# June Legislative and Regulatory Report

## LEGISLATIVE

### Ocean Shipping Reform Act Signed into Law

On June 16, President Biden signed the Ocean Shipping Reform Act of 2022 into law. The Ocean Shipping Reform Act was a major priority for President Biden in an effort to mitigate supply chain challenges, increase competition, and reduce costs for American businesses and consumers. The Senate first passed the bill by voice vote in March, the House subsequently passed the Senate version of the legislation with no amendments in June by a bipartisan 369-42 vote.

Among other provisions the OSRA: requires ocean carriers to ensure detention and demurrage charges align with federal regulations; places the burden of proof regarding the reasonableness of detention or demurrage charges on ocean carriers instead of the invoiced party; and limits ocean carriers' ability to deny goods at ports that are ready to be exported.

The OSRA also requires ports, marine terminal operators, and chassis owners with a fleet of more than 50 chassis that supply chassis for a fee to submit data on the total street dwell times and the percent of chassis that are out of service. The law requires the Federal Maritime Commission and the Transportation Research Board to conduct a study to develop best practices for chassis pools. These best practices should assess challenges to implementing chassis pools, provide potential solutions, and identify communications and data sharing methods.

The OSRA includes several provisions related to the FMC. The law provides FMC with increased authority to regulate harmful shipping practices, requires ocean carriers to provide FMC with data on total import and export tonnage per vessel, instructs FMC to maintain an Office of Consumer Affairs and Dispute Resolution Services to help resolve cargo shipment disputes, and directs FMC to issue an information request regarding whether supply chain congestion has caused an emergency impacting the competitiveness and reliability of the international ocean transportation system.

The World Shipping Council has expressed frustration with the OSRA, stating that the industry already has a competitive market and that supply chain disruptions will continue to exist until the unprecedented level of consumer demand is remedied. Other organizations, such as the American Trucking Associations and the American Association of Port Authorities, have supported the law, noting that it will balance the power between shippers and carriers and improve supply chain fluidity.

### House Introduces Legislation to Repeal Federal Excise Tax on New Trucks

This month, Rep. LaMalfa (R-CA) introduced H.R. 8116, the Modern, Clean, and Safe Trucks Act of 2022, legislation to repeal the federal excise tax on the purchase of new heavy-duty trucks, semitrailer chassis, tractors, and trailers.

The excise tax only applies to the purchase of new trucks, which the bill sponsors assert creates financial incentives to buy used equipment. They note that more than half of the Class 8 trucks in use are over 10 years old and lack the environmental and safety technologies provided by new equipment. The legislation aims to reduce the cost of new equipment and encourage the purchase of safer and more environmentally friendly trucks with the latest technologies. Additionally, the bill sponsors state that the legislation would help address supply chain challenges and shortages by lowering costs for businesses and consumers.

The federal excise tax was first established in 1917 to raise revenue for America's involvement in World War I. The Senate attempted to repeal the tax in 1975; however, the House failed to include it in their final tax bill. Since then, the federal excise tax has increased to 12 percent, which is estimated to add between $12,000 and $22,000 to the cost of a new heavy-duty vehicle. The current 12 percent tax is the highest excise tax levied by the federal government.

The bill has received support from the American Truck Dealers Association and the National Automobile Dealers Association. A similar bill, S. 2435, was introduced in the Senate in 2021 by Sen. Young (R-IN). H.R. 8116 is cosponsored by Rep. Pappas (D-NH) and was referred to the House Committee on Ways and Means.

## REGULATORY

### U.S. Supreme Court Denies CTA Petition for Review of AB 5 Lawsuit

On June 30, the U.S. Supreme Court denied the California Trucking Association's petition for review of its lawsuit challenging California's Assembly Bill 5. AB 5 codified the stringent ABC test into state law to determine if a worker should be classified as an employee or an independent contractor.

The AB 5 law originally took effect in January 2020. Following the law's passage, the U.S. Southern District Court of California granted a preliminary injunction on AB 5 enforcement for the trucking industry pending the outcome of CTA's. In April 2021, the 9th U.S. Circuit Court of Appeals ruled that AB 5 was not preempted by the Federal Aviation Administration Authorization Act, which prohibits states from implementing laws that impact the routes, prices, and services of motor carriers. Following this decision,

CTA filed a petition requesting review by the U.S. Supreme Court. The injunction on AB 5 enforcement remained in place while CTA awaited a response from the highest court.

Now that the Supreme Court has denied CTA's petition, the law will retroactively take effect as of January 2020. This has the potential to lead to additional lawsuits claiming worker misclassification under AB 5 while the injunction was in place.

The implementation of the ABC worker classification test will impact the operational model for many intermodal truck drivers and carriers as they consider changes to comply with AB 5. Some drivers may be hired as employees rather than independent contractors. Furthermore, carriers could potentially continue to work with independent drivers by serving as brokers or freight forwarders. The most challenging component of the ABC test for motor carriers is the B prong, which states that independent contractors must engage in "work that is outside the usual course of the hiring entity's business." This requirement may be satisfied by brokers who use independent drivers or smaller carriers to deliver their goods.

Trucking organizations, including CTA, the Owner-Operator Independent Drivers Association, and the Western States Trucking Association, have expressed strong concerns about the decision and the uncertain future it created, asserting that AB 5 will negatively impact current supply chain strains, interstate commerce, and inflation.

## NHTSA Issues Final Rule on Rear Underride Guards

In 2015, the National Highway Traffic Safety Administration issued a proposed rule to adopt new requirements for trailer and semitrailer rear underride guards. On June 30, 2022, NHTSA issued a final rule adopting the NPRM with minor technical changes as directed by the Bipartisan Infrastructure Law.

The final rule is consistent with current Canadian standards as it requires rear impact guards to provide sufficient strength and energy absorption to withstand impact at 35 mph, an increase from the previous standard of 30 mph. According to NHTSA, the new requirements will improve safety in the event of a crash where the passenger car hits the center of a trailer's rear and 50 percent of the width of the passenger vehicle overlaps with the rear. NHTSA estimates that 94 percent of applicable trailers already have guards that comply with the final rule.

In response to the 2015 NPRM, some stakeholder groups called for the new requirements to address higher impact speeds and additional overlap ranges. NHTSA addressed these comments stating that such requirements would be more costly and would not be practical or appropriate based on currently available data. NHTSA noted that it plans to conduct further research to determine if additional requirements are necessary.

NHTSA is complying with other provisions in the BIL by establishing a federal advisory committee on underride protection to conduct research on side underride guards for trailers to assess their effectiveness and the impact of such requirements on the intermodal industry. Furthermore, NHTSA plans to announce an advance notice of proposed rulemaking to consider requirements for side impact guards. Responses to the ANPRM will inform NHTSA's decision to move forward with a side underride rulemaking.

The final rule will take effect 180 days after it is published in the Federal Register and provides two years for manufacturer compliance.

## NLRB Decides XPO Logistics Misclassified Workers as Independent Contractors

In January 2022, port and rail truck drivers for XPO Logistics in Southern California requested an election through the National Labor Relations Board to form a union. XPO classified many of its workers, including 213 owner-operators and 49 second-seat drivers, as independent contractors, thus preventing them from unionizing. In the drivers' request to NLRB, they argue that XPO misclassified them as independent contractors.

On June 13, NLRB Regional Director William Cowen determined that XPO failed to prove that the owner-operators and second-seat drivers are independent contractors, allowing the workers to hold an election to form a bargaining unit. According to the International Brotherhood of Teamsters, the decision is the first time an election has been ordered for port truck drivers misclassified as independent contractors.

To form its decision, NLRB relied on a multipronged test used in the SuperShuttle DFW case in 2019. The test uses 10 factors to conclude if a worker is an independent contractor or employee. Through several considerations, the test analyzes the extent of the employer's control over the work, whether the worker is engaged in a specific business or occupation, and whether the employer supplies the worker's equipment and place of work.

According to the NLRB decision, XPO maintains almost complete control over the drivers, noting that the company's dispatchers determine schedules regardless of the driver's scheduling preferences. XPO also oversees the drivers' duties, such as routes, pick-up, and drop-off locations and requires drivers to adhere to company policies. Additionally, NLRB concluded that XPO integrated the drivers into its business by requiring drivers to identify themselves as an XPO worker, requiring drivers to use XPO's DOT authority even if they have their own, and requiring drivers to receive company approval to conduct outside jobs.

NLRB also found that XPO drivers routinely renew their 90-day contracts with some drivers maintaining their roles for years, which "suggests the expectation of a continuous working relationship." Further NLRB findings included that drivers are required to

complete mandatory training through XPO, such as hazardous material handling and food-safety training; drivers receive their pay on consistent intervals with their rates and expenses controlled and set by XPO, which limits entrepreneurial options; and drivers provide last-mile deliveries for XPO clients, which proves that the drivers perform an essential part of XPO's business and service.

The ballots for XPO employees to vote for unionization were sent on June 23 and will be counted by July 15.