



FMCSA Releases Prohibition of Coercion Final Rule

Last week the Federal Motor Carrier Safety Administration (FMCSA) released the final rule for the “Prohibiting Coercion of Commercial Motor Vehicle Drivers” rulemaking. TIA filed comments to the notice of proposed rulemaking (NPRM) that was posted in the Federal Register on May 13, 2014. An entity found guilty of coercion could face a \$16,000 fine per incident. The final rule becomes effective on January 29, 2016. Many of the TIA comments were considered and amendments were made to the Final Rule based on the feedback TIA provided, but some concerns remain.

In summary, the final rule adopts regulations that prohibit motor carriers, shippers, receivers, and transportation intermediaries from coercing drivers to operate commercial motor vehicles in violation of certain provisions of the Federal Motor Carrier Safety Regulations (FMCSRs). Specific provisions of concern include a driver’s hours-of-service limits, CDL regulations, drug and alcohol testing rules, and the hazardous materials regulations (HMRs). In addition, the rule prohibits anyone who operates a CMV in interstate commerce from coercing a driver to violate the commercial regulations. This rule includes procedures for drivers to report incidents of coercion to FMCSA, establishes rules of practice that the Agency will follow in response to reports of coercion, and describes penalties that may be imposed on entities found to have coerced drivers.

Comments & Changes

Definition of Coercion: Based on TIA feedback and comments from other industry stakeholders, the Agency has amended the definition of coercion. This was needed because as the definition of coercion was originally written in the NPRM, it would have been a violation for a shipper or 3PL to refuse a load to a driver if it “knew or should have known” that a driver was about to exceed or already had exceeded the HOS regulations, even if the driver informed the shipper or 3PL of impending HOS deadline. The Agency amended the final rule referring to the withholding of “current or future business, employment, or work opportunities” by striking the reference to “current or future” business and adding the phrase “take or permit any adverse employment action.” Additionally, the Agency amended the definition to require the driver to identify “at least generally” the rules that he or she would have to violate in the course of delivery.

Additional Burdens Created by Rule: TIA made the point that the NPRM would place a shipper and 3PL into the role of management having to ask the driver about hours-of-service availability, which would raise liability concerns this would raise. In response, the Agency further amended the definition of “coercion” to make clear that the driver has

an affirmative obligation to inform the motor carrier, shipper, receiver, or 3PL when he or she cannot make the requested trip without violating one or more of the regulations listed in the definition.

Agents, Officers, and Representatives: The NPRM proposed to apply the prohibition of coercion not only to principals, but also to “their respective agents, officers or representatives.” Many comments were directed at this particular provision. TIA among other commenters expressed strong concerns about the relationship status created under this rule between a broker and motor carrier. FMCSA clarified that, “brokers are not employees of a motor carrier, nor are motor carriers agents or representatives of brokers. The broker deals directly with the motor carrier, not the specific driver. However, if the broker communicates directly with the driver, they could be held liable for vicarious liability and coercion.

Respondeat Superior: Many commenters including TIA, objected to the NPRM’s assertion that the “knew or should have known” standard in the definition of coercion “is essentially a restatement of the common law principle of “respondeat superior”, which holds the master (employer) liable for the acts of his servant (employee), and raises major concerns of vicarious liability. FMCSA agreed with industry concerns and amended the definition of coercion by eliminating the “knew or should have known” standard by emphasizing more strongly the driver’s duty to object as a predicate for any subsequent allegation of coercion.

Application to Government Entities: TIA provided a comment to the NPRM asking the Agency to expand the scope of the rule to include Department of Defense (DOD), General Services Administration (GSA), Port Terminal Operators, and all other applicable entities that contract with motor carriers to haul their specific goods along the transportation supply-chain. In response, the FMCSA noted it has no authority to apply this final rule to Federal, State, or local governmental entities because of a specific MAP-21 provision. In terms of a terminal operator the Agency will require a case-by-case evaluation to determine if the operator qualifies as a political subdivision of a State.

Deadline to File Coercion Complaints: In comments, the Occupational Safety and Health Administration (OSHA) recommended that the NPRM proposed 60-day filing deadline be extended to 180 days. On the other hand, NITL suggested changing the filing deadline from 60-days to 30-days. In response, the Agency decided to amend the final rule to implement a 90-day filing deadline, in order to ensure that drivers have a sufficient time to prepare and submit a coercion complaint.

Penalties: Safety advocate organizations urged the Agency to suspend the operating authority of motor carriers found to have committed coercion instead of the “meaningless fines.” Other commenters suggested all penalties be either paid directly to the driver or put in the highway trust fund (HTF). In response, the Agency noted it will take aggressive action to ensure the claim is substantiated. This action will include civil

penalties consistent with the regulations and may include initiation of a proceeding to revoke the operating authority for a for-hire motor carrier, based on language within 49 U.S.C. 13905. In response to paying the driver directly or depositing money in the HTF, the Agency noted it did not have the authority to implement those suggested changes.

Filing a Compliant

The final rule outlines the filing of a coercion compliant process, which would follow this process:

1. Driver files a written complaint within 90-days through the National Consumer Complaint Database or FMCSA Division Administrator in the particular State where the driver is located.
2. Agency will determine whether the complaint is non-frivolous
 - a. If determined not to be frivolous, FMCSA shall conduct an investigation
 - i. Enforcement Action taken and penalties will be assessed, if coercion did in fact occur.
 - b. If determined to be frivolous, the complaint will be dismissed

TIA staff is planning a webinar for members outlining all the major provisions of the Prohibition of Coercion final rule in the month of January, stay tuned for more details. For more information, please contact Chris Burroughs (burroughs@tianet.org, or 703.299.5705). To view the entire Final Rule, please click [HERE](#).