

THE TRANSPORTATION BRIEF®

A quarterly newsletter of legal news for the clients and friends of Scopelitis, Garvin, Light, Hanson & Feary

Autumn 2017 | Vol. 24, No. 4

UNASSIGNED MILES AND MANAGING AOBRD AND ELD DATA

The primary purpose behind the new Electronic Logging Device (ELD) rule is to ensure that every time the wheels on a truck move – the movement is captured by the ELD and assigned to the appropriate driver. The Federal Motor Carrier Safety Administration's (FMCSA) goal is to prevent drivers from exceeding Hours of Service (HOS) limits by hiding or not recording drive time. Therefore, any drive time that is not assigned to a driver will be one of the main focuses of the FMCSA or state enforcement agencies during an audit or compliance review.

Unassigned drive time can quickly accumulate if not managed daily. Although drivers may have various reasons for not logging into a device, one motive may be to evade the rules in an attempt to drive more than the HOS limits allow. While ELDs are required to show unassigned drive time – drivers are not required to “accept” that time. If the proper driver does not assume “unassigned” drive time, the burden to track and assign that time falls on the motor carrier.

Motor carriers should select an ELD system that produces appropriate reports showing all unassigned drive time for every ELD and Automatic Onboard Recording Device (AOBRD) in use in their fleet. Motor carriers should work with drivers to quickly address all unassigned drive time to

ensure the drivers' logs are correct. If a motor carrier does not assign all drive time, FMCSA or a state enforcement agency will ask to review all unassigned time and investigate why it was not assigned. Failure to assign the drive time will likely result in “false log” violations for those drivers that should have accepted drive time and may result in a downgrade of a carrier's safety rating.

There are other ELD data requirements a motor carrier is required to monitor. These include malfunctions, data diagnostic issues, other information the systems capture that may signal a problem or tampering by a driver.

In addition to addressing unassigned drive time and other ELD outputs, there is also the “supporting document” requirement. This requirement verifies if drivers are properly logging activities such as fueling, roadside inspections and other tasks as “on-duty” time.

The Scopelitis Regulatory Compliance Team regularly works with and counsels motor carriers on ELD and AOBRD systems and how best to manage the data and potential violations found in the systems.

Annette M. Sandberg,
Spokane



THE FULL SERVICE TRANSPORTATION LAW FIRM

 **SCOPELITIS**
GARVIN LIGHT HANSON & FEARY

Please fax or e-mail address changes to:
The Transportation Brief
fax (317) 687-2414
tbrief@scopelitis.com www.scopelitis.com

BRIEFLY

FMCSA Exemptions to the ELD Mandate

The FMCSA has recently announced two exemptions to the new ELD mandate. In the first exemption, the FMCSA stated that drivers of a property-carrying commercial motor vehicle (CMV), rented for eight days or less, are not required to use an ELD. Drivers using this exemption must comply with the Hours of Service (HOS) regulations and keep a paper record of duty status. Drivers using this “rental-truck” exemption must also keep a copy of the CMV rental agreement in the vehicle.

The second exemption granted by the FMCSA came in response to a request by UPS regarding its drivers’ use of the “yard move” status. The FMCSA established an exemption that allows an ELD’s software configuration to have a driver in “yard move” status and to remain in that status after every ignition on/off cycle. To qualify for this exemption, the ELD must automatically switch from “yard move” status to “driving” status if the truck exceeds 20 mph, or the vehicle exits a geo-fenced motor carrier facility. The FMCSA has granted this exemption to the entire motor carrier industry for a period of five years.

Timothy W. Wiseman,
Indianapolis

AOBRD v. ELD

Fleets using AOBRDs prior to the ELD compliance date may continue using AOBRDs until December 16, 2019. Thereafter, any trucks added to a fleet must be outfitted with a compliant ELD, unless a truck that was operating with an AOBRD is retired from the fleet. In this instance, the retired truck’s AOBRD may be used on the replacement truck. There are a number of added requirements (or benefits) associated

with outfitting a fleet with ELDs versus AOBRDs.

Both devices must record data pulled from the vehicle’s engine control module (ECM), but an AOBRD records less data. ELDs automatically capture engine power status, vehicle motion status, miles driven, and engine hours while an AOBRD only requires “integral synchronization” or a connection to the ECM.

In addition to differences in the mandatory electronic data transfer capabilities, another key distinction when comparing ELDs and AOBRDs is the manner in which unassigned drive time is handled. ELDs must account for all drive time and warn drivers about unassigned drive time and miles recorded when logging into the device. AOBRDs, on the other hand, are not required to prompt drivers about unassigned drive time. Motor carriers should take great care to ensure unassigned drive time is not allowed to remain on devices because roadside enforcement will likely require an explanation for each instance of unassigned drive time.

With the additional data captured by ELDs, fleets can better track and plan loads and monitor driver safety compliance efforts in accordance with the regulations. However, this additional data requires greater diligence on the part of motor carriers because it may expose more detail of possible violations during an onsite or roadside investigation.

Jerad T. Childress,
Indianapolis

ELDs Present Unique Opportunities and Challenges for Shippers and Intermediaries

The ELD mandate, although not directly applicable to anyone other than regulated motor carriers and their drivers, may have a ripple

effect on other industry stakeholders, including shippers and third-party intermediaries. ELDs may benefit shippers and third-party intermediaries through heightened visibility about the whereabouts and timing of their freight, especially when they engage carriers that have implemented ELDs with non-mandated telematics capabilities.

On the other hand, ELDs may pose unique risks. In an effort to obtain detailed data, shippers and intermediaries may be inclined to require motor carriers to adopt ELDs with specific tracking and functionality features. This is a slippery slope with joint-employment implications, because shippers and intermediaries may have increased access to driver-level decision making. This may lead to accusations that shippers or intermediaries are misusing ELDs and may open the door to FMCSA enforcement actions under the agency’s rule that prohibits coercing drivers to violate the safety regulations, including Hours-of-Service limits.

Brandon K. Wiseman,
Indianapolis

MILEPOSTS

Spotlight on Regulatory Compliance Practice Area’s ELD Review and Audits

With the ELD mandate set to take effect on December 18, 2017, motor carriers must be certain the ELD platform they choose is compliant with federal regulations. Although ELD manufacturers are required to self-certify that their device is compliant, the FMCSA has commented that it will not actively police the list of self-certified ELD manufacturers. The FMCSA has stated it will only provide a motor carrier with eight days to remedy a non-compliant device that may require an immediate replacement with a new ELD system. As

Mileposts, continued

such, it is critical for motor carriers to proactively ensure the device they have chosen is compliant in order to avoid the burden of an 8-day timeline.

At the request of ELD manufacturers, Scopelitis Attorney and Former FMCSA Administrator Annette Sandberg and Scopelitis Attorney Jerad Childress have reviewed numerous ELD platforms over the past year. Their third-party review of the manufacturer's ELD platform is conducted in two phases and is designed to assess compliance with the technical specifications of the ELD regulations. Phase one involves back-office or administrative testing while phase two is aimed at in-truck testing of the device. The ultimate goal is to provide the ELD manufacturer with regulatory insights, and once all regulatory requirements have been satisfied, a third-party verification of compliance is issued for the device.

Sandberg and Childress have also utilized their extensive knowledge of ELD regulations to provide motor carriers with guidance on various ELD requirements. Similar to a manufacturer audit of an ELD device, the approach for a motor carrier ELD audit consists of back-office/administrative and in-truck testing. "Based on our report and recommendations, motor carriers may be able to resolve areas of non-compliance during early implementation phases," said Sandberg. "We can decrease the chances of unfavorable roadside inspections or DOT audit results."

In addition to Sandberg and Childress, Indianapolis-based Scopelitis Attorneys Tim Wiseman and Brandon Wiseman have extensive knowledge of ELD regulations and best practices, as well as Mt. Ephraim-based Attorney Tom O'Donnell.

For more information or to contact a member of the team, please visit our website at www.scopelitis.com.

FOR THE RECORD

Congratulations to Tyler P. Biddle and James A. Eckhart, who began their law practice this fall as associates in the Indianapolis office.

Congratulations to Mike Langford for being re-elected to the TIDA Board of Directors. Mike will serve for the next three years (having already served for six years). Mike is a member of the executive committee and will serve as Treasurer of TIDA in the coming year.

The Scopelitis Law Firm was named to U.S. News & World Report's "Best Law Firms" list for the fourth consecutive year. Firms included in the list are recognized for professional excellence with persistently impressive ratings from clients and peers.

Congratulations to the attorneys at Scopelitis for being honored with Illinois Trucking Association's (ITA) Allied Member of the Year Award. Scopelitis Partner Jerry Cooper was also individually recognized for his contributions to the association.

ON THE ROAD

Todd Metzger attended the Indiana Motor Truck Association's Annual Convention, November 2-5, in **Phoenix**.

Becky Trenner, Shannon Cohen and Jannie Steck presented "Legal Issues Impacting Transportation Operations and Employment Rights" at the Women in Trucking Association's Accelerate Conference, November 6-8, in **Kansas City, MO**.

Greg Feary will present on a panel addressing "Specialized Contracts in Transportation Issues and Tips: IC Contactor Operating Agreement & Owner-Operator Equipment Lease" at the Georgia Motor Truck Association's Leadership Conference, November 8-9, in **Marietta, GA**.

Shannon Cohen will participate in a panel discussion addressing "The Rapidly Evolving World of Ground Transportation Technology: Multi-Modal Regulation, Colliding Business Models & Automated Vehicle Synergies" and Kathleen Jeffries will be speaking on "Mid-90s Motor Carrier Freight Charge Reform" as part of The Jubilee Panel Half-Century Game Changers that Rocked the Transportation World at the Transportation Lawyers Association's Transportation Law Institute, November 10, in **Norfolk, VA**. Don Vogel and Fritz Damm will also attend.

Fritz Damm will attend the Transportation Lawyers Association's Executive Committee Meeting as past President, Chair of Membership and Recruiting Committee, November 11, in **Norfolk, VA**.

Kathleen Jeffries will attend and serve as Chair at the Conference of Freight Counsel's Winter 2018 Meeting, January 6-8, in **Tuscon, AZ**. Fritz Damm will also attend.

Don Vogel, Kathleen Jeffries and Fritz Damm will attend the Transportation Lawyers Association's Chicago Regional Seminar, January 19, in **Chicago**.

Bob Henry will present "A Review of the What, When and Where of Depositions" at the American Moving and Storage Association's Safety & Operations Conference, January 22-23, in **Irving, TX**.

Jeffrey S. Toole, Editor
Allison O. Smith, Editor
10 West Market St., Suite 1500
Indianapolis, IN 46204

DISPATCHES

Annette Sandberg stated, **Out of Service (OOS) Violations during roadside inspections will not start until April 1, 2018.** Property-carrying drivers are OOS after 10 consecutive hours and passenger-carrying drivers are OOS after eight consecutive hours. However, state enforcement officials will investigate ELD or ABORD compliance beginning on December 18, 2017. Carriers without compliant ELDs or AOBRDs will likely be targeted for future investigation if there appears to be a trend of roadside violations.

According to Brandon Wiseman, motor carriers continue to have a responsibility under the **ELD mandate to retain “supporting documents,”** which are records generated in the carrier’s normal course of operations that can be used to verify the accuracy of a driver’s record of duty status. According to the ELD mandate, carriers must retain “up to 8” supporting documents for every 24-hour period that a driver is on duty.

With differing HOS regulations in the U.S., Canada, and Mexico, a U.S. ELD mandate taking effect this year and a Canadian ELD mandate still being finalized, Jerad Childress recommends that fleets should be sure to work with their ELD providers to tailor their devices to accurately **monitor HOS compliance in each country in which they operate.** Trucks will continue to move the lion’s share of NAFTA surface freight, but the inevitable confusion related to complying with multiple rules may create marginal losses in productivity.

LOCATIONS

INDIANAPOLIS

10 W. Market St., Suite 1400
Indianapolis, IN 46204
Phone (317) 637-1777

CHICAGO

30 W. Monroe Street, Suite 600
Chicago, IL 60603
Phone (312) 255-7200

WASHINGTON, D.C.

1850 M Street, N.W., Suite 280
Washington, DC 20036
Phone: (202) 551-9030

LOS ANGELES

2 N. Lake Avenue, Suite 560
Pasadena, CA 91101
Phone: (626) 795-4700

CHATTANOOGA

600 Republic Center
633 Chestnut Street
Chattanooga, TN 37450
Phone: (423) 266-2769

DETROIT

535 Griswold Street, Suite 1818
Detroit, MI 48226
Phone: (313) 237-7400

SPOKANE

505 W. Riverside Ave., Suite 583
Spokane, WA 99201
Phone: (509) 747-1800

DALLAS/FORT WORTH

801 Cherry Street, Suite 1075
Fort Worth, TX 76102
Phone: (817) 869-1700

MILWAUKEE

330 East Kilbourn Ave., Suite 827
Milwaukee, WI 53202
Phone: (414) 219-8500

MT. EPHRAIM

851 Green Avenue
Mt. Ephraim, NJ 08059
Phone: (856) 203-6611

PHILADELPHIA

150 N. Radnor Chester Rd
Suite F200
Radnor, PA 19087
Phone: (215) 240-1444

SALT LAKE CITY

345 W 600 South, Suite 107
Heber City, Utah 84032
Phone: (435) 339-0730

TULSA

321 S. Boston Ave, Suite 300
Tulsa, Oklahoma 74103
Phone: (539) 202-2400