



March 15, 2019

Hon. Raymond P. Martinez  
Administrator  
Federal Motor Carrier Safety Administration  
U.S. Department of Transportation  
1200 New Jersey Ave., S.E.  
Washington, DC 20590-0001

**PETITION FOR RULE MAKING:**

**FEDERAL MOTOR CARRIER ADMINISTRATION  
DEPARTMENT OF TRANSPORTATION**

**Requested modifications to the Hours of Service and Electronic Logging Device regulations  
necessary for the perishable fruit and vegetable industry**

Dear Administrator Martinez:

Producers, handlers and shippers in the perishable fruit and vegetable industry represented by American Farm Bureau Federation, California Citrus Mutual, California Farm Bureau Federation, California Fresh Fruit Association, California Specialty Crops Council, Eastern Cantaloupe Growers Association, Florida Blueberry Growers Association, Florida Citrus Mutual, Florida Farm Bureau Federation, Florida Fruit & Vegetable Association, Florida Strawberry Growers Association, Florida Tomato Exchange, Florida Watermelon Association, Georgia Farm Bureau Federation, Georgia Fruit and Vegetable Growers Association, Michigan Farm Bureau, Michigan Processing Apple Growers, National Watermelon Association, Produce Marketing Association, Sunshine Sweet Corn Farmers of Florida, Texas Farm Bureau, Texas International Produce Association, United Fresh Produce Association and Western Growers Association are filing a petition for rule making, pursuant to 49 Code of Federal Regulations (CFR) §389.31, to receive modification to the Hours of Service (HOS) and Electronic Logging Device (ELD) rules for perishable fruit and vegetable commodities. This is an urgent issue of utmost importance for the safe and timely delivery of perishable fruits and vegetables across the nation.

Thank you for the consideration your agency has provided to our industry to date. However, many challenges and hardships remain for growers, handlers and shippers of perishable fruits and vegetables; therefore we hereby petition the Federal Motor Carrier Administration (FMCSA) / Department of Transportation (DOT) to modify driver on-duty hours for commercial motor vehicles hauling perishable fruits and vegetables. Our growers, handlers and shippers urge your consideration to ensure the safe and timely delivery of perishable fruits and vegetables.

**I. PUBLIC AND DRIVER SAFETY, CONSUMER SAFETY, PRODUCE QUALITY**

Driver and public safety on roads is always the first priority. Our requested modifications to HOS regulations specifically for the perishable fruit and vegetable industry would achieve a higher level of safety than the existing HOS regulations. The current HOS and ELD

requirements have significant effects on perishable produce quality and consumer safety, and contribute to higher volumes of undesirable food waste. The modifications to the HOS and ELD regulations being requested would allow for a safer and timelier transport to market as rapidly as possible after harvest, which is essential for perishable fruit and vegetables.

Fresh market fruits and vegetables are highly perishable, mostly consumed raw and can rapidly decompose if mishandled. Delays in shipping and/or delivery can destroy product quality demanded by USDA regulations and consumers and affect the safety of the food resulting in potential public health impacts. Research shows each fruit and vegetable has varying attributes allowing for microbial growth at different rates that affect the deterioration/aging of perishable fruit and vegetables, and numerous peer-reviewed scientific papers and extensive reviews show increased pathogen entry into foods affected by spoilage organisms.

Additionally, cross-contamination of food is a major risk in food safety. Delays in shipment of perishable fruits and vegetables provide too many opportunities for cross-contamination, temperature abuse and other mishandling. Delays in shipments can exacerbate both contamination events and additional contamination opportunities, which can potentially lead to human illness.

As such, modified HOS and ELD regulations for perishable fruit and vegetable commodities would better align FMCSA with the U.S. Department of Agriculture on quality requirements and the Food and Drug Administration (FDA) on food safety requirements to ensure that mandates of one agency do not constrain, conflict or confuse those bound by other federal regulations. FDA's new federal Food Safety Modernization Act (FSMA), which focuses on prevention and response to foodborne outbreak and illness, also includes exemptions for the perishable fruit and vegetable industry. The seven major FSMA rules include two major rules affecting fruits and vegetables: Standards for the Growing, Harvesting, Packing and Holding of Produce for Human Consumption and Sanitary Transportation of Human and Animal Food. FDA has delayed implementation of many provisions of the FSMA Produce Rule for two to four years, granted exemptions for small producers under a threshold, opened other provisions for review and improvement, and exempted fruits and vegetables sold directly to consumer, restaurant and retail markets within 275 miles.<sup>1</sup>

On behalf of the perishable fresh fruit and vegetable industry, our associations request that FMCSA/DOT take the same consideration that FDA took in reviewing the unique nature of the perishable commodities we represent through our requests for modifications to HOS and ELD regulations.

## **II. PROPOSED MODIFICATIONS AND ALLOWANCES**

Each of the following proposals for modification pertain to language set forth in 49 CFR §395.1(k)(1), where “provisions of this part shall not apply during planting and harvesting periods, as determined by each State, to drivers transporting agricultural commodities from the source of the agricultural commodities to a location within a 150 air mile radius from the source.” The modifications are listed in order of importance to the perishable fresh fruit and vegetable industry, as identified by our valued growers, handlers and shippers.

## **DRIVER ABILITY TO PAUSE THE ELD DURING REST PERIODS AND LOADING TIMES**

### **1. Add an allowance for drivers to rest at any point during their trip without counting this rest time against their HOS allotments.**

Current HOS rules do not allow a driver to turn off the ELD when stopping to rest along a route, so unplanned rest periods count against the overall 14 hours of on-duty HOS allowed per day. The one required rest break of 30 minutes within the first eight hours of driving time does not provide drivers with the full flexibility to rest whenever the driver feels the rest time is needed. This increases the number of drivers who push through periods of fatigue when they would have most likely stopped for a rest in a non-monitored situation. The current regulations incentivize drivers to keep pushing through fatigue during their haul because if they pull over to rest, their HOS clock will continue to count. The driver's motivation to reach a delivery point or the farthest point possible within the day's HOS allotment (especially under the pressure of delivering quality fruits and vegetables) has the potential to increase the number of drivers operating at less-than-optimal capacity while on the road. The current regulations could unintentionally contribute to promoting a less safe circumstance on the roads. This reality is counterproductive to the FMCSA's desire to provide and create the safest roads and travel circumstances possible. Modifying the current regulations would allow drivers to follow true and instinctive cues for taking breaks, instead of consulting their clock and their HOS allotment, which will ensure drivers are well-rested throughout their day's journey while also limiting delivery delays.

In regards to taking breaks when a driver deems it necessary, studies included in the *Commercial Motor Vehicle Driver Fatigue, Long-Term Health, and Highway Safety* report show that prolonged time on task and inadequate breaks negatively affect cognitive performance, but that naps are effective in restoring alertness when time available for a full sleeping period is limited. This is especially true for naps during the afternoon when preparing for a nighttime shift, as drivers report feeling the most fatigued between 2-4 a.m. and 2-4 p.m.<sup>2</sup> As the rule currently stands, drivers are not incentivized to pull over and take a rest period when they need it because that is time lost on their HOS allotment for the day. They could choose to use a break as part of their 8/2 Split Sleeper Berth Provision, but having to stop for a full two hours when all that is needed is a 15- or 30-minute stretching break severely limits the choices that a driver has for a refresh time. The ability to completely pause the ELD from counting a break, no matter the length, toward HOS whenever the driver needs them, will improve driving performance and road safety without the unnecessary stress of penalties from HOS restrictions.

### **2. Exclude loading and unloading times from the 14-hour on-duty HOS calculations.**

The perishable fruit and vegetable industry faces unique challenges that affect loading schedules. The unpredictability of loading and unloading times constrict on-duty hours that drivers are allowed in one day. Most drivers report that they do not know how long a loading or unloading stop will take until they reach the shipping point. Field variables, including field labor availability and harvesting weather conditions, packinghouse machinery malfunctions, and the prevalence of trucking trips requiring multiple loading stops contribute to unpredictable loading

times. For example, a truck scheduled to load strawberries in the morning may be delayed three hours for the dew to rise in the field, or processing machinery in the packinghouse may be under repair for several hours during the day before product is ready to be loaded onto the truck.

These loading times are opportunities for drivers to rest while in route to a delivery point. However, they are currently deducted the same as driving hours if they are more than 150 miles from the original source. The current guidance dictates that the original source point, where the HOS regulations begin, does not consider the extra loading and unloading stops outside of the 150 air mile radius that may occur along the way. Including loading and unloading times in the HOS regulations, outside of the 150 air-mile provision, increases the amount of variability in delivery times to the final destinations, as they currently shorten the amount of time a driver is able to work/drive after the last loading.

Most drivers report that long loading times (sometimes six to eight hours) often result in an immediate need for a 10-hour rest period before the driver can get a sufficient amount of time on the road, further delaying delivery of the product to its final point. Delays in delivery result in significant impacts on food quality and the safety of perishable fruits and vegetables and put undue stress on drivers to reach a destination in a timely fashion, including speeding and pushing through periods of fatigue, to avoid fines from late deliveries. Allowing loading and unloading times to be excused from the overall 14-hour on-duty HOS calculations outside of the 150 air mile provision could provide much-needed resting time and stress relief to drivers of perishable products.

## **REVISIONS TO THE SLEEPER BERTH PROVISIONS TO ADDRESS THESE CONCERNS**

The requested modifications above are the most significant concerns to the safe and timely transportation of the perishable fruit and vegetable industry. These outlined modifications will provide the most immediate relief to our affected drivers and to companies that grow, handle and ship fresh produce. Further revision to the Sleeper Berth Provision would help address the requested modifications.

The current Sleeper Berth Provision allows drivers to take eight consecutive hours in a sleeper berth, plus a separate two-consecutive hours either in a sleeper berth, off duty, or a combination, which do not count toward their 14-hour on-duty time. Taking both of these rest periods resets a new 14-hour work period, starting at the end of the first break and counting any on-duty time between the two breaks. This is referred to as an 8/2 split. However, the combination of these 10 nonconsecutive hours does not fully reset the HOS clock for a new 11-hour driving, 14-hour on-duty period without the driver taking an additional 10 consecutive hours off-duty.

To address these concerns, we fully support adding flexibility to the Split Sleeper Berth Provision that would allow for splitting the sleeper berth time into 5/5, 6/4 and 7/3 hour blocks, adding up to a 10-hour rest period. This revised Sleeper Berth Provision would allow for full reset of the 14-hour on-duty, 11-hour driving period when the split sleeper berth time is added to a total of 10 hours in a 24-hour day and does not require a consecutive 10 hours in the sleeper berth. Most drivers remark that they understand the need for an adequate number of hours spent

sleeping to reduce fatigue and increase performance; however, they do not necessarily spend a full 10 hours in bed sleeping at home, so they should have the ability to sleep the amount they deem necessary to feel rested while on the road but also make their deliveries on time.

Studies show that splitting sleep periods has no effect on performance unless a day's total sleep time is less than seven hours, and that strategic napping is effective as a control for time lost in other sleep periods.<sup>2</sup> Allowing more flexibility in the Split Sleeper Berth Provision addresses a few safety and efficiency concerns related to the HOS requirements by allowing drivers to split their sleeping and resting time by how they see is most beneficial to their own safety, the safety of others, and the efficiency of the haul.

To further this point, the current inability of a driver to take a three-, four- or five-hour break during rush hour results in more truck drivers on the roads at a time when more commuters are also driving, which in turn increases the risk of crashes and the amount of time each driver spends on the road. In a 2018 study conducted by the American Transportation Research Institute, drivers who were able to use a flexible Split Sleeper Berth option of 5/5, 6/4, or 7/3 were able to cut 45 minutes off of their drive time in a 40-mile stretch by avoiding high-traffic time periods.<sup>3</sup> This flexibility decreases the amount of time that drivers spend behind the wheel and increases their ability to make deliveries more efficiently. An added benefit is the reduction of the number of trucks traveling during high-volume traffic periods in already-congested areas. Related to perishable fruits and vegetables, less time spent on the truck and more reliability in delivery time results in a higher-quality and safer perishable product reaching consumers, and additionally less food waste.

More flexibility in the Split Sleeper Berth Provision may also address loading and unloading times. For instance, if a driver arrives at a loading point and is notified that the loading will take three, four or five hours, he or she could choose to use the revised Split Sleeper Berth option and nap during this time, with less effect on overall HOS spent sitting at the loading dock. Allowing drivers to adjust their schedules as unforeseen instances arise lets them utilize napping and sleeper berth time most effectively, while not hindering the delivery schedule and potentially damaging the perishable fresh fruit and vegetable load they are hauling. Allowing these long periods of resting time to count toward a full day's reset, instead of requiring 10 consecutive hours, will not negatively impact safety and would increase the number of on-time deliveries, thus allowing drivers to schedule their sleeping time to better suit their individual safety and resting needs.

Split Sleeper Berth Provision flexibility improvements will certainly help in all of these situations, but only if there is even more flexibility around taking short resting breaks when drivers need them. Regardless of how the sleeper berth rulings fare, we urge FMCSA to fully consider allowing drivers to turn off their ELDs during necessary breaks and not count them against a driver's HOS allotment for the day.

## **ADDITIONAL REQUESTS FOR CONSIDERATION**

The following requested modification is also important to the industry and should be considered as such.

**3. Allow drivers to complete their trip, regardless of HOS requirements, if they come within 150 air miles of their delivery point (if delivery takes place on any day beyond the original departure work period).**

This modification to the rule would allow the driver to appropriately take into account the need for safety and the need to rapidly transport perishable fruits and vegetables to their final destination. The current Agriculture Exemption 49 CFR § 395.1(k) guidance allows a similar exemption for an unloaded return trip that occurs within the 150 air mile radius from where the agricultural commodity was originally loaded. However, because of the perishable nature of fruits and vegetables, the extension of this exemption to fruit and vegetable carriers would allow for a more efficient delivery without sacrificing a produce product's shelf life while sitting on a truck with the endpoint in sight.

Modifying the current exemption to allow delivery of the product if the vehicle is within 150 air miles of its delivery point (provided it is not within the same work period as the day the haul started) could alleviate many of the documented speeding and unsafe driving violation situations (referenced in Additional Support). Drivers would have the assurance they could still safely deliver their load if they were within 150 miles of their final delivery point.

In regards to safety concerns with adding an additional 150 miles to the end of a trip, a driver going an acceptable speed (68-70 mph) would require just an additional two hours to complete their trip. However, most drivers are reporting that they are repeatedly hitting their HOS allotment within five to 15 miles of their final destination. Allowing truck drivers to complete their trips without the worry of being stopped mere minutes from a destination would decrease the number of trucks speeding during their hauls, increase the number of on-time deliveries of perishable fresh fruits and vegetables, and decrease the burden of late delivery fees imposed on truck drivers whose number one priority should be road safety. We would also welcome the suggestion of additional safety and fatigue training that FMCSA/DOT deems necessary to enact this modification to the rule.

### **III. SUPPORTING INFORMATION AND INDUSTRY EXAMPLES**

This document is the result of a large number of grower, handler and shipper members of the associations requesting support on the transportation issues in the fresh fruit and vegetable industry. We also recognize that these issues are not exclusive to our specific industry. A 2013 study conducted by the American Transportation Research Institute found that more than 80% of surveyed motor carriers have experienced productivity loss in direct relation to the HOS rules. When drivers were surveyed, an overwhelming majority (82.5%) indicated a negative effect on their quality of life, with 66% of these drivers reporting increased levels of fatigue due to 2013 changes in HOS rules.<sup>4</sup>

Studies conducted by Northeastern University and the University of Arkansas show that the use of ELDs has not reduced the rate of truck crashes; however, the frequency of speeding violations has increased since the mandate took effect. These speeding and other unsafe driving violations, according to the report, are directly tied to drivers attempting to make up for productivity losses caused by ELD adoption.<sup>5</sup> While the HOS rules are intended to make roads safer for all drivers,

this research shows that unintended consequences are having significant impacts on drivers' abilities to do their jobs efficiently and safely.

Additionally, interstates have seen an increase in truck traffic during high-volume periods as drivers are not incentivized to take a three, four or five hour break to avoid rush hour traffic since it counts against their HOS allotments for the day, and does not count toward the 10 consecutive hours currently needed to restart the HOS clock. A 2018 ATRI study found that by simply allowing drivers more flexibility in their Split Sleeper Berth Provision to count a varying number of hours as sleeper berth or off-duty time during rush hour, 2.3 million driving hours could be saved throughout the trucking industry.<sup>3</sup> Such flexibility would not only decrease the time that truck drivers are spending in traffic and increase the amount of time they have to rest during the day before a long haul; it also would decrease the number of hours that fresh fruits and vegetables are sitting in a refrigerated trailer on the interstate, losing valuable quality and shelf life.

We also encourage you to consider the following personal accounts we've heard in the industry specific to the hauling of perishable fresh fruit and vegetables. These examples detail the issues that truck drivers and produce companies are facing each and every day.

Drivers tell us that the 14-hour workday limit and inability to use breaks efficiently have significantly affected their deliveries and day-to-day operations. Often, because of this 14-hour limit and the inability to take breaks that count as flexible sleeper berth time, the drivers and their perishable loads are getting stuck up to an hour away from their destination. In a few extreme, but not at all uncommon cases, the loads might be a mere five to 10 miles away from the delivery point. For example, a common delivery point might require a driver to cross a bridge that is overly crowded with traffic in the mornings. The driver might be within 10 miles of the delivery point at night, but just on the other side of the bridge, when his ELD tells him to shut down and find parking immediately. If the driver could instead make the delivery over the bridge that night, he would avoid sitting in traffic for an hour and a half the next morning in route to his delivery. Being able to more effectively use a flexible Split Sleeper Berth option would help the driver avoid this issue through more effective planning.

Getting stopped by HOS limits just outside of a delivery point also interferes with the sale of fresh produce. Drivers tell us that not only are the customers at the delivery point upset by the late delivery, but they will reach out to other suppliers to fill orders, ultimately making the drivers responsible for their unsold load until a new buyer can be found. During this time, perishable produce is losing hours and sometimes days off of shelf life. The driver is then often fined \$100 to \$150 per late load, even though it is often the fault of a shipper with a slow loading process, and not the fault of the driver. As a result, drivers report increasing highway speeds to 72-74 mph instead of the usual 68 mph to make their deliveries on time and before the HOS cuts them off and stalls their delivery.

Logistics managers tell us that because of the HOS limits, a two-day haul now can take up to four days, and that smaller owner-operator trucking companies are going out of business because they cannot make enough loads in a week to stay profitable. These smaller companies do not

have the ability to build teams of drivers to take over loads when one driver has hit his or her HOS limit, relying on a single person to efficiently manage their HOS.

Drivers also mention that because of the inflexible Sleeper Berth Provision, there are more trucks on the road during rush hour, meaning they are sitting in traffic for an hour or two just watching their HOS clock tick. Additionally, the current regulations are making it increasingly difficult to find truck parking at night. Drivers can use their personal conveyance during this time to find available parking, but they lament that in order to use personal conveyance, they cannot go past the point where the HOS limit hits, so they must backtrack to find parking in order to avoid a violation.

In addition to a perishable product's shortened lifespan, weather, pests and diseases, foodborne disease outbreaks, market restrictions and trade barriers also already impact the perishable fruit and vegetable industry. This is further complicated by the current lack of driver availability. According to conversations with leaders in the produce industry, the agricultural transportation industry has already lost, and is continuing to lose, a significant number of drivers. Owner-operator groups have been hit especially hard because of the decrease in number of loads per week that they are able to complete with the current HOS restrictions. These impacts have caused product delivery delays that become liabilities for shelf-life issues (i.e. shrink).

All of these conversations lead to one conclusion: There must be a safe and efficient way to alleviate the stressors on drivers so that they can safely deliver quality fresh fruits and vegetables. The three requested proposed modifications outline how these issues can be addressed.

#### **IV. CONCLUSION**

We appreciate FMCSA's consideration of these important modification requests for perishable fruit and vegetable producers, handlers and shippers. We understand that some modification requests are more feasible for immediate implementation than others, and implore the Administrator to consider the urgency of this request as many of the state's harvest seasons have already begun.

If FMCSA cannot modify the HOS and ELD rules as requested, we urge a delay of enforcement of the HOS and ELD rules for two to four years, to allow for improvement in the regulations affecting the safe transport of perishable fruit and vegetable commodities. Such a delay would allow for improvements to the rule's compliance monitoring and more proficiently allow for the safety of perishable produce, its drivers, and its transport.

Again, Mr. Administrator, thank you for your time and consideration. We look forward to discussion on these points and a decision that favors the safe, quality and efficient transport of perishable fruits and vegetables.

## V. APPENDIX

Research studies and supporting documents consulted in the writing of this petition:

- 1) FSMA Produce Rule Exemptions

**Source:** <https://www.fda.gov/downloads/Food/GuidanceRegulation/FSMA/UCM479592.pdf>

- 2) Panel on Research Methodologies and Statistical Approaches to Understanding Driver Fatigue Factors in Motor Carrier Safety and Driver Health. (August 12, 2016). Committee on National Statistics; Board on Human-Systems Integration; Division of Behavioral and Social Sciences and Education; Transportation Research Board; National Academies of Sciences, Engineering, and Medicine.

**Source:** [National Academies Press \(US\)](https://www.ncbi.nlm.nih.gov/books/NBK384975/) and <https://www.ncbi.nlm.nih.gov/books/NBK384975/>

- 3) Short, Jeffrey, ATRI Hours-of-Service Flexibility Technical Memo. (August 2018).

**Source:** <https://atri-online.org/2018/08/28/atri-hours-of-service-flexibility-technical-memo/#.XG2ykuhKiUk>

- 4) Short, Jeffrey, Operational and Economic Impacts of the New Hours-of-Service. (November 2013)

**Source:** <https://atri-online.org/2013/11/18/operational-and-economic-impacts-of-the-new-hours-of-service-report-request/#.XG20WehKiUI>

- 5) Scott, A., Balthrop, A., and Miller, J, Did the Electronic Logging Device Mandate Reduce Accidents? (January 11, 2019).

**Source:** <https://ssrn.com/abstract=3314308> and <http://dx.doi.org/10.2139/ssrn.3314308>