

Clearinghouse Rule 08-100
ORDER OF THE STATE OF WISCONSIN
DEPARTMENT OF TRANSPORTATION
ADOPTING RULES

The Wisconsin Department of Transportation adopts an order amending TRANS 325.02(intro.) and (8), 325.15, 326.01(intro.) and (8), 326.15, 327.03(intro.) and (7), 327.09(6)(note) and 327.13; and creating TRANS 325.02(7g) and (7r), 326.01(7m) and 327.03(11), relating to motor carrier safety, and hazardous material transportation safety.

Analysis Prepared by the Wisconsin Department of Transportation

Statutes interpreted: Ch. 194, Stats.

Statutory authority: s. 110.075, Ch. 194, ss. 343.02 and 343.03(1)(a), Stats.

Explanation of agency authority: 49 USC 31102 requires states to adopt and enforce federal regulations, standards, and orders on commercial motor vehicle safety, hazardous materials transportation safety, or compatible State regulations, standards, and orders, in exchange for grants under the federal Motor Carrier Safety Assistance Program (“MCSAP”). The primary goal of the MCSAP program is to reduce the number and severity of crashes and hazardous material spills involving large trucks. In fiscal year 2009, Wisconsin will receive \$4,000,000 in federal moneys under the MCSAP program.

Under federal law, “A State that fails to adopt any new regulation or amendment to the FMCSRs [federal motor carrier safety regulations] or HMRs [hazardous materials regulations] within three years of its effective date will be deemed to have incompatible regulations and will not be eligible for Basic Program nor Incentive Funds.” 49 CFR 350.335.

Wisconsin law requires DOT to administer and enforce driver licensing laws and authorizes DOT to promulgate rules that “may not conflict with and shall be at least as stringent as standards set by the federal commercial motor vehicle safety act, 49 USC 31301 to 31317 and the regulations adopted under that act.” Section 343.02, Stats. Wisconsin law expressly assents to those federal laws relating to commercial motor vehicle drivers and “declares its purpose and intent to make provisions to implement and enforce that law and those regulations so as to ensure receipt by this state of any federal highway aids that have been or may be allotted to the state under 23 USC 104 (b) (1), (2), (5) and (6), including all increased and advanced appropriations.” Section 343.02, Stats. Wisconsin law also requires DOT to “institute a classified driver license system meeting all federal standards under 49 USC 30304 (e) and 31301 to 31317 and 49 CFR 383 and 384. Section 343.03(1)(a), Stats.

Consistent with federal and state law, DOT promulgates administrative rules each time those FMCSRs or HMRs are amended. The delay in implementing administrative rules through the rule making process creates potential enforcement conflicts and limits

the Department's ability to balance both state and federal requirements and to set consistent expectation about safety requirements, particularly among interstate motor carriers who face different (i.e., current) federally-required standards when entering neighboring states.

Related statute or rule: ss. 110.07, Stats.

Plain language analysis: As prescribed by state statute, the Department is required to regulate both intrastate and interstate transportation of property and passengers by commercial motor vehicles. Federal law prescribes various laws and regulations affecting commercial motor vehicles, and requires states to adopt and enforce those federal regulations as a condition of receiving various federal traffic safety grants. Commercial motor vehicles traveling between states could encounter enforcement difficulties traveling between states that have adopted or are enforcing different year federal regulations. Applying outdated regulations can adversely affect interstate transportation where those other states apply current regulations. In practice, many states generally appear to apply the current federal regulations despite apparently lacking necessary state adoption of the revised, current federal regulations. It is in the best interest of the public when current regulations are used for enforcement of these regulations.

In addition, the adoption of Trans 325, 326 and 327 will give the Department the authority to apply current federal standards by which traffic officers and state patrol inspectors declare vehicles and drivers out of service. Similarly, the Attorney General's office has consented to the incorporation by reference of the revised North American Standard Out-of-Service Criteria under the provision of § 227.21(2)(b), Stats.

The national motor carrier industry is informed of Federal Rule changes through the Commercial Vehicle Safety Alliance and related motor carrier memberships. The Wisconsin Motor Carriers Association also provides current links to federal and state agencies (including surrounding states) at: www.witruck.org/links.htm. Through these industry interest groups, the motor carriers are often aware of federal regulation changes before the Department. The State Patrol informs the Wisconsin Motor Carriers Association as federal changes are made, and the Federal Motor Carrier Safety Administration (FMCSA) maintains updated information on their website. Regular discussions are held between the local FMCSA representative, the Wisconsin State Patrol and the Wisconsin Motor Carriers Association.

The Department has never conducted formalized motor carrier industry training sessions and currently has no plans to do so. The Department does, however, provide media releases on any statutory or regulatory changes or updates and does operate an information booth at the Wisconsin Trucking Association Annual Conference and provides speakers on legal updates upon request.

This rule making adopts numerous changes to federal law promulgated since October 1, 2006. Those changes were summarized in the federal register, published at the time of their promulgation as federal regulations. The summaries include a plain language analysis of the regulatory change, the objective of the regulatory change, a summary of comments received in response to the proposed federal rulemaking and the response to those comments. These summaries of federal regulatory changes adopted by this rule making can be found at the federal Government Printing Office website at: <http://www.gpoaccess.gov/fr/index.html>. The Department will provide any requester with a copy of any of the federal registers identified below upon request.

Federal regulatory changes adopted by ch. Trans 325:

Requirements for Intermodal Equipment Providers and for Motor Carriers and Drivers Operating Intermodal Equipment, 73 Fed. Reg. 76793 (December 17, 2008);

New Entrant Safety Assurance Process, 73 Fed. Reg. 76471 (December 16, 2008);

Medical Certification Requirements as Part of the CDL; National Registry of Certified Medical Examiners, 73 Fed. Reg. 73095 (December 1, 2008);

Hours of Service of Drivers, 73 Fed. Reg. 69567 (November 19, 2008);

Amendments to Implement Certain Provisions of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), 72 Fed. Reg. 36759 (July 5, 2007);

Parts and Accessories Necessary for Safe Operation; Lamps and Reflective Devices, 72 Fed. Reg. 32011 (June 11, 2007);

Parts and Accessories Necessary for Safe Operation: Surge Brake Requirements, 72 Fed. Reg. 9855 (March 6, 2007).

Federal regulatory changes adopted by ch. Trans 326:

Requirements for Intermodal Equipment Providers and for Motor Carriers and Drivers Operating Intermodal Equipment, 73 Fed. Reg. 76793 (December 17, 2008);

Medical Certification Requirements as Part of the CDL; National Registry of Certified Medical Examiners, 73 Fed. Reg. 73095 (December 1, 2008);

Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments; Railroad Safety Enforcement Procedures; Enforcement, Appeal and Hearing Procedures for Rail Routing Decisions, 73 Fed. Reg. 72181 (November 26, 2008);

Amendments to Implement Certain Provisions of the Safe, Accountable, Flexible, Efficient Hours of Service of Drivers, 73 Fed. Reg. 69567 (November 19, 2008);

Hazardous Materials Regulations: Minor Editorial Corrections and Clarifications, 73 Fed. Reg. 57001 (October 1, 2008);

Hazardous Materials: Fuel Cell Cartridges and Systems Transported on Board Passenger Aircraft in Carry-On Baggage, 73 Fed. Reg. (April 30, 2008);

Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments; Railroad Safety Enforcement Procedures, 73 Fed. Reg. 20751 (April 16, 2008);

Hazardous Materials; Miscellaneous Amendments, 73 Fed. Reg. 4699 (January 28, 2008);

Hazardous Materials: Revisions to the List of Hazardous Substances and Reportable Quantities, 73 Fed. Reg. 1089 (January 7, 2008);

Hazardous Materials Regulations: Minor Editorial Corrections and Clarifications, 72 Fed. Reg. 55678 (October 1, 2007);

Hazardous Materials Regulations: Transportation of Compressed Oxygen, Other Oxidizing Gases and Chemical Oxygen Generators on Aircraft, 72 Fed. Reg. 55091 (September 28, 2007);

Hazardous Materials: Revision and Reformatting of Requirements for the Authorization to Use International Transport Standards and Regulations; Correction, 72 Fed. Reg. 55090 (September 28, 2007);

Hazardous Materials; Transportation of Lithium Batteries, 72 Fed. Reg. 44929 (August 9, 2007);

Transportation Equity Act: A Legacy for Users (SAFETEA-LU), 72 Fed. Reg. 36759 (July 5, 2007);

Hazardous Materials: Revision and Reformatting of Requirements for the Authorization to Use International Transport Standards and Regulations, 72 Fed. Reg. 25161 (May 3, 2007);

Hazardous Materials Transportation; Miscellaneous Revisions to Registration and Fee Assessment Program, 72 Fed. Reg. 24536 (May 3, 2007);

Hazardous Materials Regulations: Transportation of Compressed Oxygen, Other Oxidizing Gases and Chemical Oxygen Generators on Aircraft, 72 Fed. Reg. 4442 (January 31, 2007);

Hazardous Materials: Harmonization with the United Nations Recommendations, International Maritime Dangerous Goods Code, and International Civil Aviation Organization's Technical Instructions, 71 Fed. Reg. 78595 (December 29, 2006).

Federal regulatory changes adopted by ch Trans 327:

Chapter Trans 327 adopts many of the same chapters of the federal regulations as ch. Trans 325, so many of the regulatory changes listed above for ch. Trans 325 are also adopted by ch. Trans 327. In addition, ch. 327 adopts the following federal regulatory changes:

Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 73 Fed. Reg. 70283 (November 20, 2008);

Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 73 Fed. Reg. 35961 (June 25, 2008);

Procedures for Transportation Workplace Drug and Alcohol Testing Programs: State Laws Requiring Drug and Alcohol Rule Violation Information, 73 Fed. Reg. 33735 (June 13, 2008);

OST Technical Corrections, 73 Fed. Reg. 33326 (June 12, 2008);

Procedures for Transportation Workplace Drug and Alcohol Testing Programs: Procedures for Non-Evidential Alcohol Screening Devices, 72 Fed. Reg. 1298 (January 11, 2007).

Summary of, and preliminary comparison with, existing or proposed federal regulation: Trans 325 (Interstate Motor Carrier Safety regulations) adopts Federal regulations 49 CFR part 385, subpart C (Certification of Safety Auditors, Safety Investigators and Safety Inspectors) and parts 390 to 393 and 395 to 397. Trans 326 (Motor Carrier Safety Requirements for Transportation of Hazardous Materials) adopts Federal Regulations 49 CFR parts 107, 171-173, 177, 178, 180 and 385, subpart E (Hazardous Materials Safety Permits). Trans 327 (Motor Carrier Safety) adopts Federal regulations part 385, subpart C, (Certification of Safety Auditors, Safety Investigators and Safety Inspectors), parts 40, 390-general, except 390.23(a)(3); 391-general except 391.11(b)(1) and 391.41(b)(3), 391.41(b)(10); 392 except 392.16; 393-general except 393.42 shall not apply to vehicles placed in operation in common, contract or private carriage prior to June 1, 1987; 395, general-except 395.1(e)(1), 395.1(h), 395.1(i) 395.5, 395.8, and the maximum number of hours identified in 395.3 as follows: (a) more than 12 hours following 10 consecutive hours off duty; (b) for any period after having been on duty 16 hours following 10 consecutive hours off duty; (c) after having been on duty for 70 hours in any period of 7 consecutive days; and (d) after having been on duty for 80 hours in any period of 8 consecutive days, and parts 396 and 397.

Comparison with Rules in Adjacent States: All adjacent states (Michigan, Minnesota, Illinois and Iowa) adopt the same Federal regulations and subsequent revisions to those regulations. Two of the

four states adjacent to Wisconsin appear to adopt federal regulations automatically upon enactment, without specific reference to the date of the regulations, while two adjacent states appear to engage in rule making to specify the date of federal regulations that are adopted.

Minnesota: Minnesota statutes incorporate federal motor carrier regulations by reference, but do not appear to specify a year or effective date of those regulations, which presumably incorporates subsequent revisions to those regulations. For example, Minnesota statutes require their DMV to “disqualify a person from operating commercial motor vehicles in accordance with the driver disqualifications and penalties in Code of Federal Regulations, title 49, part 383, subpart D and Code of Federal Regulations, title 49, section 384.219.” Minn. Stat. § 171.165 (2007). Minnesota administrative code similarly adopts federal regulations without reference to the year or effective date of those federal regulations, which presumably incorporates subsequent revisions to those regulations. See, for example, Commercial Vehicle Equipment Safety Standards, which requires, among other things, commercial motor vehicles to be “equipped as required by Code of Federal Regulations, title 49, section 392.7 or 392.8 or part 393.” Minn. R. 7410.5160 (2007).

Michigan: Since 1963, Michigan statutes appear to have adopted federal commercial motor carrier safety regulations and hazardous materials regulations on file with the Michigan Secretary of State, but without reference to specific year or effective date of those regulations, which presumably incorporates subsequent revisions to those regulations when possessed by the Secretary of State. MCLS § 480.11a (2008). There appear to be no administrative code provisions adopted or excepting specific portions of those federal regulations. That Michigan statute, MCLS § 480.11a (2008), provides, in part:

§ 480.11a. Adoption of federal regulations; exceptions; definitions.

Sec. 1a. (1) This state adopts the following provisions of title 49 of the code of federal regulations, on file with the office of the secretary of state except where modified by this act:

(a) Hazardous materials regulations, being 49 CFR parts 100 through 180 except for the transportation of agricultural products for which an exception from the application of 49 CFR subchapter C and 49 CFR subchapters G and H, part 172, is provided under 49 CFR 173.5, is specifically authorized if the transportation is in compliance with this act and other state law.

(b) Motor carrier safety regulations, being 49 CFR parts 40, 356, 365, 368, 371 through 373, 375, 376, 379, 382, 385, 387, 390 through 393, 395 through 399 including the appendices of each part except for the following:

Michigan prescribes no process for filing revised federal regulations, which presumably allows Michigan to adopt revised federal regulations by filing them.

Illinois: Adopts the federal motor carrier safety regulations and federal hazardous materials regulations dated October 1, 2006, by reference, at 92 Ill. Adm. Code 390.2000 (2008).

Iowa: Adopts the federal motor carrier safety regulations and federal hazardous materials regulations dated October 1, 2007, by reference, at 761 IAC 520.1(321) (2008).

Summary of factual data and analytical methodologies used and how the related findings support the regulatory approach chosen: The Federal Motor Carrier Safety Administration continues to do

ongoing research into vehicle equipment, driver safety, carrier authority and hazardous materials. Its research, coupled with the input from the motor carrier industry, resulted in ongoing updates to federal regulations for interstate commerce. It is imperative the same regulations are enforced from state to state.

Analysis and supporting documentation used to determine effect on small businesses: The research provided by the Federal Motor Carrier Safety Administration was used in analyzing the effects on small business.

Effect on small business: This rule making will have no significant adverse effect on small businesses. The Department's Regulatory Review Coordinator may be contacted by e-mail at ralph.sanders@dot.state.wi.us, or by calling (414) 438-4585.

Fiscal effect: The Department estimates that there will be no fiscal impact on the liabilities or revenues of any county, city, village, town, school district, vocational, technical and adult education district, sewerage district, or federally-recognized tribes or bands.

Anticipated costs incurred by private sector: The Department estimates that there will be no fiscal impact on private sector revenues or liabilities.

Agency contact person and copies of rule: Copies of this rule making can be obtained, without cost, by writing to Lt. Patricia Hansen, Department of Transportation, Division of State Patrol, Bureau of Field Services, Room 551, P. O. Box 7936, Madison, WI 53707-7936. You may also contact Lt. Hansen by phone at (608) 266-0094, or by e-mail at patricia.hansen@dot.state.wi.us.

TEXT OF RULE

SECTION 1. Trans 325.02(intro.) is amended to read:

Trans 325.02 Federal rules adopted. (intro.) The following federal motor carrier safety regulations adopted by the United States department of transportation ~~and in effect on January 1, 2006~~, are adopted by the department and shall be enforced in relation to those carriers, drivers or vehicles to which these rules apply in the same manner as though the regulations were set out in full in this chapter:

SECTION 2. Trans 325.02(7g) and (7r) are created to read:

Trans 325.02(7g) Title 49, Code of Federal Regulations, part 385, subpart C, certification of safety auditors, safety investigators and safety inspectors.

(7r) Title 49, Code of Federal Regulations, part 387, as it pertains to the financial responsibility requirements applicable to commercial motor vehicles that are subject to the provisions of 392.9a.

SECTION 3. Trans 325.02(8) and 325.15 are amended to read:

Trans 325.02(8) Every traffic officer and state patrol inspector employed under the authority of s. 110.07, Stats., is authorized to declare vehicles and drivers out-of-service in accordance with the ~~2006~~ North American ~~uniform~~ standard out-of-service criteria.

NOTE: The North American Uniform Standard Out-of-Service Criteria is on file with the ~~offices of the Revisor of Statutes, the Secretary of State, Legislative Reference Bureau~~ and the Department of Transportation, Division of State Patrol. Copies may be obtained by writing to the Division of State Patrol, P. O. Box 7912, Madison, WI 53707-7912, or to the Commercial Vehicle Safety Alliance, ~~5430 Grosvenor Lane, Suite 130, Bethesda, MD 20814~~ 1101 17th Street, NW, Suite 803, Washington, DC 20036, or by calling 202-775-1623. You may also request copies via their website at www.cvsa.org.

Trans 325.15 Copies of rules. The department shall advise carriers upon request as to where copies of the federal rules adopted in this chapter may be obtained.

NOTE: Federal motor regulations may also be obtained through the Internet via:
<http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrguide.asp>

SECTION 4. Trans 326.01(intro.) is amended to read:

Trans 326.01 Federal rules adopted. (intro.) The following federal motor carrier safety regulations adopted by the United States department of transportation ~~and in effect on January 1, 2006~~, are adopted by the department and shall be enforced in relation to those carriers, drivers or vehicles to which these federal rules apply in the same manner as though the regulations were set out in full in this chapter:

SECTION 5. Trans 326.01(7m) is created to read:

Trans 326.01(7m) Title 49, Code of Federal Regulations, part 385, subpart E, hazardous materials safety permits.

SECTION 6. Trans 326.01(8) and 326.15 are amended to read:

Trans 326.01(8) Every traffic officer and state patrol inspector employed under the authority of s. 110.07, Stats., is authorized to declare vehicles and drivers out-of-service in accordance with the ~~2006~~ North American ~~uniform~~ standard out-of-service criteria.

NOTE: The North American Uniform Standard Out-of-Service Criteria is on file with the ~~offices of the Revisor of Statutes, the Secretary of State, Legislative Reference Bureau~~ and the Department of Transportation, Division of State Patrol. Copies may be obtained by writing to the Division of State Patrol, P. O. Box 7912, Madison, WI 53707-7912, or to the Commercial Vehicle Safety Alliance, ~~5430 Grosvenor Lane, Suite 130, Bethesda, MD 20814~~ 1101 17th Street, NW, Suite 803, Washington, DC 20036, or by calling 202-775-1623. You may also request copies via their website at www.cvsa.org.

Trans 326.15 Copies of rules. The department shall advise carriers upon request that copies of the federal regulations cited in s. Trans 326.01 may be obtained by contacting the division of state patrol.

**NOTE: Federal motor regulations may also be obtained through the Internet via:
<http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrguide.asp>**

SECTION 7. Trans 327.03(intro.) and (7) are amended to read:

Trans 327. 03 Federal regulations adopted. (intro.) The following federal motor carrier safety regulations adopted by the United States department of transportation ~~and in effect on October 1, 2006,~~ are adopted by the department and shall be enforced in relation to those carriers, drivers or vehicles which operate in intrastate commerce in the same manner as though the regulations were set out in full in this chapter:

(7) Every traffic officer and state patrol inspector employed under the authority of s. 110.07, Stats., is authorized to declare vehicles and drivers out-of-service in accordance with the ~~2006 North American uniform~~ standard out-of-service criteria.

NOTE: The North American Uniform Standard Out-of-Service Criteria is on file with the ~~offices of the Revisor of Statutes, the Secretary of State, Legislative Reference Bureau~~ and the Department of Transportation, Division of State Patrol, P. O. Box 7912, Madison, WI 53707-7912, or to the Commercial Vehicle Safety Alliance, ~~5430 Grosvenor Lane, Suite 130, Bethesda, MD 20814~~ 1101 17th Street, NW, Suite 803, Washington, DC 20036, or by calling 202-775-1623. You may also request copies via their website at www.cvsa.org.

SECTION 8. Trans 327.03(11) is created to read:

Trans 327.03(11) Title 49, Code of Federal Regulations, part 385, subpart C, certification of safety auditors, safety investigators and safety inspectors.

SECTION 9. Trans 327.09(6)(note) and 327.13 are amended to read:

Trans 327.09(6)(note) Note: Declarations can be faxed to (608) ~~266-4495~~ 267-9600.

Trans 327.13 Copies of federal regulations. The department shall advise carriers upon request that copies of the federal regulations cited in s. Trans 327.03 may be obtained by contacting the division of state patrol, Wisconsin department of transportation.

NOTE: Federal motor regulations may also be obtained through the Internet via:
<http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrguide.asp>

(END OF RULE TEXT)

Effective Date. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2)(intro.), Stats.

Signed at Madison, Wisconsin, this ____ day of
February, 2009.

FRANK J. BUSALACCHI
Secretary
Wisconsin Department of Transportation