



April Legislative and Regulatory Report

LEGISLATIVE

House Passes ABC Test Worker Classification Legislation

The Protecting the Right to Organize Act passed the House on March 9 by a 225-206 vote. The vote was mostly along party lines, though five Republicans joined Democrats in supporting the bill and one Democrat voted to oppose. Though Democrats narrowly control the Senate, many believe the PRO Act will lack sufficient bipartisan support to overcome a filibuster.

The legislation would establish the ABC test for worker classification under the National Labor Relations Act. Under the PRO Act, workers would be considered employees unless: (A) the individual is free from control and direction in connection with the performance of the service; (B) the service is performed outside the usual course of the business of the employer; and (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed. The bill would also make employee misclassification a standalone violation of the NLRA subject to civil penalties.

On March 31, President Biden announced the framework for the Administration's American Jobs Plan, proposing over \$2 trillion for investments in a wide range of infrastructure improvements and workforce development, among other policy priorities. The plan urges Congress to pass the PRO Act and recommends a \$48 billion investment in workforce development infrastructure and worker protection, including "funding to strengthen the capacity of our labor enforcement agencies to protect against discrimination, protect wages and benefits, enforce health and safety safeguards, strengthen health care and pensions plans, and promote union organizing and collective bargaining."

Likely in response to the PRO Act, Republican Members in both chambers introduced their own legislation related to worker classification. The Modern Worker Empowerment Act seeks to amend the Fair Labor Standards Act to codify the common-law definition of "employee." The common-law test relies on several factors focused primarily on control and independence, thereby narrowing the definition of "employee" and providing more flexibility for independent contractor classification.

Rep. Stefanik (R-NY) introduced the Modern Worker Empowerment Act in the House. H.R. 1523 has seven Republican cosponsors and was referred to the House Committee on Education and Labor. The Senate bill was introduced by Sen. Scott (R-SC) and three Republican cosponsors. S. 526 was referred to the Senate Committee on Health, Education, Labor, and Pensions.



Stop Underrides Act Reintroduced in Congress

The Stop Underrides Act directs the U.S. Department of Transportation to issue rulemakings updating its existing rear underride guards and requiring front and side underride guards on all new trucks. The legislation also mandates annual inspections of underride guards and periodic review of underride standards.

The bill's proponents include safety organizations such as the Commercial Vehicle Safety Alliance, the Institute for Safer Trucking, Citizens for Reliable and Safe Highways, and Advocates for Highway and Auto Safety. Supporters assert that underride guards protect automobile occupants when cars collide with tractor-trailers, citing crash studies conducted by the Insurance Institute for Highway Safety.

The American Trucking Associations, Owner-Operator Independent Drivers Association, and other industry stakeholders have voiced opposition to the Stop Underrides Act. Opponents cite the lack of data demonstrating the real-world effectiveness of the bill's provisions, noting the proposed standards have not been evaluated beyond test tracks and several federal agencies have stated the need for additional research prior to implementing new requirements. Furthermore, stakeholders expressed concern that the legislation's industry-wide mandate would be costly to implement and does not account for the diversity of the trucking industry. Opponents also argue that the legislation fails to recognize the value of existing, proven safety technologies – such as automatic emergency braking and lane keeping – warning that the bill could divert ongoing private investments in such technologies toward compliance with the proposed underride guard requirements.

Previous iterations of the Stop Underrides Act included retrofit provisions requiring the Secretary of Transportation to issue a rule within two years, mandating the installation of underride guards that meet the bill's standards on trailers, semi-trailers, and single unit trucks manufactured prior to the rule's effective date. These sections have been removed from the 2021 legislative text, so its requirements would only apply to new trailers and single unit trucks.

The House bill was introduced by Rep. Cohen (D-TN) and was referred to the House Committee on Transportation and Infrastructure. H.R. 1622 has 22 Democratic cosponsors. Sen. Gillibrand (D-NY) introduced the Senate companion. S. 605 has 12 bipartisan cosponsors and was referred to the Senate Committee on Commerce, Science, and Transportation.

REGULATORY

DOL Proposes Withdrawing Trump Administration's Independent Contractor Rule

The Department of Labor's Wage and Hour Division issued a notice of proposed rulemaking on March 11 to withdraw the previous Administration's final rule on independent contractor status under the Fair Labor Standards Act. The rule sought to revise the economic realities test used to determine worker classification, elevating two core factors above all others: the nature and degree of the worker's control over the work



and the worker's opportunity for profit or loss. Proponents of the final rule praised its provisions protecting the independent contractor model and said its standards would provide increased consistency and clarity for workers, employers, and courts. DOL's recent notice asserts that the rule's emphasis on two core factors represents a departure from WHD's longstanding approach. The NPRM further claims that the revised economic realities test is inconsistent with previous court positions, which held that no single factor should determine worker status. Moreover, DOL argues that, though the rule intends to provide clarity, it introduces new concepts and changes to the existing economic realities test that could result in confusion and inconsistent application by WHD and courts. The NPRM also questions whether the rule's costs, transfers, and benefits were fully and accurately considered. DOL notes that a rule increasing the number of independent contractors may not accomplish the FLSA's purpose of providing protections to workers and could have a disproportionate impact on low-wage and vulnerable workers. The NPRM states that withdrawing the rule would not be disruptive as it has not yet taken effect.

Comments are due April 12, 2021.

Ocean Carriers Deny IMCC Allegations; FMC Judge Issues Proceeding Schedule

Ocean Carrier Equipment Management Association, Consolidated Chassis Management, and 10 international ocean carriers filed responses to the Intermodal Motor Carriers Conference's complaint to the Federal Maritime Commission alleging that the respondents denied trucking companies chassis choice and inflated prices for the use of chassis at ports across the country. The replies filed by respondents stated that IMCC's complaint was "an amalgam of conclusory statements, vague and undefined terminology, select quotations from hearsay documents and legal conclusions," imposing an undue burden on respondents to address the claims. The ocean carriers generally denied all claims and requested that the FMC dismiss the complaint with prejudice. Furthermore, respondents reiterated their claims that: FMC lacks subject matter jurisdiction and jurisdiction over respondents; the complainant failed to join indispensable parties, failed to state a claim upon which relief can be granted, and failed to allege sufficient facts to state a claim for relief.

On March 1, the parties submitted a joint status report and proposed discovery schedule, which was accepted by the FMC administrative judge. While the original deadline to submit discovery disputes was March 15, the parties requested that the Scheduling Order be amended to provide the complainant and respondents additional time to negotiate the scope of discovery. The judge granted the joint request, extending the deadline for the submission of discovery disputes to April 16. This extension will not impact any other deadlines in the proceeding. The proceeding schedule requires discovery be completed by October 15 and motions for a summary decision are due October 29, 2021.



Department of Commerce Issues Final Countervailing Duty Determination and Preliminary Antidumping Determination in Chassis Investigation

In response to a petition filed by the Coalition of American Chassis Manufacturers, the U.S. International Trade Commission and Department of Commerce initiated separate antidumping and countervailing duty investigations into imported chassis from China. Commerce issued its preliminary antidumping determination on March 4, concluding that certain chassis and subassemblies thereof from China are being sold in the United States at less than fair value. The investigation found that, for the period between January 1 and June 30, 2020, the estimated weighted average dumping margin was 188.05 percent and the estimated weighted average dumping margin adjusted for export subsidies was 182.28 percent. Commerce will direct U.S. Customs and Border Protection to collect cash deposits from importers equal to this adjusted weighted average amount. Additionally, CBP will suspend liquidation of all imported subject merchandise from China, thereby delaying the final calculation of duties pending the outcome of the investigations. Once USITC and Commerce make their final determinations, CBP will finalize liquidation and issue refunds or request additional duties if needed (as the previously collected cash deposits are based on estimated amounts). Commerce will make its final determination no later than May 11. USITC's final determination is due June 25, and, if affirmative, antidumping duty orders will be issued by July 2.

On March 16, Commerce issued its final affirmative countervailing duty determination. The investigation found that countervailable subsidies are being provided by the Chinese government to producers and exporters of certain chassis and subassemblies from China. Commerce determined that there was an estimated countervailable subsidy rate of 39.41 percent. Accordingly, CBP will continue to suspend liquidation of all imports of subject merchandise from China and collect cash deposits at this rate. If USITC issues a final affirmative injury determination, Commerce will subsequently issue a countervailing duty order at a final subsidy rate of 39.14 percent. USITC's final countervailing duty determination is due April 29 and, if affirmative, orders will be issued by May 6.