Barley Snyder

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TABLE OF CONTENTS

Final Rule on Truckers' Hours Becomes Effective

By: Richard L. Hackman

Following years of study and sometimes extensive criticism, the Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) adopted as final a December 2007 interim final rule concerning hours of service for commercial motor vehicle drivers. As a result, the nation's commercial truck drivers are allowed to continue to drive up to 11 hours within a single workday, and to restart calculations of their weekly "on duty" limits after the driver has been "off duty" for at least 34 consecutive hours. The rule became effective January 19, 2009.

In December 2007, the FMCSA announced that it was reissuing an interim final rule on its hours of service requirements for drivers in response to "procedural flaws" identified by the District of Columbia Circuit Court of Appeals in July 2007 in *Owner-Operator Independent Drivers Ass'n v. FMCSA*. In this case, the court found that a portion of a 2005 rule issued by FMCSA that increased the daily driving limit for truckers from 10 to 11 hours and allowed drivers to restart the "clocks" limiting their weekly on duty time whenever they took 34 consecutive hours off duty, was invalid because the agency had failed to allow public comment to the methodology used to justify the modification to the rule.

The original components of the rule, under which the trucking industry has operated since January 2004, are:

A minimum 10 consecutive hour rest period, which was increased from 8 consecutive hours;

A work day maximum of 14 consecutive hours, which was decreased from 15 non-consecutive work hours per day;

A maximum of 11 driving hours, which was increased from a maximum of 10 driving hours; and

Resetting of the driver's weekly hours tally after the driver has remained off duty for 34 consecutive hours or more.

Despite legal challenges since 2004, the industry adapted to the rules, with carriers urging shippers to become more efficient at their loading docks since drivers' waiting time was no longer counted as off-duty time, but rather as part of the drivers' work day.

Pursuant to FMCSA administrator John Hill, the final rule "is based on an exhaustive scientific review and designed

[for drivers] to get the necessary rest to perform safety operations and the quality of life they deserve." Hill stated further that the rule was designed to continue the downward trend in trucker fatalities and to maintain motor carrier operational efficiencies. Hill noted that the number of fatalities involving large trucks declined for the third year in 2007. Ultimately, FMCSA decided to propose keeping the current rules rather than create confusion within the trucking industry and the enforcement community by issuing further revisions.

Ultimately, the adoption of the final rule in this matter may end the long legal and procedural battle to revise the hours of service regulations, which went largely unchanged from 1935 until FMCSA offered its first revision back in 2000. However, the possibility still exists that the incoming administration might be sympathetic to the Teamsters Union, Public Citizen and other safety advocates who may again try to challenge these rules in court. The law has been criticized by a number of Democrats in Congress as "weakening truck driver limits" and "threatening the safety of all drivers."

On the other hand, various trucking associations argued that any changes to these rules would be highly disruptive to shippers and carriers. Shippers and carriers have already made modifications to their policies, and further changes would be costly and inefficient.

View PDF of Entire Publication: Final Rule on Truckers' Hours Becomes Effective

Back To Top

Recent Changes in Immigration Law and Procedure for 2009

By: Silas M. Ruiz-Steele

The new year is bringing several important changes in immigration law and procedure, including the following:
Changes to the US-VISIT program and the new categories of non-US citizens including lawful permanent residents required to provide biometric data upon entry to the United States;
New I-9 regulation delayed until April 3, 2009;
Information on the lawsuit filed by the U.S. Chamber of Commerce challenging the federal contractor E-Verify rule and a postponement of its implementation until May 21, 2009;
The Department of Homeland Security's Electronic System for Travel Authorization program (ESTA) requiring all Visa Waiver Program travelers to obtain travel authorization through ESTA prior to travel by air or sea to the U.S.; and
The maximum period of stay a Trade-North American Free Trade Agreement (TN Visa) professional worker from Canada or Mexico may remain in the U.S. before seeking readmission or obtaining an extension of stay has increased from one year to three years.

Department of Homeland Security's (DHS) Final Rule Expanding the US-VISIT Program to Lawful Permanent Residents and Other Categories of Non-US Citizens.

On December 18, 2008 the Department of Homeland Security (DHS) announced a final rule expanding the pool of foreign nationals who are required to go through fingerscans, photographs or other biometric data upon entry to the United States through the US-VISIT program. Beginning January 18, 2009, the following groups will be subject to US-VISIT: U.S. lawful permanent residents;
Canadian citizens, other than those entering the U.S. for business or pleasure or transiting through the U.S.;
Immigrant visa holders;

Foreign nationals paroled into the U.S.; and
Foreign nationals entering under the Guam Visa Waiver Program.

Nonimmigrant visa holders (students and temporary workers) and foreign nationals traveling to the U.S. under the Visa Waiver Program (VWP) will continue to be required to comply with US-VISIT on arrival. Several groups of foreign nationals are exempt from US-VISIT. These include foreign nationals under the age of 14 or over the age of 79, foreign nationals holding certain diplomatic and official visas in the A, G and NATO nonimmigrant categories, and foreign nationals registered in the National Security Entry-Exit Registration System (NSEERS).

US-VISIT is an electronic check-in system for foreign travelers to the U.S. Upon arrival, travelers subject to the system are fingerprinted and photographed, and their travel documents are scanned. Each traveler's information is checked against immigration and law enforcement databases to determine whether the individual is eligible to enter the U.S. or should be prohibited from entering because of risks such as past visa or criminal violations or national security concerns. US-VISIT is operational at 115 U.S. airports, 15 seaports, 154 land border ports of entry, and at selected pre-flight inspection stations abroad. Currently, there are no US-VISIT exit procedures in place, but DHS is expected to implement US-VISIT exit procedures in the future.

New I-9 Regulation Delayed Until April 3, 2009

As previously discussed in a recent Alert, USCIS has delayed, until April 3, 2009, the implementation of an interim final rule entitled "Documents Acceptable for Employment Eligibility Verification" published in the Federal Register on December 17, 2008. The new edition of Form I-9, Employment Eligibility Verification (REV.02/02/09N), reflects certain changes to the list of identity and employment authorization documents acceptable for completing the form, and prohibits employers from accepting expired documents for I-9 purposes. The most important changes to the form include: The new Form I-9 must not only be used for new hires but also for all reverifications that might be required for existing employees after April 3, 2009; and
ALL documents presented, either by new hires or reverified employees, must be valid and unexpired.

In addition, USCIS will be updating the Handbook for Employers, Instructions for Completing the Form I-9 (M-274) and will post the revised version on the agency's website (www.uscis.gov). Employers should continue to use the June 5, 2007 edition of Form I-9 until further notice.

E-Verify for Federal Contractors Delayed Until May 21, 2009

As discussed in our December 2008 Employment Update, the final rule requiring federal contractors to use E-Verify was supposed to take effect on January 15, 2009. A recent lawsuit, however, initially delayed the implementation of the regulation that would require certain federal contractors to participate in the E-Verify electronic employment verification program until February 20, 2009. A further postponement has been agreed to until May 21, 2009. This recent postponement occurs as the White House continues its review of some new and pending Bush Administration regulations.

The lawsuit, which was filed by the U.S. Chamber of Commerce and other associations on December 23, 2008, challenges the recently published final rule and requests the court to declare the June 2008 Executive Order and the final rule illegal and void because federal law explicitly prohibits the Secretary of Homeland Security from making E-Verify mandatory or using it to re-authorize the existing workforce. As a result, federal acquisition officers will not include the E-Verify clause in any federal contract awarded prior to May 21, 2009. We will provide further updates as

the case develops.

ESTA Registration Mandatory for all Visa Waiver Travelers Beginning January 12, 2009

As of January 12, 2009, all Visa Waiver Program (VWP) travelers are required to obtain travel authorization through the Electronic System for Travel Authorization (ESTA) prior to boarding a carrier to travel by air or sea (land ports from Canada and Mexico are exempt) to the U.S. under the VWP.

ESTA is an automated system used to verify the eligibility of visitors to travel to the U.S. under the VWP. VWP allows citizens and nationals of selected countries, including Australia, Japan, Singapore and most Western European countries, to travel to the U.S. for business or tourism for a period of up to 90 days without the need for a visa. ESTA authorizations will generally be valid for two years and will enable multiple entries into the U.S. While an ESTA authorization is not a guarantee of admission to the U.S., it will serve to prevent some VWP applicants from being refused admission and returned to his/her home country following inspection by U.S. Customs and Border Patrol (CBP) after arriving in the U.S. on an international flight. ESTA is accessible online at https://esta.cbp.dhs.gov. CBP strongly recommends that VWP travelers apply for authorization at least three days prior to departing the U.S. If an application for travel authorization is denied, the VWP traveler will be required to apply for a visa at a U.S. Embassy or Consulate before traveling to the U.S. Please note that visitors who have a visa in their passport such as a B-1 or B-2; other nonimmigrant visa holders such as F-1 students or H, L, and O temporary workers, as well as permanent residents ("green card" holders) do not have to obtain ESTA authorization.

U.S. Citizenship and Immigration Services (USCIS) Increases Period of Stay for Trade-NAFTA (TN) Professional Workers from Canada and Mexico

In October 2008, the U.S. Citizenship and Immigration Services (USCIS) published a final rule increasing the period of stay granted to Trade-NAFTA (TN) nonimmigrant professional workers from Canada or Mexico. The final rule changed the initial period of admission for TN workers from one to three years, making it equal to the initial period of admission given to H-1B professional workers. Eligible TN nonimmigrants may now be allowed to receive extensions of stay in increments of up to three years of the prior maximum period of stay of one year.

The TN classification is available to qualified Canadian and Mexican citizens who seek temporary entry into the U.S. to engage in professional employment in specific occupations set forth in the North American Free Trade Agreement (NAFTA). The specific occupations that qualify for the TN nonimmigrant classification are listed in Appendix 1603.D1 to Annex 1603 of the NAFTA and are reproduced in DHS regulations at 8 CFR 214.6(c). Among the types of professionals who are eligible to seek admission as TN nonimmigrants are accountants, engineers, lawyers, pharmacists, scientists, and teachers. The spouses and unmarried children of TN nonimmigrants may be granted TD nonimmigrant status, but are not permitted to work in the U.S.

If you have questions or need more information about how these recent changes may affect your company, please contact Silas Ruiz-Steele at (610) 898-7153; sruizsteele@barley.com.

Back To Top

Are You Ready for the Sea Change in Employment Law in 2009?

Liability under the Family Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), and many other employment laws begins with your first line supervisors. Employment litigation is on the rise, and in today's economic climate, you cannot afford to direct scarce resources at a lawsuit when they are needed elsewhere. Risk management is critical. One of the most cost-effective ways to minimize exposure and avoid costly litigation and penalties is to provide internal training on human resources issues for your managers, supervisors and employees.

Consider this: An employee tells his supervisor that he has a herniated disc in his back and can't lift more than 20 pounds. The supervisor puts the employee off work and tells him not to return until he is released to "full duty" with "no restrictions". The employee files claims against the company alleging that the supervisor violated his rights under the ADA and the FMLA, and in addition, files a claim for workers' compensation benefits. Human Resources was never consulted about the matter. Where did the supervisor go wrong? Would your supervisors recognize the ADA and FMLA implications in this simple scenario to ensure your company is compliant in these areas?

More importantly, are you ready to face such a scenario with the changes that 2009 will bring to the employment law landscape? On January 1, 2009, the Americans With Disabilities Act amendments went into effect. Do your human resources professionals and supervisors know how to evaluate a disability and a request for reasonable accommodation?

The new Family Medical Leave Act regulations took effect on January 16, 2009. Are you prepared to update your policy and manage your employees' questions and requests for FMLA leave?

The Employee Free Choice Act is looming on the horizon. Is your team ready to respond to a union organizing campaign?

In this difficult economic time, employers are unfortunately faced with the prospect of layoffs and reductions in force. If you need to, are you equipped to develop a layoff strategy that minimizes your legal risks, including selecting employees for layoff and a checklist for conducting a reduction in force?

Do you know if you are covered by the WARN Act?

When expenses matter, are you doing everything you can to reduce your workers' compensation insurance costs?

Do your supervisors know what to do if one of your employees comes to them with a complaint of harassment?

Do the employees who do your interviewing and hiring know what questions they can ask and which ones they can't?

Are you a federal government contractor or subcontractor? Are you compliant with OFCCP regulations?

I-9 verification, record-keeping and anti-discrimination compliance are required of all employers. On April 3, 2009, the new I-9 form must be used for all new hires. Have you done an I-9 audit recently? Do you have procedures in place if you receive a "no-match" letter?

If you answered "No," or even "I'm not sure" to any of these questions, you should consider the types of training available through **Barley Snyder's Employment Training Programs**.

Barley Snyder's Employment Training Programs provide practical guidance in these turbulent times to help your management team to act decisively and minimize legal risk. Anyone who is involved in personnel decisions, who serves in a supervisory role, or who is responsible for corporate oversight and strategic planning, needs to be familiar and stay up-to-date with changes in employment laws. Barley Snyder's

Employment Training Programs provide your staff with the knowledge and resources you need in focused, information-packed sessions ideal for: Human resources representatives
Foremen and supervisors
Plant or department managers
Members of corporate management or Audit Committees
Executives
Business owners

Our attorneys can conduct training programs at a location of your convenience, whether it be your worksite or an off site facility, and will customize the program based on your specific needs and business objectives. Sessions can be customized to run from an hour to a half-day, on one or a combination of topics and include real-life examples, practical discussion, interaction with your team and instructive written materials.

Barley Snyder's Employment Training Programs for 2009

FMLA and ADA Changes in 2009
Some legal scholars have said that the FMLA has become so complex that it is virtually impossible for employers to remain in compliance with it. When you add in the ADA Amendments Act, an employer's efforts to be compliant with the laws become even more difficult. This session provides an overview of the new FMLA regulations and the ADA Amendments Act, explains the employee's rights and the employer's obligations under each, and provides practical advice for managing leaves of absence.

The Employee Free Choice Act -- Are You Prepared For The Surge in Union Organizing?
With the Employee Free Choice Act (EFCA) on the horizon, unions will target employers unlikely to ship jobs overseas, including workers in the healthcare, construction, transportation, hospitality and service industries. The EFCA will enable your workforce to unionize without you even knowing it. Would you recognize the signs of union organizing? For example, you've noticed that some of your employees have been acting secretively during their lunch breaks. A few weeks later, a union representative is standing outside your parking lot handing out flyers. How do you respond? This program will teach your supervisors how to look for signals that suggest employees are attempting to unionize, and will provide practical advice on the best ways to remain union-free.

How To Conduct Layoffs and Reductions In Force
This session will identify red flags which may subject an employer to liability for age discrimination, identify concerns in developing a layoff strategy, including selecting employees for layoff and a checklist for conducting a reduction in force. This session will also remind companies going through the myriad details of a significant reduction in force, plant closing, or even a sale of the business, that they need to plan ahead in the event that they are covered by the WARN Act's requirements.

What You Need To Know About I-9 Compliance
Immigration Customs and Enforcement (ICE) can impose significant fines on employers for violation of the Immigration Reform and Control Act of 1986. These fines have been imposed on employers not only for knowingly hiring unauthorized workers but also for paperwork errors on the Employment Verification Form I-9. Liability for I-9 violations, errors, and omissions can be reduced through a combination of compliance training and internal audits. Barley Snyder's immigration attorneys can help guide your staff through a

self-audit of your I-9 process and provide you with written materials on I-9 compliance, training and procedures to follow to help you minimize risks and develop in-house I-9 compliance procedures.

Methods to Reduce Your Workers' Compensation Costs

Do your supervisors understand how to work with an employee who has suffered a work-related injury? If not, you may not be doing all that you should to lower your workers' compensation insurance premium. Do you have a light duty policy that complies with the ADA and the FMLA while containing your workers' compensation costs? This program examines methods of managing the work-related injury from the moment the employee sustains an injury through the leave of absence to the employee's return to work.

Wage and Hour Issues

Any company that has ever been the subject of a Department of Labor or Office of Federal Contract Compliance Programs audit can testify that compliance is not easy. And wage and hour cases are outpacing all other employment litigation in number and cost. From determining whether your employees are exempt from overtime laws to deciding if they are entitled to compensation for travel time, to determining if there is a pay discrimination issue, the concerns arising under the Fair Labor Standards Act and the OFCCP are complex. When mistakes occur, they can be very expensive. These programs review common wage and hour issues or, for government contractors or subcontractors, review the OFCCP requirements to help you target areas where employers often run afoul of the law.

Conducting An Effective Harassment Investigation

The EEOC guidelines require employers to hold periodic harassment training for supervisors and employees. This program provides an overview of the conduct that constitutes illegal harassment, explains the legal liability a company can face when a complaint is filed, and provides recommendations for investigating such complaints internally.

Proper Hiring Practices

Do the managers in your company who conduct interviews of job applicants understand which questions cannot be asked under state and federal laws? Are they up-to-date on the latest legal decisions regarding drug tests, medical exams, criminal background checks, and credit reports? This program addresses these issues and gives employees a better understanding of how to screen applicants effectively.

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Barley Snyder's Employment Law Group strongly believes that a coordinated and integrated approach to labor and employment, workers' compensation, and employee benefits issues is the most efficient and cost-effective method of risk management. We make every effort to develop programs that meet your company's needs and your budget.

For more information on Barley Snyder's Employment Training Programs, please contact Jennifer Craighead at 717.399.1523 , jcraighead@barley.com, or Jill Welch at 717.399.1521, jwelch@barley.com .

View PDF of Entire Publication: Are You Ready for the Sea Change in Employment Law in 2009?

Back To Top