

# Regulatory and Legislative Update

April 2020

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## COVID-19 – Legislation

### Businesses can't count independent contractors in

#### paycheck protection loans

The interim final rule (IFR) for a major financial relief program in the wake of the novel coronavirus (COVID-19) pandemic excludes a company's independent contractors from payroll costs eligible for loan coverage. The common initial understanding was that the \$349 billion Paycheck Protection Program (PPP) authorized in the recent \$2 trillion COVID-19 financial rescue legislation would allow companies to count compensation for all workers in loan applications. However, the Small Business Administration IFR issued on April 2 explicitly states

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that “independent contractors have the ability to apply for a PPP loan on their own so they do not count for purposes of a borrower’s PPP loan calculation.”

The PPP establishes forgivable loans for businesses with 500 or fewer employees. The loan amounts will be forgiven provided that (1) the loan proceeds are used to cover payroll costs and most mortgage interest, rent, and utility costs over the eight-week period after the loan is made; and (2) employee and compensation levels are maintained.

Payroll costs are capped at \$100,000 on an annualized basis for each employee, and not more than 25% of the forgiven amount may be for non-payroll costs. Loan payments will be deferred for six months. The loans have maturities of two years and an interest rate of 1%. Although lenders will have their own online applications, SBA has made the standard application form available at <https://www.sba.gov/document/sba-form--paycheck-protection-program-borrower-application-form> so that potential borrowers can gather the necessary information.

PPP is the largest of several funding programs available through SBA. For more on PPP and other COVID-19 relief options for small businesses, visit <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options>.

### **New employee paid leave requirements related to COVID-19 kicked in April 1**

Prior to enacting a \$2 trillion financial rescue package, Congress passed legislation aimed at protecting individuals who were directly affected by COVID-19 – either because they were sick or because they were caring for people who were sick or for children no longer allowed to attend school or day care due to closures. The Families First Coronavirus Response Act (FFCRA) requires employers who have fewer than 500 employees to allow employees to take up to two weeks sick leave and up to 10 weeks family and medical leave related to COVID-19. Employees will get full pay for two weeks if they are quarantined and two-thirds pay for two weeks if they need to care for someone quarantined for a child under 18 if the child’s school or child care provider has been closed due to COVID-19.

Under the FFCRA, covered private employers qualify for reimbursement through refundable tax credits administered by the Treasury Department. For information on the tax credits, visit <https://www.irs.gov/forms-pubs/about-form-7200>.

Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closings or child care unavailability if the leave requirements would jeopardize the viability of the business as a going concern.

The Department of Labor’s Wage and Hour Division issued a temporary rule to implement FFCRA that is effective through December 31, 2020. For the rule and various other resources needed to understand and comply with FFCRA requirements, including a webinar, visit <https://www.dol.gov/agencies/whd/ffcra>. For the final rule, visit <https://www.federalregister.gov/d/2020-07237>.

## COVID-19 – Enforcement

### **FMCSA expands temporary COVID-19 relief to CDL renewals, drug testing rules**

As the trucking industry struggles to help with the nation’s response to the COVID-19 crisis, the Federal Motor Carrier Safety Administration has granted broad temporary enforcement relief to drivers and carriers. The agency on March 18 expanded the scope of its initial March 13 emergency declaration – the first such declaration that applies nationwide. The expanded declaration covers a broader range of goods that qualify for relief from enforcement of Parts 390 through 399. The declaration expires April 12 but likely will be extended.

The emergency declaration does not apply to several important categories of regulations, including drug use and testing and commercial driver’s license (CDL) requirements. However, in separate actions, FMCSA has granted limited relief regarding both of those. Regarding drug testing, the agency has issued guidance valid

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through June 30 regarding flexibility in the event disruptions related to COVID-19 make strict compliance impractical. For example, carriers have some flexibility in the rate of random tests as long as they have conducted the required 50% by the end of this year. FMCSA also is providing some flexibility through June 30 (or until the national emergency is lifted, if earlier than that) regarding CDLs, commercial learner's permits and medical certification.

The terms and conditions on FMCSA's enforcement relief are detailed and specific, so consult the agency's website at <https://www.fmcsa.dot.gov/COVID-19>.

### **CVSA postpones International Roadcheck due to COVID-19**

The Commercial Vehicle Safety Alliance announced that due to the COVID-19 pandemic it is postponing its annual International Roadcheck inspection and enforcement initiative. Roadcheck traditionally has been held in early June, but CVSA announced earlier this year that the event would be held May 5-7. CVSA said it will monitor the status of COVID-19 and select appropriate new dates when it is safe and reasonable to do so.

## Regulation and Enforcement

### **IANA seeks exemption to allow training program to qualify maintenance inspectors**

FMCSA requests comments by May 4 on an application from the Intermodal Association of North America (IANA) for an exemption that would allow an individual who successfully completes a training program consistent with a set of Intermodal Recommended Practices (IRPs) developed by IANA to be considered a qualified inspector for purposes of the periodic inspection rule, or a qualified brake inspector, for purposes of brake system inspection, repair and maintenance requirements. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-06886>.

### **Tank truck group seeks exemption to add pulsating brake light**

FMCSA requests comments by May 4 on an application from National Tank Truck Carriers, Inc. (NTTC) for an exemption to allow motor carriers operating tank trailers to install a red or amber brake-activated pulsating lamp positioned in the upper center position or in an upper dual outboard position on the rear of the trailers in addition to the steady-burning brake lamps required by the Federal Motor Carrier Safety Regulations (FMCSR). With a few exceptions, the FMCSRs require all exterior lamps (both required lamps and any additional lamps) to be steady-burning. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-06887>.

### **Safety technology provider seeks exemption on windshield placement**

FMCSA requests comments by May 4 on an application Nauto, Inc. for an exemption to allow its multi-sensor device to be mounted lower in the windshield on commercial motor vehicles than is currently permitted. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-06888>.

### **SBTC seeks ELD, HOS relief for drivers traveling with pets**

The latest of several attempts by the Small Business Transportation Coalition (SBTC) in the past couple of years to exclude drivers and carriers from the electronic logging device (ELD) mandate would exempt drivers who travel with domestic animals – i.e., pets – from ELDs and allow them to extend their driving window to 16 hours from the current 14 hours and to drive a total of 13 hours during the period. SBTC cited the ELD relief Congress provided to haulers of livestock and the hours of service relief that has been requested by the

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National Cattlemen’s Beef Association. STBC Executive Director James Lamb requested the exemption in a March 2 letter to Transportation Secretary Elaine Chao.

FMCSA has requested comments by April 10. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-04939>.

### Legislation

#### **House bill would authorize \$755 million to expand commercial truck parking**

Reps. Mike Bost (R-Illinois) and Angie Craig (D-Minnesota) on March 5 introduced legislation (H.R. 6104) that would establish a set-aside source of funding to expand more commercial truck parking throughout the U.S. The bill would authorize \$755 million total in annual increments through fiscal 2025. The funds could be used at a variety of locations, including construction of public rest areas and commercial vehicle parking facilities and parking capacity next to commercial truck stops, weigh stations, and public and private freight facilities. For more information, visit <https://www.congress.gov/bill/116th-congress/house-bill/6104>.

### COVID-19 Resources

#### **Legislation**

**CARES Act** (Public Law 116-136): <https://www.congress.gov/bill/116th-congress/house-bill/748>

**Families First Coronavirus Response Act** (Public Law 116-127): <https://www.congress.gov/bill/116th-congress/house-bill/6201>

#### **Federal agencies**

**FMCSA:** <https://www.fmcsa.dot.gov/COVID-19>

**Small Business Administration:** <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options>

**DOL Wage and Hour Division:** <https://www.dol.gov/agencies/whd/pandemic>

**OSHA:** <https://www.osha.gov/SLTC/covid-19/>

### Advocacy and Comment

Readers should have received an urgent update concerning the economic stimulus program passed by Congress to combat the effect of the current pandemic. As set forth in the discussion above, the final rule makes clear that motor carriers utilizing owner-operators and independent contractors cannot use the Paycheck Protection Program (PPP) to pass through stimulus money to independent contractors. This decision means that independent contractors entitled to receive stimulus money must either apply for the EIDL \$10,000 grant money or file their own PPP application. Although the PPP is the most lucrative, it requires the active participation of a bank which creates a major impediment for small carriers and independent contractors. As a result, small carriers and independent contractors are probably best served by filing for the EIDL. Sole proprietorships and independent contractors can file for either program beginning April 10.

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As mentioned earlier, the devil is in the details. Additional funding and grant and loan terms will undoubtedly be forthcoming. To receive updates and regulatory guidance and answers to Frequently Asked Questions, please send your contact information to [Covid19Relief@transportationlaw.net](mailto:Covid19Relief@transportationlaw.net).