October Legislative and Regulatory Report

LEGISLATIVE

Worker Classification Legislation Introduced in Congress

Members in both the House of Representatives and the Senate recently introduced legislation seeking to amend several provisions pertaining to worker classification within federal labor laws, including the Fair Labor Standards Act. The Worker Flexibility and Small Business Protection Act would incorporate the ABC test for worker classification into the FLSA. Under this provision most workers will automatically be presumed to be employees unless they meet the test's stringent requirements proving otherwise.

The bill would strengthen the definition of a covered employee under the FLSA to include those formerly classified as independent contractors. It further proposes a new section under the FLSA titled, "right to flexibility." This provision states that employees previously classified as independent contractors have the right to maintain the same scheduling flexibility—such as timing, duration, and location of the work as well as the ability to perform work for any entity other than the employer, including direct competitors—they had before, for the duration of their employment. The legislation specifically references transportation entities, including cargo transportation companies, stating their workers will be considered employees and must be compensated for their time "immediately before performing labor, that is spent waiting for, receiving, reviewing, considering, accepting, and transporting themselves to perform it."

The misclassification of workers would constitute a standalone violation under the FLSA, subject to civil penalties of $10,000 for the first violation and $30,000 if repeated. The bill also directs the Secretary of Labor to assign each employer a labor law compliance rating based on their number and degree of violations within the past three years, which must be posted publicly on the employer's website. Several advocacy groups have endorsed the legislation including the AFL-CIO, National Employment Law Project, and the Economic Policy Institute.

The Senate legislation is sponsored by Senators Brown (D-OH), Murray (D-WA), and Cardin (D-MD) and was referred to the Senate Committee on Health, Education, Labor, and Pensions. The House bill was introduced by Representative DeLauro (D-CT) and referred to the House Committees on Education and Labor, Oversight and Reform, House Administration, and Ways and Means. While the proposal is unlikely to move forward in the current Congress, it could be reintroduced once the 117th Congress is seated in January 2021.

REGULATORY

Parties File Response Briefs in FMC Complaint Alleging Unfair Chassis Practices

On October 5, the Intermodal Motor Carrier Conference filed a memorandum of law in opposition to respondents' motion to dismiss IMCC's formal complaint with the Federal Maritime Commission. The Ocean Carrier Equipment Management Association, Consolidated Chassis Management, and 10 international ocean carriers submitted the motion in September in response to IMCC's allegations of unreasonable conduct in violation of the Shipping Act of 1984.

IMCC's opposition brief counters respondents' claim that FMC lacks authority over their practices pertaining to chassis usage, noting that chassis choice, price, and interoperability directly relate to FMC's jurisdiction over through-transportation of property as well as port and terminal efficiency. IMCC notes that FMC has previously addressed the relationship between ocean carriers and truckers in its proceedings, such as the recently adopted Demurrage and Detention Policy Statement. Specifically, IMCC argues respondents' conduct violates Section 41102(c) of the Shipping Act which regulates unfair and unjust practices relating to inland through-transportation, including transfers of cargo containers at ports and inland terminals. The filing further contends that respondents' claim that this section only applies to terminal and forwarding services predates the Act's statutory grant of authority over inland intermodal through-transportation.

Respondents subsequently submitted a brief reiterating their arguments to dismiss IMCC's complaint on October 13. The groups contend that IMCC's filing failed to substantiate FMC's authority over the relationship between truck drivers and ocean carriers. Respondents maintain that FMC has no jurisdiction over the operation of motor or rail carriers providing inland transport under merchant haulage, and that its authority over terminal efficiency does not extend to the complaint's allegations pertaining to chassis usage. Further, respondents reference court interpretations stating that Section 41102(c) of the Shipping Act only applies to terminal and forwarding services and disputes IMCC's claim that Congress revised the section to incorporate the transportation of property. In response to IMCC's claim that conferences of ocean carriers (in addition to individual ocean carriers) are subject to this section, respondents note that OCEMA and CCM are not considered conferences by FMC.

The designated Administrative Law Judge is reviewing the motion to dismiss and subsequent responses, but FMC has not yet announced when a decision is expected.

FMC Initiates Investigation into VOCC Billing Practices

The Federal Maritime Commission published a notice of inquiry to investigate Vessel Operating Common Carrier billing practices. FMC initiated the proceeding as a result of

comments received to its Interpretive Rule on Detention and Demurrage. Several stakeholders alleged that VOCCs have used a broad definition of the term "merchant" in their bills of lading to unjustly charge entities, including freight forwarders and truckers, that have not directly contracted with the VOCC. FMC will examine whether VOCCs have enforced the terms of their bills of lading to collect freight rates and charges, equipment charges, or detention and demurrage charges from third-party entities with no beneficial interest in the cargo.

FMC's notice of inquiry specifically requests comments on: 1) how VOCCs apply the term "merchant" in their bills of lading; 2) whether this applied definition subjects third parties outside carriers' contracts to joint or several liability; and 3) whether carriers have enforced this definition against third parties that have not consented to the terms and conditions of the bill of lading. Comments are due November 6, 2020.