

ELD Zero-Hour is Nearing, May Lay Traps for the Unwary

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Many outside of over-the-road motor carriers are taking notice of the looming Electronic Logging Device Mandate (ELD Mandate). We are seeing raised hands with many questions and some confusion at this very moment from a wide range of market participants, including shippers, private carriers, intermediaries and forwarders, and companies with unique and nuanced business models involving direct or indirect transportation. Let's set the record straight for those who may not have been following the play-by-play of the ELD Mandate over the last few years.

What is the ELD Mandate?

The ELD Mandate will take effect on December 18, 2017, and will require certain motor carriers to install and use Electronic Logging Devices (ELDs) in place of the paper logs currently used for compliance with federal safety regulations. The ELDs connect to the engine of commercial motor vehicles and log all activities while a vehicle is in use, including when a driver is off duty, in the sleeper berth, driving, or on-duty but not driving.^[i] The Federal Motor Carrier Safety Administration (FMCSA) expects this ELD Mandate will increase safety on the country's roadways by eliminating the human error when logging drive time and thereby driving excess and unlawful hours as well as the possibility of "falsifying" paper logs.

Who must comply with the ELD Mandate?

The ELD Mandate applies to all drivers of commercial motor vehicles who are currently required to use paper records of duty status. In general, a motor carrier must require drivers to record their duty status for every 24-hour period.^[ii] The current applicability of these logging requirements depends on certain characteristics, including the size of the commercial motor vehicle, the nature of commerce, and the availability of certain exceptions for short haul operations.^[iii] Although the ELD Mandate will start on December 18, 2017, the FMCSA recently released guidance advising that it will not fully enforce compliance until April of 2018. However, as one would expect, compliance with the legacy logging requirements and all other safety-related regulations will continue to be enforced with all associated consequences.

What exceptions or exemptions from the ELD Mandate are available?

Certain exceptions are available for those to whom the ELD Mandate would otherwise apply. First, and perhaps the most valuable for occasional industry participants, is an exception for drivers who use paper records of duty status fewer than eight days in each 30-day period.^[iv] Second, drivers who participate in drive-away-tow-away operations (where the vehicle is the commodity) are excepted.^[v] Third, drivers of vehicles manufactured before model year 2000 are excepted.^[vi]

Fourth, drivers with grandfathered use of compliant Automatic Onboard Recorders are excepted until 2019.^[vii] Finally, operators of commercial motor vehicles may petition the FMCSA for an exemption from the ELD Mandate, which is particularly valuable for those participants for whom compliance would be extremely burdensome and whose operational characteristics permit alternative measures to ensure safety.^[viii]

What is the likelihood that the ELD Mandate will be withdrawn?

The ELD Mandate is indeed here to stay, barring the most unforeseeable of circumstances. Supporters of the ELD Mandate, including the American Trucking Association and the current and prior Presidential administrations, have zealously advocated for the implementation of this requirement on the grounds of safety and the technological advancement of the transportation industry. Many legislators and private interest groups have attempted to force withdrawal of the ELD Mandate over the past few years. Most notably, this summer the Owner-Operator Independent Drivers Association unsuccessfully litigated the matter on constitutional grounds all the way to the United States Supreme Court. More recently, Representative Brian Babin (R-TX) introduced The ELD Extension Act of 2017, which would extend the initial implementation date for the ELD Mandate two (2) years to December 2019.^[ix] Any similar last-minute attempts to derail the ELD Mandate are not expected to gain meaningful traction.

What impact should my company expect from the ELD Mandate?

Experts disagree over the exact impact that the ELD Mandate may have across our economy, but most are aligned in the understanding that the effects could be widespread. The motor carrier industry has long suffered from a driver shortage and more recently from constricting capacity. Compliance with the ELD Mandate is expected to strain small motor carriers, which together represent the majority of available capacity, due to the need for strict hours of service compliance that could potentially force drivers off the road with loads under tow. Some estimate the decrease in productivity could amount to an 8% reduction in capacity.^[x] Small motor carriers will also shoulder the cost of ELD devices, which range from around \$200 to \$800.^[xi] These carriers who would otherwise bring capacity to the market may even choose to leave the business altogether due to this commercial and regulatory environment.^[xii] This cascade of events may well result in higher linehaul transportation rates and other ancillary costs, including higher drayage and demurrage due to pressure on wait times at ports.^[xiii] Fortunately, the ELD Mandate may succeed in balancing any such near-term pain against the intended safety benefits as well as long-term advancements in analytics and optimization that could significantly improve supply chains for the foreseeable future.

The Benesch Transportation & Logistics Practice Group stands ready to bring actionable clarity to regulatory compliance obligations such as the ELD Mandate as well as implementing strategic plans for the operational and defensive use of transportation technology. Jonathan Todd is Of Counsel with the firm and may be reached at 216-363-4658 or jtodd@beneschlaw.com. Kristopher Chandler is an Associate with the firm and may be reached at 614-223-9377 or kchandler@beneschlaw.com.

^[i] 49 CFR 395.8(b)(1)-(4).

^[ii] 49 CFR 395.8(a)(1).

[iii] 49 CFR 395.1(e)(1)-(2).

[iv] 49 CFR 395.8(a)(1)(iii)(A)(1).

[v] 49 CFR 395.8(a)(1)(iii)(A)(2).

[vi] 49 CFR 395.8(a)(1)(iii)(A)(3).

[vii] 49 CFR 395.8(a)(1)(iii)(A)(4).

[viii] 49 CFR 381.200.

[ix] H.R. 3282.

[x] <https://eldfacts.com/eld-facts/>

[xi] *Id.*

[xii] *Id.*

[xiii] <https://usportservices.com/eld-mandate-ready/>