



SHORT-TERM SOLUTIONS, LONG-TERM IMPACTS?

The Fluidity of Federal Hours of Service Regulations in the Time of COVID-19

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One of the few constants during this period of unprecedented turmoil and economic uncertainty in America has been the steady and unwavering dependability of truck drivers, who continue to transport crucial goods and products across a country that needs them more than ever. Recognizing the indispensable role that truck drivers play in ensuring that all Americans continue to receive essential services during the COVID-19 pandemic, the Federal Motor Carrier Safety Administration (FMCSA) issued an Emergency Declaration on March 13, 2020, exempting motor carriers and drivers from federal regulations governing hours of service requirements when providing “direct assistance” in support of relief efforts related to COVID-19.ⁱ

The FMCSA has also announced other modifications, relaxations and suspensions of various federal trucking regulations in response to the COVID-19 outbreak, such as greater flexibility for employers to document why a drug and alcohol test could not be administered, a waiver of the expiration of annual inspection decals on intermodal chasses, a suspension of weight limits, and a waiver for drivers whose commercial driver licenses (CDLs), permits, and/or medical cards have expired or are set to expire.ⁱⁱ Interestingly, the agency has done so all while continuing to contemplate and discuss regulations that were changing well before the world encountered COVID-19, such as a new

hours-of-service rule that was first proposed in August 2019 and is expected to be published later this year. The current fast-moving landscape has demonstrated the importance for motor carriers and other actors in the transportation industry to quickly track and accurately analyze the recent emergency regulations.

HOURS OF SERVICE: THE DETAILS

The hours of service requirements contained in the Federal Motor Carrier Safety Regulations (FMCSR) include the following:

- Limit of driving 11 hours after 10 consecutive hours off duty;
- Prohibition against driving beyond the 14th consecutive hour following 10 consecutive hours off duty, regardless of whether any time was spent off duty during that 14-hour period;
- Window of 8 hours to drive after last off-duty period of at least 30 minutes;
- 30-minute break required before resuming driving after 8-hour period has passed;
- Limit of 60/70 hours on duty in 7/8 consecutive days; and
- Reset of 7/8 day period only after going off duty for 34 consecutive hours.

The FMCSA’s declaration suspends or significantly reduces all of these requirements when a truck driver is providing “direct assistance” to the COVID-19 crisis through the transportation of certain sup-

plies and materials. The declaration also exempts truck drivers from all recordkeeping requirements (i.e. keeping paper logbooks or ELDs). Furthermore, drivers are not required to carry any paperwork or documentation proving that they are engaged in direct assistance. If a driver is fatigued or sick, however, he or she is not permitted to operate a commercial motor vehicle, regardless of whether that individual is providing “direct assistance.”

The time spent engaged in direct assistance begins when the commercial vehicle is loaded and continues until the empty truck and/or trailer is returned to the motor carrier’s terminal or place of business. In other words, a driver is not exempt while travelling to the site of a pickup but continues to enjoy the benefits of the exemption after making a delivery and/or while driving an empty vehicle following a delivery.

Direct assistance has been defined to include the transportation of the following materials or things:

- (1) COVID-19-related medical supplies and equipment;
- (2) Supplies and equipment necessary for community health and safety, such as masks, gloves, hand sanitizer, soap and disinfectants (as well as household waste and medical waste);
- (3) Food for emergency restocking of stores (including livestock);
- (4) Equipment, supplies and persons necessary to establish and manage facili-

- ties related to COVID-19;
- (5) Persons designated by federal, state or local authorities for medical, isolation, or quarantine purposes;
 - (6) Persons necessary to provide other medical or emergency services, the supply of which may be affected by the COVID-19 response;
 - (7) Liquefied gases to be used in refrigeration or cooling systems; and
 - (8) Gasoline and/or fuel.

Furthermore, raw materials used as “immediate precursors” to any of the essential items listed above, such as wood pulp used to create paper products for the emergency restocking of grocery stores, are also covered. The extent to which other raw materials qualify as “immediate precursors” is one of several gray areas regarding the scope of the declaration.

The FMCSA has clarified, however, that the declaration does not cover so-called “routine” commercial deliveries, including those transporting only a nominal amount of emergency relief supplies. Specifically, motor carriers may not obtain the benefits of the emergency declaration simply by adding small quantities of COVID-19 relief materials to otherwise standard commercial loads. Generally, however, FMCSA has indicated that “mixed loads” (i.e. relief supplies mixed with non-relief supplies) entitle the driver of the load to take advantage of the suspension of the hours of service requirements.

Once the “clock strikes midnight” and the commercial vehicle arrives at its terminal or place of business following the delivery of direct assistance materials, the driver must take a 10-hour break and immediately becomes subject once again to the hours of service requirements.ⁱⁱⁱ The hours worked while providing direct assistance, however, do not count towards any subsequent hours of service requirement (such as the 60/70-hour rule or the 34-hour mandatory reset).

LIABILITY CONSIDERATIONS

First and foremost, the FMCSA’s declaration is clear that exempt drivers and carriers must continue to comply with 49 CFR § 392.2 and operate commercial motor vehicle in accordance with state laws and regulations, including compliance with applicable speed limits and other traffic restrictions. In no way, then, should the hours-of-service exemption be seen as a defense against any traditional negligence arguments or claims. Moreover, plaintiffs’ attorneys will be pay-

ing particular attention—and will surely apply retroactive scrutiny if and when the emergency declaration is lifted—to the conduct and operation of truck drivers and motor carriers purportedly engaging in emergency direct assistance.

Motor carriers should also expect the plaintiffs’ bar to attempt to exploit the confusion regarding the contours and limits of the hours-of-service exemption. For example, drivers transporting mixed loads while taking advantage of the exemption may face liability exposure if they are involved in accidents while transporting some amount of goods that are not considered to be of the direct assistance variety. Carriers should take particular caution when preparing to engage in direct assistance transportation and should seek guidance, when necessary, directly from the FMCSA, as well as DOT officers and transportation attorneys. Other best practices include obtaining assurances from shippers and brokers that a load is covered under the direct assistance framework and maintaining thorough recordkeeping and documentation of each trip and load in order to withstand future scrutiny.

Driver logs and recordkeeping will also continue to be critical, even if, paradoxically, the requirements for such practices are temporarily suspended for exempt drivers. For example, if a carrier is unable to show, years later, that its driver was engaged in direct assistance transportation at the time of an accident, the carrier may face unexpected exposure. Carriers and drivers should take precautions to clearly label business records, such as bills of lading and fuel receipts, to indicate that they were created during the provision of direct assistance. Furthermore, carriers should consider implementing company-wide protocols to standardize the logging of “exempt” miles, such as by training drivers to manually record the hours they work while operating under the exemption or by deactivating electronic logging devices when the driver is transporting an exempt load, in which case the carrier can later easily track and record the exempt miles.

Finally, the hours-of-service exemptions are ripe for abuse and/or misuse. Safety in this context is more important than ever, both for the drivers themselves as well as for the public travelling on the roadways. Working as a truck driver is stressful and physically taxing enough in normal conditions. Now, with the nation’s health and safety largely on their shoulders amidst

crumbling supply chains and remote work constrictions, drivers should explore ways to more closely and more frequently monitor their mental and physical conditions, and furthermore should be trained, instructed and encouraged to take particular precautions in order to guard against fatigue, sickness, and the further spread of COVID-19.

CONCLUSION

With the nature and scope of emergency federal trucking regulations—and the varied state implementation and enforcement of those regulations—changing daily during the COVID-19 pandemic, it is incumbent on carriers and their drivers to closely monitor their business operations, training regimens, and overall safety practices to ensure that they continue to be in compliance with the constantly shifting regulatory landscape. As encouraging as the FMCSA’s flexibility with respect to the hours of service requirements has been, the various pitfalls and obstacles facing truck drivers are as widespread as ever, especially as each individual state begins to open up its economy on a highly specific, region-by-region basis. Truck drivers have proven during the past few months that they are a crucial part of the lifeblood of America’s economy. They must continue to receive the widest possible network of support if America is to recover from this devastating pandemic.



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ⁱ 49 CFR Parts 390-399.

ⁱⁱ The waiver extends renewal deadlines for documents set to expire on March 1, 2020, or later to June 30, 2020 (and that date may be extended further into 2020).

ⁱⁱⁱ The FMCSA has advised that if a rest stop or area is not immediately available for the driver’s 10-hour break, he or she may proceed to the nearest “reasonable, safe location.”