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December 7, 2017

Via First Class Mail

The Honorable Josh Hawley
Attorney General, State of Missouri
Supreme Ct. Building, 207 W. High St.
Jefferson City, MO 65101

Re: Implementation of Electronic Logging Device (ELD) Mandate

Dear Mr. Attorney General:

On December 18, 2017, the Federal Motor Carrier Safety Administration (FMCSA), in cooperation with your state and virtually every state in the union, will begin to implement a new commercial motor vehicle (CMV) inspection regime involving the use of electronic logging devices (ELDs) to monitor CMV driver compliance with federal hours-of-service (HOS) regulations. This raises issues of how your state's enforcement officials will enforce state law.

Public statements made by FMCSA, the Commercial Vehicle Safety Alliance (CVSA), various state enforcement agencies, and others demonstrate that there is a widespread misunderstanding of the respective legal obligations imposed upon motor carriers and drivers under the ELD regulations. Further, the authority of enforcement officials to issue out-of-service orders (OOSOs) (order drivers to cease operating) under the Mandate is seriously misunderstood.

This firm represents the Owner-Operator Independent Drivers Association, Inc. (OOIDA), a trade association representing the interests of over 160,000 small business truckers including both motor carriers and drivers operating in all 50 states.

The purpose of this letter is to inform you of potential problems created by the enforcement structure FMCSA has created, and your state has adopted, in the ELD Mandate. Your understanding of OOIDA's interpretation of various provisions of the ELD Mandate could go a long way towards avoiding unnecessary, time consuming, and costly disputes between CMV drivers and motor carriers on the one hand and the law enforcement community on the other.

Motor carriers, small business truckers, drivers, and the law enforcement community each have an important stake in a proper and orderly implementation of this new ELD enforcement regime. OOIDA has made a careful evaluation of the regulations covering the ELD Mandate and potential problems that will almost certainly arise when state enforcement agencies begin to implement that Mandate. The legal analysis that OOIDA has directed us to make is set forth as an attachment to this letter. Several conclusions should be drawn from this analysis:

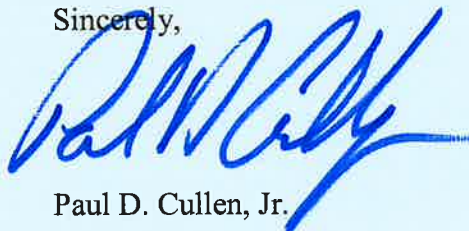
1. The ELD Mandate, which individual states are required to enforce as a matter of state law, has not made significant changes to the hours-of-service rules applicable to drivers.
2. The ELD Mandate assigns to *motor carriers* the legal responsibility of installing ELD devices on CMVs and maintaining those devices. Enforcement action for the failure to install or maintain an ELD should be directed at *motor carriers*, not drivers.
3. CMV drivers continue to have a responsibility to maintain a current and accurate record of duty status using either paper log books, an ELD device, or, for a limited period of time, an older previously approved automatic on-board recording device.
4. The Mandate requires motor carriers to ensure that, when required, CMV drivers use an ELD. The Mandate itself does not impose that requirement upon drivers. Enforcement action, therefore, for failure to use a particular method for recording a driver's record of duty status should be directed at motor carriers, not drivers.
5. The ELD Mandate does not authorize the imposition of out-of-service orders for violation of regulations respecting the installation, maintenance, or use of ELDs. There is no legal authority for any enforcement officer to issue an out-of-service order for any violation of the ELD Mandate. 49 C.F.R. § 395.13.
6. Until confusion about a certain exemption from the ELD requirement is resolved among the states, that exemption should be available for CMVs with either a pre-2000 VIN number or with a pre-2000 engine.
7. States must adopt statutes or regulations that: (1) protect the privacy and confidentiality of ELD data; and (2) limit use of ELD Data to HOS compliance determinations.

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The ELD Mandate is very detailed and filled with complexity. Legal and technical issues not addressed here abound. OOIDA and its counsel stand ready to confer with you on any issues related to this subject that might assist in resolving any questions that you may encounter. We also remain prepared to protect the rights of OOIDA members as this rule rolls out.

Sincerely,



Paul D. Cullen, Jr.

Enclosure: Attachment – Analysis of Selected Issues Associated with the Implementation of the Federal Mandate for the Use of Electronic Logging Devices

cc: **Mr. Bill Whitfield**
Highway Safety Director
Missouri Dep't. of Transportation

Jim Johnston
President
Owner-Operator Independent Drivers Association, Inc.

**ANALYSIS OF SELECTED ISSUES
ASSOCIATED WITH THE IMPLEMENTATION
OF THE FEDERAL MANDATE FOR THE
USE OF ELECTRONIC LOGGING DEVICES**

Prepared for the
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Introduction

States participating in the Motor Carrier Safety Assistance Program (MCSAP) are required to adopt CMV safety regulations that are compatible with the Federal Motor Carrier Safety Regulations (FMCSRs) set forth in Title 49, Code of Federal Regulations. Part 395 of Title 49 includes both the existing hours-of-service (HOS) regulations and the new ELD Mandate. The ELD Mandate is generally set forth in Title 49, Sections 395.8, 22, 24, 26, 28, 30, 32, 34, and 36. General and definitional provisions applicable to both HOS rules and the new ELD Mandate are located in Sections 395.1 and 2. Authority to place a driver out-of-service for certain HOS violations is found in Section 395.13.

For convenience's sake, this analysis shall refer to relevant U.S. Code of Federal Regulations sections which your state has been required to have incorporated into state law in exchange for grants it receives under MCSAP. The question of whether your state has properly incorporated these FMCSRs into your state's law is not addressed here.

Compliance with HOS Regulations

Property carrying drivers must comply with the HOS regulations that define and limit the number of hours that a driver may work and operate a CMV during given time periods, i.e., a work day, a 7- or 8-day work week, etc. The HOS regulations also direct mandatory rest periods and breaks from driving. See Section 395.3 and related definitions in Sections 395.1 and 395.2.

Enforcement Note

The ELD Mandate has not made significant changes to these HOS regulations.

Installation and Maintenance of ELDs

The ELD Mandate imposes upon *motor carriers* the duty to install (Section 395.8(a)) and maintain (Section 395.34(d)) ELDs on CMVs. Drivers are only required to notify a motor carrier of a malfunctioning ELD. Section 395.34(a). Drivers are directed to use paper log books if an ELD is malfunctioning. Section 395.34(a)(2).

Enforcement Note

Because it is the *motor carrier* who has been assigned the legal responsibility for installing and maintaining ELDs, any citation or violation notice for failure to install or maintain an ELD must be issued to the motor carrier, not the driver.

Use of ELDs

The ELD Mandate does not impose a specific, legally enforceable obligation upon drivers to use ELDs. The language of the ELD Mandate establishes a duty upon motor carriers to direct drivers as to how they should record their duty status. The only obligation imposed upon drivers is to “[r]ecord the driver’s duty status using one of the methods under paragraph (a)(1) of this section.” Section 395.8(a)(2)(i). Those methods include using ELDs or paper log books. So long as a driver has a properly prepared and current paper log book, no driver citation under the ELD Mandate would be appropriate. The only legally enforceable requirement on the use of ELDs falls on motor carriers who must “**require**” drivers to prepare a record of duty status using methods appropriate to the type of trucking operation involved. Consider the language of the regulation:

49 C.F.R. Section 395.8(a)(1)(i) – (iii)

(a)(1) Except for a private motor carrier of passengers (nonbusiness), as defined in § 390.5 of this subchapter, **a motor carrier** subject to the requirements of this part **must require** each driver used by the motor carrier to record the driver’s duty status for each 24-hour period using the method prescribed in paragraphs (a)(1)(i) through (iv) of this section, as applicable.

(i) Subject to paragraphs (a)(1)(ii) and (iii) of this section, **a motor carrier** operating commercial motor vehicles **must install and require each of its drivers** to use an ELD to record the driver’s duty status in accordance with subpart B of this part no later than December 18, 2017.

(ii) A **motor carrier that** installs and **requires a driver to use** an automatic on-board recording device in accordance with § 395.15 before December 18, 2017 may continue to use the compliant automatic on-board recording device no later than December 16, 2019.

(iii)(A) A **motor carrier may require a driver to record** the driver’s duty status manually in accordance with this section, rather than require the use of an ELD, if the driver is operating a commercial motor vehicle:

- (1) In a manner requiring completion of a record of duty status on not more than 8 days within any 30-day period;
- (2) In a driveaway-towaway operation in which the vehicle being driven is part of the shipment being delivered;
- (3) In a driveaway-towaway operation in which the vehicle being transported is a motor home or a recreation vehicle trailer; or
- (4) That was manufactured before model year 2000, as reflected in the vehicle identification number as shown on the vehicle’s registration.

(Emphasis added.) See also specific requirements imposed on motor carriers for administering the use of ELDs by their drivers in Section 395.22.

Note that the regulations implementing the ELD Mandate impose an obligation on motor carriers to **require** drivers to prepare a record of duty status in certain ways depending upon circumstances. Drivers may be **required** by a motor carrier to use either ELDs or paper log books.

Enforcement Note

Because the only legal obligation respecting a requirement to use ELDs falls on motor carriers who must “require” drivers to record a record of duty status using one of several alternative methods, any enforcement action directed at the failure of a driver to use an ELD must be directed at the motor carrier for not effectively requiring a driver to use the device. The driver may be contractually obligated to the motor carrier, and he or she might violate a proper contract term imposed by the motor carrier, but there is no direct legal obligation under the regulation for the driver to use one or the other of the particular methods of recording record of duty status in the rule.

The ELD Mandate Does Not Authorize Out-of-Service Orders for Violation of Section 395.8

The authority to issue drivers out-of-service orders (OOSO) for Part 395 violations is set forth in Section 395.13(a). This provision authorizes driver OOSOs only for driving “after being on duty in excess of the maximum period permitted” or for failing “to have a record of duty status current.” Section 395.13(b). So long as a driver has recorded and can make available a current paper log book or properly used ELD, there is no authority in the law for issuing a driver an OOSO in connection with any violation of Section 395.8.

Enforcement Note

No authority exists under the regulation for issuing a driver out-of-service order for violation of the ELD Mandate. Any other type of enforcement action under Section 395.8 should be directed at the motor carrier, not the driver.

Application of the ELD to Pre-Year 2000 CMVs

Motor carriers have also received inconsistent messages about the enforcement of the specific exemption from the ELD Mandate for pre-year 2000 commercial motor vehicles. This exemption is provided, not by statute, but by the ELD Rule at Section 395.8(a)(iii)(A):

A motor carrier may require a driver to record the driver's duty status manually in accordance with this section, rather than require the use of an ELD, if the driver is operating a commercial motor vehicle:

* * *

(4) That was manufactured before model year 2000, as reflected in the vehicle identification number as shown on the vehicle's registration.

A plain reading of this rule might lead an enforcement officer to check a truck's Vehicle Identification Number (VIN) to determine its model year and whether the motor carrier is properly operating under the ELD exemption. But several states, FMCSA, and CVSA have issued different interpretations of this rule, qualifying the exemption based on the manufacturing date of the truck's *engine*, or VIN, or both.

FMCSA's website contains a section of Frequently Asked Questions (FAQ) about the ELD Rule. It poses the question and answer:

If the vehicle registration for a commercial motor vehicle reflects a model year of 2000 or newer, but the connections and motor vehicle components (such as the engine) are older than model year 2000, is the vehicle exempt from the ELD Rule?

Yes. When a vehicle is registered, the model year should follow the criteria established by the National Highway Traffic Safety Administration (NHTSA). There may be instances where the model year reflected on the vehicle registration is not the same as the engine model year, most commonly when a vehicle is rebuilt using a "glider kit." In this circumstance, an inspector/investigator should use the model year on the engine to determine if the driver is exempt from the ELD requirements. If the engine model year is older than 2000, the driver is not subject to the ELD Rule. In instances in which the engine model year is 2000 or newer, and the vehicle registration reflects a model year older than 2000, the driver is subject to the ELD Rule. While the driver is not required to possess documentation that confirms the vehicle engine model year, 49 C.F.R. Part 379 Appendix A, requires motor carriers to maintain all documentation on motor and engine changes at the principle place of business. If a determination cannot be made at the roadside, Law Enforcement should refer the case for further investigation.

FMCSA, FAQs (July 12, 2017), <https://www.fmcsa.dot.gov/faq/if-vehicle-registration-commercial-motor-vehicle-reflects-model-year-2000-or-newer-b-0>.

While the rule specifically provides that the exemption is based on the model year of the truck as determined by the VIN, FMCSA here instructs a different, conflicting and somewhat confusing standard. Answering “Yes,” the agency states that when a vehicle’s “connections and motor vehicle components (such as the engine) are older than model year 2000,” the vehicle is exempt. This exemption would appear to apply to OOIDA members who operate a vehicle with a VIN that reflects a newer than 1999 model year, but who then modify their truck with pre-2000 components.

But while the question and answer suggest that the engine is one of the vehicle components whose pre-2000 age qualifies the vehicle for the exemption, the agency’s further explanation appears to focus solely on the “vehicle engine model year” even though drivers are not required to possess documentation verifying the engine model year. This is a very confusing interpretation because it appears to conflict with that rule. Since this past summer, OOIDA has asked FMCSA to clarify this issue, and no changes to the FAQ have been made.

More confusingly, CVSA, of which your state is a member, had drafted a pending inspection bulletin (instruction to state enforcement personnel who perform truck inspections) embracing both the VIN and engine year interpretation of this rule. The Bulletin quotes the rule correctly, and then qualifies it: “Please note, trucks manufactured according to the vehicle VIN prior to 2000 or engines manufactured prior to 2000 are exempt from the ELD mandate.” But does this explanation mean that state inspectors can choose whether to inspect the VIN number or engine year? Or does this mean if the vehicle has *either* a pre-2000 year VIN number *or* engine year it falls under the inspection?

A second Frequently Asked Question on FMCSA’s website further confuses the issue. The question is whether an ELD is required when the model year of the truck is year 2000 or newer, but the truck’s engine does not have an ECM (Electronic Control Module)—the technology needed to connect to an ELD. See <https://www.fmcsa.dot.gov/faq/if-vehicle-registration-commercial-motor-vehicle-reflects-model-year-2000-or-newer-b>. In this scenario, the agency chooses the model year as the determining factor to answer that, yes, an ELD would be required. But to OOIDA’s knowledge, no engines were made after 1999 without an ECM. Therefore, under this guidance, a newer model truck with a pre-2000 engine would NOT fall into the exemption, contradicting FMCSA’s other FAQ.

OOIDA also contacted more than 15 states’ commercial motor vehicle enforcement agencies to ask whether there was consensus on how to recognize this ELD exemption. There was none. The states have taken positions that range from following the plain language of the rule, to following FMCSA’s guidance, to an approach similar to CVSA’s and, in some cases, to taking no position yet.

This is a critical issue to resolve for both drivers and motor carriers. The adoption of ELDs is an expense and burden that small business motor carriers wish to avoid if they properly fall under the exemption. Without a clear national standard, some motor carriers may pay for ELD

equipment unnecessarily. Other motor carriers, who will in good faith believe they fall into the exemption, will be at risk of being cited for a violation, depending on the interpretation of the state they travel through. This is an issue that needs decisive and uniform instructions to both the law enforcement community and the motor carrier industry now.

Enforcement Note

Until there is a national consensus on the exemption standard to be applied, inspectors should recognize that vehicles with either a pre-2000 model year VIN or a pre-2000 engine are exempt.

Use of ELD Data

The ELD Mandate increases the amount of data available to enforcement personnel, escalating the importance of and difficulties in administering the State's obligation to "safeguard protected personally identifiable information and other [sensitive] information" consistent with the State's privacy and confidentiality obligations as MCSAP participants. *See* 2 C.F.R. § 200.303(e); *cf.* 49 U.S.C. § 31137(d)(2), (e). Enforcement personnel may use "any information collected by electronic logging devices . . . **only** for the purpose of determining compliance with hours of service requirements." 49 U.S.C.A. § 31137(e)(3) (emphasis added). However, the ELD Mandate does not contain commensurate regulations restricting use of and protecting the privacy and confidentiality of ELD data. Therefore, together with adopting the ELD Mandate, the State must also develop and adopt new statutes or regulations protecting ELD data and restricting its use.

Enforcement Note

The States must adopt new statutes or regulations that: (1) protect the privacy and confidentiality of ELD data; and (2) limit use of ELD Data to HOS compliance determinations.

Regulations implementing the ELD Mandate were prepared and promulgated by FMCSA. The enforcement community is now faced with the task of implementing those regulations as written. OOIDA and its members are prepared to deal with those regulations as written. If FMCSA had something else in mind when it promulgated those regulations, it is rather late in the day to change the direction that enforcing officers are now preparing to take on December 18, 2017.