

# Fuel Line Newsletter

September 2021

Issue 21

## Clarification of HOS

**Editor's Note:** We continue to receive inquiries on the recent Hours of Service Waiver and its scope and applicability. We are re-running the article below that initially ran in the latest Membership News E-Blast.

The Federal Motor Carrier Safety Administration (FMCSA) extended the [nationwide hours of service waiver \(HOS\)](#) through **November 30, 2021** and added petroleum products to the list of covered products deemed essential for COVID-19 emergency relief. This means that CDL drivers hauling **certain** petroleum products are now covered by the national HOS waiver. Specifically, the HOS waiver covers drivers hauling gasoline, diesel fuel, jet fuel and ethyl alcohol.

We continue to receive inquiries about the full meaning of qualifying language in the emergency declaration that extends the waiver to drivers “providing direct assistance in support of relief efforts related to the COVID-19.”

The FMCSA clarified which delivery scenarios qualify as “providing direct assistance” to COVID 19 relief efforts. They stated that ensuring that gasoline stations do not run out of supply qualifies as “providing direct assistance.” However, drivers on their **regular supply deliveries** do not qualify for the HOS waiver. Instead, only unscheduled emergency deliveries, such as a delivery required to keep a station from running out of supply qualifies for the waiver.

Also, in the event a company is short of drivers, due to COVID and can no longer keep up with regularly scheduled deliveries such that gasoline stations are in danger of running out of supply, then his/her remaining drivers qualify for the HOS waiver to make those deliveries.

In short, the HOS waiver can **only** be used in extraordinary situations requiring the immediate restoration of essential services, including the supply and sale of gasoline, diesel fuel, jet fuel and ethyl alcohol.

In summary:

- The HOS waiver in the FMCSA Emergency Declaration No.2020 -02 only applies to 40 CFR § 395.3, maximum driving time for property-carrying vehicles.
- The FMCSA National Emergency Declaration is extended through 11:59 p.m. on **November 30, 2021**.

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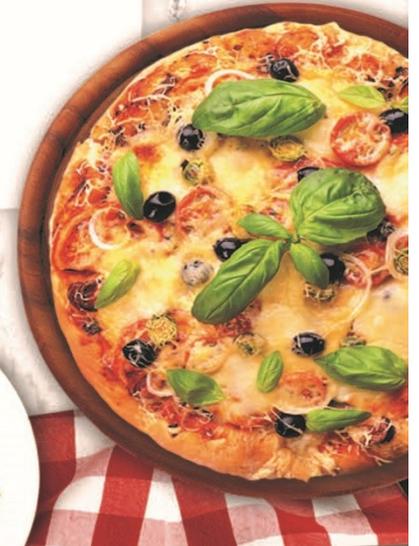
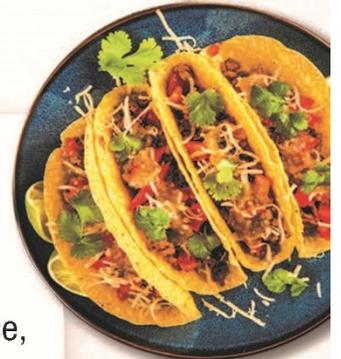
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## Clarification of Hours of Service—Continued from Page 1

- Drivers hauling gasoline, diesel fuel, jet fuel and ethyl alcohol qualify for the HOS waiver provided they are providing *direct assistance* to COVID 19 emergency relief. Direct assistance includes *unscheduled deliveries* necessary to keep a gasoline station from running out of supply or regularly scheduled deliveries that cannot be made due to loss of drivers needed to keep gasoline stations from running out of product.
- Marketers must continue to comply with all other FMCSA regulations including CDL driver drug and alcohol regulations, vehicle maintenance and inspection requirements, etc.
- 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 consecutive hours before the driver is required to return to service.
- Motor carriers that voluntarily operate under the terms of the HOS waiver must report within 5 days after the end of each month their reliance on the Emergency Declaration. To report, motor carriers will access their portal account at <https://portal.fmcsa.dot.gov/login>, log-in with their FMCSA portal credentials and access the Emergency Declaration Reporting under the Available FMCSA Systems section of the page.
- Upon termination of direct assistance to emergency relief efforts related to COVID-19, the motor carrier and driver are subject to all requirements of the FMCSRs, except that a driver may return empty to the motor carrier's terminal or the driver's normal work reporting location without complying with 49 CFR §§ 395.3. 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.

EMA Contact: Mark S. Morgan, Regulatory Counsel [mmorgan@emamerica.org](mailto:mmorgan@emamerica.org)

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## \$1 Billion Proposed for Biofuel Blending

The House Agriculture Committee proposed a \$1 billion USDA program to push E10 and B20 plus blends into the motor and heating fuels market, which Congressional democrats hope to include in a \$3.5 trillion budget reconciliation package. It is double the amount lawmakers proposed earlier this year. The USDA program is expected to offer cost-sharing grants to marketers to upgrade existing UST system infrastructure and pumps to sell higher biofuel blends as well as to build and retrofit traditional and pipeline biodiesel terminal operations and home heating oil distribution centers. Rep. Axne (D-IA) is leading the efforts in the House and Senator Klobuchar is leading efforts in the Senate. Unfortunately, the budget reconciliation package will likely include tax increases on businesses which will impact energy marketers' ability to expand biofuel infrastructure.





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## 5-Step Plan for Employers for Vaccine Mandates

In arguably the most far-reaching move of the COVID-19 pandemic, the Biden administration announced that federal workplace safety officials will soon issue a rule that will require all employers with 100 or more employees to either ensure their workers are



vaccinated or require unvaccinated employees to produce a weekly negative test result before coming to work. Businesses will also be required to give workers paid time off to get vaccinated and to recover from any vaccine side effects as part of the forthcoming emergency rule expected from the Occupational Safety and Health Administration (OSHA). (Editor's Note: On a September 10 webinar, Labor Department officials stated that while employers must provide paid time off for employees to receive and/or recover from the vaccine, employers could require employees to use their existing paid time off for this purpose.) The announcement was part of the Biden administration's "Path Out of the Pandemic," which outlines a six-pronged, comprehensive national strategy to combat COVID-19, which also includes

vaccine mandates for federal contractors ([discussed here](#)) and many additional healthcare workers, and providing further access to federal financial assistance. Here is a summary of the expected rule along with a five-step action plan you can implement immediately:

### Vaccine Mandate for Employers with 100+ Employees

The cornerstone of the plan involves OSHA issuing a vaccine/testing rule that will apply to all private employers with more than 100 employees – which is estimated to impact 80 million workers, or two-thirds of the country's workforce. This rule will take the form of an Emergency Temporary Standard (ETS), which allows the agency to enact regulations it can enforce immediately if a "grave danger" to worker safety is present. Covered employers who ignore the standard could face OSHA citations and penalties of up to \$14,000 per violation. Although it is currently unclear, this likely means a fine of up to \$14,000 for each facility inspected by OSHA where a covered employer has not implemented a mandatory vaccine policy or otherwise complied with the ETS.

### Which Employers Will Be Covered?

As OSHA will be the agency responsible for issuing and enforcing the ETS, all employers covered by the OSH Act must comply with the forthcoming ETS. Many office-based employers do not even realize they fall under this statute and are not accustomed to interacting with OSHA, including financial institutions, insurance companies, law firms, and other professional and technical work environments.

### When Will the ETS Likely be Issued?

While the Biden administration did not set out a timeline or deadline for OSHA to issue the ETS, it is clear that the administration is taking an aggressive approach. It is likely that OSHA will issue the ETS relatively quickly – perhaps in the next several weeks, especially if it has been in the works behind the scenes for some time now. After it is issued, OSHA will likely strive for a timeline of 75 days before it starts enforcing the ETS to remain consistent with the Biden administration's proposed deadline for federal workers to obtain the vaccine. (Editor's Note: On a September 10 webinar, Labor Department officials stated that the ETS will be issued in the "coming weeks," but did not provide a specific date.)

Once issued, the ETS will have immediate effect in the 29 states where federal OSHA has jurisdiction. But in states where the federal government does not have jurisdiction over workplace safety (OSHA-state-plan states such as California, Tennessee, North Carolina, and Kentucky) these agencies will have to adopt the ETS or "just-as-effective measures" within 15 to 30 days.

### How Long Will the ETS Last?

The ETS can remain in place for six months. After that time, it must be replaced by a permanent OSHA standard, which must undergo a formal rulemaking process involving a typical notice-and-comment period.

*Continued on page 13*



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The Energy Marketers of America (EMA) has a new program providing timely value to any organization responding to **emergencies or disasters** in the United States. Energy marketers are front and center in providing fuel in their communities on a daily basis, but when disaster strikes they are ready to respond nationally. While most people are hunkering down to ride out a disaster, petroleum marketers are preparing to deliver fuel where it is needed, and as quickly as possible. Fuel delivery is critical for providing emergency services, restoring utilities, and rebuilding after disasters.

The need for the marketers who participate in the EMA Disaster Fuel Response Program was at its highest level for Hurricane Ida. In fact, when more marketers were needed to fuel the impacted portions of Louisiana, EMA reached out to the states to generate more volunteers, and the response was great. There were 250 EMA member trucks from 16 states in Louisiana, with many continuing the re-fueling effort. To join and make a difference, please click [here](#) or contact Sherri Stone at [ssstone@emamerica.org](mailto:ssstone@emamerica.org).

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## The 7 Biggest Unanswered Questions

The details of what the ETS will include are scarce at this point, leaving many questions unanswered. The seven biggest unanswered questions for employers at this point:

- **Will remote employees be covered?** Unless the ETS specifically addresses remote employees, remote employees likely will not be covered by the emergency rule. OSHA largely avoids addressing safety issues concerning employees working from home. (Editor’s Note: On a September 10 webinar, Labor Department officials confirmed that remote workers not working in contact with others would not be covered by the emergency rule provided they don’t come to the workspace.)
- **How will the 100-employee threshold be counted?** It is unclear whether the 100-employee threshold will be considered on a per location or company-wide basis. Given other standards that mandate certain requirements based on employer size, the threshold likely will be on the total number of workers employed by the company. It is also unclear whether a joint employer analysis will apply to the calculation of employees. (Editor’s Note: On a September 10 webinar, Labor Department officials confirmed that the 100-employee threshold will be counted on a company-wide basis.)
- **Will employers be required to collect proof of vaccination?** Whether the ETS requires employers to collect proof of vaccination may have a huge impact on employers. OSHA’s record retention regulations require that employers preserve and maintain employee medical records for the duration of employment plus 30 years. Therefore, if the ETS requires employers to collect proof of vaccination, you may be required to maintain that record for the duration of the employee’s employment plus 30 years. (Editor’s Note: On a September 10 webinar, Labor Department officials confirmed that information regarding collection and verification of vaccination status will be outlined in the ETS.)
- **What type of testing will be required?** It is unclear whether the ETS will mandate a particular type of COVID-19 test (antigen, PCR, etc.). While the PCR test is more accurate, it takes longer to receive the results and is more expensive.
- **Who Pays for Testing?** While the Plan proposed to improve access to COVID-19 tests – even suggesting that retailers will offer to sell those rapid tests at cost for the next three months – the question of who pays for testing remains unanswered. Generally, however, any testing protocols must comply with applicable wage and hour laws, which provide that time spent on receiving employer-required tests should almost always be treated as compensable. Indeed, the Department of Labor’s COVID-19 and the Fair Labor Standards Act Questions and Answers, published before the Plan’s announcement, provides that employers are required to pay employees for time spent waiting for and receiving medical attention (including COVID-19 testing) at their direction or on their premises during regular working hours under the Fair Labor Standards Act (FLSA). This likely includes required testing occurring on employees’ days off if such testing is necessary to perform their jobs safely and effectively during the pandemic. Regarding the tests themselves, while insurance may cover the cost of tests, several states have laws predating COVID-19 requiring employers to pay for mandatory medical tests or reimburse employees for any such testing. (Editor’s Note: On a September 10 webinar, Labor Department officials confirmed that the ETS will contain information about who bears the responsibility for COVID-19 testing costs.)
- **Will unionized employers be required to bargain over the decision of how to comply with the ETS?** It remains to be seen whether and to what extent unionized employers would be compelled to bargain over the decision to effectuate compliance with the new mandate (or at least the discretionary aspects with respect to vaccines vs. weekly testing) under NLRB doctrine. At a minimum, you should prepare for a corollary obligation to bargain over the effects of that decision on demand. In the meantime, non-union employers should consider the practical implications of compliance from a labor relations perspective, as unions may attempt to leverage aspects of the new requirements for organizing purposes. (Editor’s Note: On a September 10 webinar, Labor Department officials confirmed that the ETS will not change any collective bargaining agreement obligations, similar to all other OSHA standards.)
- **Will the ETS face legal challenges?** As with any broad sweeping policy, any ETS that is adopted is likely to face legal challenges. Governors of many states have already indicated that they intend to challenge any ETS. It is possible that a court could even block enforcement of the emergency rule until the legal challenges are resolved. OSHA will have to prove that there is a “grave danger” to the workers of large employees in order for the ETS to withstand a legal challenge, which may be a difficult task.

Continued on page 15



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**What Should You Do?** Here is a **five-step action plan** you can implement immediately to put yourself in the best position to comply with the expected ETS.

**1. Adopt Procedures for Determining Employees' Vaccination Status**

You should prepare to implement a system for asking employees whether they have been vaccinated and maintain confidential records of employee vaccination status. The Equal Employment Opportunity Commission has indicated that it is generally lawful for employers to ask employees about COVID-19 vaccination status. That's because this simple question alone is not likely to elicit information from the employee about possible medical conditions, an inquiry that otherwise would invoke federal or state disability laws. In most cases, the answer to that question alone may be all you really need.

The ETS likely will require that you not only ask for vaccination status but collect proof of vaccination. If this is the case, you should ask employees to show you documentation from the immunization source showing the date(s) the vaccine was administered. To avoid potential legal issues related to this process, you should affirmatively inform employees that they do not need to provide any additional medical or family history information. In lieu of collecting vaccination records, you can create a confidential list of vaccinated workers in order to minimize legal risks and requirements associated with retaining medical documentation, including checking state laws regarding confidentiality and privacy of medical records. If you decide to collect vaccination records, it is recommended that you treat those records as you would other medical records.

**2. Determine if You Will Mandate the Vaccine or Allow Unvaccinated Employees to be Tested Weekly**

You will also need to determine whether you will adopt a mandatory vaccination policy or allow unvaccinated employees to be tested weekly. For some employers, collecting and tracking weekly test results may burden them such that they decide to adopt a mandatory vaccination policy.

**3. Develop a Plan for Handling Accommodation Requests**

For those employers that adopt a vaccine mandate, develop a robust and clear reasonable accommodation policy to address [religious](#) and disability issues. Take special care to communicate and administer the accommodation process thoughtfully, emphasizing individualized, confidential consideration of each request. You should also be prepared for employees to request an accommodation from the weekly testing requirement – an accommodation process that must be addressed separately from requests for exemptions from any vaccination mandate. For a detailed discussion of this topic, please refer to [An Employer's 3-Step Guide to Responding to COVID-19 Vaccine Religious Objections](#).

**4. Have a Plan for Tracking Test Results**

For employers who allow individuals who are not fully vaccinated to undergo weekly COVID-19 testing in lieu of receiving the vaccine, you should have a plan in place for collecting and tracking test results. If regular employment-related testing is not covered by the employee's health insurance and free testing is not feasible, you will need to review the applicable federal, state, and local employment laws to determine if you must pay for testing. Further, under the federal FLSA, employers must pay nonexempt employees for the time spent undergoing testing during the workday.

**5. Prepare for OSHA Complaints and Inspections**

As a reminder, the vaccination ETS will not displace current compliance duties related to COVID-19 prevention and mitigation. Social distancing, masking, sanitizing, and other safety steps you may already be required to take under existing OSHA and CDC guidance, or state or local public health orders, remain in effect.

Therefore, in addition to the requirements of the new ETS, OSHA likely will ask for your COVID-19 response plan and training records if it receives a complaint or conducts an inspection concerning the vaccine mandate ETS. If not already in place, develop a COVID-19 policy and communicate its requirements to your employees. Train managers and supervisors on what to do and say if OSHA arrives for an inspection. This effort could save your company from paying significant fines.

**Conclusion:** You should begin preparing now for the forthcoming Emergency Temporary Standard by establishing policies for determining employees' vaccination status and procedures for tracking weekly test results. You should also prepare for the possibility that employees may refuse to comply with the requirements of the ETS and begin planning and appropriate response – which would include terminating their employment.

## EMA Opposes “Double Death Taxes”

The Energy Marketers of America (EMA) joined other members of the Family Business Estate Tax Coalition in a letter to Ways and Means Committee Chairman Neal and Ranking Member Brady to state our unequivocal support for the continuation of stepped-up basis.

Stepped-up basis prevents family-owned businesses and farms from being hit with two significant and damaging tax bills when a family member passes away—the capital gains tax on any appreciated assets and the estate tax on whatever is left.

The FBETC opposes any changes to stepped-up basis that would impose this **double death tax** and increase taxes on family-owned businesses and farms—including administratively unworkable “protections” that simply delay destructive tax hikes.

To review the entire letter, go [here](#).

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# CALENDER OF EVENTS

## OCTOBER

October 4-5 (Mon.-Tues.)	EMA Fall Meeting	InterContinental Chicago 505 North Michigan Avenue, Chicago, IL 60611
October 5-8 (Tues.-Fri.)	NACS Show	McCormick Place 2301 S King Drive, Chicago, IL 60616
October 21 (Thur.)	SCCPMA PAC Golf Tournament 8:30 AM - 3:30 PM	Cobblestone Golf Club Blythewood, SC

## NOVEMBER

November 9 (Tues.)	Fishing Tournament	Charleston, SC
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## DECEMBER

December 7 (Tues.)	HazMat Training 8:30 AM - 12 NOON	SCCPMA Headquarters 1809 Gadsden Street, Columbia, SC 29201
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