

The Wage and Hour, Field Assistance Bulletin, No. 2007-2
Acknowledges Change in MCA Coverage for Drivers of
Light-Weight Vehicles

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On May 23, 2007, the Department of Labor, Wage and Hour Administrator, Paul DeCamp, issued a Field Assistance Bulletin, No. 2007-2, addressed to Regional Administrators and District Directors, advising his staff that “employees engaged in transportation via vehicles such as most light pick-up trucks and automobiles, who historically had been covered by the FLSA § 13(b)(1) exemption from overtime, are no longer exempt.” This follows several recent federal courts decisions that have likewise recognized that the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (“SAFETEA-LU”) has affectively narrowed the coverage of what is known as the Motor Carrier Act exemption to the FLSA, 29 U.S.C. § 213(b)(1). In *Dell’Orfano v. Ikon Office Solutions, Inc.*, 2006 U.S. Dist. LEXIS 61563, * 5 (M.D. Ga., August 29, 2006), the court found “it is clear that the motor carrier exemption has no application to any claims in this case after August 10, 2005” when “[i]t is undisputed in this case that Plaintiff drove a vehicle that weighed substantially less than 10,000 pounds.” The federal district court in *Musarra v. Digital Dish, Inc.*, 454 F. Supp. 2d 692, 701 (S.D. Ohio 2006), agreed, finding workers who were previously exempt under the old definition of “motor private carrier” are no longer exempt under the revised definition of “motor private carrier” if they travel in vehicles weighing less than 10,001 pounds.¹ See *King v. Asset Appraisal Services, Inc.*, 2006 U.S. Dist. LEXIS 94937, *11 (D. Neb. October 23, 2006) (supporting same view); *O’Neil v. Kilbourne Medical Laboratories*, 2007 U.S. Dist. LEXIS 22620, **24-25 (E.D. Ky March 28, 2007) (same); *Kautsch v. Premier Communications*, Slip Copy, 2007 WL 1459694, ** 2-3 (W.D. Mo. May 16, 2007) (same).

It is clear that employers can no longer rely on the MCA as a defense to claims of unpaid overtime if their employees travel in light-weight motor vehicles that weigh less than 10,001 pounds. It has been confirmed that the modification made to the definition of “motor private carrier” in SAFETEA-LU limited the jurisdiction of the Secretary of Transportation over non-commercial motor vehicles that have a gross vehicle weight (“GVW”) of less than 10,001 pounds.

I. SAFETEA-LU Amendment to MCA

Effective August 10, 2005, the SAFETEA-LU amended the definition of “motor private carrier” found in 49 U.S.C. § 13105 to confine “motor private carrier” to carriers

¹ Notwithstanding, courts have stated that the SAFETEA-LU amendment to the MCA is not retroactive. See *Musarra*, 454 F. Supp. 2d at 703 (absence clear language evincing Congressional intent to the contrary, the amendment cannot be applied retroactively).

transporting property by “commercial motor vehicle (as defined in [49 U.S.C.] section 31132).” In section 31132, a *commercial motor vehicle* is defined as a vehicle with a gross vehicle weight of at least 10,001 pounds.

Although legislative history provides scant insight into Congress’ intent in making this far reaching modification, a conference report confirms that the change in the definition of motor private carrier was in part to “harmonize[] the reach of the commercial and the safety statutes by eliminating the requirement for motor carriers to register if they are not subject to the Federal motor carrier safety regulations.” Conference Report: H.R. Rep. No. 109-203 (July 28, 2005), 151 Cong. Rec. H 7033; H.R. Rep. No. 109-12 § 4118 (Mar. 7, 2005), 151 Cong. Rec. H 988. The result of this Amendment, although touted by management attorneys as unintentional, is a statutory change of law that clearly requires employers to pay overtime wages to certain employees who prior to August 10, 2005 were considered exempt employees under FLSA Section 213(b)(1).

The change to the definition of “motor private carrier” to include only vehicles weighing 10,001 pounds or more limits the jurisdiction of the Secretary of Transportation (“Secretary”) over those who drive vehicles weighing less than 10,001 pounds. Moreover, it brings employees transporting property in interstate commerce in vehicles weighing less than 10,001 pounds within the regulatory arm of the FLSA.

II. Brief History of the MCA

As a brief historical overview: in 1935, Congress passed the MCA to regulate the hours of service of truck drivers, and to provide other safety rules. The MCA gave the Secretary the authority to regulate the hours of service of truck drivers. However, the Secretary chose to regulate the hours of service only of those drivers in trucks with over 10,000 pounds GVW.

In 1938, when Congress passed the FLSA, it wanted to avoid conflicts between the FLSA and the MCA and included an exemption from the FLSA's overtime regulations for those workers subject to the Secretary of Transportation's jurisdiction under the FLSA. Congress’ recognition of the necessity for the exemption from the FLSA for workers under the jurisdiction of the Secretary reflected its expectation that the Secretary would enact legislation regulating the maximum hours of service for employees within her jurisdiction.

However, and notwithstanding her authority to do so, the Secretary has never exercised her power to establish qualifications and maximum hours of service over light-weight (vehicles of under 10,001 pounds GVW) motor private carriers in the interest of safety. *See* 49 U.S.C. § 31502(b). Nor has the Federal Highway Administration (FHWA), the agency of the Department of Transportation (DOT) responsible for motor carrier safety, ever regulated or enforced any reporting, permitting, or maximum-hour requirements on vehicles weighing less than 10,001 pounds. Instead, the Secretary and the FHWA have focused primarily on safety regulations for medium-to-large-sized

commercial vehicles, leaving a gap in coverage for those workers over whom the Secretary of Transportation could, but had chosen not, to exercise such jurisdiction: truck drivers whose trucks weighed less than 10,001 pounds GVW.

The Secretary's unwillingness to exercise power to regulate motor private carriers weighing less than 10,001 pounds did not diminish the authority given to her. Because the Secretary had preserved jurisdiction over all motor private carriers, the hours of drivers of vehicles of less than 10,001 pounds in interstate commerce were historically left unregulated by either the Secretary of Transportation's hours-of-work regulations or the FLSA. *See Lynn Martin v. Coyne International Enterprises, Corp.*, 966 F.2d 61, 63 (2d. Cir. 1992) (acknowledging that the decision not to exercise a given power does not mean that power does not exist); *Friedrich v. U.S. Computer Services*, 974 F.2d 409, 416 (3d. Cir. 1992) (affirming the district court's holding and stating the "DOT's election not to regulate lightweight and passenger vehicles does not strip it of its power to establish maximum hours and qualifications for private motor carriers"); *Turk v. Buffets*, 940 F. Supp 1255, 1259 (N.D. Ill. 1996) (holding that the Secretary retains jurisdiction over drivers of light-weight vehicles regardless of whether it exercises this power). Thus, many workers in the transportation industry were deprived of the overtime pay protections other workers in the United States enjoyed.

For approximately thirteen more years, employees whose work could require² that they transport goods in interstate commerce³ in vehicles weighing less than 10,001 pounds continued to be denied overtime compensation under the MCA exemption. This, however, is no longer this case after Congress passed and President Bush signed the SAFETEA-LU on August 10, 2005.

III. Congressional Update

There have been a few attempts by industry to resurrect the old definition of motor private carrier since the passage of the SAFETEA-LU. On June 14, 2006, the House of Representative passed a Transportation Appropriations Bill, H.R. 5576, that included a provision that could once again redefine "motor private carrier" to include vehicles with a GVW of less than 10,001 pounds, thereby reinstating jurisdiction to the Secretary of Transportation and the MCA exemption to the FLSA for drivers of those vehicles. H.R. 5576 was expressly made retroactive to recapture any benefit employees

² Those who do not typically transport goods in interstate commerce but could be called upon to do so may also be subject to the Motor Carrier Act exemption.

³ Solely intrastate travel may also satisfy the interstate commerce requirement if the transportation is part of a continuous movement in interstate commerce. Courts tend to evaluate the essential character of the shipment to determine whether the out-of-state shipper had a fixed and persistent intent that the shipment continues in interstate commerce to its final destination. *See Walling v. Jacksonville Paper*, 317 U.S. 564 (1943). Although not addressed by this paper, the discussion regarding when intrastate transportation becomes travel in interstate commerce is also a developing topic worthy of further examination. *See Foxworthy v. Highland Dairy Co.*, 997 F.2d 670, 673 (10th Cir. 1993); *Watkins v. Ameripride Services*, 375 F.3d 821, 826 (9th Cir. 2004); *Herman v. Suwannee Swifty Stores, Inc.*, 19 F.Supp. 2d 1365, 1373 (M.D. Ga. 1998); *Masson v. Ecolab, Inc.*, 2005 U.S. Dist LEXIS 18022, at **29-31 (S.D.N.Y. 2005); *DeMaria v. Ryan P. Relocator Company*, 2007 U.S. Dist. LEXIS 8099 (S.D. Fla. February 5, 2007).

received since August 10, 2005. It was referred to the Senate and placed on the Senate Legislative Calendar on July 26, 2006. However, when the 109th lame duck Congressional Session came to an end in 2006, H.R. 5576 remained pending. H.R. 5576 has since been rolled into the Revised Continuing Appropriations Resolution of 2007 *without* the provision in question.

On February 27, 2007, H.R. 1195, a bill to amend the SAFETEA-LU to make technical corrections, was introduced. However, no technical correction was proposed to reinstate the MCA exemption to the FLSA for employees who travel in light-weight vehicles. The House of Representatives passed H.R. 1195 on March 26, 2007, and the SAFETEA-LU technical corrections bill was referred to the Senate, again without any mention of amending the SAFETEA-LU to again broaden the scope of the MCA exemption. At this writing, H.R. 1195 is pending before the Senate Committee on Commerce, Science, and Transportation.

IV. Conclusion

The Wage and Hour, Field Assistance Bulletin 2007-2, coupled with the recent federal court decisions interpreting the statutory change of the MCA in favor of employees, provide sufficient support for employees who drive vehicles weighing less than 10,001 pounds in interstate commerce to recover back pay wages for overtime denied them as of August 10, 2005.