January Legislative and Regulatory Report

LEGISLATIVE

Senate Confirms Pete Buttigieg as U.S. Department of Transportation Secretary

On January 21, Pete Buttigieg sat for his confirmation hearing to become Secretary of the U.S. Department of Transportation before the Senate Commerce, Science, and Transportation Committee. The former South Bend, Indiana mayor and Democratic presidential contender testified on the need for robust infrastructure investment to spur economic recovery and noted that such investment is a "generational opportunity."

During the hearing, Senator Roy Blunt (R-MO) noted that a patchwork approach to trucking regulation is counterproductive for the industry and cited California's meal and rest break rules as problematic when applied to interstate commerce. He applauded the Federal Motor Carrier Safety Administration's decision under Secretary Chao's leadership that California's regulations are preempted by federal hours of service and asked then-Secretary-designate Buttigieg if he agreed with this assessment. In response, Mr. Buttigieg said he would need to familiarize himself with the case law but, in general, he recognized the importance of consistency and predictability – and the need to square these goals with the USDOT's mission of safety.

The Senate Commerce, Science, and Transportation Committee approved Mr. Buttigieg's nomination on January 27, and by a vote of 86-13, the Senate approved his nomination on February 2.

REGULATORY

Biden Issues Regulatory Freeze, Repeals Previous Administration's Executive Orders

On January 20, the White House published a "regulatory freeze pending review" memorandum requesting federal agencies refrain from issuing new rulemakings until they have been reviewed and approved by President Biden's newly designated department heads. The memorandum also asked agencies to delay by 60 days the effective date of any recent rules that were published in the Federal Register or that have been issued but have not yet taken effect.

The same day, President Biden also signed an Executive Order repealing several Trump Administration policies. Among them was a January 2017 EO titled "Reducing Regulation and Controlling Regulatory Costs," which directed agencies to identify at least two existing regulations to be eliminated to offset the cost of each new regulation. Several lawsuits had previously challenged the Trump Administration's EO, claiming it exceeded

constitutional authority and limited agencies to solely consider cost rather than the public benefits of new or existing rules.

A separate EO issued by President Biden, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," revokes two Trump Administration orders issued in 2017 and 2020 regarding environmental reviews and permitting for infrastructure projects. Specifically, the 2017 EO, known as the One Federal Decision rule, prompted the Council on Environmental Quality's recent final rule revising requirements under the National Environmental Policy Act. In revoking the EO, President Biden directs the Director of the Office of Management and Budget and the Chair of the CEQ to consider whether a replacement of the NEPA rule should be issued. President Biden also repealed the Trump Administration's 2020 EO directing agencies to accelerate certain infrastructure investments through emergency NEPA procedures to strengthen the nation's economic recovery in the wake of COVID-19.

FMCSA Proposal Clarifies "Yard Moves" Definition Under HOS Rules

On January 4, the Federal Motor Carrier Safety Administration proposed regulatory guidance concerning the documentation of "yard moves" under its hours-of-service rules. The revised guidance would clarify examples of commercial motor vehicle movements that qualify as "yard moves" and allow drivers to record such operations as on-duty not driving time rather than driving time.

According to the proposed guidance, examples of properties that qualify as yards include, but are not limited to: an intermodal yard or port facility; a motor carrier's place of business; a shipper's privately-owned parking facility; and a public road, but only if public access is restricted through traffic control measures. FMCSA requested stakeholder feedback on the estimated benefits of its proposed guidance and examples of other properties or situations to include. Since this proposal was issued prior to January 20, the publication of a final guidance document could be suspended or delayed pending review by FMCSA's new Deputy Administrator Meera Joshi.

Comments are due February 3, 2021.

FMC Judge Denies Ocean Carriers' Appeal in Chassis Case

In August 2020, the Intermodal Motor Carriers Conference filed a formal complaint with the Federal Maritime Commission alleging that Ocean Carrier Equipment Management Association, Consolidated Chassis Management, and 10 international ocean carriers denied trucking companies chassis choice and inflated prices for the use of chassis at ports across the country, resulting in $1.8 billion in overcharges within the past three years. Respondents filed a motion to dismiss the complaint, though this motion was denied on November 18, 2020. Subsequently, respondents submitted a motion seeking leave to file an interlocutory appeal. This motion was also denied on January 29, allowing the case to proceed.

In denying respondents' appeal, FMC's administrative law judge reaffirmed the Commission's jurisdiction over conferences of carriers as well as issues between ocean carriers, truck drivers, and shippers. The order stated that ocean carrier agreements — which implement FMC regulations and practices related to receiving, handling, storing, and delivering property — are under FMC jurisdiction if they violate the Shipping Act. Respondents also argued the complainant failed to join third parties to the case "without whom relief cannot be granted," referring to intermodal equipment providers. While the judge acknowledged that it remains unclear whether intermodal equipment providers are necessary parties, the order concluded that "this factor does not support granting leave to appeal this ruling."

The decision directs respondents to file their response to IMCC's original complaint by February 18. The parties must also submit a joint status report with a proposed schedule by March 1.

USITC Announces Final Phase of Investigation Following Dept. of Commerce's Preliminary Determination

Following a petition filed by the Coalition of American Chassis Manufacturers, the U.S. International Trade Commission and Department of Commerce initiated antidumping and countervailing duty investigations into imported chassis from China. During its preliminary investigation, USITC determined in September 2020 that there was a reasonable indication that the domestic chassis industry is "materially injured" by chassis imports from China.

Commerce's preliminary affirmative countervailing duty determination, issued on January 4, 2021, found that countervailable subsidies were provided to intermodal chassis producers and exporters from China at a rate of 38.52 percent. In publishing its determination, Commerce directed U.S. Customs and Border Protection to begin collecting cash deposits on entries of chassis and parts thereof from China.

Commerce's preliminary antidumping determination is due February 25, 2021, with its final countervailing duty determination expected in March and final antidumping determination in May. USITC will hold its final phase of investigation hearing on March 16, 2021.

California Supreme Court Holds Dynamex Decision Applies Retroactively

The California Supreme Court's April 2018 decision in Dynamex Operations West, Inc. v. Superior Court significantly altered the factors for determining whether workers in the state were considered independent contractors by establishing the stringent "ABC test." In its January 14 ruling on Vazquez v. Jan-Pro Franchise International, Inc., the Court concluded that the Dynamex ruling applies retroactively.

Jan-Pro argued reliance on the previously applicable Borello test was reasonable as businesses could not have anticipated the Court would adopt the ABC test, therefore requesting the judge apply the exception to retroactive application for rulings that

undermine fairness or public policy. While retroactive application is generally common in the state's judicial decisions, the Court reasoned that the three-pronged test closely aligned with the history and purpose of the "suffer or permit to work" standard in California's wage orders. In rejecting Jan-Pro's case, the Court explained retroactivity has been applied in suits regardless of a litigant's "complete foresight into the court's decisions that undermine the party's prior understanding." It further clarified the Borello test addressed workers' compensation rather than obligations imposed by wage orders, to which the ABC test applies.

The recent decision expands liability for companies facing misclassification lawsuits that were not finalized prior to April 2018, though the Court noted it will only affect a limited number of cases due to the applicable statutes of limitations.

FMCSA Proposes Pilot Program to Analyze Sleeper Berth Flexibility

On January 14, the Federal Motor Carrier Safety Administration posted a notice on its website requesting comments on a potential three-year pilot program that would allow split sleeper berth periods of 6/4 and 5/5. Currently, federal hours-of-service regulations limit drivers to 8/2 and 7/3 sleeper berth splits. The proposal has not yet been published in the Federal Register and is therefore subject to the Biden Administration's regulatory freeze. At this time, it remains unclear if the new Administration intends to move forward with the proposed pilot program.

The Flexible Sleeper Berth Pilot Program would be comprised of 200-400 motor carriers or commercial driver's license holders who operate commercial motor vehicles equipped with sleeper berths and regularly use the sleeper berth provision. Baseline data would be collected for 90 days during which drivers will be instructed to operate under the existing HOS regulations. After this period, participating drivers would receive a temporary exemption from current sleeper berth requirements for 6-12 months, allowing them to divide their 10 hours of off-duty time into a 6/4 and 5/5 split.

FMCSA plans to collect driver metrics (including crashes, safety critical events, fatigue levels, caffeine consumption, and duty status) for the duration of the study to analyze participants' safety performance.

DOL Finalizes Rule on Independent Contractor Status; Rule Remains Under Review by Biden Administration

In early January, the Department of Labor finalized its rule clarifying the interpretation of independent contractor status under the Fair Labor Standards Act. The rulemaking, originally proposed in September 2020, adopts changes to the five-factor economic realities test to determine worker classification. The final rule is currently scheduled to take effect on March 8, though it is under review by the Biden Administration and will likely be delayed or revised.

The DOL's multifactor test relies on two core elements to determine an individual's economic dependence on an employer: 1) the nature and degree of the worker's control

over the work; and 2) the worker's opportunity for profit or loss. It will also consider three additional factors carrying less weight, including the amount of skill required for the work, the degree of permanence of the working relationship between the individual and the potential employer, and whether the work is part of an integrated unit of production.

In response to requests by the American Trucking Associations and an unnamed logistics provider, the DOL's Wage and Hour Division published an opinion letter addressing the rule's impact on owner-operators, noting that requirements to ensure drivers comply with certain legal and safety standards do not jeopardize their independent contractor status. The letter, issued on January 19, clarified that companies may require independent contractors to install mandatory safety training and equipment such as dash cams, speed limiters and driver monitoring systems. It further concluded that such owner-operators are likely independent contractors due to their ability to control key aspects of their work and their opportunity for profit or loss based on personal initiative and investment.

On January 26, the DOL's Wage and Hour Division announced several opinion letters issued the day before President Biden's inauguration had been withdrawn, including the trucking-related guidance. DOL stated the letter was issued prematurely as it was based on rules that have not yet gone into effect.