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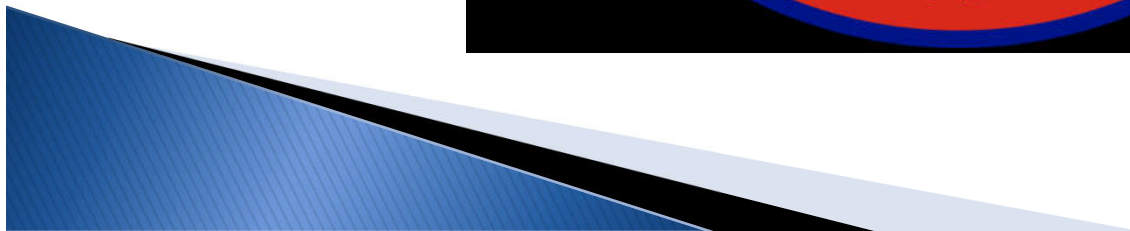


2020 Year-In-Review: Brokers, Regulatory Changes, and More

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Moseley Marcinak Law Group, LLP



Time for Football!



Happy National Tortilla Chip Day!



What Happened in 2020? – Brokers

- ▶ In *Gillum v. High Standard, LLC*, 2020 WL 444371 at *2–6 (W.D. Tex. Jan. 27, 2020), Scott Gillum was hit by a tractor-trailer and sued the driver, the motor carriers involved in hiring and training the driver, and the freight broker that selected the motor carriers in Texas state court.
- ▶ The freight broker, which Gillum accused of negligently hiring the motor carriers, removed the case to federal court and moved to dismiss under the argument that federal law completely preempts state common law negligence claims against a freight broker relating to its provision of services as a broker.
- ▶ The federal district court agreed, concluding that the Federal Aviation Administration Authorization Act (FAAAA) completely preempts simple and gross negligence claims related to a freight broker's services.



What Happened in 2020? – Brokers

- ▶ *Uhrhan v. B&B Cargo, Inc.*, 2020 WL 4501104
- ▶ A claim of negligent brokering was not preempted under Missouri law said the Eastern District in Missouri. While the court agreed that Plaintiffs' negligent brokering claims relate to the services of the broker and fall within the scope of 49 USC 14501(c)(1), the cause of action was subject to the safety regulation exception and therefore not preempted.



What Happened in 2020? – Brokers

- ▶ *Ciotola v. Star Transportation & Trucking, LLC*, 2020 WL 4934592
- ▶ The Middle District in Pennsylvania also rejected a broker's claim of preemption for a personal injury loss. The court concluded that the FAAAA does not preempt general tort law that does not significantly impact the broker's prices, routes, and service. The court also denied summary judgment to the plaintiff, concluding that whether the broker should be held to the liability of a motor carrier was one to be left to the jury.



What Happened in 2020? – Brokers

- ▶ *Miller v. C.H. Robinson Worldwide*, 2020 WL 5757013 (9th Cir. Sept. 28, 2020).
- ▶ The Ninth Circuit has allowed a man who was seriously injured after colliding with a semi-tractor-trailer to bring a state negligence claim against the freight broker who hired the truck's driver, reversing a district court's ruling finding preemption. The Ninth Circuit held 2-1 that while the Federal Aviation Administration Authorization Act (FAAAA) preempts state laws "related to" a freight broker's services, the man's claim falls under the state safety law exception to FAAAA preemption. AAJ filed an amicus brief in support of the plaintiff.



What Happened in 2020? – Independent Contractors

- September 25, 2020 – Department of Labor issued a proposal to allow for more workers to be reclassified as “independent contractors.”
- Economic Reality Test:
 1. Degree of control of the individual;
 2. Permanency of relation;
 3. Integration of the individual's work in the business to which he renders service;
 4. Skill required by the individual;
 5. Investment by the individual in facilities for work; and
 6. Opportunity of the individual for profit or loss.
- DOL admits workers reclassified from being “employees” under the Fair Labor Standards Act to being “independent contractors” would have to shoulder more expenses and receive fewer benefits.



Trump's Last Hurrah and Independent Contractors

January 6, 2021 – DOL announced final rule to clarify independent contractor status under the Fair Labor Standards Act.

The Final Rule includes the following clarifications:

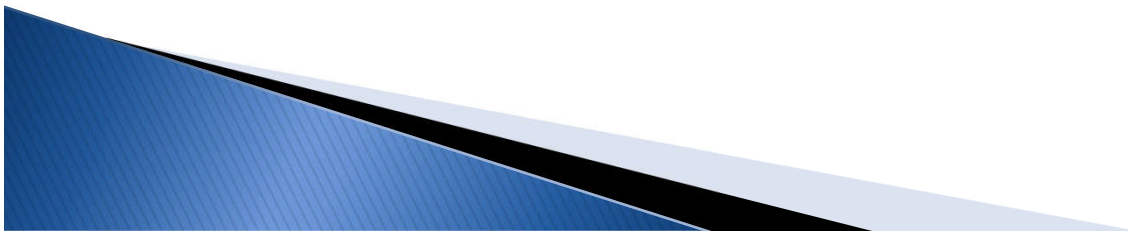
1. Reaffirms an “economic reality” test to determine whether an individual is in business for him or herself (independent contractor) or is economically dependent on a potential employer for work (FLSA employee).
2. Identifies and explains two “core factors” that are most probative to the question of whether a worker is economically dependent on someone else’s business or is in business for him or herself:
3. The nature and degree of control over the work.
4. The worker’s opportunity for profit or loss based on initiative and/or investment.
5. Identifies three other factors that may serve as additional guideposts in the analysis, particularly when the two core factors do not point to the same classification. The factors are:
6. The amount of skill required for the work.
7. The degree of permanence of the working relationship between the worker and the potential employer.
8. Whether the work is part of an integrated unit of production.
9. The actual practice of the worker and the potential employer is more relevant than what may be contractually or theoretically possible.
10. Provides six fact-specific examples applying the factors.



Trump's Last Hurrah and Independent Contractors

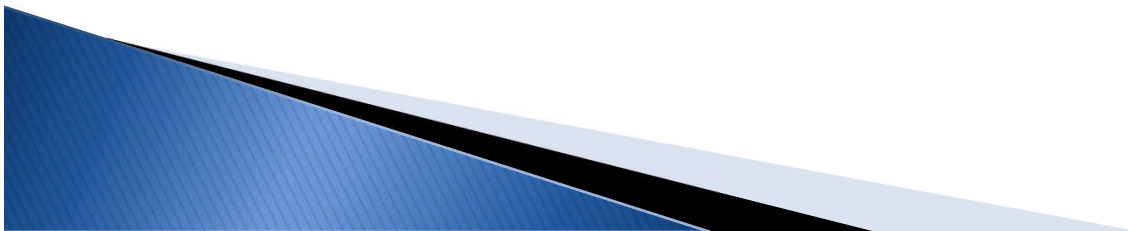
Safety Exemption for ICs

Instructing ICs on safety not evidence of employee relationship.



Biden's Quick Response

- ▶ Economic Reality Grounded
- ▶ Safety Exception Halted

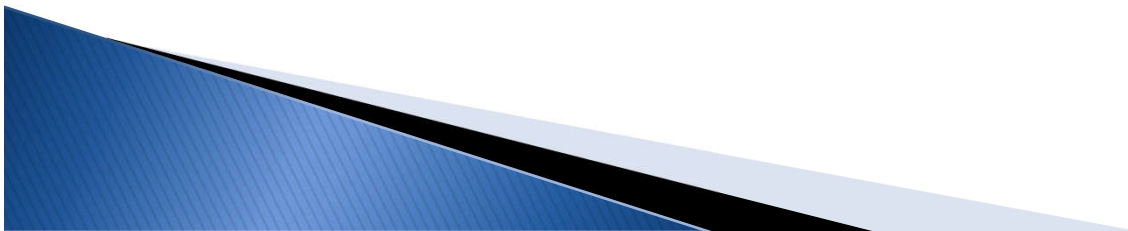


2020 and Sleeper Berths

State of Arkansas has proposed an amendment to Arkansas Code 11-4-221(a) that would provide an employer relief from failing to pay minimum wage or overtime..

For an employee of a motor carrier employed in a driving capacity, in addition to a few other activities, an activity that occurs while the employee is:

- (A) Traveling to or from a personal residence;
- (B) Engaging in a personal activity that is not primarily in furtherance of the employer's business; or
- (C) Logging time as "off-duty" or "sleeper berth".



2020 and Split Sleeper Berths

The FMCSA conducted a study in 2010 and 2011 comparing different sleep conditions: consolidated nighttime sleep, consolidated daytime sleep, and split-sleep.

Currently, drivers can use the sleeper berth provision to reset their hours if they take hours at once.

Alternatively, drivers can spend 8 hours in the sleeper berth to extend their drive time and on-duty time, as the time spent in the berth doesn't count towards to the 14-hour limit.

FMCSA Studying 7/3 splits



2020 and Equipment Changes

- ▶ A notice of proposed rulemaking that would require rear guards to be examined as part of a commercial motor vehicle's annual inspection was published in the Federal Register on Tuesday, Dec. 29.
- ▶ As part of the proposal, FMCSA also would alter the labeling requirements for rear impact guards and exclude road construction controlled horizontal discharge trailers from the rear impact guard requirements.
- ▶ Side impacts on the way?



2021 – Push for collision mitigation technology?

- ▶ The U.S. has not mandated CAT systems for either trucks or passenger vehicles, but the Insurance Institute for Highway Safety (IIHS) and the National Highway Traffic Safety Administration (NHTSA) brokered a voluntary accord involving U.S. passenger vehicles. The 20 automakers that account for 99 percent of the U.S. passenger vehicle market agreed to make AEB systems standard on almost all new passenger vehicles by September 1, 2022.



9th Circuit Preemption – 2021 Win!

- ▶ On January 15, 2020, the Ninth Circuit Panel, in the consolidated case of *International Brotherhood of Teamsters v. Federal Motor Carrier Safety Administration*, held that the FMCSA's determination reflected a permissible interpretation of the Motor Carrier Safety Act of 1984, and denied the petitions for review.
- ▶ The Ninth Circuit's decision means that for now interstate motor carriers need not comply with California's meal and rest break laws but must comply with the FMCSA's rest break requirements.



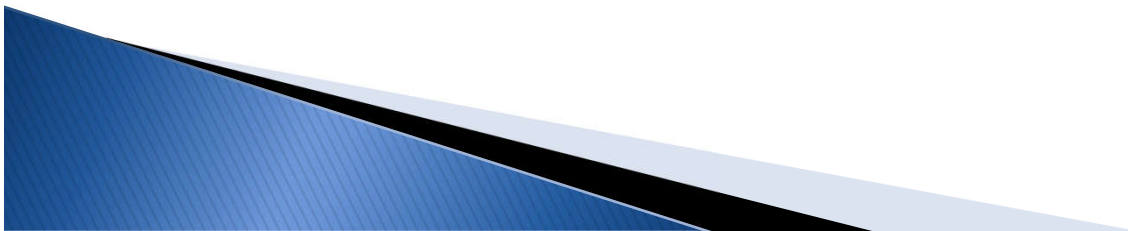
2020 and Hours-Of-Service

- ▶ FMCSA revises the hours of service (HOS) regulations to provide greater flexibility for drivers subject to those rules without adversely affecting safety.
- ▶ The Agency:
 - (1) expands the short-haul exception to 150 air-miles and allows a 14-hour work shift to take place as part of the exception;
 - (2) expands the driving window during adverse driving conditions by up to an additional 2 hours;
 - (3) requires a 30-minute break after 8 hours of driving time (instead of on-duty time) and allows an on-duty/not driving period to qualify as the required break; and
 - (4) modifies the sleeper berth exception to allow a driver to meet the 10-hour minimum off-duty requirement by spending at least 7, rather than at least 8 hours of that period in the berth and a minimum off-duty period of at least 2 hours spent inside or outside of the berth, provided the two periods total at least 10 hours, and that neither qualifying period counts against the 14-hour driving window.



2020 and the Drug and Alcohol Clearinghouse

- ▶ January 6, 2020 was the deadline to be compliant.



Broker Visibility

- FMCSA is studying whether to turn a federal rule that carriers may request data on a transaction from a broker into a rule that the broker must supply that data automatically to a carrier (and other parties in a transaction) within 48 hours.
- The OOIDA petition said that brokers often find ways of circumventing federal regulations (49 CFR §371.3) that require them to keep records of transactions and make them available to carriers upon request.
- OOIDA petitioned DOT and FMCSA to strengthen the regulations in 49 CFR §371.3 by doing the following:
 - Require brokers to automatically provide an electronic copy of each transaction record within 48 hours after the contractual service has been completed; and
 - Explicitly prohibit brokers from including any provision in their contracts that requires a carrier to waive their rights to access the transaction records as required by 49 CFR §371.3



2020 and the MVR Annual Review

- ▶ On December 14, 2020, the Federal Motor Carrier Safety Administration (FMCSA) proposed rescinding the requirement that commercial motor vehicle (CMV) drivers annually prepare and submit a list of their convictions for traffic violations to their employers.
- ▶ However, the change would require motor carriers to request an MVR equivalent for some drivers from Canadian and Mexican driver's licensing authorities, according to the FMCSA.



From: White, Raymond (FMCSA) <raymond.white@dot.gov>

Sent: Friday, January 29, 2021 1:10 PM

To: [REDACTED]

Subject: FMCSA Missouri Division Informational Email

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
MISSOURI DIVISION
3219 EMERALD LANE SUITE 500, JEFFERSON CITY, MISSOURI 65109-6863
573-636-3246 PHONE 573-636-8901 FAX

January 29, 2021

[REDACTED]

The Federal Motor Carrier Safety Administration (FMCSA) has noticed a trend in the driving performance of [REDACTED], [REDACTED] identified through violations cited during roadside inspections while operating a commercial motor vehicle. **Specifically, our records show [REDACTED] has significant non-compliance in the area of Unsafe Driving BASIC.** This warning letter formally notifies you of this safety performance and compliance problem. We are bringing this safety deficiency to your attention so that you can take corrective action. You do not need to respond to this letter.

FMCSA encourages [REDACTED] to visit FMCSA's Pre-Employment Screening Program (PSP) at <https://psp.fmcsa.dot.gov/psp/Public> to request and review their personal driver record at any time, and take steps to improve compliance. FMCSA also encourages [REDACTED] to visit FMCSA's SMS Website <https://ai.fmcsa.dot.gov/SMS/> to review all roadside inspection data.

If [REDACTED] believes they have been improperly or erroneously cited for a violation during a roadside inspection, they may file a request for data review through FMCSA's DataQs program. The DataQs program allows drivers to request a review of information such as Federal and State-reported crash and inspection reports in FMCSA safety databases. Follow the link <https://dataqs.fmcsa.dot.gov> to access DataQs.

FMCSA will continue to assess safety performance on a monthly basis. [REDACTED] can demonstrate improved performance by driving in accordance with the laws, ordinances, and regulations in every jurisdiction, in compliance with the FMCSRs at 49 CFR Part 392 – Driving of Motor Vehicles and, if applicable, 49 CFR Part 397 – Transportation of Hazardous Materials. If [REDACTED] safety performance and compliance does not improve, FMCSA may conduct additional interventions that could result in penalties and/or sanctions, including fines, suspension of State vehicle registration, or an order to cease operations. FMCSA will not issue penalties or sanctions based on this warning letter alone.

If you have additional questions regarding this matter or need assistance, please contact the following:

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

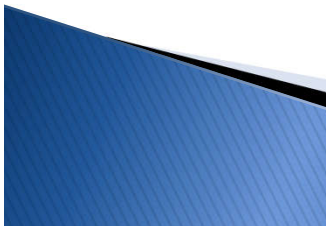
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Questions

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