



REG **REVIEW**SM

March 2019

Underride Crash Bill Reintroduced in Congress

Members in both houses of Congress reintroduced a bill that would require all trailers, semi-trailers and straight trucks to be equipped with underride guards on the sides and front of trucks to help reduce the risk of deadly crashes.

An underride crash occurs when a car slides under a large truck, such as a semi-trailer, during an accident. These types of crashes, even at low rates of speed, often cause severe injuries or deaths.

The *Stop Underrides Act* would:

- Update outdated standards that only call for underride guards to be installed on the back of trucks;
- Require that underride guards be included in a vehicle's daily and annual inspection; and
- Require the DOT to review underride standards every five years to evaluate the need for changes in response to advancements in technology.

The bill was previously introduced in 2017 but gained no traction.

News of the bill comes as the National Transportation Safety Board investigates a fatal underride crash between a Tesla car and a truck that took place in Florida last week.

Technical Report Takes Aim at Reducing Risk of Workplace Violence

The American Society of Safety Professionals (ASSP) has published a technical report, "How to Develop and Implement an Active Shooter/Armed Assailant Plan," containing recommendations from safety experts on how businesses in any industry can better protect themselves in advance of an active shooter event.

ASSP says the report, which is registered with the American National Standards Institute (ANSI), is the collaborative effort of more than 30 professionals experienced in law enforcement, industrial security, and corporate safety compliance, and aims at driving a higher level of preparedness against workplace violence.

ASSP notes that acts of workplace violence are most likely to be carried out by a disgruntled or terminated employee, a spouse of an employee, or a dissatisfied customer, and that employees must be trained to recognize potential threats and early warning signs and know how to report them.

FMCSA Amends Entry-level Driver Training Regulations

The Federal Motor Carrier Safety Administration (FMCSA) announced on Tuesday, March 5, a final rule streamlining the process to upgrade from a Class B to Class A commercial driver's license (CDL).

Adoption of the Class A CDL theory instruction upgrade curriculum will save driver trainees and motor carriers \$18 million annually, according to FMCSA.

The ruling amends entry-level driver training (ELDT) regulations published on December 8, 2016. The ELDT rule required the same level of theory training for individuals obtaining a CDL for the first time as for those who already hold a Class B CDL and are upgrading to a Class A CDL.

FMCSA said that because Class B CDL holders have prior training or experience, they should not be required to obtain the same level of training as individuals who have never held a CDL. FMCSA said the change will maintain the same level of safety established by the 2016 ELDT rule.

More than 11,000 driver-trainees are expected to benefit annually from the rule change and see an average reduction of 27 hours in time spent in theory training.

The ruling applies only to Class B CDL holders and does not change behind-the-wheel range and public road training requirements established in the 2016 ELDT rule. All driver-trainees, including those who hold a Class B CDL, must show proficiency in behind-the-wheel curriculum in a Group A vehicle. The compliance date for this amendment is February 7, 2020.

NIOSH Offers Tips on Keeping Workers Safe after 'Springing Forward'

Sunday, March 10, marks the date we set our clocks ahead, which shifts work times and other scheduled events one hour earlier. According to the National Institute for Occupational Safety and Health (NIOSH), it takes about one week for the body to adjust to the time change. This can lead to sleep deprivation and an increased risk for mistakes, including vehicle crashes. NIOSH reminds employers to be aware of the higher risk for errors and injuries following the time change and offers tips to share with employees:

- Remind workers that several days after the time changes are associated with somewhat higher health and safety risks due to disturbances to circadian rhythms and sleep.
- It can take one week for the body to adjust sleep times and circadian rhythms to the time change so consider reducing demanding physical and mental tasks as much as possible that week to allow oneself time to adjust.
- Remind workers to be especially vigilant while driving, at work, and at home to protect themselves since others around them may be sleepier and at risk for making an error that can cause a vehicle crash or other accident.
- Research found men and people with existing heart disease may be at risk for a heart attack after the time change.

Circadian rhythms and sleep are strongly influenced by several factors including timing of exposure to light and darkness, times of eating and exercise, and time of work. One way to help the body adjust is to gradually change the times for sleep, eating, and activity.

Trainer Admits to Selling Fake OSHA 10 Cards

A certified OSHA training agent admitted to submitting false reports and selling fraudulent training cards to carpenters to improperly establish that they were certified in safety standards.

According to documents filed in the case and statements made in court, the trainer was certified by OSHA's Outreach Training Program (OTP) and was authorized to issue OSHA 10 cards that proved to employers that the card holders had taken and passed a 10-hour OTP training course. Instead, the trainer sold more than 100 false OSHA 10 cards for approximately \$200 per card. He also submitted reports falsely claiming that approximately 73 students had attended his OSHA 10 classes.

The OSHA 10-hour class is intended to provide workers with awareness of common job-related safety and health hazards. While the training is not required by OSHA, some states, municipalities, or other employers may require it as a condition of employment.

The trainer faces a maximum potential penalty of five years in prison and a \$250,000 fine.

CDL Examiner Sentenced in Skills Testing Scheme

A third-party commercial driver's license (CDL) examiner from Mississippi was sentenced earlier this month for his role in an illegal CDL skills testing scheme.

An investigation revealed that the examiner provided 41 CDL applicants with test score sheets falsely certifying that they had successfully completed the tests. The Mississippi Department of Public Safety then revoked the CDLs of the individuals who purchased the fraudulent test results.

The examiner was sentenced to 15 months incarceration, three years of supervised release, \$13,500 in restitution, and \$1,500 in fines. Sentencing took place in U.S. District Court in Jackson, Mississippi, on February 15, 2019.

The Federal Motor Carrier Safety Administration provides funding to help states administer CDL programs, which develop proper testing procedures and oversee trucking schools and CDL applicants. Operators of trucking schools and individual applicants are required to pass an extensive test and road skills test to obtain their CDLs and specialized endorsements.

ELD Exemption Extended to October

An exemption from electronic logging devices (ELDs) for drivers transporting livestock or insects has been given new life. The recent omnibus appropriations bill that President Trump signed into law on Friday, February 15, extends the exemption through the end of the government's fiscal year, through September 30, 2019.

The spending bill prohibits the Federal Motor Carrier Safety Administration (FMCSA) from spending any federal funds on enforcing the ELD mandate on drivers transporting livestock or insects, no matter how far they travel.

The term "livestock" includes cattle, elk, reindeer, bison, horses, deer, sheep, goats, swine, poultry, fish used for food, and other animals that are part of a foundation herd.

Though most long-haul interstate motor carriers were required to start using ELDs in place of paper logs on December 18, 2017, the FMCSA temporarily waived that requirement for drivers transporting livestock. Congress then stepped in and has kept the exemption alive through several stopgap spending bills.

Court Addresses the Importance of Capturing an Employee's Call-in Information

Many people suffer from chronic illnesses such as migraines, and many of these people take FMLA leave from work due to the condition. Under the FMLA, when an employer has already provided leave for a condition for which an employee takes leave intermittently (such as chronic conditions), when calling in, the employee is expected to either indicate that the absence is for FMLA or for the particular condition. At your place of business, in such situations, is someone capturing what employees are actually saying when they call in? Doing so could help defend or deter an action in court.

Case in point

Miranda took FMLA leave for migraines. On one such occasion, Miranda was absent from work beginning Monday, July 18 and continuing through Thursday, July 21. On each of those days, Miranda left a voicemail in the early morning for her supervisor, Kevin, to report her absence from work.

When Miranda returned to work, she was asked to provide a doctor's note because she was out for more than three days, and company policy required such a note before returning to work. Without it, employees could be terminated, as they were considered away without official leave. Miranda did not provide such a note. Therefore, she was terminated.

Being unhappy with the termination, Miranda filed a claim against the employer, arguing that it interfered with her FMLA rights, and retaliated against her for taking FMLA leave.

In court, one of the sticking points was whether Miranda provided enough information when she called in to indicate that her absence was FMLA leave. Miranda and the employer disagreed as to what details Miranda provided in the voicemails she left for Kevin. Miranda argued that in two of the three voicemails she said that she specifically mentioned her migraines.

The employer, on the other hand, argued that Miranda never specified migraines in the voicemails, and stated only that she would be absent due to either an "illness" or "doctor's visits." Kevin indicated that he wrote down when somebody called in and what information they left. In connection with Miranda's absences on July 18–21, Kevin wrote "ill/out," "ill out," "DR," and "DR," respectively. When asked directly if Miranda mentioned "migraine or headache at all" in the voicemails, however, Kevin testified that he did not recall.

Because neither Miranda nor the employer had solid evidence reading what information Miranda provided, the case will need to be decided by a jury. Had Kevin kept recordings of Miranda's call-in voice mails, he might have had enough evidence to stop the case from progressing.

The court was also not keen upon the employer requiring an employee on FMLA leave to provide a doctor's note before returning to work after a three-day FMLA absence. FMLA regulations generally limit the circumstances in which employers may seek medical information from an employee's health care provider. Where an employer's internal policies conflict with the provisions of the FMLA, the FMLA controls. Therefore, by requiring Miranda to obtain a doctor's note for absences exceeding three consecutive days and before she returned to work, the employer imposed on her a burden that is more onerous than permitted under FMLA regulations. It basically made a doctor's note a condition of receiving FMLA leave for absences of four or more consecutive days.

Holladay v. Rockwell Collins, Inc., District Court for the Southern District of Iowa, No. 3:17-cv-00078, January 24, 2019

Congress Bills Aimed at Reducing Driver Shortage Issue

Bills were reintroduced in Congress on February 26, 2019, to address driver shortage in the trucking industry and enhance safety training and job opportunities for young truckers.

The Developing Responsible Individuals for a Vibrant Economy (DRIVE-Safe) Act seeks to establish an apprenticeship program that would allow for the legal operation of a commercial motor vehicle (CMV) in interstate commerce by commercial driver's license (CDL) holders under the age of 21. The training program would help ensure that drivers are trained beyond current standards and institute stricter safety standards and performance benchmarks.

Under the legislation, once a driver obtains his or her CDL, drivers would begin a program of additional training that includes completing at least 400 hours of on-duty time and 240 hours of driving time with an experienced driver. Trucks used in the training program must also be equipped with active braking collision mitigation systems, a forward-facing video event capture, and be operated at governed speeds of 65 mph at the pedal and 65 mph under cruise control.

Many states currently allow individuals to obtain a CDL at age 18, but federal law prohibits those drivers from engaging in interstate commerce until they are 21.

DRIVE-Safe was reintroduced by U.S. Senators Todd Young of Indiana and Jon Tester of Montana. Representative Trey Hollingsworth of Indiana introduced a companion bill in the House.

NIOSH Releases Final Research Agenda for Respiratory Health

The National Institute for Occupational Safety and Health (NIOSH) says the final National Occupational Research Agenda (NORA) for Respiratory Health is now available. The Agenda is intended to identify the knowledge and actions most urgently needed to prevent respiratory diseases.

Broader than any one agency or organization, the Agenda allows stakeholders to describe the most relevant issues, research gaps, and needs for traumatic injury prevention.

The Agenda's 10 strategic objectives are organized into three sections:

- Occupational respiratory diseases
- Occupational respiratory exposures
- Fundamental activities of surveillance, exposure assessment, and communications that are needed for a comprehensive research and prevention program

Most objectives have sub-objectives that describe research needs in greater detail.

March is National Ladder Safety Month

In March, the American Ladder Institute (ALI) is sponsoring its annual National Ladder Safety Month to promote ladder safety at work and at home. The organization is partnering with OSHA to promote events that focus on ladder safety.

OSHA is participating in two symposiums, on March 13 in Houston and March 19 in Arlington, Texas, to discuss real life events, solutions, and the role of leadership in preventing ladder-related incidents. Interested parties can register to attend in person or via live webcast.

ALI notes that every year more than 100 workers are fatally injured in ladder-related incidents, and thousands suffer disabling injuries.

National Ladder Safety Month will focus on five key themes in March:

- February 24 - March 2: What is Ladder Safety?
- March 3 - 9: Ladder Safety Training and Year Round Partners
- March 10 - 16: Ladder Safety at Work
- March 17 - 23: Ladder Safety at Home
- March 24 - 31: Ladder Inspection and Disposal

California Takes FMCSA to Court Over Rest-break Laws

California's labor commission is asking a federal court to reverse a decision from the Federal Motor Carrier Safety Administration (FMCSA) that the state's meal and rest-break rules cannot be enforced on interstate truck drivers.

California Attorney General Xavier Becerra and the California Labor Commissioner's Office filed a petition with the U.S. Court of Appeals for the Ninth Circuit on Wednesday, February 6.

The petition asks the court to review and reverse a December 2018 decision from the FMCSA that rest-break requirements under the California Labor Code are a burden on interstate commerce and don't improve safety, so interstate truck drivers do not have to follow them.

"It is well within a state's rights to establish standards for the welfare of our workers," said Attorney General Becerra. "Truck drivers, like every other person protected under California's labor laws across hundreds of different industries, deserve adequate meal and rest breaks." In California, workers are generally entitled to a 30-minute meal break for shifts of five hours or more and a 10-minute break per four hours of work.

The FMCSA determined that these rules are "preempted" under federal law, meaning the state cannot enforce them on any property-carrying commercial motor vehicle drivers covered by federal hours-of-service rules.

In September 2018, California's break requirements for drivers transporting hazardous materials were preempted by the Pipeline and Hazardous Materials Safety Administration, which ruled that they conflict with hazmat attendance requirements.

Memo Clarifies Citation Policy for Welding, Cutting, Heating in Confined Spaces

In a recent memo, OSHA reminds regional administrators and state plan designees that the former definition of a “confined space” in construction has been replaced with the new three-part definition at 1926.1202, and that definition should be used to determine whether a violation of the welding in confined spaces standard at 1926.353(b)(1) has occurred.

The memo notes that just as under the former definition, the hazard addressed is the accumulation of toxic or flammable contaminants. OSHA says it expects accumulation would occur when welding in a confined space under the new definition because the welding, cutting, or heating task itself produces metal fumes, gases, and smoke, and there is an inherent risk of incapacitation if exposure levels to carbon dioxide, carbon monoxide, or smoke suddenly spike.

OSHA says the following citation policy applies:

Section 1926.353(b)(1) is triggered by the act of welding, heating, or cutting in a confined space, regardless of whether the atmospheric hazard within the space is likely to exceed any particular exposure level. If an employer has not implemented mechanical or local exhaust ventilation when welding, cutting, or heating is performed within a confined space, a serious violation of section 1926.353(b)(1) should be considered unless:

- Open ventilation is present, such as when a confined space has a substantial number of openings in its walls to outside the confined space (like a screen or open sections of rebar) or is entirely open on one side but still has limited or restricted means of access and egress. For example, to access or egress the space, a ladder, ramp, controlled descent device, etc. must be used; and
- The employer has conducted air sampling within the confined space where welding, cutting, or heating is being performed and determined that natural ventilation maintains the atmospheric hazard below the threshold limit values in Appendix A to 1926.55.

OSHA says that if the two bulleted factors above are established, the Compliance Officer should consider the employer’s failure to implement mechanical or local exhaust ventilation a de minimis violation unless air sampling demonstrates the existence of an atmospheric hazard.

FMCSA Removes Ohio Truck Driver From Road

The Federal Motor Carrier Safety Administration (FMCSA) declared an Ohio-licensed driver an imminent hazard to public safety and ordered him not to operate any commercial motor vehicles (CMV) in interstate commerce. The commercial driver's license (CDL) holder was served the federal order in December after striking and killing two individuals while operating his truck in the past six months.

On July 2, 2018, the driver struck a man who was standing near his disabled vehicle on the right shoulder of Interstate 81 in Lebanon County, Pennsylvania. He was charged with: careless driving causing death of another person; driving a vehicle at a speed greater than is reasonable and prudent under the conditions; driving outside of a single lane before ascertaining if the movement can be made safely; and failing to wear a properly adjusted and fastened safety belt system.

On December 7, 2018, the driver drove his truck onto the fog line and struck a highway construction worker who was standing next to a parked vehicle along U.S. highway 33 in Union County, Ohio. After striking the man, the driver did not stop but continued to drive. The case remains under investigation by Union. County law enforcement officials.

Drivers Transporting Ready-mix Concrete Granted two HOS Exemptions

Two hours-of-service (HOS) exemptions were granted to drivers transporting ready-mixed concrete and related materials and equipment in vehicles (other than those outfitted with rotating mixer drums).

The Federal Motor Carrier Safety Administration (FMCSA) approved the American Concrete Pavement Association, Inc. exemption application for the following HOS requirements:

- **30-minute rest break provision.** The exemption enables these drivers to use 30 minutes or more of on-duty "waiting time" to satisfy the requirement for the 30-minute rest break, provided they do not perform any other work during the break.
- **Specific criteria in the short-haul exception.** The exemption allows these drivers to use the short-haul exception but return to their work-reporting location within 14 hours instead of the usual 12 hours.

The exemption is valid February 6, 2019, through February 6, 2024.
Drivers who wish to use the exemption must:

- Have a copy of the FMCSA *Federal Register* notice from February 6, 2019, or equivalent signed FMCSA exemption document in their possession; and
- Present the document to law enforcement officials upon request.

In addition, exempt motor carriers must notify FMCSA within five business days of any FMCSA accident (as defined in 49 CFR 390.5) involving any of its CMVs operating under the terms of the exemptions.

OSHA Memo Provides Guidance on Crane Operator Rule Enforcement

In a February 7 memo to regional administrators and state plan designees, OSHA said that while it will be fully enforcing the requirement that employers must evaluate their operators before allowing them to operate cranes independently, the Agency will provide some leeway on the enforcement of the documentation requirement until April 15, 2019.

OSHA says it received feedback from the construction industry indicating some employers may need more time to document evaluations of crane operators. Therefore, during the first 60 days of enforcement (until April 15, 2019), OSHA will evaluate good faith efforts taken by employers in their attempt to meet the new documentation requirements for operators of cranes used in construction.

During this period, OSHA says it intends to offer compliance assistance, in lieu of enforcement, for employers who have evaluated operators in accord with the final rule and are making good faith efforts to comply with the new documentation requirement. The memo notes that if it is determined that an employer has failed to make sufficient efforts to comply with the documentation requirement, OSHA should cite for that deficiency.

The *Cranes and Derricks in Construction: Operator Qualifications* final rule was published November 8, 2018, and had an effective date of February 7, 2019.

Beginning April 15, 2019, OSHA will fully enforce all applicable provisions of the final rule.