
CLINICAL CARE UPDATE

NEW DRIVER SERVICE HOUR RULES VACATED

This is the second part of a two-part article on sleep disorders and fatigue in the workplace.

In a July 16 ruling, the U.S. Court of Appeals for the District of Columbia Circuit vacated long-awaited Federal Motor Carrier Safety Administration (FMCSA) hours-of-service (HOS) rules intended to address safety risks associated with driver fatigue.

For occupational medicine physicians, the court's action serves as a reminder of the need to address fatigue and sleep disorders in daily practice, particularly for patients who work in safety-sensitive positions.

In a lawsuit filed against the FMCSA, a coalition of safety-oriented groups claimed the revised HOS rules failed to meet requirements Congress set in 1995. The law contained a provision directing the Federal Highway Administration, which was in charge of truck safety at the time, to issue rules addressing truck driver fatigue by March 1996. The revised rules were promulgated in April 2003 and finally took effect in January 2004. The revisions represent the first major re-write of the rules in more than 60 years.

In response to the court's decision, the FMCSA filed a motion Sept. 2 seeking to stay further action in the case (*Public Citizen et. al v. Federal Motor Carrier Safety Administration*). A stay would give the FMCSA time to address and correct concerns about the new hours-of-service rule, the agency said. If granted, the motion would mean the new HOS rule would remain in effect for the time being.

In a press release, the agency said it believes a stay is necessary to avoid substantial disruption in the enforcement of HOS requirements. Changing rules would produce a potentially uncertain and problematic patchwork of enforcement obligations, which could result in significant confusion and substantially hampered enforcement, FMCSA officials said.

While the court weighs the agency's motion, the FMCSA said it will move forward to address issues raised in the lawsuit. In a first step, it published an Advance Notice of Proposed Rulemaking Sept. 1 in the *Federal Register*. (Electronic On-Board Recorders for Hours-of-Service Compliance; Advance notice of proposed rulemaking; request for comments; RIN-2126-AA89; FMCSA-2004-18940; 69 FR 53386.)

The notice describes the agency's request for information on costs and benefits associated with the use of

electronic on-board recorders as a substitute for paper logbooks. In addition, the agency has entered into contracts with several entities for literature reviews pertaining to the effect of hours of service regulations on driver health. The agency says these actions will produce necessary information contributing to a revised HOS rule.

The Court's Position

The appellate court agreed with the plaintiff's position on the timing of enforcement, and also said the new rules are "arbitrary and capricious because the agency neglected to consider the impact of the rule on the health of drivers." The court said: "Nothing in the agency's extensive deliberations establish that it considered the statutorily mandated factor of drivers' health in the slightest. Instead, the agency states that 'the statute does not require the agency to protect driver health to the exclusion of other considerations, such as the costs and benefits of the proposed regulation.'"

It continues: "It is one thing to consider whether an overworked driver is likely to drive less safely and therefore cause accidents. Whether overwork and sleep deprivation have deleterious effects on the physical health of the driver is quite another. This is not to suggest that the two factors are unrelated: healthy drivers presumably cause fewer accidents and conversely drivers who have fewer accidents suffer fewer injuries. However, the relatedness of the concept discussed to the statutorily mandated factor that the agency does not discuss does not relieve the agency of the duty of compliance with the congressional instruction. It may be the case, for example, that driving for extended periods of time and sleep deprivation cause drivers long-term back problems or harm drivers' immune systems. The agency may of course think that these and other effects on drivers are not problematic (or are outweighed by other considerations, like cost), but if so it was incumbent on it to say so in the rule and to explain why."

In vacating the rule, the court also questioned the rationale behind the agency's decisions to:

- increase the maximum permissible daily driving time from 10 to 11 hours.
- retain a sleeper-berth exception to the rule. (The rule permits drivers to obtain the necessary 10 hours of off-duty time by splitting their rest into two periods of time spent in sleeper berths, at least one of which is two hours long.)

- not require the use of electronic onboard monitors instead of logbooks to monitor compliance.
- a 34-hour restart provision, which has the effect of increasing the maximum number of hours drivers can work each week.

The new HOS rules 1) increase the required off-duty time from eight to 10 hours; 2) decrease the total permissible driving-eligible workday from 15 to 14 hours; 3) increase the total maximum daily possible driving time from 10 to 11 hours; 4) eliminate a “loophole” which allowed drivers to extend a 15-hour duty period by taking breaks throughout the day. A maximum workday of 14 hours in combination with 10 hours of off-duty time results in a 24-hour cycle should the start of each daily driving shift remain the same.

In addition, the revisions increase the number of hours truckers can work per week. The old rules capped the number of weekly working hours at 60 (or 70 for eight days) regardless of whether a trucker got 34 hours of consecutive rest during the week. The new rules allow drivers to work more hours if they take 24 hours off before the close of the weekly limits.

Sleep Research

Sleep researchers say most people need eight hours of quality sleep for optimal alertness and sustained vigilance. The combination of 11 hours of driving and 10 hours off under the new rules (a total of 21 hours) comes closer to a 24-hour cycle than the old rules and have the potential to reduce the circadian sleepiness effect of the old rules, which allowed an 18-hour day.

During the rulemaking process, the FMCSA said it supports a framework that moves toward a 24-hour work/rest cycle because it is “in general agreement” with the concept of accommodating the body’s natural circadian rhythms. However, the agency also noted that a stricter requirement would unduly disrupt the trucking industry.

According to the National Sleep Foundation (NSF), this aspect of the rule is significant because research has shown the amount, quality and timing of sleep is a critical factor in maintaining vigilance for up to 14 hours.

The NSF says regulations based on a sound body of knowledge on the biology of sleep and alertness can be developed to enhance commercial driver safety. Optimal alertness for activities such as safely operating a vehicle depends primarily on two conditions: satisfaction of the biological need for sleep, and timing the period of wakefulness to be synchronized with the alerting function of the brain’s biological circadian clock.

Satisfying the biological need for sleep means obtaining the necessary number of hours of sleep, as well as sleep free of disorders or other effects that disrupt or fragment sleep. Timing periods of wakefulness to be in synchrony with the brain’s alerting functions generally means avoiding the early morning hours (around 4 a.m. to 8 a.m. for most people). Even if a person gets a sufficient amount of quality sleep, they may not be alert when their circadian alerting rhythm is not active, the NSF reports.

A common misunderstanding is that wakefulness and alertness are the same thing. A person can be awake, but at a biological level have a low degree of alertness and a strong tendency to fall asleep in dull situations. Additionally, people are often poor judges of their degree of alertness. That means that a person may not feel sleepy even if at a biological level their alertness is low and the drive for sleep is high.

The NSF believes there are at least two problems with the original regulations. First, it was unlikely that drivers would get eight hours of sleep between shifts when they also needed to eat, re-fuel, and take care of other business. Second, with an on-off and on-again system of permissible drive times, the driver’s waking period and periods of alertness could change daily.

According to the NSF, another problem has been a failure to effectively screen drivers for sleep disorders or medications that could make a driver sleepy even if they optimize their amount of sleep and the time of day they drive. The new rules do not create an environment for monitoring or better enforcement, nor do they substantially improve health screening or address driver education pertaining to sleep and alertness, the NSF contends. As an alternative, the foundation recommends that hours-of-service rules:

- provide for a minimum of 10 consecutive hours off-duty time per 24 hours.
- maximize driving outside the known early morning time period of increased risk of accidents.
- include required driver education about how to obtain good sleep and how to recognize signs of reduced alertness and sleep disorders.
- require automated, on-board monitoring of drive times.
- encourage effective screening of commercial drivers’ health and for sleep disorders, excessive sleepiness and medications.
- not include penalties.
- minimize lost work time for drivers with sleep disorders provided they comply with effective treatment.
- apply to bus drivers and other commercial drivers.