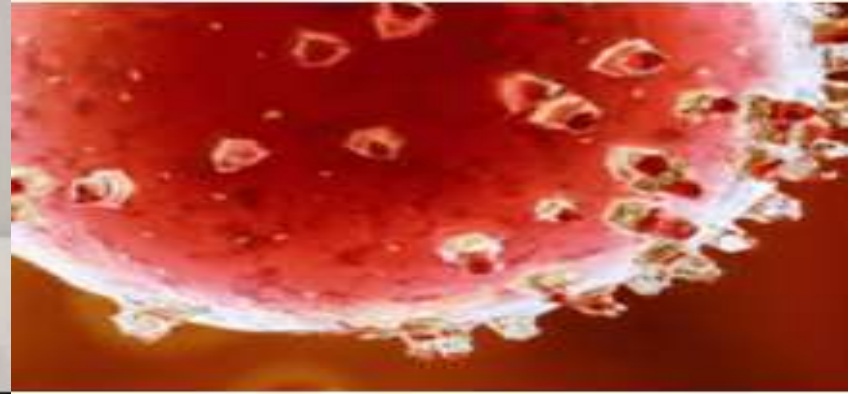




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COVID-19 Transportation and Logistics: Your Questions Answered (or not?)

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Happy Earth Day!



COVID-19 Issues

- ▶ FMCSA and State Emergency Orders
 - ▶ CARES Act and Paycheck Protection Program
 - ▶ Contract/Loan Issues
 - ▶ Collections/Claims Issues
 - ▶ Future Considerations
- 



FMCSA

Federal Motor Carrier Safety Administration

- ▶ Exemptions for carriers moving:
 - (1) medical supplies and equipment related to the testing, diagnosis and treatment of COVID-19;
 - (2) supplies and equipment necessary for community safety, sanitation, and prevention of community transmission of COVID-19 such as masks, gloves, hand sanitizer, soap and disinfectants;
 - (3) food, paper products and other groceries for emergency restocking of distribution centers or stores;
 - (4) immediate precursor raw materials -- such as paper, plastic or alcohol -- that are required and to be used for the manufacture of items in categories (1), (2) or (3);
 - (5) fuel;
 - (6) liquefied gases to be used in refrigeration or cooling systems;
 - (7) equipment, supplies and persons necessary to establish and manage temporary housing, quarantine, and isolation facilities related to COVID-19;
 - (8) persons designated by Federal, State or local authorities for medical, isolation, or quarantine purposes; and
 - (9) persons necessary to provide other medical or emergency services, the supply of which may be affected by the COVID-19 response.
- ▶ Direct assistance does not include routine commercial deliveries, including mixed loads with a nominal quantity of qualifying emergency relief added to obtain the benefits of this emergency declaration.
- ▶ Exemptions include Parts 390 through 399
- ▶ Now extended through May 15, 2020

Exemptions Not Applicable

- ▶ State laws and regulations including speed limits
- ▶ 49 CFR § 392.3 related to operation of a commercial motor vehicle while a driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the motor vehicle.
- ▶ Controlled substance and alcohol uses and testing requirement (49 CFR Part 382),
- ▶ Commercial driver's license requirements (49 CFR Part 383),
- ▶ Financial responsibility (insurance) requirements (49 CFR Part 387),
- ▶ Hazardous material regulations (49 CFR Parts 100–180),
- ▶ Applicable size and weight requirements
- ▶ Any other portion of the regulations not specifically exempted under 49 CFR § 390.23
- ▶ Motor carriers or drivers currently subject to an out-of-service order
- ▶ Upon termination of direct assistance to emergency relief efforts related to the COVID-19 outbreaks, the motor carrier and driver are subject to the requirements of 49 CFR Parts 390 through 399, except that a driver may return empty to the motor carrier's terminal or the driver's normal work reporting location without complying with Parts 390 through 399.



Hours of Service

- ▶ Exemption from hours of service if driving for direct assistance to COVID-19 as outline above
- ▶ No fatigued drivers can operate. If driver informs carrier they need immediate rest, driver must be given 10 consecutive hours of rest
- ▶ When a driver is moving from emergency relief efforts to normal operations a 10-hour break is required when the total time a driver operates conducting emergency relief efforts, or a combination of emergency relief and normal operations equals 14 hours.

Drug Testing

- ▶ DOT-regulated employers must comply with testing and training requirements
- ▶ Must make reasonable effort to locate the necessary resources
- ▶ Consider mobile collection services as option
- ▶ If unable to conduct drug or alcohol testing or training due to COVID-19 then must continue to comply with existing applicable DOT Agency requirements to document why a test was not completed
- ▶ If unable to conduct DOT drug and alcohol testing due to the unavailability of testing resources, the underlying modal regulations continue to apply
 - Current or prospective employee cannot conduct DOT safety-sensitive functions without “negative” drug test
- ▶ Employers must use best efforts to determine circumstances in which driver refuses test, but remain sensitive to employees being afraid of collection sites and employers need to confirm that collection sites have taken steps to minimize spread of COVID-19
- ▶ Review back-up plans for your alcohol and drug testing program

Commercial Drivers Licenses

- ▶ FMCSA will not enforce:
 - A CLP or CDL holder operating a CMV with an expired license, but only if the CLP or CDL was valid on February 29, 2020, and expired on or after March 1, 2020.
 - A motor carrier that allows a CLP or CDL driver to operate a CMV during a period in which the driver does not have a current CLP or CDL, but only if the CLP or CDL was valid on February 29, 2020, and expired on or after March 1, 2020.
 - A CMV driver or motor carrier that allows a CMV driver to operate a CMV during a period in which the driver's operator license has expired, but only if the driver's license was valid on February 29, 2020, and expired on or after March 1, 2020, and the driver is otherwise qualified to drive under 391.11.
 - A CMV driver or motor carrier that allows a CMV driver to operate a CMV during a period in which the driver does not have the current medical certificate as required by 49 CFR 391.45(b), but only if the driver has evidence of a medical certification that was valid on February 29, 2020 and expired on or after March 1, 2020.

Accidents with Drivers under Exemptions

- ▶ A motor carrier must report that driver was under exemptions **WITHIN 24 HOURS** of accident



Covid-19 legislation

- ▶ <500 Employees
- ▶ Must give paid leave if sick or caring for sick or children
 - Two weeks leave
 - 10 weeks FMLA leave
- ▶ Pay
 - Full pay if diagnosed with Covid-19
 - 2/3 pay if caring for sick or children
 - Employer gets refundable tax credits to compensate
- ▶ Exemption
 - <50 employees and leave would jeopardize business
- ▶ Independent Contractors / Self Employed can claim credits

CARES Act

- ▶ Coronavirus Aid, Relief, and Economic Security (CARES) Act was signed by President Trump to assist business owners with whatever needs they have during these unprecedented times.
- ▶ As such, it is important to keep in mind most provisions of this Act are fluid and are subject to change as certain needs arise.

Paycheck Protection Program (PPP)

- ▶ The CARES Act provides \$350 Billion for the Small Business Association (SBA) to provide loans to small businesses.
- ▶ The SBA's Paycheck Protection Program provides liquidity to businesses in the form of loans which are partially or fully forgivable.



Paycheck Protection Program (PPP)

- ▶ Out of money....but more is on the way.
 - \$350 billion spent in two weeks.
 - \$310 billion additional to be added.
 - "A billion here, a billion there, and pretty soon you're talking about real money."
 - --Everett Dirksen

PPP: Who Qualifies?

- ▶ The following entities with less than 500 employees
 - Small businesses
 - Sole Proprietors
 - Independent Contractors
 - Employee Stock Ownership Plans (ESOPs)
 - 501(c)3 nonprofits

CARES: Small Business Concern

- ▶ FAQ No. 2 clarifies that a business with more than 500 employees may still be a “small business concern” if it either:
 - Meets its relevant employee-based or revenue-based SBA size standard corresponding to its industry; or
 - Has a tangible net worth of not more than \$15 million and average after-tax net income of not more than \$5 million for the two fiscal years before the date of the application.

Small Business Size Standards by NAICS Industry

- ▶ Scheduled and Nonscheduled Freight Air Transportation – 1,500 employees
- ▶ Line-Haul and Short Line Railroads – 1,500 employees
- ▶ Truck Transportation – \$30 million
- ▶ Warehousing and Storage – \$30 million
- ▶ Support Activities for Air Transportation \$35 million
- ▶ Support Activities for Rail Transportation \$16.5 million
- ▶ Port and Harbor Operations and Marine Cargo Handling \$41.5 million
- ▶ Motor Vehicle Towing \$8 million
- ▶ Support Activities for Road Transportation \$8 million
- Freight Transportation Arrangement \$16.5 million
- Packing and Crating \$30 million
- Non-Vessel Owning Common Carriers and Household Goods Forwarders \$30 million
- All Other Support Activities for Transportation \$8 million
- Truck, Utility Trailer, and Recreational Vehicle Rental and Leasing \$41.5 million
- Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$35 million
- Construction, Mining, and Forestry Machinery and Equipment Rental and Leasing \$35 million
- Other Commercial and Industrial Machinery and Equipment Rental and Leasing \$35 million

PPP: Who Qualifies?

- ▶ Affiliates must be included:
 - Various tests that look at common ownership, management, control

What CARES loans can be used for



Payroll Expenses (US resident employees only)



Rent



Mortgage interest payments (but not principal payments or prepayment of



Interest paid on debt obligations incurred before February 15, 2020 (such as interest



Utilities (electric, gas, water, transportation, telephone, internet)

What CARES loans cannot be used for



Employee/owner compensation over \$100,000



Taxes imposed or withheld under chapters 21, 22, and 24 of the IRS code



Compensation of employees whose principal place of residence is outside of the U.S.



Qualified sick and family leave for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus

Loan Forgiveness

- ▶ Loan forgiveness is not reduced or impacted if the identities of employees differ but based on average numbers. Reduction is calculated as $\frac{[\text{total amount of loan used for payroll, rent, mortgage, utilities}] \times [\text{average number of full time employees during 8 weeks following loan origination}]}{[\text{average number of full time employees 1/1/20-2/29/20 (for non-seasonal businesses) or average number of full time employees 2/15/19-6/20/19 (for seasonal employers)}]}$ Note that 75% of the loan forgiveness amount must be used for payroll costs.
- ▶ The amount of loan forgiveness is further reduced if employees who made less than \$100,000 in annualized wages in 2019 receive a reduction in pay of more than 25% during the covered period.
- ▶ Reductions in full-time employment or salary that occur between Feb. 15, 2020 and April 26, 2020 can be “cured” and will not reduce the amount of loan forgiveness if, by June 30, 2020, the borrower eliminates the reduction in employees or the reduction in wages, as applicable. There is no requirement that the borrower rehire the same employees; hiring full-time equivalent employees is sufficient.

CARES: Large Business

- ▶ The CARES Act allocates \$454 billion to the U.S. Treasury's Exchange Stabilization fund for large businesses.
- ▶ Requirements:
 - Prohibited from engaging in stock buybacks for the duration of the loan plus one year
 - Must maintain the same employment levels from March 2020 through September 2020
 - Must maintain no less than 90% of employees as of that date

CARES: Independent Contractors

- ▶ Must file their own PPP applications
- ▶ Cannot be included in a company's salary calculations for PPP

Individual States

- ▶ Some state Governors have been issuing executive orders to benefit motor carriers
- ▶ These executive orders vary from state to state but they tend to be more liberal than the FMCSA



South Carolina's Executive Order

- ▶ South Carolina suspended:
 - Requirements relating to registration, permitting, length, width, weight, and load for commercial and utility vehicles traveling on noninterstate routes for up to one hundred twenty days, provided the vehicles do not exceed a gross weight of ninety thousand pounds and do not exceed a width of twelve feet
 - Requirements relating to time of service for commercial and utility vehicles traveling on interstate and noninterstate routes
- ▶ Essential goods and products include food, water, medicine, medical supplies and equipment, fuels and petroleum products (to include fuel oil, diesel oil, gasoline, kerosene, propane, and liquid petroleum), livestock, poultry, feed for livestock and poultry, and crops and other agricultural products ready to be harvested (to include timber and wood chips)





North Carolina's Executive Order

- ▶ North Carolina Department of Safety and the North Carolina Department of Transportation were ordered to waive the maximum hours of service, and some height and weight restrictions, for drivers transporting medical supplies, other equipment, or participating in other efforts to address the public health threat posed by COVID-19.
- ▶ This includes vehicles used to transport livestock, poultry, crops, and timber.
- ▶ North Carolina's Order did not specify what good and or equipment are essential.



- ▶ The expiration date for CDLs expiring between March and June 2020 was extended for 60 days
- ▶ The weight limit was increased to 95,000 pounds max gross vehicle weight for vehicles with five weight-bearing axles and an outer bridge span of not less than 51 feet

Georgia's Executive Order

Resources

- ▶ FMCSA
 - <https://www.fmcsa.dot.gov/emergency-declarations>
- ▶ US Senate Committee on Small Business and Entrepreneurship
 - <https://www.sbc.senate.gov/public/index.cfm/guide-to-the-cares-act>
- ▶ Small Business Administration for Paycheck Protection Program
 - <https://www.sba.gov/page/coronavirus-covid-19-small-business-guidance-loan-resources>

Contract/Loan issues

- ▶ **Contracts**
 - Force majeure clauses
- ▶ **Loan Issues**
 - Foreclosure/eviction delays
 - Forbearance on loan payments

Collection/claims issues

- ▶ Collections
 - Manage A/R
 - Payment plans
 - Consent judgments
 - Confession of judgments
 - Personal guarantees
 - collateral

Claims Issues

▶ Claims Issues

- BOL/Delivery Receipt
 - Shipper signature/blind loading
 - Consignee signature/blind unloading

Claims Issues

- ▶ SAMPLE LANGUAGE:
- ▶ When Carrier's driver is not permitted to observe unloading, the following terms apply:
- ▶ Consignee must sign for delivery before unloading, and any exceptions reported will be deemed concealed damage.
- ▶ Consignee and its employees release Carrier from any liability due to personal injury that occurs in trailer or during unloading.
- ▶ Consignee must defend, indemnify, and hold Carrier harmless for any and all personal injury and property damage that occurs during unloading.

Claims Issues

- ▶ SAMPLE LANGUAGE:
- ▶ Shipper must sign the Bill of Lading with notation “Driver Not Allowed on Dock” before it begins loading freight. Shipper must notate on the BOL with handling units loaded. Carrier’s signature on the BOL will not establish freight was received in good condition. Exceptions or damages later discovered by Carrier will be deemed to have existed when freight was loaded. Carrier will not be liable for shortages within a palletized unit.
- ▶ Shipper must not damage Carrier’s trailer or freight belonging to other customers of Carrier. Shipper agrees to defend, indemnify, and hold Carrier harmless for all property damage and freight damage that it causes.
- ▶ Shipper and its employees assume all risk of entering Carrier’s trailer. Shipper and its employees waive and release all claims against Carrier for personal injury that occurs in Carrier’s trailer or otherwise during unloading of freight. Shipper agrees to defend, indemnify, and hold Carrier harmless for all claims arising from personal injury that occurs in Carrier’s trailer or otherwise during unloading of freight.
- ▶ Except as set forth herein, all provisions of the [Carrier’s Tariff] will apply.

Claims Issues

- ▶ Claims Issues
 - Act of God
 - Inherent Vice
 - Act of the Public Authority
 - [public enemy?]

Employment Matters

- ▶ Employees afraid of Covid-19
 - ADA Accommodations
- ▶ Employees with Covid-10
- ▶ Employees exposed to Covid-19
 - Screen
 - Monitor
 - Mask
 - Distance
 - Disinfect and Clean

Insurance Business

- ▶ Personal Auto Insurers refunding premium
- ▶ CE, Licensing, Filing requirements delayed
- ▶ GA Insurance Commissioner – prohibit cancellation of health insurance and business policies that include business interruption.
 - Maybe cargo earned freight charges
- ▶ Arizona/Idaho “urge” patience on late premium, late claim filing
 - Might violate rebating laws
- ▶ Premium Finance company involvement

Future considerations

- ▶ Return to “Normal”
- ▶ End of FMCSA/Emergency Orders

About Moseley Marcinek Law Group LLP

- Momarlaw.com is 387 days old
- 9 lawyers licensed in 3 states
- National practice
 - Truck Accident litigation
 - Insurance
 - Business
 - Freight claims
 - Contracts
 - Independent Contractor
 - Collections
 - Regulatory Compliance.
 - Corporate Organization





Questions

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