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Mandatory Pilot Obesity/Sleep Apnea Screening: New FAA Policy Thumbs Its Nose at New Federal Commercial Driver Transportation Law

By Dale Deitchler

On November 20, 2013, Fred Tilton, the Federal Aviation Administration's (FAA) Federal Air Surgeon, announced a *New Obstructive Sleep Apnea Policy*¹ (Policy) the FAA will be "releasing shortly."² Under the Policy, aviation medical examiners (AMEs) must calculate the Body Mass Index (BMI)—a method for identifying obesity—for every pilot. Pilots with a BMI of 40³ or more will have to be evaluated by a physician who is a board-certified sleep specialist, and, if diagnosed with obstructive sleep apnea, treated before they can be medically certified.⁴ The FAA's Policy will issue despite new legislation restricting sleep apnea screening for federally regulated commercial drivers and opposition from the Aircraft Owners and Pilots Association (AOPA).

Under existing FAA regulations, all pilots must be medically examined and obtain a medical certificate before operating the controls of any aircraft. Those regulations were established through formal rulemaking and not by guidance such as the new Policy. Those regulations do not mandate sleep apnea screening.

Although the FAA spent months publishing educational pamphlets, talking about the issue at flying safety meetings and adding a sleep apnea session to the curriculum of AMEs, Tilton's announcement caught transportation employment law specialists off-guard. Why? Because, on October 15th, President Obama signed into law⁵ a bill requiring the Federal Motor Carrier Safety Administration (FMCSA) (a sister U.S. Department of Transportation modality to the FAA) to follow formal rulemaking procedures before including sleep apnea screening in its medical examination requirement for commercial drivers. Notably, the day after the FAA announced the new Policy, a

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- 1 FAA, *New Obstructive Sleep Apnea Policy*, available at http://www.faa.gov/other_visit/aviation_industry/designees_delegations/designee_types/ame/fasmb/media/201304_editorial.pdf.
 - 2 Complete directions will be fully explained in the FAA's aviation medical examiner (AME) *Guide*.
 - 3 In a margin comment, Tilton noted that obstructive sleep apnea "is almost universal in obese individuals who have a body mass index over 40 and a neck circumference of 17 inches or more, but up to 30% of individuals with a BMI less than 30 have OSA."
 - 4 FAA's intent, in a second phase under the Policy, is then to "gradually expand the testing pool" by applying lower BMI measurements. FAA also plans to implement the same assessment and treatment protocol for air traffic controllers. Dr. Tilton urges AMEs to be "on the alert" for other sleep disorders (e.g., insomnia, parasomnias, restless leg syndrome, retrograde mandible, large tongue, large tonsils, neuromuscular/connective tissue disorders as these conditions could be signs of problems which interfere with restorative sleep).
 - 5 Pub. L. No. 113-45 (Oct. 15, 2013).

member of the House of Representatives introduced a similar measure that would require formal rulemaking for FAA sleep apnea screening, testing, or treatment of pilots and air traffic controllers.⁶

Both the Teamsters and the American Trucking Association (ATA) supported the FMCSA bill requiring formal rulemaking. Teamsters President James P. Hoffa expressed concern that drivers would be “forced to spend money on a test they may not need at the whim of a federal agency.” ATA President and CEO Bill Graves objected to increased costs that would arise with mandatory screening. Both organizations cast the purpose of the legislation as preventing FMCSA from mandating screening through “guidance” rather than through the formal rulemaking process.⁷

So, it is surprising that “guidance” under the FAA’s new sleep apnea policy will allow carriers to impose on pilots requirements the law explicitly prohibits the FMCSA from applying to commercial drivers and motor carriers without the notice and comment process required for formal rulemaking. Stakeholders should take note that under federal administrative procedure laws, while the Policy has been cast as imposing mandatory sleep apnea screening, “guidance” does not carry the force of binding law (although a court may give it deference), while rules adopted through formal rulemaking are legally binding.

In any event, while the FAA medical examinations are largely overseen by the agency, and the FMCSA medical examinations have little, if any, agency oversight, the two diverging approaches are nevertheless striking. The FAA, at bottom, ignores the new law applicable to commercial drivers, conflicting medical evidence on BMI/obesity, other sleep apnea indicia such as neck size, the overall risk associated with sleep apnea, and effective treatment.

The burden on pilots and/or carriers will be substantial, as a large number of pilots are expected to meet the minimum BMI standards for further examination and re-certification requirements (e.g., an additional visit to a board-certified sleep specialist, costly and time-consuming sleep studies, etc.). The associated costs and pilot/carrier responsibility may be substantial. As the AOPA explained in a letter to FAA Administrator Michael Huerta requesting withdrawal of the new Policy or that the FAA follow established rulemaking procedures:

In 2011, the FAA identified 124,973⁸ airmen who are considered obese, making them potential candidates for testing under an expanded policy. The Wall Street Journal estimated the cost of an overnight visit in a sleep lab to be between \$800 and \$3,000. Using these figures, the potential cost to pilots is between \$99 million and \$374 million for testing alone. That does not include the time and costs associated with seeking a special issuance medical certificate. In this regard, it should also be noted that FAA currently has a backlog of 55,000 cases for special issuance medical certificates.

Finally, this is an area that is not without employment law controversy outside the field of government transportation industry law and regulation. For example, the Equal Employment Opportunity Commission (EEOC) has yet to take a clear position on sleep apnea screening as part of a medical examination and legal compliance under the Americans with Disabilities Act (ADA). EEOC regulations allow employer medical examinations “when there is a need to determine whether an employee is still able to perform the essential functions of his or her job.”

In addition, EEOC regulations state physical examinations are permitted if “required” by medical standards or are requirements imposed by law. It remains to be seen whether the FAA’s new across-the-board approach creates a conflict with applicable EEOC regulations in light of the status of this requirement being in the form of mere “guidance” (rather than a requirement that is imposed by law).

Because the Policy has not yet been released, air carrier employers and others employing pilots should continue to monitor its status. Even upon the Policy’s release, affected employers should anticipate a possible AOPA, other industry, or organized labor challenge to its implementation and administration. Affected employers should prepare in advance to have a dialogue with retained AMEs about the FAA, ADA, and other employment and labor law compliance approaches. The stakes in this industry for all concerned are simply too high to forego careful and thoughtful preparation and contingency planning.

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6 Rep. Frank LoBiondo (R-NJ) introduced H.R. 3578 with five co-sponsors. The bill has been referred to the House Committee on Transportation and Infrastructure.

7 Government agencies can issue “guidance” without public comments, while issuance of binding “rules” requires public comment.

8 This high number might be skewed. On the one hand, the new standard applies to those with a BMI over 40. On the other hand, FAA commentary suggests a lower screening threshold at a BMI of 30. It may be, then, that the high number of airmen the FAA has identified as obese is the agency’s way of first addressing the pilots who pose the most risk, and then—assuming the program is “successful” and expanded—including additional pilots at the lower BMI threshold.