

## ***FHMS COVID-19 Resource Center:***

### **ENFORCEMENT OF FMCSA REGULATIONS DURING COVID-19 PANDEMIC**

In response to COVID-19, the U.S. Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) issued an Emergency Declaration on March 13, 2020 that relaxed enforcement of certain regulations for carriers. The declaration was subsequently expanded on March 18, 2020 and extended on April 8, 2020. It remains in effect through May 15, 2020. The Emergency Declaration is available [here](#) and discussed herein.

Among other changes, the Emergency Declaration expands the Hours of Service exemption for commercial motor vehicle drivers transporting personnel and supplies in response to the COVID-19 pandemic. Specifically, the hours spent providing "direct assistance" to the response *do not count* toward the 60/70-hour on-duty limit and drivers providing "direct assistance" are exempt from the 30-minute break rule. After completing any trips that qualify as "direct assistance", and prior to returning to normal operations, drivers *must* take 10 hours off duty, or 8 hours for passenger carriers, and *must also* comply with the on-duty limit of 60/70 hours in 7/8 days before returning to driving.

"Direct assistance", for purposes of the Emergency Declaration, "means transportation and other relief services provided by a motor carrier or its driver(s) incident to the immediate restoration of essential services (such as medical care) or essential supplies (such as food and fuel) related to COVID-19 outbreaks during the emergency."

Transportation of the following qualify for the exemption: (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.

There is no specific documentation that FMCSA requires to verify that a driver is operating under the exemption. However, it is recommended that the driver and carrier retain the bill of lading or other ordinary business records to document use of the exemption.

Importantly, FMCSA has warned carriers that, "**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.**" In other words, if carriers are transporting these goods in the ordinary course of business and not specifically in response to the COVID-19 pandemic, then the exemptions do not apply and full compliance with the applicable regulations is required.

FMCSA has cautioned that other regulations remain in place during the pandemic. These regulations relate to obeying speed limits, driver fatigue and safety, include the following:

1. 49 CFR § 392.2 – regarding operating in accordance with State laws and regulations, **including compliance with applicable speed limits and other traffic restrictions.**
2. 49 CFR § 392.3 – regarding operating 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.
3. Motor carriers shall not require or allow fatigued drivers to operate a commercial motor vehicle. A driver who informs a carrier that he/she needs immediate rest shall be given at least ten (10) consecutive hours before the driver is required to return to service.
4. A motor carrier whose driver is involved in a crash while operating under this Emergency Declaration must report any recordable crash within 24 hours, by phone or in writing, to the FMCSA Division Office where the motor carrier is domiciled. The carrier must report the date, time, location, driver, vehicle identification, and brief description of the crash.
5. The Emergency Declaration **does not** exempt compliance with the controlled substance and alcohol uses and testing requirement (49 CFR Part 382), the commercial driver's license requirements (49 CFR Part 383), the financial responsibility (insurance) requirements (49 CFR Part 387), the hazardous material regulations (49 CFR Parts 100-180), applicable size and weight requirements, or any other portion of the regulations not specifically exempted under 49 CFR § 390.23.
6. Motor carriers or drivers currently subject to an out-of-service order are not eligible for the relief granted by the declaration until they have met the applicable conditions for its rescission and the order has been rescinded by FMCSA in writing.
7. Direct assistance terminates when a driver or commercial motor vehicle is used in interstate commerce to transport cargo or provide services that are not in support of emergency relief efforts related to the COVID-19 outbreaks or when the motor carrier dispatches a driver or commercial motor vehicle to another location to begin operations in commerce. 49 CFR § 390.23(b).

Upon termination of direct assistance, 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. 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.

#### Additional FMCSA Guidance Regarding Drug and Alcohol Testing

FMCSA has issued additional guidance regarding drug and alcohol testing requirements during the COVID-19 pandemic. Generally, carriers are required by 49 CFR 382.305(k) to ensure that the dates for administering random alcohol and controlled substances tests are spread reasonably throughout the calendar year. DOT guidance further recommends that you perform random selections and tests at least quarterly. However, if a carrier is unable to perform random selections and tests sufficient to meet the random testing rate for a given testing period due to disruptions caused by the COVID-19 national emergency, then carriers should make up the tests by the end of the year. **Carriers should document in writing the specific reasons why they were unable to conduct tests on drivers randomly selected**, and any actions taken to locate an alternative collection site or other testing resources.

With respect to post-accident testing, a carrier is required to test each driver for alcohol and controlled substances as soon as practicable following an accident as required by 49 CFR 382.303. However, if a carrier is unable to administer an alcohol test within 8 hours following the accident, or a controlled substance test within 32 hours following the accident, due to disruptions caused by the COVID-19 national emergency, **it must document in writing the specific reasons why the test could not be conducted, as currently required.**

Likewise, if a carrier is unable to perform reasonable suspicion testing, it should document in writing the specific reasons why the test could not be conducted as required and efforts made to mitigate the effect of the disruption, such as trying to locate an alternative collection site. This documentation should be provided in addition to the documentation of the observations leading to a test, as required by 49 CFR 382.307(f). Carriers should follow current regulations addressing situations in which reasonable suspicion testing is not conducted, set forth in 49 CFR 382.307(e)(1), (2).

As always, we are available to discuss your questions or concerns. Please do not hesitate to contact us.

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**Michael F. Socha** is a partner with over fourteen years of experience defending companies and individuals involved in catastrophic commercial vehicle, general liability, construction accident, and premises liability matters. He oversees FHMS's rapid response accident investigation hotline and handles all aspects of litigation from initial pleadings through jury trial. For questions, please contact him directly at **267-342-5899**.

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