

McAfee & Taft AGLINC

FALL 2012

AGRICULTURE & EQUINE INDUSTRY LEGAL INFORMATION NEWS & COMMENTARY

INSIDE THIS ISSUE

- 4 Aflatoxin and the insured farmer**
- 5 Do you need a CDL for your recreational vehicle?**
- 6 McAfee & Taft's Agricultural Real Estate Transactional Practice**

Receive AgLINC via email

To register for electronic delivery, please send your request to events@mcafeetaft.com

McAfee & Taft

OKLAHOMA CITY
TENTH FLOOR
TWO LEADERSHIP SQUARE
211 N. ROBINSON
OKLAHOMA CITY, OK 73102
405.235.9621

TULSA
1717 S. BOULDER
SUITE 900
TULSA, OK 74119
918.587.0000

www.mcafeetaft.com

This newsletter has been provided for information of clients and friends of McAfee & Taft. It does not provide legal advice, and it is not intended to create a lawyer-client relationship. Readers should not act upon the information in this newsletter without seeking professional counsel.

Farmers and commercial motor vehicle regulations



BY JARED BURDEN

jared.burden@mcafeetaft.com

The Federal Motor Carrier Safety Administration (FMCSA) administers a host of regulations covering the registration, operation and maintenance of commercial motor vehicles. Rules can vary by operator and industry, and there is consequently much confusion about what rules apply to what vehicles and drivers. This has been especially true in the agricultural industry. Different exemptions and special rules can make compliance with the FMCSA very different depending on the circumstances of an agricultural operation. Everything from the size of the vehicle used to the distance traveled can affect how the FMCSA will view an operator.

What operations does the FMCSA cover?

The FMCSA applies to commercial motor vehicles and their operators involved in interstate commerce. This, however, does not mean that transportation occurring within state lines will not be regulated. According to guidance released by the FMCSA, “[w]hen the intent of the transportation being performed is interstate in nature, even when the route is within the boundaries of a single State, the driver and CMV are subject to the [Federal Motor Carrier Safety Regulations].” Therefore, if transportation is part of trade originating or terminating outside the state or country, it is covered by the FMCSA regardless of where it occurs. If a commercial motor vehicle (CMV) is used exclusively for trade within a state, it will only be subject to the specific laws and regulations of that state. Many state rules are similar to those of the FMCSA, but this article will only discuss federal regulations.

What vehicles are regulated?

Many people associate the FMCSA with commercial trucking. For this reason, they assume the regulations only affect tractor-trailers and other similarly large commercial trucks. The FMCSA, however, regulates a far broader range of vehicles. As a result, many small business owners, including farmers engaged in interstate commerce, are unaware of the FMCSA’s applicability and, consequently, may be open to liability for failure to follow its regulations.

The FMCSA defines its regulatory scope through vehicle classification. Classifications may be made according to (1) the gross vehicle weight rating (GVWR) or gross vehicle weight, whichever is greater (i.e. truck only); (2) the gross combination weight rating or gross combination weight, whichever is greater (i.e. truck and trailer); and (3) the ability to transport

a certain number of passengers. For the agricultural industry, the most important classifications involve vehicle weight.

GVWR is usually assigned by the manufacturer of the truck and/or trailer. For example, a 1-ton pickup truck (e.g. a Ford F-350) generally has a GVWR of between 10,001 to 14,000 pounds, depending on the make. Trailers will also have a GVWR and/or weight that must be taken into account when determining the full rating or weight. Together, the GVWR or weight of your truck and trailer will determine what kind of licenses you are required to carry, whether a Department of Transportation number is needed, the applicability of hours of service and physical fitness requirements, and many other regulatory standards.

Generally, regulatory burdens fall into two categories. The more restrictive category covers larger vehicles. If a farmer operates a truck that has a GVWR or gross weight over 26,001 pounds, then he or she must obtain a commercial driver's license (CDL). Affected vehicles include your typical tractor-trailer, but may also include larger trucks such as a dump truck. A class A CDL is

required where such a truck is used to pull a trailer with a GVWR or weight of more than 10,000 pounds; a class B license will be needed for smaller trailers or where the truck is not pulling a trailer. In addition to CDLs, falling into this category of regulated operators will require a farmer to comply with many other regulations, including, but not limited to:

- Safety regulations;
- Hours of service regulations;
- Commercial motor vehicle marking rules;
- Maintenance of an accident register;
- Adoption of an alcohol and drug testing policy; and,
- Compliance with hiring procedures for DOT regulated drivers.

This list is not exclusive and guidance should be sought to ensure compliance with all applicable regulations.

CONTINUED ON NEXT PAGE



If a farmer operates any vehicle that has a GVWR or gross weight of between 10,001 pounds and 26,001 pounds, then drivers are not required to have CDLs. However, a farmer will be required to obtain a USDOT number and display it on each “self-propelled” commercial motor vehicle in its fleet (i.e. only the truck, not the trailer) with a weight or weight rating over 10,001 pounds. This rule extends to a variety of vehicles, including pickup trucks that are generally available to the public. In addition, the farmer will be required to comply with the following regulations:

- FMCSA safety regulations;
- Hours of service regulations;
- FMCSA commercial motor vehicle marking rules;
- Maintenance of an accident register; and,
- Establishment of procedures for preventive maintenance and inspections.

As with the list above, this list is not exclusive and guidance should be sought to ensure compliance with all applicable regulations.

As is readily apparent from these categories, many farmers who utilize common equipment in their operations, such as a 1-ton pickup with a gooseneck trailer, may fall under the jurisdiction of the FMCSA. As such, they may unknowingly be open to inspections and/or fines.

What farm-related exemptions are available?

Again, as stated above, the FMCSA only has jurisdiction over farmers engaged in interstate commerce. Therefore, farmers who only trade within their state will not be affected. For those farmers who might otherwise fall under the federal regulations, though, several exemptions exist to the various regulations. The most important exemption relates to the obligation of obtaining a CDL. In particular, the operator of a farm vehicle may be exempt if the commercial motor vehicle is (1) controlled and operated by the farmer, his or her employees or family members; (2) used to transport agricultural products, machinery or supplies to and from a farm; (3) are not used in the operations of a common or contract motor carrier; and (4) is used within 150 miles of the farmer’s farm. The existence of this exemption is dependent on the law of the farmer’s home state, but many states honor it, including Oklahoma.

In the past, farmers have raised concerns about this exemption, pointing out that many transport crops or livestock that are not owned by them, technically making them a contract carrier. Of particular concern have been those who farm under sharecropping agreements. However, the FMCSA has ruled that the exemption applies equally to farmers who (1) own their own land and haul their crops to market; (2) rent land and haul their crops to market; and (3) rent their land for a share of the crops and haul their own and the landlord’s crops to market.

Conclusion

There are many transportation regulations, both state and federal, that can affect a farming operation. It takes close attention to a farmer’s operations and vehicles to determine what rules apply.

- » [Federal Motor Carrier Safety Administration’s \(FMCSA\) website](#)

AGRICULTURE AND EQUINE INDUSTRY GROUP LAWYERS

Jennifer Callahan

Co-leader

Tax and Employee Benefits

Jeff Todd

Co-leader

Litigation and Agricultural Law

Rachel Blue

Intellectual Property

Joseph H. Bocock

Litigation and Real Estate

Tim Bomhoff

Litigation

Jared Boyer

Litigation

Jeremiah Buettner

Litigation and Environmental Law

Steven Bugg

Litigation and Creditors’ Rights

Brian Burget

Litigation

Robert Dace

Litigation

Cliff Dougherty

Intellectual Property

Rachel Kirk Evans

Energy and Business Law

Sam Fulkerson

Labor & Employment

Spencer Haines

Tax

Stephen Hetrick

Real Estate and Business Law

John Kenney

Litigation

Myrna Schack Latham

Real Estate and Business Law

Cole Marshall

Real Estate and Business Law

Jared Mashaney

Real Estate and Business Law

Alison McCalla Patel

Employee Benefits

Aflatoxin and the insured farmer



BY JEREMIAH BUETTNER

jeremiah.buettner@mcafeetaft.com

Aflatoxin, the toxic and carcinogenic mycotoxin fungus, is a threat well known by corn farmers across the country. This olive-green or gray-green collection on kernels typically develops in corn, particularly drought-stressed corn, before harvest or during storage, and can be harmful to humans and fatal to livestock. It also can have serious implications on the viability of a farmer's crop, as aflatoxins in excess of certain levels can result in absolute prohibitions on the sale of corn or even the required destruction of a corn crop. *The instances of aflatoxin are expected to be exceptionally high this year due to the increased prevalence of drought conditions in the Midwest and other areas of the country.*

Fortunately for the farmer whose crop is hit with aflatoxin, it is typically an insured cause of loss under the common crop insurance policies, even though the actual production yield may not be impacted. The claims are adjusted as a deduction percentage of actual yield, depending on the aflatoxin level (insurance coverage kicks in at 20.0 ppb).

Notably, if the aflatoxin is due to an uninsured factor, such as inadequate irrigation (under an irrigation practice), non-weather related delayed harvest, or inappropriately high plant populations, then the aflatoxin caused loss may not be insured. However, in most cases aflatoxin will result in an indemnity if proper procedure is followed.

Action steps if your crop has aflatoxin

The Risk Management Agency, which administers the federal crop insurance program, has released an information sheet to assist farmers potentially dealing with this issue on its website, www.rma.usda.gov, but the most important points to know are as follows:

- Notify your crop insurance agent immediately upon discovery of aflatoxin, before harvesting, storing or delivering corn for sale. Because aflatoxin can increase in storage, the insurance provider *will not cover losses where testing does not occur before storage.*
- Once notified, the insurance provider's adjuster will either hand harvest ears from representative locations in the field (predetermined by RMA loss adjustment publications) or collect samples at harvest from trucks/wagons for testing at an approved facility. The adjuster may also require representative strips to be left for later harvest or hand sampling.

Insureds are also recommended to obtain written confirmation from their insurance agent and/or provider regarding their instructions as to testing, harvesting and, especially, any destruction of the crop. If an insured is not able to show that he complied with the notification requirements and instructions of the insurer as to testing of the crop, then he runs the risk of being left with a contaminated corn crop that is unsellable and uninsured.

AGRICULTURE AND EQUINE INDUSTRY GROUP LAWYERS

Andy Peterson
Intellectual Property

Tony Rahhal
Intellectual Property

Natalie Ramsey
Labor & Employment

Bill Rodgers
Business Law

Paul Ross
Labor & Employment

Scott Sewell
Tax & Family Wealth

Jim Sharrock
Real Estate and Business Law

Susan Shields
Tax & Family Wealth

Spencer Smith
Litigation

Mary Ellen Ternes
Environmental Law

Nathan Whatley
Labor & Employment



Do you need a CDL for your recreational vehicle?



BY JEFF TODD

jeff.todd@mcafeetaft.com

From trailers, campers and fifth-wheels, to motor homes and boats, people are spending their weekends on the road to the lake, rodeos, races, the river, and other recreational venues and activities. In our world of “bigger is better,” recreational vehicles are no exception. With a manufacturer’s weight rating (“GVWR” or “GCWR”) over 26,000 pounds and often towing a unit with a GVWR over 10,000 pounds, these vehicles can be as large as some commercial trucks.

Both state and federal law sets forth requirements for drivers of certain types and sizes of vehicles. The Federal Motor Carrier Safety Administration sets minimum standards for motor vehicles used in commerce. However, states are not precluded from establishing their own laws relating to vehicle safety, which are often more specific than their federal counterpart. Oklahoma has taken an approach very similar to federal regulations, adopting the same weight ratings system to differentiate between classes of vehicles. Generally, if federal guidelines require a driver to possess a CDL, Oklahoma law does as well.

In Oklahoma, “no person...shall operate any motor vehicle upon a highway in this state unless the person has a valid Oklahoma driver license *for the class of vehicle being operated under the provisions of this title.*” Likewise, under federal regulations “no person shall operate a commercial vehicle unless such person has taken and passes written and driving tests which meet the Federal standards...*for the commercial motor vehicle that person operates or expects to operate.*”

To determine the license requirements for the driver of a particular vehicle or combination of vehicles, the weight rating of the vehicle is used to classify the vehicle. Essentially, federal and state law both require a CDL if the vehicle or combination of vehicles:

- Has a GCWR over 26,000 pounds including a towed unit with a GVWR over 10,000 pounds; or
- Has a GVWR over 26,000 pounds; or
- Is designed to transport more than 15 people or hazardous materials.

Assuming the vehicle falls under one of these classifications requiring a CDL, federal regulations provide an exception for vehicles used for recreational purposes. The regulations explain that the rules do not apply to “[t]he occasional transportation of personal property by individuals not

for compensation not in the furtherance of a commercial enterprise.” It has been explained that the federal recreational exemption only applies if the underlying activities are not for profit and there is no corporate sponsorship involved. If the vehicle is tagged in Oklahoma,



it must also meet the more narrow Oklahoma recreation exception to avoid CDL requirements. Under Title 47 of the Oklahoma Statutes, the exemption exists for a vehicle that is “self-propelled or towed ... equipped to serve as temporary living quarters for recreational, camping or travel purposes and is used solely as a family or personal conveyance.”

In summary, drivers must meet federal and state licensing requirements when operating a vehicle or combination of vehicles meeting or exceeding certain weight ratings. To be exempt from these regulations that would otherwise require a CDL, the vehicle must fit within the bounds of both federal and state exceptions. In Oklahoma, a CDL should not be required to operate a recreational vehicle used in (a) the occasional, recreational transport of persons or property, (b) strictly for non-business purposes, and (c) equipped to serve as temporary living quarters for recreational, camping or travel purposes and is used solely as a family or personal conveyance.

McAfee & Taft’s Agricultural Real Estate Transactional Practice



BY RICHARD RIGGS

richard.riggs@mcafeetaft.com

McAfee & Taft regularly represents clients in connection with the purchase, sale and financing of agricultural real property. Issues that arise in these transactions include all the issues that are routinely attendant to real estate transactions, such as assurance of title, surveys, boundary issues, environmental issues, and the handling of improvements on the property. However, such transactions also include issues unique to agricultural property, such as availability of utility services, water rights, handling of farm equipment (including irrigation facilities), and growing crops. The firm has also provided strategic estate, income tax, and ad valorem tax advice to clients in connection with such transactions. McAfee & Taft attorneys who have contributed to successful transactions of this nature include **Richard Riggs**, **Stephen Hetrick**, **Jared Mashaney** and **Cole Marshall** (all aspects of the purchase and sale of agricultural real property), **Robert Garbrecht** (ad valorem tax matters), **Keith Peters** (income tax and estate planning matters), **Lauren Hanna** and **Jeff Todd** (water law rights), and **Mary Ellen Ternes** (environmental matters).

McAfee & Taft is also active in representing parties involved in wind energy projects. McAfee & Taft has represented landowners and developers in negotiating wind energy leases and has represented developers in their development and construction activities. Wind energy leases involve unique issues regarding shared usage of property, access to facilities, liabilities, insurance and project decommissioning. In representing developers McAfee & Taft has addressed such issues as zoning regulations, usage of public roads, permitting, environmental regulation, and potential conflicts with operators of oil and gas pipelines and mineral lessees. **Richard Riggs**, **Elizabeth Tyrrell**, **Rachel Evans** and **Meredith Caldwell Fazel** have represented clients in various aspects of these transactions.

In addition to agricultural real estate and wind energy projects, McAfee & Taft handles a wide variety of transactional matters for its agriculture clients, including entire business sales, business formation and entity structuring, all aspects of tax planning, employment and workplace safety, and inventions, trademarks and licensing matters.

» **McAfee & Taft’s Agriculture and Equine Industry Group**