MEDIA MENTIONS

Marc Blubaugh quoted in Transportation Law360 | “House Transpo Funding Bill Clears Murky Trucking Regs”

MAY 25, 2016

By **Linda Chiem**

Law360, New York (May 25, 2016, 8:46 PM ET) -- The House's $58.2 billion transportation and funding package that appropriators advanced Tuesday could provide needed operational flexibility to commercial truckers, experts say, by clarifying regulations over drivers' working conditions, like how long they spend driving and when they take breaks.

The fiscal 2017 **Transportation, Housing and Urban Development funding bill** will pay for critical transportation investments and low-income housing needs, while also providing a vehicle for the commercial trucking industry to get some long-sought relief from murky and inflexible regulations that truckers say disrupts interstate commerce.

The House Appropriations Committee's attempts to restore the so-called 34-hour restart rule for truckers and make clear that federal law preempts state regulations for truckers' meal and rest breaks provide a much more palatable package, experts say, that the industry hopes will win out when negotiations begin with the Senate's version of the bill.

"From my perspective, the House Appropriations Committee is the more sensible and straightforward approach and has the virtue of simplicity," said Marc S. Blubaugh, a partner with Benesch Friedlander Coplan & Aronoff LLP. "In any event, all in the industry are looking for predictability. The industry hardly needs to live through yet another seismic shift in operational practices."

The House's fiscal 2017 THUD bill locks in a fix related to the 34-hour restart rule, which governs how much time drivers can spend on the road during any given stretch, as well as the amount of time they're supposed to be off duty.

Under this rule, drivers may not drive after 60 to 70 hours on duty in seven to eight consecutive days. A driver may restart that seven- or eight-day period after taking 34 or more consecutive hours off duty. So drivers could actually "restart" their respective clocks multiple times a week.

But the industry got thrown for a loop in 2011 when the Federal Motor Carrier Safety Administration enacted a pair of extra restrictions on the use of the 34-hour restart period that took effect July 1, 2013.

After industry outcry and studies demonstrating that the regulations didn't actually have its intended effect of ensuring drivers were properly rested, the U.S. Department of Transportation in 2014 suspended that pair of extra provisions that had been tacked onto the restart rule and mandated the 34-hour rest period include two consecutive periods off duty between 1 a.m. and 5 a.m. and restricted drivers to taking that restart period only once every 168 hours, or seven days.

When drafting the fiscal 2016 appropriations legislation, Congress in 2015 intended to eliminate those narrow additional restrictions on the restart rule permanently if a federal study failed to show that the restrictions had any safety benefit. But the language they used actually could have eliminated the entire 34-hour restart rule altogether, so they went back this year to iron out the wording to permanently eliminate the pair of additional restrictions on the rule, experts say.

"In short, from the industry's perspective, this was a legislative debacle," Blubaugh said of the drafting glitch.

The trucking industry is taking a shine to the House's handling of this provision in the bill when compared to the Senate's bill stating the fate of the restrictions would still depend on the results of the federal study while also adding a new 73-hour cap on the amount of hours that a driver can remain on duty in a seven-day period.

"It's easier to comply with, there's a simplicity in the enforcement," Prasad Sharma, a partner with Scopelitis Garvin Light Hanson & Feary PC, said of the House's provision. "And it's a rule that was in place and that was working."

Lawmakers are also seeking to ensure that uniform federal labor rules apply to truckers, experts say, by pushing through a provision that could effectively shut down piecemeal state-level legislation on meal and rest breaks.

It's a direct response to recent court rulings that truckers have claimed run afoul of federal preemption, such as the Ninth Circuit's 2014 holding in Dilts v. Penske Logistics LLC.

In that case, the appeals court held that the Federal Aviation Administration Authorization Act of 1994 - which set the test for preemption to apply when carriers' prices, routes and services were involved - did not preempt California's meal and rest break requirements for truck drivers because the requirements didn't have a significant-enough effect on prices or services offered by the motor carrier industry.

"Even when faced with evidence that state measures affecting employment terms such as minimum wages, worker classification, and meal and rest breaks exert substantial effects on carriers' prices and services, courts increasingly are enforcing the state laws," Strasburger & Price LLP partner Mark J. Andrews said. "It remains to be seen whether the provision can prevail in the face of opposition from the Obama administration and the California congressional delegation."

Another provision in the House's 2017 THUD bill that truckers are relieved to see is one that throws a roadblock in the FMCSA's proposed rule-making process for the agency's so-called safety fitness

determination rule, an update to the FMCSA's methodology for determining when a motor carrier is unfit to operate a commercial motor vehicle.

The FMCSA had issued its **notice of proposed rule-making** on Jan. 15 to come up with a new safety fitness rating methodology that will integrate on-road safety data from inspections, along with the results of carrier investigations and crash reports, to determine a motor carrier's overall safety fitness on a monthly basis.

But trucking groups and attorneys quickly pounced, saying the FMCSA was undermining certain provisions Congress had laid out in last year's Fixing America's Surface Transportation Act. The FAST Act set parameters around the FMCSA's continued use of data through its controversial safety measurement system, or SMS, under the program known as Compliance, Safety, Accountability, or CSA.

The FAST Act specified that SMS data and analysis could not be used in any new safety fitness determination rule until completion of a third-party review of SMS in a process likely to take between 22 and 26 months, Andrews said.

--Editing by Katherine Rautenberg and Edrienne Su.