BRACEWELL

INSIGHTS

Motor Carrier Act Update: Fifth Circuit Confirms Employer-Friendly Burden of Proof

May 18, 2018

*By: **Leslie Selig Byrd** and **Amber K. Dodds***

On May 16, 2018, the Fifth Circuit Court of Appeals published an opinion unequivocally placing the burden of proof on *interstate drivers* of motor carriers seeking overtime under the small vehicle exception to the Motor Carrier Act. *Scot Carley et al. v. Crest Pumping Technologies, LLC*, No. 17-50226 (5th Cir. May 16, 2018). This is one of a growing number of Fair Labor Standards Act ("FLSA") collective actions filed by DOT drivers seeking overtime. The *Crest* decision changes the legal landscape for litigating Motor Carrier Act claims. A copy of the opinion is available ***here***.

In summary, if a driver performs safety-affecting duties – including driving – on a vehicle weighing more than 10,000 pounds and occasionally on a vehicle less than 10,000 pounds (a "small vehicle"), then the driver may be entitled to overtime during the particular weeks in which the driver works on or drives a small vehicle. When employees bring claims for overtime pay, especially when they litigate with a class of other employees, litigation must determine which employees (otherwise not entitled to overtime under the Motor Carrier Act) are entitled to overtime pay during which workweeks – a highly fact-specific inquiry because it is made on an individual basis, week by week. The *Crest* opinion addresses whose burden – employee or employer – it is to prove the underlying facts.

Fair Labor Standards Act and Motor Carrier Act Exemption

The FLSA provides for overtime pay unless an employee meets an exemption. The Motor Carrier Act provides an overtime pay exemption for drivers, driver's helpers, loaders or mechanics whose duties affect the safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce and who work for motor carriers or motor private carriers. Section 13(b)(1); DOL FactSheet #19, available ***here***. The Motor Carrier Act applies "in all workweeks when [an employee] is employed . . . regardless of the proportion of the employee's time or of his [safety-affecting] activities [and] even in a workweek when the employee happens to perform no work directly affecting 'safety of operation.'" 29 CFR § 782.2(b)(3). Summarized, if the employee's duties require performance of qualifying activities, the Motor Carrier Act applies in all workweeks, regardless of whether or to what extent qualifying activities are performed in a specific workweek.

Technical Corrections Act / Small Vehicle Exception

Effective June 2008, the Safe Accountable, Flexible, Efficient Transportation Equity Act ("Technical Corrections Act") narrowed the scope of the Motor Carrier Act. The Technical Corrections Act provides for a "small vehicle exception," which entitles the employee to

overtime pay for individual work weeks in which he is deemed a "covered employee." A covered employee is: (a) employed by a motor carrier or private motor carrier; (b) whose work "in whole or in part" (i) is as a driver, driver's helper, loader, or mechanic, (ii) affects the safety of operation of motor vehicles weighing 10,000 pounds or less (with some exceptions); and (c) performs duties on motor vehicles weighing 10,000 pounds or less. The DOL issued a Field Assistance Bulletin describing the small vehicle exception's effect on the Motor Carrier Act in 2010. *See* DOL Field Assistance Bulletin 2010-2, available ***here***. The majority of courts apply the small vehicle exception on a workweek-by-workweek basis – employees may be entitled to overtime in each workweek in which they are covered by the small vehicle exception – a highly fact-specific analysis.

The Burden of Proof

The law places the burden on the employee to prove he/she is covered under the FLSA overtime pay requirement and on the employer to show that the Motor Carrier Act applies to the employee to exempt him/her from receiving overtime. Previously, it was undecided which party had the burden of proof regarding the applicability of the small vehicle exception. Again, this burden applies on an individual employee, individual workweek basis – requiring extensive evidence to demonstrate employee entitlement to overtime under the small vehicle exception or the proper application of the Motor Carrier Act.

The burden of proof under the small vehicle exception had previously been placed on both the employee and the employer at the district court level because the small vehicle exception does not provide which party has the burden of proof. Definitively answering this ambiguity, the Fifth Circuit analyzed the statutory structure of the FLSA, Motor Carrier Act and small vehicle exception to hold that the burden of proof is on the employee to show that the small vehicle exception applied to him/her. The Fifth Circuit pointed to an April 2018 United States Supreme Court ruling, *Encino Motorcars, LLC v. Navarro et al.*, as part of the basis for its decision. The *Encino Motorcars* court, in another significant decision for employers, held that the FLSA and its exemptions must be given a "fair reading" – rather than the previous "narrow construction" standard – to determine whether employees are exempt.

Again, the small vehicle exception is considered on an individual basis and a workweek-by-workweek basis. When District Courts placed the burden on the employer in the past, that employer was required to prove a negative – that an employee did not perform safety-affecting activities on a small vehicle – for each workweek an employee alleged he/she was due overtime under the small vehicle exception. Multiplying this across workweeks for a two or three-year period and over a high number of employees in a FLSA collective action lawsuit created a difficult burden on employers. Here the Fifth Circuit confirmed that burden should be on the employee – to show that he/she did perform safety-affecting duties on a small vehicle during a particular workweek.

Please contact us if you have questions regarding this opinion or other overtime pay and FLSA exemption concerns.