



ELECTRONIC LOG MANDATE

By: Michael F. Nerone, Esquire
Christine R. Tartamella, Esquire
Pion, Nerone, Girman, Winslow & Smith, P.C.
Date: December 31, 2015

I. Origins of Electronic Log Mandate

The final rule requiring the use of electronic log devices in commercial motor vehicles (the “ELD mandate”), published by the Federal Motor Carrier Safety Administration (“FMCSA”) on December 16, 2015,¹ was more than a decade in the making. When the FMCSA began overhauling the hours of service regulations in 2003, it also considered a rule requiring drivers to use electronic on-board recording devices (“EOBRs”), but eventually concluded the time and market were not yet ready. The next year, however, the FMCSA issued an advanced notice of proposed rulemaking, indicating the agency was still considering regulations pertaining to the use of EOBRs.² The final rule was published on April 5, 2010,³ and required EOBRs only for motor carriers that showed significant noncompliance with hours of service requirements (ten percent or greater violation rate during a compliance review).

The final rule did not go unchallenged for long. The Owner-Operator Independent Drivers Association (“OOIDA”) filed a Petition for Review in the Seventh Circuit in June 2010, the day before the rule became effective. *See Owner-Operator Indep. Drivers Ass’n v. Fed. Motor Carrier Safety Admin.*, 656 F.3d 580 (7th Cir. 2011). OOIDA argued, *inter alia*, that the

¹ The full text of the final rule is available at <https://www.gpo.gov/fdsys/pkg/FR-2015-12-16/pdf/2015-31336.pdf>.

² 69 FR 53386 (published September 1, 2004).

³ 75 CFR 17208.

FMCSA had failed to consider whether EOBRs would harass drivers, which Congress had made a mandatory consideration for any regulations pertaining to monitoring devices in commercial motor vehicles. See 49 U.S.C. § 31137(a). The 2010 final rule stated only a “single conclusory sentence” that it had taken the non-harassment statute into account in the final rule. See *Operator Indep. Drivers Ass’n*, 656 F.3d at 588. The Seventh Circuit vacated the rule and remanded for further rulemaking, also criticizing in dicta the FMCSA’s failure to calculate the benefits of the EOBRs by looking at the different models on the market.

Not long after the Seventh Circuit issued its decision, Congress stepped in and mandated the use of electronic logs. As part of the Commercial Motor Vehicle Safety Enhancement Act of 2012, part of the larger Moving Ahead for Progress in the 21st Century Act (MAP-21), Congress directed the Secretary of Transportation to prescribe regulations requiring commercial motor vehicles to be equipped with an electronic logging device if the vehicle is involved in interstate commerce and the driver is subject to the hours of service and record of duty status requirements of the Federal Motor Carrier Safety Regulations (“FMCSR”). This statute was codified at 49 U.S.C. § 31137, maintaining the harassment prohibition.

Specifically, the statute required the FMCSA to create regulations mandating the use of electronic logging devices (“ELDs”) that are capable of performing the following tasks: (1) accurately recording commercial driver hours of service; (2) recording the location of the commercial motor vehicle; (3) being tamper resistant; (4) being synchronized to the vehicle engine or capable of recognizing when the vehicle was in operation; and (5) permitting law enforcement to access the data during a roadside inspection.

The purpose of the ELD mandate is to reduce hours-of-service violations, to decrease fatigued driving, and to reduce the number of accidents on the road. The FMCSA estimates that

the ELD mandate will prevent approximately 20 fatalities and 434 injuries annually.⁴ In addition to these savings, the FMCSA also performed a cost-benefit analysis in conjunction with the ELD mandate. The FMCSA estimated that it would cost the industry \$1.836 billion annually to comply with the ELD mandate, which includes the cost of purchasing ELDs, replacing devices that are not compliant with the mandate, enforcement training and equipment, driver training, and compliance costs (additional drivers and vehicles to reduce hours-of-service violations). In turn, the FMCSA calculated that the ELD mandate would lead to annual cost savings of just over \$3 billion, which includes driver time filling out paper logs, clerical time processing paper logs, the purchase of logbooks themselves, and safety benefits. This amounts to a net benefit of \$1.174 billion per year, according to the FMCSA. It is evident the FMCSA is trying not to make the same mistakes it made in the unsuccessful 2010 rule.

II. Provisions of the ELD Mandate

With a few exceptions, the ELD mandate applies to all drivers who are subject to the record of duty status requirements of the Federal Motor Carrier Safety Regulations (“FMCSR”). Drivers who are required to keep logs for eight days or fewer out of thirty are exempt from the ELD requirement, as are drivers operating a commercial motor vehicle manufactured prior to model year (not calendar year) 2000. Drivers must submit their logs to their carrier within thirteen days. As already required under the FMCSR, the carrier is to retain the logs for six months.

Similarly, drivers must submit supporting documents to their carrier within thirteen days. These supporting documents can be chosen among five categories: (1) bills of lading, itineraries, schedules, or similar documents providing evidence of the origin and destination of the trip; (2) dispatch records, trip records, or equivalent documents; (3) expense receipts related to on duty,

⁴ See <https://www.fmcsa.dot.gov/newsroom/dot-proposes-use-electronic-logbooks-improve-efficiency-safety-commercial-bus-truck>.

not driving time; (4) electronic mobile communication records; and (5) payroll records or similar documents reflecting driver payments. The supporting documents must contain the following information: driver identification, date, vehicle location, and time. Carriers are required to retain eight supporting documents showing the driver's activities in a twenty-four hour period. If a driver has fewer than eight supporting documents, then the "time" element isn't required; as long as the document has driver identification, date, and vehicle location, it still will be considered a "supporting document." Additionally, carriers must retain supporting documents in a manner that permits them to be tied to a driver's record of duty status. Motor carriers and drivers are forbidden from obscuring, defacing, or altering the supporting documents. If drivers are exempt from the ELD requirement (either permanently or temporarily), then the carrier also must retain toll receipts for the period(s) during which they are exempt.

While the motor carrier is expected to keep supporting documents so that they can be tied to a driver's logs, neither the driver nor the carrier is required to generate new or additional documents as a result of this rulemaking. The new rule amends Section 395.2 of the FMCSR to define "supporting document" as a "document, in any medium, generated or received by a motor carrier in the normal course of business" (emphasis added). If a carrier has more than the required eight supporting documents, they must retain the documents with the earliest and latest time indications, but need not retain all of them. Furthermore, drivers must present any supporting documents in their possession during roadside inspections, but they are not required to have any specific type or amount.

Carriers that have their own systems for retaining supporting documents may apply to the FMCSA for an exemption from this portion of the rule. The procedure for requesting an exemption has not changed. Carriers requesting this exemption would go through the same process outlined in Section 381, Subpart C, for requesting exemptions under the FMCSR.

As part of FMCSA’s statutory obligation to ensure ELDs are not used to harass drivers, the new rule holds that a carrier cannot restrict drivers’ ability to view their own logs that are stored on the ELD. In other words, drivers will not (and cannot be required to) go through the carrier to view these logs. This provides the driver some freedom in completing, certifying, and submitting the logs. Another ELD requirement that is intended to preclude harassment and coercion is that the device must automatically mute, or permit the driver to mute, the audible output from the ELD when the status is “sleeper-berth.” Together with the requirement that the driver approve all edits to the log, these are all technical specifications intended to address and prevent harassment.

In addition to the technical specifications intended to address harassment, the rule expressly prohibits driver harassment, subject to a civil penalty if harassment occurs.⁵ As a related matter, on November 30, 2015, the FMCSA issued a final rule prohibiting coercion of truck drivers, also subjecting violators to a civil penalty.⁶ Effective January 29, 2016, the FMCSR will define coercion as a “threat by a motor carrier, shipper, receiver, or transportation intermediary, or their respective agents, officers or representatives, to withhold [or actually withholding] business, employment or work opportunities or to take or permit any adverse employment action against a driver in order to induce the driver” to operate a motor vehicle in violation of the FMCSR.⁷ The FMCSA clearly is attempting to address the flaws that the Seventh Circuit found in its earlier rulemaking.

III. Compliant Devices

⁵ The civil penalty structure is outlined at 49 CFR 386.81.

⁶ See 80 FR 74695.

⁷ See 49 CFR § 390.5 (emphasis added).

A. ELD Specifications and Requirements

ELD manufacturers will have to register their devices with the FMCSA. They cannot simply make and sell a device that they believe is compliant. The FMCSA will then publish a list of compliant, registered devices on its website.⁸ Right now, there is a notice that registered devices will begin to be published on February 16, 2016. Once the ELD mandate goes into effect on December 18, 2017, drivers and carriers who are not exempt will have to choose among the registered ELD devices. Drivers and carriers using an AOBRD by December 18, 2017 will have until December 16, 2019 to begin using a registered ELD.⁹

The ELD must have the capability of creating separate accounts for drivers and the carrier's non-driving support personnel. The driver accounts will not have the capability to create new accounts on the ELD, and the personnel accounts will not record ELD data for the account holder. Drivers will have access only to their data, but not to the data of any other drivers using the ELD for privacy reasons. Carriers will have to make sure that each of their drivers has a unique ELD account and that the accounts are kept updated and current. The accounts can be created using the driver's valid license. The carrier also will have the responsibility of activating, deactivating, and updating accounts.

The ELD must be synchronized to the vehicle's engine, becoming fully functional within one minute of the engine's receiving power, and have the ability automatically to record driving time. Once the vehicle speed reaches a certain threshold (5 mph or less), the vehicle will be considered in motion and driving time will be recorded. The ELD will continue to record the vehicle in motion until its speed remains 0 mph for three consecutive seconds. The default ELD setting must be "on-duty not driving." A prompt will appear if the vehicle is not in motion for

⁸ <http://www.fmcsa.dot.gov/devices>.

⁹ If possible, it would behoove carriers and drivers to purchase an AOBRD as soon as possible, and certainly before the deadline, in order to take advantage of this extended compliance period. They then can adjust to the technology in their own time and await developments in the ELD market during that period.

five consecutive minutes. The status will then be entered automatically if the driver fails to respond to the prompt within one minute.

ELD devices also must have the ability to automatically record the following:

- (1) Date;
- (2) Time—synchronized to Coordinated Universal Time (UTC), to avoid any problems or misunderstandings with drivers crossing time zones, with the ability to convert UTC time to the time standard at the driver's home terminal;
- (3) Geographic location of the motor vehicle;
- (4) Engine hours (both during the course of an ignition power on cycle and total engine hours for the vehicle);
- (5) Vehicle miles (both ignition power on cycle or trip miles and total vehicle miles);
- (6) Driver or authenticated user identification data;
- (7) Vehicle identification data; and
- (8) Motor carrier identification data.

This information will be recorded whenever a driver in-puts a change in duty status. The ELD also will record this information each hour while the vehicle is in motion, if there has not been a change in duty status within the hour. The ELD must have a function that allows the driver to certify his or her records each twenty-four hour period. When a driver logs in or out of the ELD, the device must record all of the above information except geographic location, providing some privacy protection for the driver. Similarly, the device will record all information except geographic location whenever it detects or clears a malfunction or diagnostic event. The ELD records all of the information when the engine is powered up or down.

ELD devices may be configured to show when a vehicle is being operated during a yard move or for authorized personal use. It is the driver's responsibility to indicate the status on the

ELD and to provide further description of the driver's activity if prompted by the ELD. The FMCSA has provided some amount of privacy protection for drivers who are using the vehicle for authorized personal use. When such use is indicated on the ELD, engine hours and vehicle miles will not be recorded, and the geographic location will be restricted to a ten-mile radius.

The ELD must permit the driver and motor carrier to edit the logs after the logs have been certified. The driver, however, will have to re-certify the logs after the edits are made. Carriers are not permitted to ask drivers to edit their logs before drivers submit them to the carrier, nor can the carrier coerce drivers to certify false logs. Each edit suggested or requested by a carrier has to be approved and certified by the driver. Moreover, the original logs will not be lost and there will be a clear chain showing who made what changes.

The FMCSA has not required that ELDs have printing capabilities, but the ELD must be able to print the logs for a roadside inspection or display them graphically on the device. The ELD also must have the ability to transfer data at a roadside inspection. There are a few options for this transfer, which can be done telematically with a wireless web service and email, or locally through Bluetooth or USB 2.0. The local transfer option would be more economical because it does not require a monthly subscription service. The FMCSA estimated the annual cost of a telematic device at \$419, with the local transfer device costing as low as \$166 per year.

In case of an ELD malfunction, the driver must notify the carrier within twenty-four hours and use paper logs until the ELD is repaired. If the records from the previous seven days are not available and cannot be retrieved from the device, then the driver will have to reconstruct them using paper logs. Although the FMCSA has touted the cost savings of purchasing paper logs, it is clear that drivers still will have to keep paper logs on hand in case of a malfunction. While drivers have thirteen days to submit their logs to their carrier, they should submit them as soon as possible, or otherwise ensure there's a record in case of malfunction. The motor carrier must take actions to correct the malfunction within eight days from the date it discovers or is

notified of a malfunction. If the carrier needs additional time to repair the ELD, it must make a formal request with the state Division Administrator of the FMCSA. The formal request must include the identity of the carrier representative making the request, the make, model, and serial number of the ELD, the date and location of malfunction, and explanation why additional time is requested. It is apparent that the FMCSA is going to keep track of the reliability of registered ELDs. The FMCSA could de-certify certain ELD makes or models that consistently malfunction. The rule does provide a process for de-certification, including notice to ELD provider, an opportunity to respond and/or correct the deficiency, and administrative review of the decision.

The ELD may be installed in the vehicle or implemented as a hand-held unit, including smartphones and tablets, as long as the device satisfies all of the technical requirements of the rule. This provides some flexibility for drivers and carriers, both on price and type of device. It is anticipated that the hand-held devices may generally be less expensive than the devices installed in the vehicle. Furthermore, the hand-held device might be a good option for drivers and carriers that regularly upgrade their vehicles, drivers and carriers that use leased or rental vehicles, drivers who work for multiple carriers, or otherwise might need to use the ELD in multiple vehicles.

B. Current Market – ELDs and AOBDRDs

The FMCSA has conceded that there are only “ELD-like” devices on the market right now, in part because ELDs have to be registered with the FMCSA and that process has not begun. The FMCSA, however, believes that ELD-like devices (the AOBDRDs) could be made fully compliant with a few relatively low-cost modifications. AOBDRD manufacturers, too, have

stated that it will not be difficult for them to update their products to be fully compliant with the ELD mandate.¹⁰

One device that specifically targets small fleets and owner-operators is the VDO RoadLog.¹¹ It is a local transfer USB device with a printer, not requiring any monthly subscription fees. J.J. Keller has a BYOD (“Bring Your Own Device”) option that is Bluetooth-enabled and compatible with drivers’ smartphones and tablets.¹² Telematics options include KeepTruckin,¹³ Omnitrac’s,¹⁴ Rand McNally,¹⁵ and PeopleNet.¹⁶ Again, none of these products has been registered or listed as an ELD, but it is anticipated they will be registered, with or without some modification.

IV. Industry Response

When the ELD mandate was announced, the response in the industry was mixed. Commentary and discussion within the trucking industry indicates, at least preliminarily, that drivers may look for a pre-2000 vehicle in order to be exempt from the mandate.¹⁷ Generally, smaller fleets and independent owner-operators were the most opposed to the rule. Specifically, in a survey at *Overdrive* magazine, fifty-two percent of company driver owner-operators and an astounding seventy-one percent of independent drivers responded that they

¹⁰See, e.g. <http://www.overdriveonline.com/2015eldchart/>. This cite also shows a comparison chart of current AOBDRs on the market.

¹¹ Available at <http://www.vdoroadlog.com/>.

¹² Available at <http://www.jjkeller.com/shop/Product/J-J-Keller-E-Logs>.

¹³ Available at <https://keeptruckin.com/>.

¹⁴ Available at <http://www.omnitrac.com/products>. This appears to be a popular option with larger fleets.

¹⁵ Available at <http://www.randmcnally.com/product/hd-100-fleet-app>.

¹⁶ Available at <https://www.peoplenetonline.com/products/safety-compliance/compliance-solutions/>.

¹⁷See, e.g. <http://www.overdriveonline.com/dont-freak-out-man/>, including comments.

would quit driving if they were required to drive with an ELD.¹⁸ The FMCSA has noted that approximately ninety-nine percent of motor carriers are considered small businesses as defined by the Small Business Administration. The FMCSA knows that it cannot ignore this demographic and has stated that it intends to conduct webinars and other presentations specifically directed at small businesses, at no cost, in order to plainly and clearly explain the new requirements.

While there may be some attrition as drivers most resistant to the ELD mandate leave the industry, and there will be a learning curve as drivers and dispatchers adjust to the mandate, in the end it may lead to greater efficiency.¹⁹ This is because the resultant “data explosion” from the widespread use of ELDs would permit drivers and fleets to better plan and organize their shipments, improving logistics significantly. Dispatchers would know immediately where their drivers are and what hours they have left. This prediction is borne out by the experience of two small-sized fleets in the southeast and upper Midwest that have switched to electronic logs, who found increased efficiency after they made the switch.²⁰ Their experience also showed that drivers initially resistant to the change embraced the technology once they became accustomed to it, and were noticeably less fatigued. See id.

The ELD mandate, together with the anti-coercion regulation, will provide increased leverage for drivers and carriers in relating to and negotiating with customers. Shippers and receivers cannot place unreasonable or unrealistic demands on drivers without risking a violation of the FMCSRs. The ELD would provide documentary proof that the demands were unreasonable. See id. By the same token, it could enhance customer-relations because carriers

¹⁸ See <http://www.ccjdigital.com/my-e-log-blog/>. As noted in the article, it is unlikely there will be a widespread exodus from the trucking industry and most drivers who try electronic logs make peace with them.

¹⁹ See http://www.joc.com/regulation-policy/transportation-regulations/us-transportation-regulations/electronic-logbook-mandate-could-drive-supply-chain-gains_20150817.html.

²⁰ See, e.g., <http://fleetowner.com/regulations/two-fleets-experience-elds-and-extras-cut-costs-boosted-image>.

would be able to keep their customers updated on the status of the shipment, location of driver, and expected delivery time. See id.

Similarly, carriers, drivers, and their customers all will have an incentive to increase efficiency during pick-ups and deliveries.²¹ Drivers cannot make up lost hours by driving any additional time, and both they and the carrier will know exactly what hours remain. Carriers will have to become more insistent with their customers that they not hold up the drivers, or demand additional and higher detention fees. See id. The ELD mandate and accompanying anti-coercion regulation provide all parties better means to plan and organize shipments, as well as making them all more or less responsible for ensuring that no violations occur.

Any benefits from the ELD mandate, however, will have to wait and remain to be seen. OOIDA has filed another Petition for Review in the Seventh Circuit, docketed as case 15-3756. The matter is in the early stages and no briefs have been filed, so OOIDA's precise arguments are unknown. The FMCSA did address harassment and provided a more substantial cost-benefit analysis than the 2010 rule, which were the issues the Seventh Circuit honed in on earlier. OOIDA has asserted in its comments on the rulemaking that the GPS tracking constitutes an illegal search. FMCSA, however, responded that the rulemaking essentially requires only a different medium for recording the information that drivers already are required to keep on paper, including their location. ELDs specifically will not record location constantly and the FMCSA has addressed privacy concerns with the wider GPS location record during authorized personal use operation. Furthermore, interstate commercial trucking is a pervasively regulated industry, and federal courts have held:

[A] Warrantless search of a pervasively regulated business is permitted if: (1) there is a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made; (2) the inspection is necessary to further the regulatory scheme; and (3) the statutory or regulatory scheme provides a constitutionally adequate substitute for a warrant.

²¹ See, e.g., <http://www.overdriveonline.com/detention-detente-old-time-express/>.

United States v. Castelo, 415 F.3d 407, 409-410 (5th Cir. 2005). Any Fourth Amendment argument is unlikely to be successful. OOIDA also criticized the ELD mandate on Fifth Amendment grounds, likening the regulation to continuous electronic monitoring of individuals charged or convicted of certain crimes. There is a distinction, however, between continuous electronic monitoring of an individual and electronic monitoring of a vehicle while it is being operated in interstate commerce. Again, it seems unlikely that this argument would succeed. Any other arguments OOIDA might make remains to be seen. The American Trucking Associations has already stated its intent to submit a brief in favor of the ELD mandate.

V. Conclusion

The ELD mandate was bound to be controversial, and that has proven to be the case. It is equally likely that there will be a period of confusion and inefficiency as drivers, carriers, shippers, and receivers all adjust to the pervasive use of this technology in the industry. In the end, as anecdotal evidence from voluntary electronic log adopters has already shown, most in the industry likely will adjust. Hopefully ELD's will lead to greater efficiency, greater communication among carriers and customers, and increased compliance with the FMCSR.