

COVID-19'S IMPACT ON THE TRANSPORTATION INDUSTRY: MORE QUESTIONS ANSWERED

 SCOPELITIS
GARVIN LIGHT HANSON & FEARY

INDIANAPOLIS • CHICAGO • WASHINGTON, DC • LOS ANGELES
CHATTANOOGA • MILWAUKEE • DETROIT • DALLAS/FT. WORTH
PHILADELPHIA/MT. EPHRAIM • SALT LAKE CITY • SEATTLE

Roadmap

- PPP Loans and Owner-Operators
- Update on the CARES Act
- Update on the FFCRA
- Workers' Compensation
- Update on Stay-at-Home Orders
- Rapid Response Plan
- FMCSA Update
- Rate Considerations
- *Force Majeure*
- Insurance (presented by TrueNorth)



Paycheck
Protection
Program
Loans





CARES Act Paycheck Protection Loans

- Q: Do ICs count as employees for purposes of PPP loan calculations?
- A: No. The current interpretation states that because ICs can apply for their own PPP loan, they should not be included when calculating the number of employees or eligible payroll.



CARES Act

Paycheck Protection Loans

Q: Why was I hearing that payments to independent contractors should be included in payroll costs?

A: The reason for the confusion and our caution was the Act's text indicates "yes," but there are policy and practical considerations that suggest no. The definition of "payroll costs" includes "the sum of payments of any compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation ..." Additionally, in evaluating the eligibility of a borrower for a covered loan, a lender shall consider whether the borrower "(bb)(AA) had employees for whom the borrower paid salaries and payroll taxes; or (BB) paid independent contractors, as reported on a Form 1099-MISC."

We had a practical concern about allowing a double-dip, i.e., the carrier and the independent contractor both being authorized get a loan to cover the same payment. That concern is what carried the day at SBA.



CARES Act Paycheck Protection Loans

Eligibility Issues

- Q:** Do I count terminal locations in separate states individually toward the 500 employee maximum?
- A:** No. All employees regardless of location will be combined toward the 500 employee maximum for expanded PPP loan eligibility



CARES Act Paycheck Protection Loans

Eligibility Issues

Q: I have a number of separate, but related entities - is each one a “stand-alone” for employee count purposes?

A: Maybe. The SBA has its own affiliation rules for purposes of determining whether related entities will be consolidated for employee count purposes. The PPP loan application form requires businesses with common owners and common management with any other business to identify all such business and describe their relationship.



CARES Act Paycheck Protection Loans

Eligibility Issues

Q: What date will the SBA use to determine if I have 500 employees?

A: When the application is made, the SBA will calculate the average number of employees for the previous twelve months



CARES Act

Paycheck Protection Loans

Loan Calculation Issues

- Q:** What can I consider as payroll costs for purposes of calculating average monthly payroll costs?
- A:** The maximum loan amount is determined by average monthly payroll costs in the previous 12-month period multiplied by 2.5. Payroll costs include salary, wage, commission or similar compensation. You can also include paid leave costs for vacation, parental, family, medical or sick leave and also costs related to group health care benefits and retirement contributions. Federal employment taxes are excluded, but state and local payroll taxes can be considered. Payroll costs may not include compensation for individual employees in excess of \$100,000 annually



CARES Act Paycheck Protection Loans

Loan Calculation Issues

Q: Do I count per diem payments as a payroll cost?

A: Qualified “No”



CARES Act Paycheck Protection Loans

Loan Application Issues

- Q:** Does my business have to suffer a down turn or other harm to be eligible for a PPP loan?
- A:** Yes. Borrowers must certify in good faith that the loan is necessary due to impact on operations related to uncertain economic conditions and the funds will be used to retain workers and maintain payroll, pay mortgage or lease payments and utilities. Also, must certify that the borrower does not have any other PPP loans pending for the same period or has received the loan for the same purpose between February 15 and December 31, 2020



CARES Act Paycheck Protection Loans

- Q: What is the interest rate and the maximum term for a PPP loan?
- A: The interest rate has been set at 1% and the maximum maturity or duration of the loan is 2 years



CARES Act Paycheck Protection Loans

Q: During what time period are costs eligible for forgiveness?

A: The principal amount of a loan and any accrued interest may be forgiven in the amount of payments made for eligible costs incurred during the 8-week period following origination of the loan. Those eligible costs include: payroll costs; interest on mortgage obligations incurred before Feb. 15; rent payments under leases in force before Feb. 15; and utility payments for service which began before Feb. 15.

Not more than 25% of the costs eligible for forgiveness can be non-payroll costs.



CARES Act Paycheck Protection Loans

Q: How does employee count matter for purposes of loan forgiveness?

A: The first key measure is the average number of FTEs per month during the 8-week period following origination of the loan. The next key measure is your choice: either (a) the average number of FTEs per month from Feb. 15, 2019 - Jun. 30, 2019 or (b) the average number of FTEs per month from Jan. 1, 2020 - Feb. 29, 2020.

If the average number of FTEs during the 8-week period is less than either of (a) or (b), then the amount forgiven will be reduced unless the exemption or re-hires applies.

Example: Carrier has an average of 20 FTEs during the 8 week period. Carrier had an average of 25 FTEs during period (a). Carrier had an average of 24 FTEs during period (b).

Under scenario (a), the amount forgiven would be only 80% ($20 \div 25$) of the amount had there been no reduction.

Under scenario (b), the amount forgiven would be only 83% ($20 \div 24$) of the amount had there been no reduction.



CARES Act Paycheck Protection Loans

Q: Does it matter why there is a reduction in employee count?

A: It does not matter why the employee count was reduced; like an accountant, the Act is only concerned with the numbers.



CARES Act Paycheck Protection Loans

Q: How does the re-hire exemption work?

A: If you reduced or reduce the number of FTEs between Feb. 15, 2020 and April 26 (30 days after enactment), those reductions won't reduce your loan forgiveness if you rehire the same number of FTEs by Jun. 30, 2020.



CARES Act Paycheck Protection Loans

Q: Are forgiven loans deemed income subject to tax?

A: No, the amount forgiven is considered canceled debt and not subject to tax



CARES Act Economic Injury Disaster Loans

Q: What is the interest rate and maximum term for an EIDL loan?

A: The interest rate is set at 3.75% and the maximum maturity or duration of the loan is 30 years



CARES Act

Economic Injury Disaster Loans

- Q: Congress also expanded eligibility for EIDL loans. Can I have both an EIDL and a PPP?
- A: You can apply for both. And although there is some confusion that may be cleared up by guidance, it appears that a borrower may have both an EIDL loan and a PPP loan, provided they are not for the same purpose. The IFR clarified that if you have an EIDL loan originated between Jan. 31 - Apr. 3, you can also get a PPP if you weren't using the EIDL for payroll costs.

The Coronavirus
Aid, Relief and
Economic
Security Act
(Update)





CARES Act

Title II: Payroll Tax Credits

- Q:** If I have a Paycheck Protection Program loan, can I still take advantage of the employee retention credit against payroll tax or delay the payment of payroll taxes?
- A:** If you have obtained a Paycheck Protection Program loan, you cannot take the retention credit against payroll taxes. If you have had a Paycheck Protection loan forgiven, you cannot defer payment of payroll taxes under Title II of the CARES Act



CARES Act

Title II: Payroll Tax Credits

- Q:** I have more than 500 employees - am I eligible for the employee retention credit against payroll taxes or the delay of payment relief?
- A:** Yes. There is no employer size limitation for either program, but for employers with 100 average full-time employees “qualified wages” are only for wages paid to an employee not working during qualifying event periods. For employers with less than 100 average full-time employees “qualified wages” are all wages paid during the qualifying event



CARES Act

Title II: Payroll Tax Credits

- Q: Can I take a tax credit under the CARES ACT and the Families First paid leave requirements?
- A: Yes, so long as both combined do not exceed the amount of payroll tax due



CARES Act

Title II: Payroll Tax Credits

- Q:** What are the qualifying events for purposes of the employee retention payroll credit?
- A:** Business operations are fully or partially suspended due to orders from a governmental authority limiting commerce, travel, or group meetings (including stay at home orders or less-restrictive no restaurants/bars orders), or a decline in gross receipts of over 50% (continuing until gross receipts recover to above 80%)



CARES Act

Title II: Pandemic Unemployment Insurance

- Q:** Are independent contractors eligible for the expanded pandemic unemployment assistance benefits, including the additional \$600 per week payment?
- A:** Yes. For states that agree to accept the federal benefit, independent contractors will be eligible both for the state unemployment benefit and the additional \$600 payment until its sunsets on July 31st



CARES Act

Title II: Pandemic Unemployment Insurance

- Q: If I have freight available for an independent contractor but they don't want to run, will they be eligible for unemployment benefits?
- A: Only if they otherwise meet one of the specified COVID-19 criteria



CARES Act

Title IV: Economic Stabilization Assistance

- Q:** Are the mid-sized business loans for employers with between 500 and 10,000 employees available?
- A:** At this juncture, while guidance and relief has been released for certain sectors such as air carriers, the guidance has not yet been released for mid-sized business loans, but is expected soon

The Families First Coronavirus Response Act





Department of Labor Guidance on FFCRA

- Fact Sheet for Employees
- Fact Sheet for Employers
- Questions and Answers
- Model Notice
- Temporary Rule (regulations)

www.dol.gov



Paid Sick Leave for the Following Purposes:

- Employee is subject to a federal, state, or local quarantine or isolation order.
- Employee has been advised by a doctor to self-quarantine due to COVID-19 concerns.
- Employee is experiencing symptoms of COVID-19 and is seeking a diagnosis.
- Employee is caring for an individual who is (a) under a quarantine or isolation order, or (b) has been advised a by a doctor to self-quarantine.
- Employee is caring for a son or daughter whose school or place of care has closed.
- Employee is experiencing any other substantially similar condition as determined by the Sec. of Health and Human Services.



Unable to work due to federal, state, or local quarantine or isolation order

- Includes a broad range of government orders
- Includes shelter in place and stay-at-home orders
- But consider exemption for essential businesses
- Does not apply to lack of work situations



Unable to work due to advice by health care provider

- Belief that employee has COVID-19, may have COVID-19, or is particularly vulnerable
- Does not apply if telework is available



Small Business Exemption

- Less than 50 employees
- Exemption from paid sick leave and paid family leave - but for child care circumstances only
- Must show:
 - Leave would cause expenses to exceed business revenue and cause cessation of operations at even a minimum capacity;
 - Absence of employee(s) would cause substantial risk to financial health or operational capacity due to employee's specialized skills or responsibilities; or
 - Employer cannot find enough willing and qualified workers to replace the employees taking leave in order to continue operating.



Intermittent Leave

- Available for sick leave and family leave
- Employee and employer must agree
- Applies to teleworkers
- For worksite employees - for child care circumstances only



Intersection Between Old and New FMLA

- The new regulations make clear that the new paid FMLA benefit does not effectively double the amount of leave available
 - If an employee exhausted FMLA leave by April 1, then no paid FMLA time off will be available
 - If FMLA renews during the year, employees can use it for paid FMLA leave (or regular, unpaid FMLA leave)
 - However, in no case may an employee obtain more than 12 weeks of paid leave.
- The new regulations also allow for FMLA and PTO to run concurrently



Notice of the Need for Leave

- Employees must provide notice of the need for leave
- Employers can require employees to follow reasonable notice procedures, including notice as soon as practicable
- Employers cannot require notice until after the first day missed
- If an employee is late in providing notice, employer should provide a second opportunity for the employee to provide the notice



Documenting the Need for Leave

- For all paid sick or FMLA leave, employees must provide:
 - Name
 - Date(s) for which leave is requested
 - Qualifying reason for leave
 - Statement that the employee is unable to work due to the qualifying reason - Oral or Written
- Employees must provide additional information based on the reason for leave:
 - Name of gov't body issuing quarantine/isolation order
 - Name of medical provider advising self-quarantine
 - Name and age of child out of school/daycare as well as the name of the school AND a certification that *no other suitable person will be caring for the son or daughter during leave.*



Healthcare Coverage During Leave

- During leave, healthcare must be maintained as if the employee was not on leave
- Employee-portions of the premiums should be taken out of the paycheck like normal
- If a new plan is implemented while the employee is out, the employee must have the opportunity to participate



Recordkeeping

- Employers must maintain records related to paid leave:
 - Four years
 - Regardless of whether leave was granted or denied
 - Even if the notice by the employee was oral
- For tax credits, employers should keep the following for four years:
 - Docs showing how the amount of paid leave was determined
 - Docs showing how the employer determined the amount of health plan expenses to allocate to wages
 - Copies of IRS Form 7200
 - Copies of IRS Form 941
 - Other documents supporting the credit



Enforcement and Penalties

- Sick leave
 - No adverse employment action -
 - Because an employee took leave
 - Because an employee filed a complaint or proceeding
 - Subject to enforcement under the FLSA
 - Failure to provide sick leave is an FLSA minimum wage violation (including private right of action)
- Paid FMLA
 - Same DOL complaint remedies as the traditional FMLA
 - BUT: private right of action is only available if employer is subject to the traditional FMLA thresholds



Workers' Compensation and "Stay at Home" Orders



- Q:** Can drivers (or other employees) receive workers' compensation coverage for COVID-19 exposure and illness?
- A:** A worker who can show they contracted COVID-19 at the workplace may be eligible for workers' compensation. However, proving that an employee's illness results from workplace exposure may be difficult depending on the circumstance.



Q: Can we mandate/require employees to come in as “essential employees” when a stay at home order is in place?

A: Yes. We would view requiring an “essential employee” to come in during a SAH order the same as requiring an employee to come in to a location that does not have a SAH order in place.



Q: Are drivers required to quarantine for 14 days when coming into Texas or Florida?

A: No. Commercial activity is exempted from the quarantine orders.



- Q: What happens if a driver is pulled over by law enforcement and told they are operating in violation of a quarantine or SAH order?
- A: The driver should present the letter of declaration that it is operating as an essential business and should ask to speak to a supervisor if the officer continues to dispute their ability to operate.

Rapid Response Plan



Q: How long after disinfecting workspaces can employees return?

A: **CDC guidance doesn't indicate specific timeframe**

- Close off space as best possible
- Ventilate area
- Wait 24 hours or as long as practical before beginning cleaning and disinfection
- Clean common areas, bathrooms, shared electronics, offices, “high touch” surface



Q: If an employee has COVID-19, what steps should a company take with respect to other employees who may have been exposed?

A: **Implement Rapid Response Plan**

- Close, persistent contact in previous 14 days
- Self-quarantine for 14 days
- Confirmation that symptom-free before return to work
- Consider notifying all for risk assessment
- Disinfect workspace



FMCSA Update



Federal
Motor Carrier
Safety
Administration



- March 31st - FMCSA issues guidance related to MCSAP grant program
 - E.g., grant recipients can conduct certain investigation activities remotely; grant funds can cover PPE
- April 1st - FMCSA issues statement on shelter-in-place orders
 - Non-binding appeal to state/local governments to consider CISA guidance and consider trucking operations to qualify as “essential business”
 - Recognizes states may impose restrictions (e.g., NY)
 - Carriers should report access issues to appropriate FMCSA state division



Q: Does FMCSA's emergency declaration encompass annual inspection requirement?

A: Yes, so long as drivers are providing direct assistance to emergency relief efforts. But, vehicle would need a non-expired annual inspection before performing any non-emergency-assistance work.



Q: If a state DMV has extended expiration dates for licenses and endorsements, can a hazmat driver licensed in that state continue operating under an expired hazmat endorsement?

A: Carriers will have to look at this issue on a state-by-state basis. To date, the only state extension that specifically mentions that it applies to a hazmat endorsement is Colorado. We'd recommend that an updated MVR be pulled for any hazmat driver that has an expiring CDL to confirm whether the hazmat endorsement is still showing valid.



RATES!

Rate
Considerations

Rate Considerations



Q: Spot rates exceed my contracted rates. What can I do?

A: If no duty to accept tender, could refuse tenders and renegotiate rates.



Rate Considerations

Q: I am a motor carrier. Spot rates exceed my contracted rates. What can I do?

A: If a duty to accept tender, there is likely a contract in place and the answer depends.

If you are the transporting carrier, your hard costs have likely not significantly increased:.

1. Does the contract give you a right to renegotiate rates or terminate?
2. Do you have the right to terminate without cause?



Rate Considerations

Q: I'm a broker. Spot rates exceed my contracted rates. What can I do?

A: If a duty to accept tender, there is likely a contract in place and the answer depends.

As a broker, your cost to provide services have now likely increased, and you are losing money on every load.

1. If you have a right to propose new rates, or terminate without cause, may need to exercise it (or leverage it for new negotiated rates).
2. If no such rights, options are limited and risky- essentially have to refused to provide service or terminate.
 - a. If customer relents seek a release related to increasing rates

*Force
Majeure*



Force Majeure

- Public, blanket declarations of *force majeure* may be advisable for some—but not all—transportation providers
- If COVID-19 developments have not made performance impossible, consider narrower, more targeted changes, such as suspension of service-level guarantees
- The defense of “commercial impracticability” may be available if performing would be “exceptionally difficult or expensive”
- Messaging to customers could lay the groundwork for rate renegotiation or defense of subsequent nonperformance
- **BUT:** In fixed-price contracts, you assume risk of market decline



Trent Tillman

EXECUTIVE VICE
PRESIDENT

ttillman@truenorthcompanies.com



Matt Rathje

VICE PRESIDENT OF
OPERATIONS

mrathje@truenorthcompanies.com



Dan Cook

PRINCIPAL & PRACTICE
LEADER

dcook@truenorthcompanies.com





Q: Is there any insurance coverage for business interruption?

A: Not the First Rodeo

- Asbestos
- Silica
- Chinese Drywall



Q: Is there any insurance coverage for business interruption?

A: Which policies might apply?

- Property
- General Liability
- Cargo
- Workers' Compensation
- Excess
- Director & Officers Liability



Q: Is there any insurance coverage for business interruption?

A: Focusing on property and inland marine

B: Business income/interruption coverage requires the interruption to be from a Covered Cause of Loss (e.g. fire, tornado, etc.). COVID-19 excluded in most cases due to “pandemic,” “epidemic,” and/or “virus” exclusions.

***Each claim is fact-driven, governed by the jurisdiction and policy-language specific. Ultimately there will be a body of case law and legislation that will develop which may assist policyholders in locating BI coverage or relief.*



Q: Business Income vs. Extra Expense?

A: Business income

B: Extra Expense

C: What do motor carriers typically have and how much?



Q: Is there an instance when Workers' Compensation might cover an infected driver?

A: If the driver can prove the origin of COVID-19 was “peculiar” to the job and a greater risk of exposure than the general public, workers’ compensation may apply depending on the jurisdiction. Burden of proof may be challenging to overcome.

B: Health Insurance – Burden to subrogate back, but lacks wage loss

C: Disability – Eligible? Definition?

***Each claim is fact-driven, governed by the jurisdiction and policy-language specific.*



Q: Is there an instance when Occupational Accident might cover an infected driver?

A: Exposure or contraction of COVID-19 is unlikely to be considered an Accident or Injury. If policy endorsed with Occupational Disease endorsement, needs to be environmental or physical hazards. Environmental hazards are non-communicable diseases. Physical hazards cause harm to the body without actual contact (e.g. radiation, noise, etc.)

B: Health Insurance – Burden to subrogate back, but lacks wage loss

C: Disability – Eligible? Definition?



Q: How can we get creative? What are other ways to mitigate losses?

A: Focus on subrogation efforts (closed file reviews), telemedicine, advocacy-based approach, early settlement on litigated files



Q: How will this impact the already hard insurance market?

The Scopelitis COVID-19 Task Force
is available 24/7/365:
covid19@scopelitis.com