



October Legislative and Regulatory Report

LEGISLATIVE

No legislative updates for October 2022.

REGULATORY

Department of Labor Proposes Changes to Worker Classification Regulations

On October 11, the Department of Labor issued a notice of proposed rulemaking to modify regulations determining whether a worker is classified as an employee or independent contractor under the Fair Labor Standards Act.

In 2021, the Trump Administration's DOL issued a final rule guiding the classification of independent contractors across many industries. The 2021 IC Rule focused on two "core factors" under the economic reality test that would carry the most weight: the nature and degree of control over the work and the opportunity for profit or loss based on initiative and investment. If those two factors were not conclusive, other factors would be examined, including: the skill or expertise required by the worker; the permanency of the labor; and whether the work is part of an integrated unit of production. Due to the primary factors considered under the test, the final rule provided more flexibility for independent contractor classification. The Biden Administration attempted to repeal the rule in May 2021; however, a federal district court reinstated the 2021 IC Rule after concluding that the Biden Administration DOL's withdrawal notice violated the Administrative Procedure Act.

Now, DOL is proposing a new rule, stating that the 2021 IC Rule does not align with the FLSA's text and purpose and narrows the economic reality test by predetermining which criteria carry the most weight. Under the new proposal, DOL intends to rescind the 2021 IC Rule and provide updated standards for worker classification. DOL argues the newly proposed rule would provide more consistent guidance to employers and protect workers from misclassification.

In the NPRM, DOL proposes to eliminate the use of core factors and, instead, consider the totality of all factors in the economic reality test without predetermining the weight of each consideration. The factors that will be considered are: (1) the opportunity for profit



or loss depending on managerial skill; (2) the investments by the workers and the employer; (3) the degree of permanence of the work relationship; (4) the nature and degree of control of the work; (5) the extent to which the work performed is an integral part of the employer's business; and (6) the skills and initiative used to perform duties. By expanding the circumstances and factors considered under the test, the NPRM is expected to increase the likelihood of workers being classified as employees.

Additionally, the proposed rule diverts from the 2021 IC rule by proposing to analyze the opportunity for profit or loss based on a worker's managerial skills instead of investment. DOL proposes to make investment a standalone factor in the economic reality test. Other deviations from the 2021 IC rule include: making the exclusivity of the work a consideration under the degree of permanence factor; considering contractual requirements, such as those to meet legal obligations or satisfy health, safety and quality control standards, when analyzing the nature and degree of control over the work; and evaluating the level of initiative taken by a worker when analyzing the skills used to perform the duties instead of considering it under the profit or loss factors.

Comments on the proposal are due by December 13, 2022.

FMC Issues Proposed Rulemaking on Detention and Demurrage Billing Practices

This month, the Federal Maritime Commission issued a notice of proposed rulemaking seeking changes to demurrage and detention billing practices and to establish minimum information requirements for invoices.

In response to rising cargo volumes, and resulting increases in detention and demurrage charges, the FMC earlier this year published an advance notice of proposed rulemaking on detention and demurrage billing practices. The action was recommended as part of FMC's fact finding investigation on International Ocean Transportation Supply Chain Engagement, which raised concerns regarding the timing and clarity of invoices as well as billing practices. The NPRM was informed, in part, by stakeholder comments received during this proceeding and also addresses provisions included in the Ocean Shipping Reform Act.

To determine the scope of the NPRM, the FMC adhered to a broad definition of the terms "demurrage or detention" to include any charge assessed by common carriers and marine terminal operators related to the use of marine terminal space or shipping containers. However, the proposed requirements do not apply to charges related to other equipment, such as chassis.



In the NPRM, FMC proposes new requirements that would apply to vessel operating common carriers, non-vessel-operating common carriers, and marine terminal operators. As mandated by the Ocean Shipping Reform Act, the proposal would require invoices issued by common carriers or marine terminal operators to include specific identifying, timing, rate, and dispute resolution information. FMC also proposes to add further requirements to include information such as bill of lading numbers, the basis for why the party was invoiced, and dates the charges accrued.

Further, the NPRM proposes that only the person who contracted with the common carrier for the carriage or storage of goods may be issued an invoice for detention or demurrage charges – which would limit invoices to motor carriers and customs brokers. However, the proposed rule would not prevent a motor carrier from paying on behalf of a third party.

Under the proposed rule, detention and demurrage invoices must be issued within 30 days from the time the charges stop accruing. A charge would become void if a billing party fails to issue an invoice within the required timeframe or without the required minimum information. Billed parties must submit requests for fee mitigation, refunds, or waivers within 30 days of receiving a demurrage or detention invoice.

While the FMC is accepting comments on all provisions included in the NPRM, it expressed particular interest in comments addressing whether it would be beneficial to include the consignee on the bill of lading as another party eligible to receive an invoice. Comments on the proposal are due by December 13.