your ability to control as a safety professional. However, you may be able to reduce other sources of environmental stress.

Even within the safety realm, some stressors cannot be avoided. For example, wearing a respirator for extended periods does contribute to stress — but if the job requires wearing a respirator, eliminating the stressor probably isn't possible.

Other background stressors, such as constant noise, might be reduced. While excessive noise can cause stress, even lower levels of continual background noise may contribute as a background stressor. Employees might not notice background stressors because they tend to be constant. While a sudden noise might make you jump, an ongoing background noise seems like it could be ignored. However, it still affects the body, and those effects stack up over time.

Initial negative effects could include sleep disorders, headaches, irritability, and even digestive problems or increased alcohol use. According to the National Institute of Mental Health, continued strain from routine stress may contribute to more serious health problems such as heart disease, high blood pressure, diabetes, and depression or anxiety.

Employees may not even be aware that the workplace stressors are contributing factors, yet these problems not only impact health and attitude (headaches and irritability certainly affect a worker's attitude) but they also negatively impact productivity.

Identifying and addressing stressors

In addition to background noise, other environmental stressors could include light (too much or not enough), working in hot or cold environments, the presence of allergens, and strenuous physical work or poor ergonomics.

You probably already evaluate the workplace for ergonomic concerns, but consider looking for other stressors such as noise, light, temperature extremes, and even allergens. Addressing these stressors may not be quick, easy, or cheap. Mounting new lights, adjusting HVAC systems to control temperature, installing sound baffles to reduce noise, or adding air filters to reduce allergens all come with costs.

However, if employees identify one of those items as a source of stress, the cost may be worth the effort. Try translating the cost into productivity terms. For example, the cost of an adjustment might equal the cost of ten sick days, or a certain percentage of productivity. If the alteration could save more than it costs, the expense may be worthwhile.

Identifying Confined Spaces and Using Contractors

Your workplace likely contains some areas that are hard to reach, and may even be awkward to enter, such as crawlspaces. When these confined locations don't pose additional hazards to employees (such as atmospheric or physical hazards), your employees don't need special permission or procedures to enter them.

Some confined spaces, however, present hazards such as low oxygen, flammable or toxic gasses, or even converging walls that could trap and suffocate an employee in the space. The presence of such hazards makes them permit-required confined spaces. All employers should identify the existence of any permit spaces.

If your workplace contains any permit-required confined spaces, you must inform employees by posting danger signs (or by any other effective means) of the existence and location of them, and the danger posed by the permit spaces.

If you decide that your employees will not enter permit spaces, you must still take effective measures to prevent your employees from entering the permit spaces.

For necessary maintenance, you might decide to hire a contractor, or your employees might share entry operations. Either way, you'll have some obligations to the contractor.

Using Contractors

Even if contractors will handle all permit space entry, you aren't free from responsibilities. The contractor will need information regarding permit space hazards and entry operations. As the host employer, you must:

Inform the contractor that permit space entry is allowed only through compliance with a permit space program meeting OSHA's requirements; tell the contractor about the elements that make the confined space a permit space, including the hazards identified and your experience with the space; and

Advise the contractor of any precautions or procedures you've implemented to protect employees in or near permit spaces where contractor personnel will be working.

You and the contractor will need to coordinate the entry and operations because certain activities near a permit space could affect conditions within the space. For example, running a generator nearby might introduce exhaust into the space.

Once the contractor has concluded the entry operations, you and the contractor must meet to discuss the program that was followed, as well as any hazards confronted.