COVID-19 AND THE TRANSPORTATION INDUSTRY
Roadmap

- Policy Guidance
- Customer Issues
- Employment Issues
- FMCSA’s Response
- Impact on Air/Ocean Cargo
Policy Guidance
Understanding the Balancing Act and Line-Drawing
Challenges for Carriers

• States are limiting access to rest areas, welcome centers, and restaurants to promote social distancing
  • PA closed rest areas but in response from pressure from the industry agreed to reopen several critical rest areas effective 3/19/2020
• Some states are closing DMV or equivalent offices. If a driver needs to renew a license — but the office is closed — they would be unable to operate a vehicle once the license expires.
  • TX has waived license expirations effective 3/18/2020
• Customers are asking drivers to stay in trucks or switch from paper to electronic methods to document pickups and deliveries
• Carriers, brokers, and drivers are facing new restrictions at shippers’ facilities if they have been in states considered COVID-19 “hot zones,” including signing verification forms.
Challenges for Carriers

• San Francisco has issued a “shelter in place” order, which is in effect until April 7, 2020
• Requires residents to stay home except for “essential business” and “essential travel.”
• “Essential business” includes healthcare, groceries, banks, etc.
• Also includes:
  ✓ businesses that “supply other essential businesses with the support or supplies necessary to operate” (arguably most carriers)
  ✓ “ship or deliver groceries, food, goods or services directly to residences” (arguably last-mile carriers)
Challenges for Carriers

- The California Trucking Association is seeking clarification from state authorities that the industry is not subject to the San Francisco (and other) orders
- NYC is considering similar “shelter in place” order, though as of 3/18/2020 Governor Cuomo appears unwilling to support it
- If “shelter in place” orders apply, the FAAAA should preempt them; they should not fall under the “safety exception” because they are not focused on vehicle safety.
Challenges for Carriers

FMCSA seems to agree on preemption. From ATA’s notes on its March 17, 2020, conference call with FMCSA:

How is FMCSA ensuring critical deliveries continue in light of state and local restrictions? If motor carriers have specific locations where there are problems, let FMCSA know. The agency has preemptive authority to ensure state and local laws and regulations do not disrupt interstate activities.
Your COVID-19 Policy

• Do you have an Infectious Disease Preparedness and Response Plan?
  ✓ Strongly recommended by OSHA.

• Will your COVID-19 policy:
  ✓ Limit business travel?
  ✓ Address remote work policies, sick leave, and sending employees home?
  ✓ Address requests to wear protective face masks at work?
  ✓ Consider the legality of medical examinations?
  ✓ Protect against disclosure of employees’ private information?
  ✓ Encourage effective precautions?
Workers’ Compensation Claims

• Is COVID-19 likely a compensable WC claim?

• **Answer:** Not likely due to lack of course and scope of work causation connection (unless claimant is healthcare worker)

• Prior case law (involving SARS/MERS/H1N1) reveals no extrapolation of coverage based on holdings indicating cause between disease and workplace
Communicating Policy with Your IC Fleet

- ICs require a different approach than employees
- As vendors to your business, you have an interest in knowing what steps they are taking to slow the spread of the virus
- Consider a questionnaire that informs them of steps recommended by the government (e.g., the CDC) while asking them to report the steps they plan to take in their businesses
Communicating Policy with Your IC Fleet (Cont.)

- Using escrow as a “business interruption” fund
- Paying for availability
- Paying for compliance:
  - Contracted COVID-19 (positive test)
  - Symptomatic
  - Exposed
Dealing with a Positive Test

• Should be sent/remain at home
  • Consult the CDC’s guidelines for those sick with COVID-19
• Conduct interview of sick worker
• Anyone else worked with in last 14 days should be sent home; “reasonable cause to believe you have come into contact with someone infected with COVID-19”
• Do not identify the sick worker
• Consider a “Rapid Response Guide”
Cyber Risks
Cyber Risks

• COVID-19 is being used as a phishing lure by cybercriminals

• Expect to see an increase in exploit attempts related to COVID-19 as publicity around the disease skyrockets

• Cybercriminals are using trusted brands, like World Health Organization & U.S. Center for Disease Control & Prevention, to build credibility & entice users to open attachments
Cyber Risks

• What can you do?
  • Don’t click links or attachments you receive via email or messaging apps.
  • Don't be fooled by legitimate-looking branding on messages you receive.
  • Cybercriminals will also often use language that conveys urgency; be alert.
  • If you want COVID-19 news, go to WHO & CDC websites. Use best practices by typing URLs into your web browser & use trusted platforms to search
  • Don't put your login credentials into third-party sites unless you're 100% sure you're on the correct site
Notice to your shippers can serve multiple purposes.

On *force majeure*, contract terms are key, but there may be options even if your contract doesn’t contain an explicit clause.

Are you obligated to perform *at all*?

Economic duress ≠ a *force majeure*

- ✓ If you can perform but it will be more expensive, or you won’t make as much (or any) profit, the argument is difficult.
- ✓ If you can’t perform, say due to road closures, the argument is easier.

**Consider:** OTR freight v. dedicated or last-mile operations.

See FAQ: *Force Majeure* Considerations for Transportation Providers.
The Families First Coronavirus Response Act
Emergency Paid Sick Leave Act

• All employers with fewer than 500 employees.
• Available to all employees.
• For the following purposes:
  • Employee is subject to quarantine or isolation order (full pay but capped at $511 per day and $5,110 total)
  • Employee has been advised by a doctor to self-quarantine due to COVID-19 concerns (full pay but capped at $511 per day and $5,110 total)
  • Employee is experiencing symptoms of COVID-19 and is seeking diagnosis (full pay but capped at $511 per day and $5,110 total)
  • Employee is caring for an individual who is (a) under quarantine due to COVID-19 concerns, or (b) has been advised to self-quarantine due to COVID-19 concerns (2/3 pay but capped at $200 per day and $2,000 total)
  • Employee is caring for a son or daughter whose school or place of care has closed due to COVID-19 (2/3 pay but capped at $200 per day and $2,000 total)
  • Employee is experiencing any other substantially similar condition (2/3 pay but capped at $200 per day and $2,000 total)
Emergency Paid Sick Leave Act (Cont’d)

• Leave amount required:
  • For full-time employees: 80 hours
  • For part-time employees: employee’s average number of hours over a two week period
• No carryover.
• Employee may use this paid sick leave first.
• Posting requirement.
• May not discharge, discriminate, or retaliate.
Emergency Family and Medical Leave Act

• All employers with fewer than 500 employees.
• Eligible employees: at least 30 days on the job.
• Eligible Reason:
  • Employee must care for a child whose school is closed or whose
daycare provider is unavailable due to a public health emergency
  • Note: if employee is nevertheless able to work or telework, paid
leave does not apply.
• First 2 weeks - Unpaid
• Remaining weeks - Paid
  • Paid at 2/3 regular rate.
  • Maximum payout is $200/day or $10,000 in aggregate.
  • Employer to receive tax credits to compensate for paying employees.
Recent EEOC Guidance on ADA

• Okay for now:
  • Asking about COVID-19 symptoms
  • Measuring body temperatures
  • Sending an employee with symptoms home
  • Requiring symptom-free before returning
  • Requiring doctor note to return
  • Customer questionnaires
Wage and Hour Issues

• Pay for employees not working
• Pay for salary/exempt workers
• Pay for hourly employees working from home
• Collective Bargaining Agreements/Unionized workforces
OSHA Issues

• An employee’s fear v. a safe workplace
• Section 5(a)(1) - requires each employer to furnish a workplace free from recognized hazards that are causing or are likely to cause death or serious physical harm

• OSHA COVID-19 Guidance
  • Develop a preparedness and response plan
  • Implement basic infection prevention measures
  • Develop procedures for prompt identification and isolation of sick employees
  • Communicate workplace flexibilities and protections
  • Implement workplace controls
WARN Act Issues

• Worker Adjustment and Retraining Notification Act
• Applies to employers with 100+ employees
• Requires 60 day advance written notice of “plant closing” or “mass layoff”
• Plant closing: shutdown causing employment loss for 50 or more employees
• Mass layoff: reduction resulting in employment loss for at least 33% of the workforce and at least 50 employees.
• Exception for non-foreseeable business circumstances
  • Notice still required
• State statutes also
How Will Employers Pay for These Benefits?

• 100% tax credit for amounts paid each quarter

• If the credit exceeds the employer’s total liability under the employer’s portion of Social Security taxes for any quarter, the excess can be refunded to the employer.

• The tax credit, like the leave benefits, sunsets December 31, 2020.
But What About . . .

Group Health Plan Issues
• Furloughed Employees - Actively at work?
• FMLA or Otherwise - Premium payment issues?
• COBRA

COVID-19 Testing
• Some states already have required coverage
• Federal legislation will require coverage
• Diagnostic Testing, Related Services including office visits, emergency room, etc.
• Summary of material modification required?
But What About . . .

High Deductible/Health Savings Account
• Legislation will require payment of testing without cost, co-pay or deductible
• Generally high deductible plan can’t pay for services until deductible met - plan qualification issues
• IRS Notice 2020-15

Short-Term Disability
• Expanded FMLA only for caregiving
• Paid sick leave up to 80 hours
• State Temporary Disability Insurance (California, Hawaii, New Jersey, New York, Rhode Island)
• Private Short Term Disability Insurance
• Check your SDI policies - may provide coverage
But What About . . .

HIPAA Privacy Rules
• Confidentiality of Protected Health Information
• Applies to Covered Entities and Business Associates
• Apply to employers? Maybe!
• Employer-Sponsored Group Health Plan is a Covered Entity!
• HHS Announcement - “Protections of the Privacy Rule are not set aside during an emergency”
• What does that mean to me?
But What About . . .

IRC § 139 - Financial Assistance
• Allows tax-favorable financial assistance to employees
• “Qualified Disaster Relief Payments” that are “reasonable and necessary” and not reimbursed by insurance
• “Declared Emergency” versus “Major Disaster”
• Proceed with caution

Unemployment Benefits
• $1 billion allocated to states by pending legislation
• States can waive waiting periods and actively seeking employment requirement
• PA and others are announcing legislative proposals to expand relief to employers reducing or closing due to COVID-19
• States are reminding employers of the availability of partial benefits for reduced hours and through shared-work programs to keep as many employees working as possible

90-Day Tax Payment Deferral
• Must still file returns April 15
• Defer tax payments up to 90 days
• $1 million individual/$10 million business
• No interest or penalties
FMCSA’s Emergency Declaration
Questions About FMCSA’s Recent Declaration

Exemption from what?

• Parts 390-399 of the FMCSRs (e.g., driver qualification, hours of service)
• No exemption from: drug/alcohol testing, CDL requirement, or hazmat regulations

What is covered?

Commercial motor vehicle operations providing “direct assistance in support of emergency relief efforts related to the COVID-19 outbreaks”
Covered vs. Not Covered

What is Covered?

• Medical supplies and equipment related to the testing, diagnosis and treatment of COVID-19
• Supplies and equipment necessary for community safety, sanitation, and prevention of community transmission such as masks, gloves, hand sanitizer, soap, and disinfectants
• Food, paper products and other groceries for emergency restocking of distribution centers and stores
• Fuel
• Equipment, supplies and persons necessary to establish and manage temporary housing, quarantine, and isolation facilities related to COVID-19
• Persons designated by Federal, State or local authorities for medical, isolation, or quarantine purposes
• Persons necessary to provide other medical or emergency services

Not covered?

• “Routine commercial deliveries”
• Mixed loads containing only a nominal amount of emergency relief added just to qualify for the exemption
Open Questions

• Drug/alcohol testing and medical examinations with clinics closing
• Expiring licenses and registrations with state DMV closures
• Transporting potentially-infected passengers
• Impact of shelter-in-place orders and potential federal preemption
Impact on Air Cargo
Air cargo represents less than 1% of global trade by tonnage but 35% by value, or about $6 trillion a year, Boeing says. Coronavirus turmoil spreads to airline cargo operations. Reuters. Feb. 4, 2020.

"On March 5th we estimated that industry revenues could take a hit of up to $113 billion as a result of what we thought then would be a worst-case scenario." Remarks of Alexandre de Juniac at the IATA Media Briefing on COVID-19. Mar. 17, 2020.
Impact on Air Cargo

2/1  Travel ban for foreign nationals who had been in China

3/11  Travel restrictions to/from European Union (eff. 3/13)

“There will be exemptions for Americans who have undergone appropriate screenings, and these prohibitions will not only apply to the tremendous amount of trade and cargo, but various other things as we get approval.”

3/14  Travel restrictions to/from U.K. and Ireland (eff. 3/16)

3/17  European Union closes borders to all external traffic

3/18  U.S.-Canada border closed for non-essential travel
Impact on Air Cargo

75% Reduction in int’l capacity
20-30% reduction for April/May

Elminating all flights to continental Europe for 30 days
Offering jets for cargo charters

50% Reduction for April/May

70% Reduction for April/May;
Suspended flights to China, all flights to/from Italy; reduced capacity on Asian routes

Long-haul routes reduced up to 90%

90% Reduction over next few months
Impact on Air Cargo

• Relief Measures Proposed by IATA:
  ✓ Loans to airlines
  ✓ Extend credit to airlines
  ✓ Tax relief (e.g. suspension of employer payroll taxes, reduction of income taxes)
  ✓ Waiver of 80-20 rule
  ✓ Reduction of airport charges
  ✓ Financial support for airlines
Impact on Ocean Cargo
Ocean Cargo Impact

• Manufacturing shut down in China and cancelled sailings have created problems with getting intermodal containers repositioned.

• Historically, steamship lines have been very aggressive in assessing container use fees.

• NVOCCs and other clients engaged in arranging transportation with steamship lines should carefully monitor per diem charges and take proactive steps to minimize the likelihood of any such charges.
The Scopelitis COVID-19 Task Force is available 24/7/365:

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