

## NEW DRIVER ANTI-COERCION RULE

January 26, 2016

On January 29, 2016, the Federal Motor Carrier Safety Administration's ("FMCSA") "Prohibiting Coercion of Commercial Motor Vehicle Drivers," commonly referred to as the "driver coercion rule," becomes effective. Under the rule, the FMCSA adopts regulations that prohibit motor carriers, shippers, receivers, transportation intermediaries, or anyone operating a commercial motor vehicle in interstate commerce from coercing drivers to operate a commercial motor vehicle in violation of certain provisions of the Federal Motor Carrier Safety Regulations ("FMCSRs"). The applicable FMCSRs include drivers' hours-of-service limits, the commercial driver's license regulations, drug and alcohol testing rules, and the Hazardous Materials Regulations.

The rule permits drivers to report incidents of coercion to FMCSA, beginning January 29<sup>th</sup>. Complaints must be filed within ninety (90) days of the alleged coercion action. The rule further requires FMCSA to investigate "non-frivolous" claims, and authorizes penalties up to \$16,000 against motor carriers, shippers, receivers, or intermediaries determined to have violated the restrictions. In certain instances, an entity that engages in coercion may even have its operating authority revoked.

Other key points of the rule include:

- **What is coercion?** "Coercion" is defined under the rule as the threat or action by a motor carrier, shipper, receiver, or transportation intermediary, or their agents, officers, or representatives, to withhold business, employment, or work opportunities from, or to take or permit any adverse employment action against, a driver in order to induce the driver to violate one of more of the applicable FMCSRs. *However*, the rule places on the driver an affirmative obligation to inform the motor carrier, shipper, receiver, or transportation intermediary that a request will cause a violation of the FMCSRs and to "at least generally" identify the regulation to be monitored. As a result, an entity cannot commit coercion under the rule unless and until they have been put on notice by the driver of a violation of the applicable FMCSRs.
- **What if attempted coercion is unsuccessful?** The rule does not state specifically what actions or communications may constitute coercion in all circumstances, but guidance from FMCSA is clear that coercion that fails is still coercion. Stated differently, the act of coercion under the rule is complete when the attempt is made; it does not require success. "Failed coercion" claims may present an opportunity for potential overreaching by drivers. However, whether coercion occurred depends on the substance of the communication and the existence of a threat, explicit or implied, to make the driver pay an economic price for refusing to violate an FMCSA regulation. Just as there can be no coercion unless the driver explicitly states he or she cannot perform a request without violating the

applicable FMCSRs, and why that is the case, there can likewise be no coercion unless the motor carrier, shipper, receiver, or transportation intermediary responds with an equally explicit threat to force the driver to comply with the request despite the regulatory violation.

- **Who can commit coercion?** With the final version of the rule, FMCSA clarified its position that coercion may occur as the result of actions or communications by an agent, officer, or representative of a motor carrier, shipper, receiver, or intermediary. In response to the publication of the original version of the rule in May 2014, FMCSA received comments from within the industry citing concerns of the inclusion of “agents, officers, or representatives” in the definition of coercion. However, FMCSA declined to remove the language from the final version of the rule, and instead provided guidance on the scope of those relationships. *Specifically*, FMCSA confirmed that a motor carrier is subject to enforcement where an independent contractor hired by the motor carrier coerces one of its own drivers to violate the FMCSRs, even without the knowledge or approval of the motor carrier. *Further*, while broker and other intermediaries are generally not an agent, representative, or employee of a motor carrier, a broker could be found liable for coercion if it interacted directly with a driver, instead of with a carrier, and attempted to coerce the driver to commit an action that would require a regulatory violation.

The full impact of the driver coercion rule remains to be seen. That uncertainty and the potential exposure to affected entities makes critical the implementation of effective policies and procedures addressing communications with drivers and the training of appropriate personnel on the proper handling of circumstances that may give rise to opportunities for coercion claims.

As always, we are available to answer any questions you may have regarding the new rule.

*Taylor & Associates*