

# ***WHY* WE NEED TO ELIMINATE THE OVERTIME EXEMPTION TO THE FAIR LABOR STANDARDS ACT TO SOLVE THE DRIVER 'SHORTAGE'**

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**PAY-BY-THE-*MILE***  
**+ REGULATION BY THE *HOUR***

**UNNECESSARY DRIVER *RISKS***

If the Wheels ain't turning, Driver ain't earnin'

# EFFECTS OF THE MOTOR CARRIER EXEMPTION (1966) TO THE FAIR LABOR STANDARDS ACT (1938)

MCE (1966) eliminated  
overtime pay requirement  
for hours worked >40

## Deregulation (1980)

- Great for trucking *companies*
- Bad for Truck *Drivers*
- Real earnings dropped 30%

Fleets' turnover ~ 100% for  
*decades*

- Fleets reliant upon perpetual revolving recruitments
- Established driving schools
- Catered to specific groups: Vets, women, now 18 year olds

Detention delays

Fleets' safety has decreased  
Higher truck speed limits to  
promote "making more money"

Nuclear verdicts common



# ELIMINATE MOTOR CARRIER EXEMPTION TO THE FAIR LABOR STANDARDS ACT

Utilize ELD regulatory  
clock as pay-clock logging  
device

Increases Company  
Drivers' pay

- Competitive with broader labor market

Increases Driver retention  
and recruitment

- Increasing pay on-par with labor market will boost recruitment and support retention

Decreases detention  
delays

Increases fleet safety, CSA  
scores

Prevents nuclear verdicts

# Eliminate the Overtime Exemption to the Fair Labor Standards Act to Solve the Driver ‘Shortage’

*By Alec Costerus*

There has been a lot of discussion about a so-called driver shortage lately. For the past ten years of my trucking career, I’ve heard this mantra every year. The American Trucking Associations’ members, made up of the largest fleets, with 100% turnover commonplace, have continuously been challenged with driver retention. ATA economists fictitiously assert that there is a driver shortage of 80,000 drivers.

The Fair Labor Standards Act is the law that guarantees overtime pay to many workers. However, the same law has a Motor Carriers Exemption, which says that “any employee with respect to whom the Secretary of Transportation has the power to establish qualifications and maximum hours” is not guaranteed overtime pay.

Ironically, the ATA members who cry about a driver ‘shortage’ are the very same ones who asked for the Motor Carriers Exemption to overtime pay citing the difficulty in paying drivers for inclement weather, traffic or accident delays, truck breakdowns, delays at shippers and consignees, and so on. So, the carriers built their business model on a pay-per-mile basis; that difficulty no longer holds true with the full implementation in December, 2019 of electronic logging devices that track the vehicle and hours-of-service by the *second*. If there really was a driver shortage of 80,000, or whatever the real number is, then microeconomics supply-demand would dictate that the price of labor needs to increase to match the labor supply.

The ATA member mega-fleets, to their credit, have tried every trick in the book to feebly address the driver shortage. They’ve tried military veterans’ transition programs, actively hiring overseas workers and sponsoring work visas to drive, driver hiring sign-on bonuses, and advocating members of Congress for the need to hire kids as young as 18 to drive big-rigs. Amazon even wants to hire pot-heads as long as they don’t toké and drive.

For the past several years, driver retention has become an increasing bigger problem. First, US hours-of-service rules limit over-the-road long-haul truckers to driving 70 hours in 8 days. Beyond

those hours, there's the waiting at loading docks, maintenance, fuel-ups, and a myriad of other job-related activities that are performed off-the-clock in order to preserve their precious hours-of-service. Yet, despite those long, arduous hours couped in a small truck cab, away from home and family, company drivers average paltry earnings.

According to ZipRecruiter, as of May 2, 2021, the average annual pay for a Truck Driver in the United States is \$50,909 a year. Just in case you need a simple salary calculator, that works out to be approximately \$24.48 an hour. But this math is as equally flawed as the exemption. The \$50,909 figure assumes only 2,079 hours in the year, which is a normal 52-week year at 40 hours per week.

When a driver works 70 hours in 8 days, assuming two weeks off, that driver is actually working 3,071 hours. That reduces his hourly pay to \$16.58, just barely above many states' minimum wage. And when measured against Walmart, McDonald's, and Amazon, there's little to no economic incentive for anyone to drive as a company driver – and that's before the other externalities such as benefits, living accommodations, access to home, friends, and family are considered. This is why the ATA and its member meg-fleets have to own the very driver 'shortage' that they themselves created.

The easy, simple, economically viable and socially equitable solution is to eliminate the overtime pay exemption under the FLSA. Using the example above, the same company driver who worked 3,071 hours in a year would bolster their income to \$87,320, much more commensurate with the hours worked and the living conditions endured. Seriously, trying to figure out why there's a driver 'shortage' is no mystery; it's pay, stupid! And it all stems from the FLSA exemption. It's long past the time that truck drivers need to carry the economic burden on their backs. And if the driver 'shortage' has taught us anything, if there is insufficient remuneration, there will continue to be a driver retention problem.

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# *Why We Need to Eliminate the Overtime Exemption to the Fair Labor Standards Act to Solve the Driver ‘Shortage’*

*By Alec Costerus*

I previously wrote an article, *Eliminate the Overtime Exemption to the Fair Labor Standards Act to Solve the Driver ‘Shortage’* in which, as the title suggests, eliminating the Motor Carrier Exemption for overtime under the FLSA to solve the so-called driver shortage. In this article, I continue the previous discussion of *how* to discuss the *why*.

The Fair Labor Standards Act (FLSA) was enacted in 1938 at 29 USC §203. The Motor Carrier Exemption, which exempts motor carriers from overtime pay, came in a 1966 amendment. Perhaps there was once upon a time a place where the exemption was justified. During the ensuing 55 years, technology has made the exemption outmoded, the disproportionate labor market inequity is outdated, and the perpetual driver turnover at large fleets is out-of-touch with small and private fleets. That blatant disparity – 94% vs 14% turnover – should clearly demonstrate that it’s the business model that has a shortage: it’s a failed model!

When a driver is paid by-the-mile yet regulated by *hour*, there will be a natural disconnect as the financial incentives are constrained by the clock. Truckers in the US are regulated by a set of hours-of-service rules that limit driving to 11 hours per day with up to 70 working hours in an 8-day period. This inherent regulatory disconnect breeds unnecessary driver risks, instills driver abuse of their no-driving hours, undermines driver recruitment and retention, and poses a public safety road hazard.

For example, because “when the wheels ain’t turnin’, the driver ain’t earnin’,” when a driver confronts inclement weather, he/she must park the truck. There’s a financial incentive for the driver to push on, even when conditions might otherwise suggest prudence.

When a truck breaks down, blows a tire, overheats, or anything else as often happens, the wheels stop and the driver doesn’t get paid. The driver goes “off-duty” to preserve his available hours.

When the truck shows up for an appointment to pick up a load at a shipper or arrives at the consignee for delivery, the driver similarly goes unpaid while being detained – sometimes for hours. Again, the driver goes “off-duty” to preserve his available hours. Without a financial cost associated with detention at the dock, the carriers have no incentive to contact the shipper or consignee to ascertain the reason for the hold-up. If the carriers were required to pay the driver for all “off-duty” and “on-duty, not driving time,” then one can rest assured that the carriers would

soon figure out that detention costs them money and would add a freight ticket surcharge for detention. Detention problems would be cured virtually overnight.

And while we're at it, let's put a proper value on that detention time. The equivalent 60 mph truck at today's \$3/mile freight rate yields a \$180/hour cost. If carriers charged shippers and receivers for all time that a truck is on-site, that truck would get loaded or unloaded right away. The inefficient notion of "first-come, first served" is predicated on sufficient warehouse staff, but that cost of inefficiency is borne entirely by the driver.

The carriers assert that the on-duty nature of the job and its remuneration is baked into the mileage rate. Moreover, carriers have argued that they cannot know where the rig is, how many hours-of-service the driver has, and they are unaware of traffic and road conditions. None of these are true today. Since full implementation of electronic logging devices in December 2019, fleets know exactly the vehicle's location, know the driver's available hours-of-service, and telematics provide the capability to see the precise operating conditions of the vehicle.

Consider the driver 'shortage' itself. With a historical average turnover hovering just shy of 100% among ATA member fleets, it's clear that there is a driver *retention* issue – not a driver shortage. In order to curb the revolving door and the perpetual introduction of new inexperienced drivers, drivers need to be compensated more justly and equitably compared to other labor markets where overtime pay is not only expected, but also standard practice under the law. Why should transportation be exempt?

When we have a perpetual revolving door of trainees and new drivers, is that what we want – inexperienced truck drivers at the helm of an 80,000 pound rig? Here in Colorado, we had an inexperienced driver descending I-70 in April, 2019 who claims he lost his brakes. His inexperience did not allow for him to utilize truck runaway ramps that could have saved four innocent victims who he killed, injuring another six, while damaging 24 cars and four trucks. Our road safety demands that we shift the pay paradigm to ensure that experienced drivers are fairly compensated and thus retained. Motor carriers should praise this curb to nuclear verdicts as well!

Both global responsibility for environmental sustainability and our national security require a smarter business model. As an owner-operator, I always drove "as slow as possible, and only as fast as necessary" to maximize profits. The same holds true for minimizing emissions and reducing fuel consumption. If a driver is paid by the clock, then the incentive to whiz through construction zones, tailgating, driving aggressively in traffic, etc. all disappear. And that instills better driving behavior that will reap benefits far beyond what little gains can be had through advanced technologies.



Specifically, the ELD becomes the time clock for both pay purposes and hours-of-service regulatory compliance, in unison. When the driver is in the sleeper berth, then the pay-clock is stopped. For all other lines, “on-duty,” “driving,” and “off-duty, not driving,” the driver should get paid. Also, as part of my scheme, drivers would be paid an hourly rate for on-duty, not driving. For any workweek in which that aggregate of driving + on-duty hours exceeds 40 hours, then the hourly rate is overtime. And for any week, in no event shall the combined driving + on-duty + off-duty pay be less than the minimum wage plus overtime, as applicable. The way I envision this is: as long as the driver is responsible for the rig, whenever a driver is away from home or not asleep, he/she is at work, ready and able to work, and entitled to get paid.

Here’s why: while driving, it’s traditionally been to go as hard and as fast as possible because one’s earnings were predicated on how many miles in a day one could travel. Often this was too fast, too dangerous, too aggressive, and too stressful for the driver. “On-duty” now becomes a payable period, so detention at a loading dock will cost the carrier, which in turn will financially motivate wasteful detention reduction. No longer will drivers solely bear the burden of detention while the carrier gets a free variable labor cost. Lastly, “off-duty, not driving” will encompass those historical periods where the driver awaits the next dispatch (sometimes for days); now the carrier must pay the driver to sit and wait, through no fault of his own, while the dispatcher seeks to locate the next load.

Albert Einstein said that “doing the same thing over and over and expecting different results” is the definition of insanity. Our current transportation business paradigm has failed America and its hard-working professional drivers. The ATA-member mega-fleets have done everything possible to perpetuate the driver ‘shortage’ myth as a disguise for their own ineptitude to address a problem that they – with Congress’ help – created. It’s overdue to deliver a more equitable, just, effective solution to the truck drivers who keep America rolling. Making small changes to tweak the current business model is like repositioning the chairs on the deck of the *Titanic*; we need a wholesale restructuring akin to Deregulation in 1980.



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