



STUDENT BORROWER  
PROTECTION CENTER



## Federal Motor Carrier Safety Administration, Department of Transportation Proposed Action Memorandum

October 19, 2023

### Invoking the DOT's safety authority to ban the use of non-compete and de facto non-compete clauses in trucking

#### I. Introduction

The American trucking industry is characterized by poor pay and unsafe working conditions, both of which have contributed to high rates of driver turnover. In an attempt to mitigate this challenge without offering better terms of employment, motor carriers use traditional and de facto non-compete clauses, including stay-or-pay contracts that require a departing worker to pay his employer a certain amount. Throughout this memo, the term “non-compete clause” refers to both traditional and de facto non-compete clauses. These provisions prevent drivers from pursuing better job opportunities and further suppress wages by decreasing competition for labor.

Non-compete clauses also create safety risk for drivers and the general public by increasing economic pressure on drivers and creating disincentives for drivers to speak up about their safety concerns. Heightened economic pressure: encourages unsafe driving behavior; discourages maintenance and repairs that are necessary for safety; and traps drivers in unsafe and sometimes violent working arrangements.

A number of federal agencies have authority to regulate these agreements, including the Department of Transportation (“DOT”).<sup>1</sup> This memorandum proposes that the Federal Motor Carrier Safety Administration (“FMCSA”) promulgate, through notice-and-comment rulemaking, a regulation banning the use of non-compete and de facto non-compete clauses in employment contracts for commercial motor vehicle drivers.

#### II. Justification

##### A. *Noncompetes in trucking*

Since deregulation in the 1970s and 1980s, the trucking sector, which once offered solid, well-paying jobs with reasonable terms, has transformed into one with notoriously poor working conditions and terrible pay. Changes brought about by deregulation and declining unionization caused trucker pay to plummet and hours to lengthen, resulting in extremely high turnover rates. In 1980, big rig drivers affiliated with the Teamsters union made an average of more than \$100,000 per year in 2022 dollars.<sup>2</sup> Most had predictable schedules, frequent nights at home, and were provided hotel rooms for nights spent on the road. As part of its efforts to

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<sup>1</sup> For example, stay-or-pay contracts may be subject to the Consumer Financial Protection Act's prohibitions on unfair, deceptive, or abusive acts and practices in consumer financial products or services because of the debt obligations they create. Additionally, the Federal Trade Commission and the Department of Transportation may have jurisdiction to regulate such agreements under their unfair methods of competition or unfair or deceptive acts and practices authorities under their respective organic statutes. 49 U.S.C. § 41712(a); 15 U.S.C. § 45(a). The Department of Health and Human Services may also have the authority to regulate such practices as part of its regulation of healthcare facilities that receive Medicare patients. 42 U.S.C. § 1395x(e)(9); *see also* 42 C.F.R. § 482.1(a)(1)(ii) (“The Secretary may impose additional requirements if they are found necessary in the interest of the health and safety of the individuals who are furnished services in hospitals.”); *see generally* American Economic Liberties Project letter to White House Competition Council, (May 30, 2023),

<http://www.economicliberties.us/wp-content/uploads/2023/05/2022-05-30-Competition-Council-Noncompetes-Letter.pdf> (outlining various authorities that agencies may have to regulation non-compete agreements).

<sup>2</sup> Bob Woods, Why driving big rig trucks is a job fewer Americans dream about doing, CNBC, (Jul. 5, 2022), <https://www.cnbc.com/2022/07/05/why-driving-big-rig-trucks-isnt-a-job-americans-want-to-do-anymore.html>.

curb inflation, the Carter administration removed regulatory barriers to entry to the industry, which triggered bankruptcies at legacy, unionized carriers.<sup>3</sup> Today, the average annual salary for truckers hovers just below \$50,000.<sup>4</sup> Truckers routinely spend weeks away from home, lack health insurance, may be required to pay their own fuel costs and maintenance, and work more than 60 hours per week, with many of those hours left uncompensated because they are not paid for time spent waiting for loading or unloading; truckers are also excluded from the overtime provisions of the Fair Labor Standards Act.<sup>5</sup> As a result, the industry faces staggering turnover rates: in 2019, 91 percent of new drivers quit their jobs, moving to another company or out of the industry.<sup>6</sup> Turnover rates in some segments of the industry can reach 200%.<sup>7</sup> Further, industry estimates indicate that over 90 percent of new hires decide whether to quit or stay in their driving jobs within the first 6 months of work—a time period that often coincides with the contract term of stay-or-pay contracts discussed in this memorandum.<sup>8</sup>

Rather than increase pay or improve working conditions to attract and retain drivers, trucking companies have turned to non-compete clauses, in traditional and de facto forms, to limit drivers' mobility. Traditional noncompetes, which restrict a driver who leaves a company from working in the logistics industry for a set period of time and within a certain geographic area, are common in the industry.<sup>9</sup> Driver advocates see these clauses as restricting wages of drivers and contributing to unsafe practices that force drivers out of the industry.<sup>10</sup> At least one in five American workers is subject to a traditional non-compete clause.<sup>11</sup> The exact proportion of CMV drivers restrained by non-compete clauses is difficult to estimate, but one study found that 21 percent of workers employed in transportation and material moving occupations within the transportation and warehousing sector are subject to such contractual provisions.<sup>12</sup>

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<sup>3</sup> Rachel Premack, *How a little-known 1980 law slashed pay for millions of truck drivers and created big-box retail as we know it*, Business Insider, (Jul. 25, 2020), <https://www.businessinsider.com/truck-driver-pay-motor-carrier-act-retail-2020-7> (explaining that “[f]rom 1980 to '86, some 4,000 trucking companies went bankrupt”).

<sup>4</sup> Bob Woods, *Why driving big rig trucks is a job fewer Americans dream about doing*, CNBC, (Jul. 5, 2022), <https://www.cnbc.com/2022/07/05/why-driving-big-rig-trucks-isnt-a-job-americans-want-to-do-anymore.html>.

<sup>5</sup> *Id.*; 29 U.S.C. § 213(b)(1).

<sup>6</sup> Robin Kaiser-Schatzlein, *How Life as a Trucker Devolved Into a Dystopian Nightmare*, NYTimes, (Mar. 15, 2022), <https://www.nytimes.com/2022/03/15/opinion/truckers-surveillance.html>.

<sup>7</sup> Trucker Desiree, *Is there a truck driver shortage?*, (Dec. 25, 2018), <https://truckerdesiree.com/2018/12/25/is-there-a-truck-driver-shortage/>.

<sup>8</sup> American Shipper, *Survey: 50% of trucking companies say most new drivers quit within 6 months*, (Sept. 1, 2017), <https://www.freightwaves.com/news/survey-50-of-trucking-companies-say-most-new-drivers-quit-within-6-months>.

<sup>9</sup> Comment from Owner-Operator Independent Drivers Association to the Federal Trade Commission on proposed Non-Compete Clause Rule, (Apr. 25, 2023) <https://www.regulations.gov/comment/FTC-2023-0007-19806>; Comment from American Trucking Associations to the Federal Trade Commission on proposed Non-Compete Clause Rule, (May 3, 2023), <https://www.regulations.gov/comment/FTC-2023-0007-20857>.

<sup>10</sup> Comment from Owner-Operator Independent Drivers Association to the Federal Trade Commission on proposed Non-Compete Clause Rule, (Apr. 25, 2023) <https://www.regulations.gov/comment/FTC-2023-0007-19806>.

<sup>11</sup> Federal Trade Commission, *Non-Compete Clause Rulemaking*, (Accessed: Jul. 10, 2023), <https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking>; *see also* Alexander J.S. Colvin & Heidi Shierholz, *Noncompete agreements*, Economic Policy Institute, (Dec. 10, 2019), <https://www.epi.org/publication/noncompete-agreements/> (estimating that “between 27.8% and 46.5% of private-sector workers are subject to noncompetes”).

<sup>12</sup> Evan Starr, JJ Prescott, & Norman Bishara, *Non Compete Agreements in the U.S. Labor Force 39*, (Oct. 12, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2625714](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714).

Now, as the Biden Administration<sup>13</sup> and state lawmakers,<sup>14</sup> have cracked down on traditional non-compete clauses, transportation companies are increasingly relying on new, nefarious contractual provisions: stay-or-pay contracts.<sup>15</sup> These contracts operate as de facto non-compete clauses,<sup>16</sup> intentionally designed to evade bans on traditional non-compete clauses while achieving the same outcome through different means. These contracts require departing employees to pay their employer thousands dollars if they leave their job via termination or resignation before a specific date, and can include a host of other financial penalties.

As the Consumer Financial Protection Bureau (“CFPB”) explained in a recent report on employer-driven debt, workers are often rushed into signing up for de facto non-compete contracts and associated debt loads because they are presented as conditions of employment.<sup>17</sup> The on-boarding process in the trucking industry, which commonly takes the form of a one- to four-day orientation conducted at one of the motor carrier’s terminals, exacerbates the pressure put on workers. Workers may travel hundreds, if not thousands, of miles to attend a motor carrier’s orientation on a one-way ticket arranged and paid for by the motor carrier. The contracts may be presented to the worker for the first time during the final hours of orientation and if the contract is not executed, the worker may need to pay for the return home. Additionally, employers misrepresent the value and nature of the contracts that workers are required to sign: whereas workers are made to believe that the contracts and debt are necessary to achieve career mobility and higher earnings,<sup>18</sup> employers instead use the contracts as tools to reduce outside employment options.

One of the most common forms of stay-or-pay contracts in the trucking industry is the training repayment agreement provision (“TRAP”). TRAPs are a type of liquidated damages provision wherein the worker agrees to pay the employer for the employee’s training expenses if the worker leaves or is terminated before a certain date.<sup>19</sup> Often the training is inaccurately valued in the TRAPs because of the dubious quality of the training and the failure to properly account for productive work performed by workers during the training, and the financial penalties imposed on drivers can be significant. The CFPB explained that one company charged drivers over \$6,000 for attending its commercial driver’s license school if they sought out a different employment opportunity, but the company only paid the driving school \$1,400-\$2,500 per driver.<sup>20</sup> One former trainee at CRST, a large privately-owned transportation company, explained that “calling the [training]

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<sup>13</sup> See, e.g., Federal Trade Commission, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition, (Jan. 5, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition>; National Labor Relations Board, NLRB General Counsel Issues Memo on Non-compete Violating the National Labor Relations Act, (May 30, 2023), <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-issues-memo-on-non-competes-violating-the-national>.

<sup>14</sup> SHRM, More States Block Noncompete Agreements, (Sept. 15, 2022), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/states-restrict-noncompete-agreements-colorado.aspx>.

<sup>15</sup> Real Women in Trucking comment to Federal Trade Commission on its Non-Compete Rule, (Apr. 19, 2023), [https://c4747b7e-f126-4822-be79-8b623d1bca7b.usrfiles.com/ugd/c4747b\\_0bdd7a6442aa4e6eaaebbdadd00ddd40.pdf](https://c4747b7e-f126-4822-be79-8b623d1bca7b.usrfiles.com/ugd/c4747b_0bdd7a6442aa4e6eaaebbdadd00ddd40.pdf) (explaining that training repayment agreements “often function as de facto non-compete clauses, restricting workers’ mobility and ability to earn a decent living”) (hereinafter “RWIT Comment”).

<sup>16</sup> Zoe Salzman, Liquidated Damages Clauses in Employment Agreements, [https://www.americanbar.org/content/dam/aba/publications/aba\\_journal\\_of\\_labor\\_employment\\_law/v34/number-2/liquidated-damages-clauses.pdf](https://www.americanbar.org/content/dam/aba/publications/aba_journal_of_labor_employment_law/v34/number-2/liquidated-damages-clauses.pdf) (comparing liquidated damages clauses to non-compete agreements in their effects of preventing worker mobility).

<sup>17</sup> Consumer Financial Protection Bureau, Issue Spotlight: Consumer risks posed by employer-driven debt, (Jul. 20, 2023), <https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-consumer-risks-posed-by-employer-driven-debt/full-report> (hereinafter “CFPB Report”).

<sup>18</sup> *Id.*

<sup>19</sup> RWIT Comment at 2 citing FTC Non-Compete Proposed Rule.

<sup>20</sup> CFPB Report.

program a ‘training’ might have even been a stretch,” as it did not contain “real training in backing up” and “didn’t really prep you for the” commercial driver’s license test.<sup>21</sup> When his instructor quit, the trainee decided to move on from CRST and was immediately subjected to repeated calls from debt collection agencies attempting to collect more than \$6,000 on behalf of CRST.<sup>22</sup>

The exact prevalence of TRAPs is difficult to quantify, but one survey revealed that nearly 10 percent of American workers are subject to these provisions,<sup>23</sup> and the Student Borrower Protection Center estimated that “major employers rely upon TRAPs in segments of the U.S. labor market that collectively employ more than one in three private-sector workers.”<sup>24</sup> Although estimates of TRAPs’ prevalence in trucking is unavailable, there are documented examples of their use at many of the largest trucking companies, including Swift Transportation School (an on-site training program for Knight-Swift Transportation Holdings Inc.), Schneider Trucking School (a training program for Schneider National), Prime Trucking School (a training program for Prime, Inc.), and Contract Freighters.<sup>25</sup>

Restrictive employment contracts like traditional and de facto non-competes tend to produce relatively more negative impacts on women, workers of color, and workers with disabilities. These workers are generally more likely to be low-wage workers,<sup>26</sup> who are most negatively impacted by stay-or-pay practices. TRAPs, for example, are more common in industries that disproportionately employ women and people of color.<sup>27</sup> Truck drivers, although mostly men, are more likely to be non-white than the average worker.<sup>28</sup>

### B. *Driver and public safety*

Traditional non-compete clauses and de facto non-compete clauses enforced by employer-driven debt increase economic pressure on drivers. This economic pressure can put drivers and the public at risk by creating incentives to drive unsafely, reducing the likelihood that trucks are properly maintained, and perpetuating unsafe work environments.

These clauses create economic pressure on drivers by raising the stakes of quitting or getting fired, thereby suppressing wages for drivers because carriers face little pressure to compete to retain talent.<sup>29</sup> Additionally, these contracts can directly reduce drivers’ net compensation through demands for repayment on a stay-or-pay contract or for breaking a traditional non-compete clause. For example, as noted above, CRST

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<sup>21</sup> Student Borrower Protection Center, Trapped at Work 18, (July 2022), [https://protectborrowers.org/wp-content/uploads/2022/07/Trapped-at-Work\\_Final.pdf](https://protectborrowers.org/wp-content/uploads/2022/07/Trapped-at-Work_Final.pdf) (hereinafter “Trapped at Work report”).

<sup>22</sup> *Id.*

<sup>23</sup> Diane Bartz, More U.S. companies charging employees for job training if they quit, Reuters, (Oct. 17, 2022), <https://www.reuters.com/world/us/more-us-companies-charging-employees-job-training-if-they-quit-2022-10-17/>.

<sup>24</sup> Trapped at Work at 3.

<sup>25</sup> Trapped at Work at 17.

<sup>26</sup> Economic Policy Institute, Workers of color are far more likely to be paid poverty-level wages than white workers, (Jun. 21, 2018), <https://www.epi.org/blog/workers-of-color-are-far-more-likely-to-be-paid-poverty-level-wages-than-white-workers/>; Pew Research Center, More women than men earn the federal minimum wage, (May 5, 2014), <https://www.pewresearch.org/short-reads/2014/05/05/more-women-than-men-earn-the-federal-minimum-wage/>; Maria Manansala, *Disabled Workers Can Be Paid Less Than \$7.25 an Hour. It’s Time to Change That.*, National Partnership, (Aug. 7, 2023), <https://nationalpartnership.org/disabled-workers-paid-less-than-725-time-to-change-that/>.

<sup>27</sup> Trapped at Work at 8.

<sup>28</sup> Carl Romer, *Black and Hispanic men could face disproportionate job loss due to transportation automation*, Economic Policy Institute, (Oct. 3, 2019), <https://www.epi.org/blog/transportation-automation-job-loss/>.

<sup>29</sup> Government Accountability Office, Noncompete Agreements: Use is Widespread to Protect Business’ Stated Interests, Restricts Job Mobility, and May Affect Wages, (May 11, 2023), <https://www.gao.gov/products/gao-23-103785>.

enforces TRAPs of more than \$6,500,<sup>30</sup> which is an enormous sum compared to the approximately \$50,000 average annual salary of CRST drivers.<sup>31</sup> These debt obligations can follow drivers throughout their careers.

Economic pressure caused by these provisions can trap drivers in unsafe, toxic, and abusive, work environments. Because financial penalties created by de facto non-compete clauses apply to workers upon their resignation or, often, termination, they are strongly incentivized to remain, quietly in their jobs even when doing so means declining to report safety violations or enduring harassment or abuse. Trucking is an industry notorious for its harsh working conditions, and drivers' inability to speak up about risks to their personal safety for fear of retaliation or firing creates safety risks for drivers and the public.

With regard to abuse, the Biden Administration has acknowledged that the prevalence of sexual assault and harassment in the trucking industry<sup>32</sup> plays a role in dissuading women from helping fill what the administration sees as a labor shortage in trucking.<sup>33</sup> A disturbing episode documented in a SBPC report illustrates how de facto non-competes can perpetuate this crisis:

One woman who was a student trainee at CRST reported being raped by her trainer at the beginning of her 10-month training program. When she reported the incident to the company, she was told "without corroborating evidence like a video, the company could not do anything." Her complaint went ignored. After being effectively terminated by CRST following the event, she received a bill for \$9,000 due to her TRAP. When she later sued the company for multiple causes, the company settled for \$5 million. The court case revealed a much wider problem. In a deposition for the case, Brooke Willey, vice president of human resources, stated that in 2018 and 2019, there were 150 to 200 sexual harassment claims involving CRST drivers.<sup>34</sup>

In many cases, drivers suffer harassment and abuse at the hands of their supervisor or training co-driver. According to one attorney working on a gender discrimination class action lawsuit against CRST in 2015, many members of the class "were made to understand that their passage—that is being able to move on to be driver and receive actual pay—was dependent on providing sexual favors."<sup>35</sup>

In addition to disturbing accounts of sexual violence, drivers reported other types of violence between workers. Friction between co-drivers during training periods has resulted in violent episodes, complete with threats of physical altercations, purposeful sleep deprivation, and even murder.<sup>36</sup> Traditional and de facto noncompetes prevent drivers from speaking up about or leaving these kinds of unsafe situations.

Economic pressure of the type described above also creates incentives to drive unsafely,<sup>37</sup> particularly given truckers' pay structures. To attempt to make ends meet under such pressure, drivers may drive longer and

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<sup>30</sup> Trapped at Work at 19.

<sup>31</sup> Ziprecruiter, Crst Trucking Salary, (Accessed: Jul. 10, 2023), <https://www.ziprecruiter.com/Salaries/CRST-Trucking-Salary>.

<sup>32</sup> See, e.g., Alexia Fernández Campbell & Claire Molloy, *Attacked behind the wheel*, The Center for Public Integrity, (Dec. 11, 2022), <https://publicintegrity.org/labor/female-drivers-attacked-behind-the-wheel/>.

<sup>33</sup> Department of Labor Women's Bureau, *Day of Action to Promote Safety and Prevent Sexual Assault and Sexual Harassment in the Trucking Industry*, (Accessed: Jul. 10, 2023), <https://www.dol.gov/agencies/wb/TruckingDayOfAction>.

<sup>34</sup> Trapped at Work at 19.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 18.

<sup>37</sup> Statement of Hon. Deborah A.P. Hersman, Chair of the National Transportation Safety Board, to the Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security of the United States Senate Committee on Commerce, Science, and Transportation, S. Hrg. 111-892, (Apr. 28, 2010), <https://www.govinfo.gov/content/pkg/CHRG-111shrg65003/html/CHRG-111shrg65003.htm> ("It goes without saying that no carrier wants to have an accident, but we recognize that the economic pressures in the motor carrier industry can create conditions where safety is just not guarded as vigilantly as it should be.")

faster than is safe or lawful, as they are frequently paid by the mile instead of by the hour.<sup>38</sup> As a result, on average, long-haul truck drivers work fifty percent more hours than the typical American worker.<sup>39</sup> There is a bevy of evidence that links poor driver pay to poor driver safety because of the pressure to drive unsafely.<sup>40</sup> For example, the Office of the Inspector General of the DOT found that similar economic pressure created by unpaid detention time increases crash rates.<sup>41</sup> Additional research in Australia led that country's parliament to eliminate mileage-based pay for drivers.<sup>42</sup> Suppressed wages and debt obligations created by non-competes serve to exacerbate this dynamic. Poor pay, made even poorer due to non-compete clauses, incentivizes drivers to violate posted speed limits and DOT safety regulations that aim to limit driver hours.

Now-President Todd Spencer of the Owner-Operator Independent Drivers Association (“OOIDA”) explained in a 2010 statement to Congress the need for FMCSA to take a more active role in regulating the economic pressures that encourage unsafe driving behavior:

Enforcement priorities that ignore the relationship between highway safety and the coercive demands of shippers, receivers, motor carriers and freight brokers upon drivers are impediments to our overall safety objectives. The demands and expectations of trucking stakeholders on drivers are far more influential on safety than any inspection scheme or schedule of fines that Congress or FMCSA may devise. Unless those economic issues are addressed, drivers who become disqualified from driving for violating hours-of-service rules and other safety regulations will simply be replaced by new, less experienced drivers, facing the same economic pressures. It is only by addressing underlying economic concerns that we will begin to see significant improvements to highway safety.<sup>43</sup>

Finally, economic pressure caused by non-compete clauses can reduce spending on maintenance and repairs, thereby decreasing safety. While the vast majority of drivers are employees of trucking companies, a sizable minority – between 9 and 15 percent, by some estimates – are “owner-operators,” meaning that they own or lease their own vehicle and motor carriers classify them (accurately or not) as independent contractors.<sup>44</sup> This number is considerably higher in some pockets of the industry: approximately two-thirds of drivers hauling goods from U.S. seaports in California are classified as independent contractors.<sup>45</sup> While all carriers face economic trade-offs for investments in safety-related equipment and maintenance, these trade-offs are

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<sup>38</sup> Michael H. Belzer & Stanley A. Sedo, Why do long distance truck drivers work extremely long hours? 2, (2017), [https://www.leraweb.org/assets/images/MbrProj/BelzerMichael\\_LongDistanceTruckDrivers.pdf](https://www.leraweb.org/assets/images/MbrProj/BelzerMichael_LongDistanceTruckDrivers.pdf)

<sup>39</sup> Michael Belzer, Truck drivers are overtired, overworked and underpaid, (Jul. 25, 2018), <https://clas.wayne.edu/news/truck-drivers-are-overtired-overworked-and-underpaid-31408>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*; see also Michael H. Belzer, Daniel Rodriguez, & Stanley Sedo, Paying for Safety: An Economic Analysis of the Effect of Compensation on Truck Driver Safety, (Jan. 2002), [https://www.researchgate.net/publication/242737359\\_Paying\\_for\\_Safety\\_An\\_Economic\\_Analysis\\_of\\_the\\_Effect\\_of\\_Compensation\\_on\\_Truck\\_Driver\\_Safety](https://www.researchgate.net/publication/242737359_Paying_for_Safety_An_Economic_Analysis_of_the_Effect_of_Compensation_on_Truck_Driver_Safety); Mayhew, C., & Quinlan, M. (2006). Economic pressure, multi-tiered subcontracting and occupational health and safety in Australian long-haul trucking. *Employee Relations*, 28(3), 212–229. <https://doi.org/10.1108/01425450610661216>; Howard Abramson, *Safety drives Australia to end pay-by-the-mile*, *FleetOwner*, (Jan. 13, 2016),

<https://www.fleetowner.com/operations/drivers/article/21692626/safety-drives-australia-to-end-paybythemile>.

<sup>42</sup> Howard Abramson, *Safety drives Australia to end pay-by-the-mile*, *FleetOwner*, (Jan. 13, 2016), <https://www.fleetowner.com/operations/drivers/article/21692626/safety-drives-australia-to-end-paybythemile>.

<sup>43</sup> Prepared statement of Todd Spencer, Executive Vice President, Owner-Operator Independent Drivers Association, to the Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security of the United States Senate Committee on Commerce, Science, and Transportation, S. Hrg. 111-892, (Apr. 28, 2010), <https://www.govinfo.gov/content/pkg/CHRG-111shrg65003/html/CHRG-111shrg65003.htm>.

<sup>44</sup> BookerTrans, *What percentage of truckers are owner operators*, (Aug. 6, 2022), <https://bookertrans.com/what-percentage-of-truckers-are-owner-operators>; GlobeCon, *Independent Owner Operator Truck Driver Statistics for the United States*, (Accessed: Jul. 10, 2023), <https://www.globeconfreight.com/blog/independent-owner-operator-truck-driver-statistics-united-states/>.

<sup>45</sup> Navesink, *Most US Truck Drivers are Misclassified as Independent Contractors*, (Accessed: Jul. 10, 2023), <https://www.navesinkriskmgmt.com/technology-and-hiring>.

particularly problematic for owner-operators and small carriers, who are solely responsible for generating profits and maintenance of equipment.<sup>46</sup> Owner-operators are responsible for the cost of their own benefits, retirement savings, additional payroll taxes, as well as for a myriad of expenses associated with their truck,<sup>47</sup> including required maintenance and repairs.<sup>48</sup> The intense economic pressure that owner-operators face — drivers' expenses in a week can result in a negative paycheck — may prevent owner-operators from making these repairs and keeping up with this maintenance. These pressures are exacerbated by reduced wages and debt obligations caused by restrictive employment contractual provisions like non-compete clauses. Poorly maintained trucks can contribute to unsafe outcomes like vehicle failures and crashes.<sup>49</sup>

### III. Current State

Congress enacted the Motor Carrier Safety Improvement Act in 1999, which created the FMCSA in order to prevent commercial motor vehicle-related fatalities and injuries.<sup>50</sup> The Act was one in a series of statutes that focused on improving safety on the country's highways, including the Surface Transportation Assistance Act of 1982, the Motor Carrier Safety Act of 1984 ("MCSA"), and the Commercial Motor Vehicle Safety Act of 1986, among others. In particular, the laws sought to encourage the safe operation of large trucks, which have grown in size and weight since deregulation in the trucking industry, and harmonize safety regulations across states.<sup>51</sup>

The regulatory authorities possessed by the DOT are codified at 49 U.S.C. § 31131 *et seq.* The Secretary of Transportation delegates to the Administrator of the FMCSA, at 49 C.F.R. § 1.87(f), the authority to carry out safety statutes as they relate to commercial trucking. Congress enacted the safety provisions primarily discussed in this memorandum as part of the 1984 MCSA.<sup>52</sup>

49 U.S.C. § 31136(a) directs DOT to issue safety rules prescribing "minimum safety standards" that, "[a]t a minimum," ensure that:

- "commercial motor vehicles are maintained, equipped, loaded, and operated safely";
- "the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely..."; and
- "the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators."

Additionally, 49 U.S.C. § 31502(b)(1) empowers the DOT to "prescribe requirements for ... qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier...[.]"

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<sup>46</sup> Congressional Office of Technology Assessment, *Gearing Up for Safety: Motor Carrier Safety in a Competitive Environment* 51, (1988), <https://www.princeton.edu/~ota/disk2/1988/8817/881705.PDF>.

<sup>47</sup> Steve Viscelli, *The Big Rig: Trucking and the Decline of the American Dream* 149 (2016) (miscellaneous fees); *id.* at 156 (fuel).

<sup>48</sup> *Id.* at 148 (maintenance).

<sup>49</sup> OSHA, NETS, and NHTSA, *Guidelines for Employers to Reduce Motor Vehicle Crashes*, (Accessed: Jul. 10, 2023), [https://www.osha.gov/sites/default/files/publications/motor\\_vehicle\\_guide.pdf](https://www.osha.gov/sites/default/files/publications/motor_vehicle_guide.pdf); *see also* Jason Miller & John Saldanha, *A New Look at the Longitudinal Relationship Between Motor Carrier Financial Performance and Safety* 290, *Journal of Business Logistics* 37(3) (2016), [https://www.researchgate.net/publication/307532622\\_A\\_New\\_Look\\_at\\_the\\_Longitudinal\\_Relationship\\_Between\\_Motor\\_Carrier\\_Financial\\_Performance\\_and\\_Safety](https://www.researchgate.net/publication/307532622_A_New_Look_at_the_Longitudinal_Relationship_Between_Motor_Carrier_Financial_Performance_and_Safety) (explaining that low financial performance can reduce motor carrier safety due to deferred maintenance).

<sup>50</sup> FMCSA, *About Us*, (Accessed: Jul. 10, 2023), <https://www.fmcsa.dot.gov/mission/about-us>.

<sup>51</sup> *See generally* Congressional Office of Technology Assessment, *Gearing Up for Safety: Motor Carrier Safety in a Competitive Environment* 51, (1988), <https://www.princeton.edu/~ota/disk2/1988/8817/881705.PDF>.

<sup>52</sup> PL 98-554 Title II (1984), <https://www.congress.gov/98/statute/STATUTE-98/STATUTE-98-Pg2829.pdf>.

DOT has repeatedly used these authorities to issue regulations designed to safeguard drivers' and public safety. In 2010, the FMCSA issued a regulation under §31136(a)(1) and §31136(a)(2) prohibiting drivers from texting.<sup>53</sup> In 2011, the FMCSA issued a similar regulation restricting drivers' use of hand-held cellphones.<sup>54</sup> The rules' statutory authority sections were nearly identical, stating that the rules were "based primarily on 49 U.S.C. § 31136(a)(1), which requires regulations that ensure that CMVs are operated safely, and secondarily on §31136(a)(2), to the extent that drivers' use of hand-held mobile telephones [or texting] impacts their ability to operate CMVs safely."<sup>55</sup> In 2015, the FMCSA issued a rule, based in part on its authorities listed in 49 U.S.C. § 31136(a)(3) and (4), that specified processes that drivers must follow for medical examinations prior to beginning work.<sup>56</sup> In 2021, the FMCSA issued a regulation based in part on 49 U.S.C. § 31136(a) that modified controlled substances and alcohol testing requirements for commercial vehicle drivers.<sup>57</sup> In 2020, the FMCSA made modifications to the agency's Hours of Service ("HOS") regulations based on its authority under 49 U.S.C. § 31502(b) and 49 U.S.C. § 31136(a).<sup>58</sup> Several other regulations issued under 49 U.S.C. § 31502(b) and 49 U.S.C. 31136(a) regulate commercial motor vehicle safety with respect to topics like alcohol and drug use,<sup>59</sup> inspection of cargo,<sup>60</sup> and safe parts and equipment.<sup>61</sup>

The safety regulation perhaps most closely analogous to the regulation proposed in this memorandum was issued prior to the 1984 enactment of the MCSA. In 1968, the Interstate Commerce Commission ("ICC") (which then possessed regulatory authority over commercial motor vehicle safety) issued a rule, now codified at 49 C.F.R. § 392.6, which prohibits a motor carrier from devising schedules that would place pressure on drivers to drive faster than applicable speed limits.<sup>62</sup> Rather than directly prohibiting drivers from driving faster than the posted speed limits, this regulation recognizes that forces beyond the driver's control – in this case, a carrier's delivery schedule – can, in the words of the current statute, impose "responsibilities" on drivers that can "impair their ability to operate" their vehicle safely.<sup>63</sup> Although the current 49 U.S.C. § 31502(b) and 49 U.S.C. § 31136(a) did not yet exist, the statutory language under which the ICC issued this regulation closely resembled these current statutes. The then-extant statute directed the ICC to regulate motor carriers with respect to "safety of operation and equipment" and "establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation."<sup>64</sup> This

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<sup>53</sup> Federal Motor Carrier Safety Administration, Department of Transportation, Limiting the Use of Wireless Communication Devices, 75 Fed. Reg. 59118, (Sept. 27, 2010), <https://www.federalregister.gov/documents/2010/09/27/2010-23861/limiting-the-use-of-wireless-communication-devices>.

<sup>54</sup> Federal Motor Carrier Safety Administration and Pipeline and Hazardous Materials Safety Administration, Department of Transportation, Drivers of CMVs: Restricting the Use of Cellular Phones, 76 Fed. Reg. 75470, (Dec. 2, 2011), <https://www.federalregister.gov/documents/2011/12/02/2011-30749/drivers-of-cmv-restricting-the-use-of-cellular-phones>.

<sup>55</sup> 75 Fed. Reg. 59118 (2010).

<sup>56</sup> Federal Motor Carrier Safety Administration, Department of Transportation, Medical Examiner's Certification Integration, 80 Fed. Reg. 22789, 22791 (Apr. 23, 2015), <https://www.federalregister.gov/documents/2015/04/23/2015-09053/medical-examiners-certification-integration>.

<sup>57</sup> Federal Motor Carrier Safety Administration, Department of Transportation, Controlled Substances and Alcohol Testing: State Driver's Licensing Agency Non-Issuance/Downgrade of Commercial Driver's License, 86 Fed. Reg. 55718, (Oct. 7, 2021), <https://www.federalregister.gov/documents/2021/10/07/2021-21928/controlled-substances-and-alcohol-testing-state-drivers-licensing-agency-non-issuancedowngrade-of>.

<sup>58</sup> Federal Motor Carrier Safety Administration, Hours of Service of Drivers, 85 Fed. Reg. 33396, (Jun. 1, 2020), <https://www.federalregister.gov/documents/2020/06/01/2020-11469/hours-of-service-of-drivers>.

<sup>59</sup> 49 C.F.R. § 392.4, 392.5.

<sup>60</sup> 49 C.F.R. § 392.9.

<sup>61</sup> 49 C.F.R. Part 393.

<sup>62</sup> 33 Fed. Reg. 19732 (1968).

<sup>63</sup> 49 U.S.C. § 31136(a)(2).

<sup>64</sup> *Bihou v. Dutchess Beer Distributors, Inc.*, 300 F.3d 217, 227 n.5 (2d Cir. 2002) citing 49 Stat. 546, § 204(a) (1935).



language is very similar to that of 49 U.S.C. § 31502(b) (e.g. “prescribe requirements for ... safety of operation and equipment of, a motor carrier...”) and 49 U.S.C. § 31136(a) (e.g. “prescribe regulations on commercial motor vehicle safety” that “prescribe minimum safety standards” to ensure that “commercial motor vehicles are maintained, equipped, loaded, and operated safely”). The FMCSA continues to bring enforcement actions under the schedule-speed limit regulation to ensure that demands from carriers do not encourage unsafe driving behavior.<sup>65</sup> This demonstrates that this type of regulation is supportable under current statutory authority.

While FMCSA has yet to issue safety regulations regarding economic pressure caused by low compensation or exploitative employment contract terms, there are new efforts to address the intersection between these issues. The 2022 Bipartisan Infrastructure Law directed the FMCSA to commission research studying the impacts of various driver compensation methods on overall safety and driver retention rates.<sup>66</sup> The FMCSA announced in 2022 that it would also study the impact of unpaid detention time on CMV safety and operations.<sup>67</sup>

The infrastructure law also mandated the creation of a taskforce to study another type of employer-driven debt: predatory truck leasing and lease-purchase agreements.<sup>68</sup> The authorizing language explicitly directed the Truck Leasing Task Force to, at a minimum, examine truck leasing arrangements, including “whether [they] properly incentivize the safe operation of vehicles, including driver compliance with the hours of service regulations and laws governing speed and safety generally”<sup>69</sup> The task force must produce a report that includes, among other items, “recommendations relating to changes to laws (including regulations) ... to promote fair leasing agreements” and “best practices relating to ... preventing coercion and impacts on safety as described in” 49 U.S.C. § 31136.<sup>70</sup>

#### IV. Proposed Action

##### A. Legal authority

As stated above, 49 U.S.C. § 31136(a) directs the DOT to “prescribe regulations on commercial motor vehicle safety” that “prescribe minimum safety standards.”<sup>71</sup> The statute identifies five goals that regulations under 49 U.S.C. § 31136(a) should accomplish “[a]t a minimum.” Among these goals, the statute requires that the regulations ensure that “(1) commercial motor vehicles are maintained, equipped, loaded, **and operated safely**”; “(2) the responsibilities imposed on operators of commercial motor vehicles **do not impair their ability to operate the vehicles safely** ...” and “(4) the operation of commercial motor vehicles does not have a **deleterious effect on the physical condition** of the operators.”<sup>72</sup> Additionally, 49 U.S.C. § 31502(b)(1) empowers the DOT to “prescribe requirements for ... safety of operation and equipment of ... a motor carrier...”

These statutory provisions authorize the proposed regulations because non-compete clauses create intense economic pressure on CMV drivers. As explained above, that economic pressure:

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<sup>65</sup> See, e.g., FMCSA, Field Administrator’s Submission of Evidence, In the Matter of: Last Chance Trucking & Excavation 7, LLC Docket MCSA-2015-0511, (Dec. 30, 2015), <https://www.regulations.gov/document/FMCSA-2015-0511-0001>.

<sup>66</sup> H.R. 3684, Infrastructure Investment and Jobs Act Section 23022, Public Law 117-58, (Nov. 15, 2021).

<sup>67</sup> FMCSA, Impact of Driver Detention Time on Safety and Operations, (Accessed: Jul. 10, 2023), <https://www.fmcsa.dot.gov/research-and-analysis/impact-driver-detention-time-safety-and-operations>.

<sup>68</sup> H.R. 3684, Infrastructure Investment and Jobs Act Section 23009, Public Law 117-58, (Nov. 15, 2021).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> 49 U.S.C. § 31136(a).

<sup>72</sup> *Id.* (emphasis added).

- discourages CMV drivers from speaking up about safety and abuse issues, permitting FMCSA regulation under 49 U.S.C. § 31136(a)(1) and 49 U.S.C. § 31502(b)(1), as well as 49 U.S.C. § 31136(a)(4) when that failure can result in physical harm to the driver; and
- imposes responsibilities on drivers that impair their ability to operate the vehicles safely, either through their driving more than is safe or lawful or, in the case of independent contractor drivers, through disincentivizing investment in safety equipment, maintenance, and repairs, permitting FMCSA regulation under 49 U.S.C. § 31136(a)(2) and, secondarily, may cause vehicles not to be operated safely, permitting regulation under 49 U.S.C. § 31136(a)(1) and 49 U.S.C. § 31502(b)(1).

In order to survive arbitrary and capricious judicial review, such justifications would need to be based on empirical and anecdotal evidence. In preparation for regulating non-compete clauses under its safety authority, in addition to providing the evidence cited in Section II(B) of this memorandum, the FMCSA could: ensure that current efforts to study commercial vehicle safety and compensation methods include study of these clauses;<sup>73</sup> direct the TLTF to include consideration of these practices in its remit;<sup>74</sup> and/or commission new research and issue requests for information on these practices and their effects on safety.

#### B. *Issue a new regulation via notice-and-comment rulemaking*

Under its regulatory authority regarding CMV safety, described above, the FMCSA should consider issuing, through notice-and-comment, a regulation that bans traditional and de facto non-compete clauses in employment and contractor agreements for CMV drivers. The FMCSA could draw on the language used by the FTC to define and prohibit such clauses.<sup>75</sup> Potential language (adapted from the FTC's non-compete clause rule):

Non-compete clauses that bind drivers of commercial motor vehicles are prohibited. Non-compete clause is defined as a contractual term between a carrier and a driver that prevents the driver from seeking or accepting employment with a person, or operating a business, after the conclusion of the driver's contract with the carrier. The clauses have the effect of reducing the ability of workers to leave their jobs because they diminish the availability of outside opportunities. This term includes a contractual term that is a de facto non-compete clause because it has the same effects of reducing worker mobility by adding a financial penalty for workers' resignation or termination, effectively prohibiting the driver from seeking or accepting employment with another business or person or from operating a business. The following types of contractual terms, among others, may be de facto non-compete clauses:

- A non-disclosure agreement between a carrier and a driver that is written so broadly that it effectively precludes the driver from working in the same field after the conclusion of the driver's contract with the carrier.
- A no-poaching agreement that involves carriers agreeing not to hire each others' drivers.<sup>76</sup>

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<sup>73</sup> See, e.g., H.R. 3684, Infrastructure Investment and Jobs Act Section 23022, Public Law 117-58, (Nov. 15, 2021) (directing the Transportation Research Board to study the impacts of driver compensation on safety and driver retention).

<sup>74</sup> This topic with respect to LPAs is directly within the statutory directive to the task force, and the statutory language is specific that the directives for what the task force should examine are "at a minimum" (implying that the task force could also study related issues like non-competes and EDD). H.R. 3684, Infrastructure Investment and Jobs Act Section 23009, Public Law 117-58, (Nov. 15, 2021).

<sup>75</sup> Proposed 16 C.F.R. § 910.1(b), Federal Trade Commission, Non-Compete Clause Proposed Rule, 88 Fed. Reg. 3482, 3535 (Jan. 19, 2023).

<sup>76</sup> See Flaster Greenberg, Another Trucking Co. Settles Out Of No-Poach Suit, (Aug. 25, 2021), [https://www.flastergreenberg.com/newsroom-articles-Another\\_Trucking\\_Company\\_Settles\\_Out\\_Of\\_No\\_Poach\\_Suit.html](https://www.flastergreenberg.com/newsroom-articles-Another_Trucking_Company_Settles_Out_Of_No_Poach_Suit.html).

- A contractual term between a carrier (or its affiliate) and a driver that requires the driver to pay the carrier or a third-party entity liquidated damages, including training costs, if the driver's relationship with the carrier terminates within a specified time period.

The FMCSA could also incorporate language from various state-level efforts to regulate these types of employment contracts.<sup>77</sup>

## **V. Conclusion**

Trucking companies are deploying noncompetes and stay-or-pay contracts to trap workers in unsafe working conditions with low wages. Restrictive employment contracts create economic pressure on drivers that creates risks to their safety and that of the public. The FMCSA should use its authority to regulate CMV safety to ban these practices.

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<sup>77</sup> See proposed California AB 747, (Accessed: Sept. 11, 2023), <https://legiscan.com/CA/text/AB747/id/2769444>.