

# Regulatory and Legislative Update

June 2020

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**Note:** FMCSA has extended the emergency declaration related to COVID-19 through June 14. For the latest FMCSA guidance related to COVID-19, visit <https://www.fmcsa.dot.gov/COVID-19>.

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## Regulation and Enforcement

### Changes in HOS rules to take effect September 29

The Federal Motor Carrier Safety Administration (FMCSA) issued a final rule, effective September 29, to provide more flexibility to truck drivers in several aspects of the hours-of-service (HOS) regulations. As with all prior HOS changes, the new rule is certain to draw a judicial challenge from safety advocates and, perhaps, the Teamsters union, which also has publicly opposed the rule.

The final rule adopts FMCSA's proposed rule with one major exception and one minor one. The final rule changes HOS regulations in four areas: The short-haul exception to electronic logging devices (ELDs); adverse driving conditions; the 30-minute rest break; and use of sleeper berths for split rest. The rule:

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- Extends the maximum duty period allowed under the short-haul exception (which allows use of time sheets instead of ELDs) from 12 hours to 14 hours and extends the maximum radius in which the short-haul exception applies from 100 to 150 air-miles;
- Modifies the adverse driving conditions exception by extending by two hours the maximum window during which driving is permitted and by revising the definition of prior knowledge. Current regulations allow two more hours of driving, but not another two hours for the window;
- Requires a break after 8 hours of consecutive driving (instead of the current 8 hours on duty) and allows a driver to satisfy the requirement using on-duty, not driving status, not just off-duty status; and
- Expands the sleeper berth option for split rest to allow a 7-hour/3-hour split as well as the current 8-hour/2-hour split and – perhaps more important – excludes the shorter period of the split from the calculation of the maximum 14-hour driving window.

The changes from the notice of proposed rulemaking (NPRM) include withdrawal of a proposed change in the mechanics of the 14-hour driving window and a tweak to language related to adverse driving conditions. The agency chose not to adopt a provision that it had proposed initially to allow a pause in the 14-hour driving window of up to three hours if drivers took an off-duty break. Although FMCSA said it did not necessarily agree with opponents on the merits, it conceded that the issue warranted more study. Several groups had argued that the provision could lead to greater detention time given that there would be fewer consequences on drivers' productivity during a given shift.

The other change from the NPRM is closer to a clarification than a major change. Under the longstanding adverse driving conditions exception allowing more driving time under certain circumstances, a key qualification has been that the adverse driving condition was not known to the dispatcher before the trip. FMCSA said that because of changes in availability and use of technology, drivers on the road often can evaluate situations that could not be foreseen before dispatch or the start of a duty day. As revised, the definition allows the exception under conditions that are unknown, or could not reasonably be known, to the driver immediately before the start of the duty day or before resuming driving after a sleeper berth break, or to the motor carrier immediately before dispatching the driver.

Petitions for reconsideration are due July 1. For the June 1 Federal Register notice on the final rule, visit <https://www.federalregister.gov/d/2020-11469>.

### **FMCSA temporarily allows remote compliance reviews**

FMCSA on May 19 said that until the president revokes COVID-19 national emergency it will conduct compliance reviews and issue safety ratings even if they do not include an "on-site" component in order to limit exposure risk for the regulated community and safety standards. The agency said in a guidance document that since adopting the safety fitness rating methodology (SFRM) in 1997, the mechanisms and tools it uses to access information from motor carriers has evolved.

"Although the definition of "compliance review" in 49 CFR 385.3 describes these reviews as 'on-site,' in practice, the advent of electronic recordkeeping and other technology now allows FMCSA to perform the same investigative functions remotely that it could perform previously only by in-person reviews of the motor carrier's files," FMCSA said. "FMCSA has determined that because safety investigators are able to follow all of the procedures in 49 CFR part 385 without physically visiting the motor carrier's business premise, compliance reviews that do not include an 'on-site' component will limit exposure risk to COVID-19, consistent with current regulations, without compromising FMCSA's safety mission.

The Motor Carrier Regulatory Reform Coalition previously has recommended that FMCSA conduct remote audits of all regulated motor carriers every two years rather than the current practice of conducting a very small number of compliance reviews triggered by unreliable Safety Measurement System (SMS) metrics.

For the guidance on compliance reviews and other information related to COVID-19, visit <https://www.fmcsa.dot.gov/COVID-19>.

### **OOIDA seeks changes in broker disclosure regulations**

The Owner-Operator Independent Drivers Association (OOIDA) has filed a petition for a rulemaking that would require brokers to routinely provide transaction records to carriers and would bar brokers from demanding that carriers waive their rights to the information. Current regulations at 49 CFR 371.3 require brokers to maintain records of each freight transaction and to make those records available to parties to the transaction. OOIDA contends that brokers make it difficult to obtain the information in practice or require carriers to waive their rights under 371.3 as a condition of taking loads. The rule sought by OOIDA would:

- Require brokers to automatically provide an electronic copy of each transaction record within 48 hours after the contractual service has been completed; and
- Explicitly prohibit brokers from including any provision in their contracts that requires a carrier to waive their rights to access the transaction records as required by 49 CFR §371.3.

The OOIDA petition has not been docketed, but it is available at <https://bit.ly/OOIDA-371>.

### **FMCSA rejects carrier's bid for sleeper berth flexibility**

FMCSA has denied an application from PTS Worldwide, Inc. (PTS) for an exemption that would have allowed its team drivers to obtain mandatory rest through a combination of sleeper berth and off-duty times in which the shorter period is at least 4 hours. PTS, which noted that its work for the Defense Department requires team drivers for security reasons, wanted to use sleeper berth/off-duty splits of 4 hours/6 hours, 5 hours/5 hours, and 6 hours/4 hours. Until the new rule change takes effect in September allowing splits of 7 hours and 3 hours, regulations allow only one option for use of the sleeper berth for split rest: At least 8 hours in the sleeper berth and at least 2 hours off-duty. FMCSA said that the application lacked evidence that would ensure an equivalent level of safety or greater would be achieved absent such exemption. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-10592>.

### **Carrier seeks exemption for alternative securement on metal coils**

FMCSA requests comments by June 15 on an exemption application from K & L Trucking, Inc. to allow the company to secure large metal coils to its trailers for transport using a securement system that differs from that required by the Federal Motor Carrier Safety Regulations (FMCSRs). K & L's requested exemption would allow it to use a securement system consisting of (1) a specialized metal carrier permanently affixed to the flatbed trailer designed to secure the coil and prevent it from rolling, and (2) a single, two-ply, nylon-Kevlar tie down strap routed through the eye of the coil that secures the coil to the coil carrier. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-10322>.

### **Entertainment industry group wins limited relief on clearinghouse queries**

FMCSA granted an exemption to Motion Picture Compliance Solutions (MPCS) to allow its members to hire commercial driver's license (CDL) based only on a limited drug and alcohol clearinghouse query, provided that limited queries do not indicate that information about the driver exists in the clearinghouse. MPCS serves as a consortium/third-party administrator (C/TPA) for employers involved in transportation related to theatrical, commercial, television, and motion picture production. FMCSA said that the terms and conditions of the exemption, "coupled with MPCS's unique safety protocols," will achieve a level of safety equivalent to that achieved through compliance with the applicable regulation.

The "unique safety protocols" includes a DOT violation database that MPCS and its member motor carriers implemented 10 years ago, including detailed information related to positive drug tests and return-to-duty tests. "In the Agency's judgment, MPCS's process for identifying qualified drivers for its member employers is uniquely designed to accommodate safety concerns related to drug and alcohol testing violations," FMCSA said. For the Federal Register notice on the exemption approval, visit <https://www.federalregister.gov/d/2020-11742>.

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### **Bus operations get exemption from CMV interchange marking rules**

FMCSA has granted an exemption to commonly owned motorcoach operators Adirondack Transit Lines, Pine Hill-Kingston Bus Corp., and Passenger Bus Corp. from the commercial motor vehicle (CMV) marking rules under certain circumstances involving the exchange of equipment and/or drivers. FMCSA said it has determined that the terms and conditions of the exemption likely ensure a level of safety equivalent to, or greater than, the level of safety achieved without the exemption. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-11740>.

### **Fireworks firm gets holiday exemption from 14-hour rule**

FMCSA has granted Extreme Logistics, LLC an exemption applicable June 28 through July 8 each year from the requirement that all driving be completed within 14 hours of the beginning of the work shift. This exemption allows the applicant to exclude off-duty and sleeper-berth time, of any length, from the calculation of the 14-hour driving window. FMCSA said the terms and conditions of the exemption will likely ensure a level of safety equivalent to, or greater than, the level of safety achieved without the exemption. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-10590>.

### **Grote seeks exemption to allow pulsating warning lamps**

FMCSA The Federal Motor Carrier Safety Administration (FMCSA) requests public comment on an application for exemption from Grote Industries, LLC to allow motor carriers operating trailers and van body trucks to install brake-activated pulsating warning lamps on the rear of those vehicles in addition to the steady-burning brake lamps required by the FMCSRs. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-10116>.

### **Laydon gets exemption for repositioning of lamps**

FMCSA has granted Laydon Composites Ltd.'s requested exemption to allow motor carriers to operate certain CMVs that are equipped with Laydon's OptiTail aerodynamic device with rear identification lamps and rear clearance lamps that are mounted lower than currently permitted by the agency's regulations. The agency has determined that locating the rear identification lamps and rear clearance lamps lower on the trailers and semitrailers at the same level as the stop lamps, tail lamps, and turn signals will maintain a level of safety that is equivalent to, or greater than, the level of safety achieved without the exemption. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-10593>.

### **Lytx gets exemption for windshield placement**

FMCSA granted Lytx Inc. an exemption to allow its advanced driver-assistance systems to be mounted lower in the windshield on CMVs than is currently permitted. The agency has determined that lower placement of the ADAS would not have an adverse impact on safety. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-10971>.

## Legislation

### **Congress passes bill to loosen restrictions on PPP**

The House and Senate have passed legislation (H.R. 7010) to grant flexibility in the rules Congress initially had set for the Paycheck Protection Program (PPP), which authorized forgivable loans to businesses with 500 or fewer employees. President Trump is expected to sign the bill. As passed by Congress, H.R. 7010:

- **Expands forgiveness period for expenses to 24 weeks.** Because of lockdowns throughout the U.S., many small businesses were either not allowed to remain open or could open only with restrictions,

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making the original eight-week period for forgiveness unworkable for many companies. The bill extends the period considered for forgiveness to 24 weeks.

- **Allows non-payroll expenses loan forgiveness for up to 40% of loan proceeds.** The current PPP law requires 75% of loan proceeds to go to payroll for loans to be forgiven. However, for many businesses, expenses like mortgage, rent, and utilities exceed 25% of expenses. The justification for the change is that retaining employees might not be possible if a business cannot retain its physical location
- **Extends PPP loan terms to five years.** The current PPP requires repayment in two years, but lawmakers are concerned based on the economic contraction since mid-March that businesses would need more than two years to generate enough revenue to pay back their loans.
- **Ensures full access to payroll tax deferment for businesses that take PPP loans.** Sponsors of the legislation argued that because the purpose of PPP and the payroll tax deferment was to provide businesses with capital to weather the crisis, receiving both should not be considered double-dipping.
- **Extends the rehiring deadline through 2020.** Currently businesses can receive loan forgiveness under PPP only if they rehire employees by June 30. However, the enhanced unemployment benefits Congress provided meant that unemployment benefits are higher than the median wage in 44 states. Many businesses have reported difficulties rehiring employees that make more on unemployment, which has made complying with the June 30 deadline difficult.

For information on H.R. 7010, visit <https://www.congress.gov/bill/116th-congress/house-bill/7010>.

### Senate panel approves bill giving states flexibility in spending FMCSA grant funds

The Senate Commerce Committee on May 20 approved legislation (S. 3729) providing flexibility to states in spending FMCSA) grant funds in light of COVID-19 impacts. The Motor Carrier Safety Grant Relief Act would give states an extra year to spend funds awarded for fiscal years 2019 and 2020 through the Motor Carrier Safety Assistance Program, CDL program implementation, and high priority grants. The bill also would authorize FMCSA to keep and redistribute unallocated funds at the end of the grant period for FY 2019 and 2020. For more information, visit <https://www.congress.gov/bill/116th-congress/senate-bill/3729>.

## Advocacy and Comment

### Four regulatory and legislative issues you should not overlook

With the Presidential election six months away and an economic slowdown due to the pandemic and legislative gridlock, it is all too easy to ignore pending rules and legislative initiatives that affect the trucking industry. The following is a commentary on the most important pending issues.

1. **Hours of service.** Hopefully the long debate over changes in the hours-of-service rules is coming to an end. Although the changes will have to be programmed and understood, the extension of the short-haul exemption to 150 air-miles will allow many short-haul carriers to avoid electronic logs and move to a liberal 14-hour, 150-mile radius operation. This can permit useful configuration of substantial inner-city services while protecting the Fair Labor Standard Act exemption from federal overtime.

2. **Broker issues.** MCRR's comments in response to an effort to reduce the scope of the broker regulations have just been filed. A group calling itself the Small Business in Transportation Coalition (SBTC) has sought reconsideration of the agency's five-year-old denial of its request for rulemaking. Petitioner's position is that bond costs are too expensive and that the agency should eliminate licensing and bond requirements for small carriers and so-called "dispatch services."

In this case, the FMCSA's decision to deny the petition for rulemaking should be affirmed. The cost of the bond is not prohibitive, and creating an exception for any class of broker would result in confusion and

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prejudice access of small brokers to freight by making it difficult, if not impossible, for them to compete on equal vetting standards with larger carriers.

Petitioner and others seem to be confused about the scope of the broker regulations and its application to anyone who arranges for transportation for “compensation” – regardless of the method of payment. In a recent letter to Petitioner, Acting Administrator Jim Mullen confirms the broad application of the regulations and leaves no room for confusion. MCRR has filed its comments on this issue with supporting affidavits. See <https://beta.regulations.gov/document/FMCSA-2020-0130-0022>.

On the other hand, OOIDA has filed a petition for rulemaking requiring brokers to make public their commissions or markups which is discussed above. The anti-competitive effect of contracts of adhesion that require carriers to waive applicability of broker regulations, including the right to see the broker’s compensation, have a manifestly unfair anti-competitive effect. When, how and if legal, legislative or regulatory restraints can be placed on abusive waiver demands deserves further scrutiny.

**3. Regulatory reform.** The initial promises of regulatory reform by the Trump administration are late arriving. As noted, DOT has placed in effect rules of procedure that should afford greater due process and aid in agency accountability. Accountability for use of rulemaking at the agency level has been slow in coming, particularly with respect to implementation of reforms specified in the FAST Act. The COVID-19 pandemic and the need for quick governmental action has resulted in emergency decision making to address issues with epidemic proportions without regulatory lag.

For more than three years MCRR has advocated – without response – that the agency develop use of remote audits as a pre-screening mechanism for in-depth compliance reviews, replacing the corrupt SMS system. The efficacy and the usefulness of the remote new carrier audit has not been challenged. Yet, as a result of the pandemic the agency has now temporarily allowed desktop audits to replace on-site compliance reviews. Whether a remote desktop audit should be used as a screening tool to replace SMS for the agency’s convenience or whether compliance reviews and 49 C.F.R. 385 can and should be rewritten without rulemaking may become a major issue following the outcome of the November election.

**4. Paycheck Protection Program.** The PPP is a case study on haste makes waste. \$511 billion was quickly distributed on a first come, first served basis with little oversight or restraint to small businesses. Big banks acting as gatekeepers directed funds to their best clients – not the neediest – and not to those in the industries most affected by COVID-19. Threats of government claw-backs and conditions put on forgiveness by Treasury after the fact created chaos. Proprietorships, small businesses, independent contractors, and small carriers with owner-operators that do not receive W-2 income were hamstrung by getting out of the starting gate and only belatedly in Round 2 have begun to see access to stimulus available.

With a divided Congress and election year, it is hard to handicap the future, but both the Democratic-controlled House and the Republican-controlled Senate are advocating for massive additional stimulus following the PPP low interest loan grant forgiveness model. Assuming that trucking is recognized as an industry in need as the number of small businesses and nature of the industry reflects, massive amounts of additional loans/grant money can be expected.

As set forth in the PPP analysis above, the House and Senate have agreed and presumably the President will sign legislation establishing more liberal loan forgiveness criteria and an important extension of the short 10-week limitation. Presumably, these changes will apply nunc pro tunc without penalty. Small businesses which have not filed but which face diminished revenue related to COVID-19 and have liquidity problems, fixed costs of equipment, and insurance as well as labor expenses, should get their accounting in order and complete the current application process under the best available current guidelines without delay. By the time you get your act together and file, hopefully there will be more clarity and substantial additional funding, and at least you will have your place in line if “first come first serve” continues to be the rule. For additional information concerning applications, government guidance and frequently asked questions visit [https://drive.google.com/drive/folders/1t373ieeP\\_DHT5oqfKM1Ld2FavafYd9si?usp=sharing](https://drive.google.com/drive/folders/1t373ieeP_DHT5oqfKM1Ld2FavafYd9si?usp=sharing).