Regulatory and Legislative Update

August 2020

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Legislation

Authorization for PPP expires as Washington is unable to strike a rescue deal

Although more than $128 billion remains unallocated, the congressional authorization for the Paycheck Protection Program (PPP) ended August 8. Congress could still reauthorize the program, but House and Senate leaders and the White House have yet to reach agreement on another COVID-19 relief plan.

The principal focus of negotiations has been on resumption of the federal supplement for unemployment benefits. A federal add-on of $600 a week that had been included in the CARES Act expired July 31. Approximately 29 million Americans were receiving those benefits. Also under discussion among lawmakers and the White House have been another round of stimulus payments to taxpayers and money to allow some distressed small businesses to get additional funds under PPP. Talks apparently have stalled with Democrats and Republicans reportedly still more than $1 trillion apart on the costs of their proposals.

Meanwhile, President Trump on August 8 issued a series of executive orders intended to provide some financial relief until an agreement can be reached – or, potentially, in the event an agreement is not reached. One executive order continues the augmented unemployment benefits at a level of $400 a week, although

states would have to contribute $100 of that amount. Other actions defer payroll taxes on individuals earning less than $100,000 a year, extend the relief from federally financed student loan payments through yearend, and take steps to help guard against evictions and foreclosures.

PPP ends – for now at least – with banks lending more than $521 billion to more than 5 million entities under PPP. The loans are forgivable and would become grants if businesses meet certain criteria, which Congress liberalized in June. (*See Regulatory Update, June 2020*.) According to detailed data released in early July, more than 100,000 for-hire trucking companies received between $7 billion and $14 billion in loans. For more information on PPP and other SBA lending programs related to COVID-19, including data on which companies received funds, visit www.sba.gov/coronavirus.

Regulation and Enforcement

FMCSA adopts 'reasonable enforcement flexibility' on random drug testing

FMCSA in July issued a notice that it would exercise "reasonable enforcement flexibility" with motor carriers that are unable to fully comply with the minimum random drug and alcohol testing rates during the pandemic. The agency emphasized, however, that employers capable of meeting these requirements must do so.

As of the beginning of this year, FMCSA increased the minimum required rate for controlled substances to 50% of their average number of driver positions. The rate had been 25% for several years. Random testing for alcohol is required at a 10% rate. Another requirement is that the dates for administering drug and alcohol tests are spread reasonably throughout the calendar year, although FMCSA already granted some flexibility on this score.

FMCSA is not changing the random test rates for 2020, but it said that if a test is unable to be completed due to the COVID-19 public health emergency, the motor carrier must maintain written documentation of the specific reasons for non-compliance. For example, carriers should document closures or restricted use of testing facilities or the unavailability of testing personnel. Employers also should document actions taken to identify alternative testing sites or other testing resources. FMCSA also said that carriers unable to spread random tests reasonably through the year should document specific reasons why not. Examples include the lack of available testing facilities or personnel or prolonged or intermittent driver furloughs due to the impacts of COVID-19.

The notice is available at https://www.fmcsa.dot.gov/emergency/notice-enforcement-discretion-determination-random-controlled-substance-and-alcohol. Other FMCSA guidance and relief related to COVID-19 is available at https://www.fmcsa.dot.gov/COVID-19.

Intermodal operators get limited waiver on expired inspection decals

FMCSA on July 16 granted a temporary waiver to intermodal equipment providers (IEPs) and motor carriers operating intermodal equipment that would allow operation of intermodal equipment with annual inspection decals that show an expiration date of March 31, 2020. The agency on June 1 granted a similar waiver that was limited to IEPs and motor carriers operating intermodal equipment included in the Intermodal Association of North America's (IANA) Global Intermodal Equipment Registry (GIER). The July 16 waiver extends the same relief to all other IEPs and motor carriers operating intermodal equipment. Unless extended, the waiver expires on September 1, 2020, unless President Trump were to revoke his declaration of a national emergency regarding COVID-19 before then.

The notice is available at https://www.fmcsa.dot.gov/safety/limited-waiver-response-covid-19-public-health-emergency-permit-operation-intermodal. Other FMCSA guidance and relief related to COVID-19 is available at https://www.fmcsa.dot.gov/COVID-19.

FMCSA holds Truck Safety Summit

Representatives of trucking groups, safety, advocates, trucking companies, law enforcement, technology providers, federal agencies, and others participated in an August 5 virtual Truck Safety Summit hosted by FMCSA. The summit, moderated by acting Administrator Jim Mullen, did not include any announcement of agency policy. The agenda and a recording of each Truck Safety Summit session is available by registering at https://www.fmcsa.dot.gov/safety/fmcsa-trucking-safety-summit-august-5-2020.

No-defect DVIR requirement rescinded for passenger CMVs

Several years after eliminating the requirement for drivers of property-carrying commercial motor vehicles (CMVs), FMCSA has rescinded the requirement that drivers of passenger-carrying CMVs operating in interstate commerce submit driver-vehicle inspection reports (DVIRs) when the driver has neither found nor been made aware of any vehicle defects or deficiencies. The agency estimates that drivers spend about 2.4 million hours annual completing no-defect DVIRs and that the rule saves the industry $74 million a year. The rule, which was announced July 15, has not been formally published in the Federal Register but the text of the final rule can be found on FMCSA's website at https://www.fmcsa.dot.gov/safety/driver-safety/passenger-carrier-no-defect-driver-vehicle-inspection-reports.

Pipeline contractors seek exemption from various HOS requirements

FMCSA is requesting comments until August 21 on an application from the Pipe Line Contractors Association (PLCA) for an exemption from certain hours-of-service (HOS) regulations for drivers of a variety of CMVs used by its member pipeline contractors. PLCA specifically seeks an exemption from: (1) The requirement of the short-haul exception that drivers return to the work reporting location from which they started the day; (2) the requirement that drivers use electronic logging devices (ELDs) if they must complete a record of duty status (RODS) on more than 8 days in any 30-day period; and (3) the prohibition on driving after having been on duty for 70 hours in 8 consecutive days. The PLCA also requested that drivers of CMVs used exclusively in the construction and servicing of pipelines be allowed the same HOS exceptions currently available to oilfield operations. For the Federal Register notice, visit https://www.federalregister.gov/d/2020-15815.

Agricultural exemption for turfgrass sod unnecessary, FMCSA says

FMCSA has denied as moot the application by Turfgrass Producers International (TPI) to extend the hours-of-service (HOS) exemption for agricultural operations to drivers transporting turfgrass sod. The agency said it has analyzed the application, comments, and applicable law and determined that turfgrass sod is an agricultural commodity already subject to the HOS exemption. For the Federal Register notice, visit https://www.federalregister.gov/d/2020-17087.

Courts

Court rules Amazon delivery drivers are exempted from Federal Arbitration Act

Last-mile delivery drivers for Amazon are exempted from coverage of the Federal Arbitration Act (FAA) even if they do not physically cross state lines in the course of their work because they transport goods or "within the flow of interstate commerce," the U.S. Court of Appeals for the First Circuit has ruled. In an opinion issued July 17, the appeals court said that the FAA does not govern disputesregarding Amazon's agreement with

independent contractors and, therefore, provides no basis for compelling the individual arbitration required by the dispute resolution section of the agreement.

Although the First Circuit judges ruled that the FAA does not compel arbitration, they agreed that the arbitration clause potentially could be enforceable under state law. Although the agreement itself chooses Washington state as the law that applies, the court concludedthat Massachusetts would treat the class waiver provisions in the agreement as contrary to the commonwealth's fundamental public policy and that, based on conflict-of-laws principles, the contractual choice of Washington law would be unenforceable if it would permit such waivers. Therefore, the court ruled that the individual arbitration cannot be compelled pursuant to state law.

The case stems from a class-action lawsuit filed in Massachusetts state court in August 2017 claiming that Amazon (1) misclassified drivers as independent contractors; (2) , violated the Massachusetts Wage Act by requiring drivers to pay necessary business expenses themselves; and (3) violated the MassachusettsMinimum Wage Law.

For the First Circuit's opinion, visit http://media.ca1.uscourts.gov/pdf.opinions/19-1848P-01A.pdf.

Advocacy and Comment

The past month reflects the summer's doldrums and Washington partisanship. Democrats and Republicans alike acknowledge more stimulus is needed because PPP was misspent and the needs of small businesses have not been abated. President Trump's most recent announcement of an Executive Order is at best a stop gap for the unemployed which does not address the needs of proprietorships and small businesses. Hopefully the stalemate will be of short duration. The First Circuit's Amazon decision mentioned above has importance beyond addressing the use of arbitration clauses to frustrate class actions in interstate commerce. The holding of the case is based upon the important preliminary affirmation. It has long been recognized that first mile pickup or last mile delivery, when moving between points in the same state, are nonetheless shipments moving in interstate commerce if the shipper intended the ultimate delivery to be made to an interstate destination at time of dispatch.

Whether state, federal safety or employment laws apply to final mile deliveries and if so, does the size of the delivery vehicle make a difference are unresolved issues which can affect insurance rates, premiums, labor and preemption issues.