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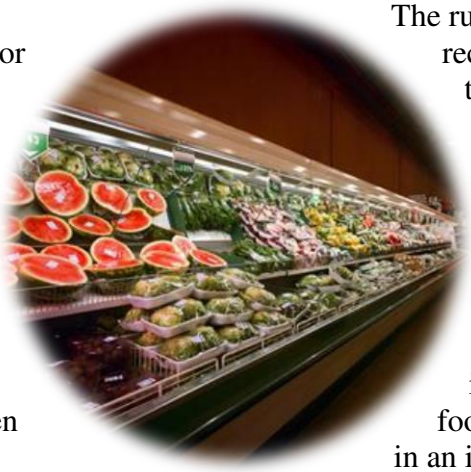
New FDA Food Safety Rule Excludes Packaged Food

The Food and Drug Administration on Jan. 31 proposed new regulations that when adopted will require shippers, carriers and receivers – including warehouses – to take certain steps to prevent the contamination of human and animal food during transportation and storage.

The proposal marks the seventh major rule adopted to in implement the revised Sanitary Food Transportation Act that was enacted in 2005.



The new proposed rules establish criteria for sanitary transportation and storage practices, such as properly refrigerating food, adequately cleaning vehicles between loads, and properly protecting food during transportation.

Exempted from the rules are companies engaged in food transportation and storage that have less than $500,000 in annual sales.

The good news for many 3PL warehouse operators is that is not imposing the new requirements on the transportation and storage of fully-packaged shelf-stable foods. The International Warehouse Logistics Association had sought this change from an earlier version of the proposal.

The FDA rebuffed another change IWLA proposed when the agency defined a "receiver" as anyone who receives food after it's transported, even if you are not the shipment's final point of receipt. IWLA had noted that law holds a warehouse is not the owner of freight it stores for another company. The FDA made it clear that the rules will apply to anyone who receives food after transportation, not just the ultimate consignee.

The rules also don't apply to shippers, receivers or carriers engaged in transportation of food that is transshipped through the United States to another country, or to food imported for future export that is neither consumed nor distributed in the U.S.

However, the rules do apply to international shippers who transport food for U.S. consumption or distribution in an international freight container by air or ship, and who arrange for transfer of the intact container onto a truck or rail car in this country.

What It Means for You

The rules are intended to ensure that shippers, carriers and receivers who transport food items that the FDA says are at the greatest risk for potential contamination are following appropriate sanitary practices.

For example, the proposed rules require that shippers inspect a vehicle for cleanliness prior to loading food not completely enclosed in a container, such as fresh produce in vented boxes.

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The rules would require that materials and workmanship used in design and manufacture of vehicles and transportation equipment for food to be suitable for that purpose and adequately cleanable.

The FDA said the equipment must be maintained "to prevent the food that they transport from becoming filthy, putrid, decomposed or otherwise unfit for food, or being rendered injurious to health from any source during transportation operations."

The FDA would not consider pallets to be maintained in an appropriate sanitary condition if they are in such poor repair – for example, jagged wood edges -- that they could damage food packaging, causing a loss of container integrity and increasing the potential for direct contamination.

The agency added that pallets used within food distribution centers must be cleaned and rotated or disposed of on a regular basis.

It is also proposed that the same Current Good Manufacturing Practice (CGMP) regulations for maintenance of equipment and utensils in food plants will apply to transportation equipment.

For foods requiring refrigeration the rules require the temperature be maintained in such a way that it will prevent such microbial growth.

The agency said it continues to receive reports of foods, such as meat and some seafood products, requiring temperature control being transported in unrefrigerated vehicles that are not equipped with insulated coolers and ice packs.

As a result, the proposed rules require proper insulation and ice packs be used when these foods are hauled in equipment lacking temperature controls.

Who Is Responsible?

Once transportation is complete, the carrier will be required to demonstrate to the shipper and if requested, to the receiver, that it maintained temperature conditions during transportation

If the carrier and shipper agree in writing before transportation that the shipper is responsible for monitoring or assuring that the food was held under acceptable temperature conditions during the transportation operation, then the carrier is discharged from responsibility.

The shipper is also required to provide this same assurance to the receiver, and meet the same corresponding records requirements as the carrier would otherwise be, in circumstances where the shipper has assumed a responsibility that is normally borne by the carrier.

Applying equally to shippers, carriers and receivers, like warehouse operations, the proposed rules require that responsibility for ensuring operations are carried out in compliance with the law be assigned to competent supervisory personnel.

This provision mirrors a longstanding provision in the current CGMP regulations regarding the manufacturing, processing, packing, or holding of human food, the FDA noted.

In its examples of improper food handling, the agency included shell eggs left unattended for several hours on a loading dock on a warm day, and pasteurized citrus juice became spoiled during transport due to inadequate refrigeration

Noting that temperature monitoring is not always practiced during loading and unloading of refrigerated and frozen foods, the FDA made it clear that it does not consider acceptable the staging and holding of any food subject to rapid growth of undesirable microorganisms in the absence of temperature control on a non-temperature controlled loading dock hours before a pickup.

Shippers and receivers must provide drivers who handle food not enclosed in a container during loading and unloading with access to a convenient hand-washing facility.

Anyone working in direct contact with food must conform to hygienic practices, including washing hands thoroughly and sanitizing if necessary.

The proposed preventive controls rules for animal food contain many similar provisions, including access to hand-washing facilities.

The entire FDA rulemaking can be found at: www.federalregister.gov/articles/2014/02/05/2014-02188/sanitary-transportation-of-human-and-animal-food.

Comments on the proposed rules are due by May 31. Public meetings on the proposal will be held in Chicago on Feb. 27; Anaheim, CA, on March 13; and College Park, MD, on March 20.

Chemical Activity Barometer Points to Improving Economy

The American Chemistry Council's said its first 2014 Chemical Activity Barometer reading strengthened slightly, indicating continued growth and an improving economy throughout the year.

In January the CAB ticked up to 94.0, increasing 0.2 points over December on a three-month moving average basis. This marks the ninth consecutive monthly gain for the CAB, which is now up 2.6% over a year ago, ACC noted.

The growth is at a more moderate pace since the 0.4% gain in September 2013, ACC Chief Economist Kevin Swift said. "Slow and steady isn't a bad thing when you consider the alternative," he added.

"This recovery seems to lag compared to previous post-recession recoveries, but overall the fundamentals remain strong, including the ongoing expansion in chemistries related to construction and consumer-related resins, as well as light vehicle sales," Swift said.

Pointing to a particularly bright spot, Swift said there have been strong gains recently in electronic chemicals, food additives, foundry chemicals, lubricant and paint additives, mining chemicals and printing ink.

Overall results in the four primary components of the CAB were mixed, ACC said, with production and inventories up, product/selling prices flat, and a drop in equity prices.

The CAB is a leading economic indicator derived from a composite index of chemical industry activity, the council observed.

"The chemical industry has been found to consistently lead the U.S. economy's business cycle given its early position in the supply chain," the council said, "This barometer can be used to determine turning points and likely trends in the wider economy."

That Was Fast: NLRB Re-Issues Ambush Elections Proposal

On Feb. 5 the National Labor Relations Board announced it was re-issuing its "Quickie" or "Ambush" organizing election rules designed to give unions an extra advantage by shortening the time allowed for employers to counter unions' campaign claims.

The original ambush election rules were adopted in 2011 but weren't enforced due to court challenges. In late December, the NLRB withdrew an appeal of a court ruling overturning the rules lack of a board quorum, and the new board was expected to re-issue them (*ACWI Advance*, 1-15-14, P. 4).

The rules are designed to make it easier for unions to win organizing votes by substantially reducing the amount of time employers had to mount defenses before the elections are held.

The shortened time for elections after the filing of a representation petition limits employers' ability to effectively contradict union propaganda. As a result, when the rules are finalized employees' will vote based almost exclusively on what the union claims.

The new rules also would allow a union to file a petition electronically, rather than by hand or mail.

The deadline for the employer to provide voter eligibility list will be shortened from seven to two work days from the Direction of Election.

Also, the employer must provide email addresses and telephone numbers for employees eligible to vote in addition to names and home addresses.

Under the proposed rules the election need not wait until 25 days after a Direction of Election is issued.

Pre-election appeals are eliminated, leaving only an appeal of both pre- and post-election issues after the election. The pre-election hearing determines only whether a question exists about representation

Individual voter eligibility issues will be deferred to a post-hearing appeal, which can only be allowed at the discretion of the NLRB's hearing officer.

Comments are due by April 7. To read the entire proposal, you can find it available online here: www.federalregister.gov/articles/2014/02/06/2014-02128/representation-case-procedures.

Is Robust Intermodal Growth The Sign of More to Come?

The Intermodal Association of North America pointed to solid domestic intermodal growth in 2013 as evidence that the industry has cemented its role in the North American supply chain.

Building on the industry's positive 2012 performance, total shipments improved 4.6% in 2013, according to IANA's fourth quarter and year-end numbers released Feb. 6.

Domestic box volume, which doubled over the past 10 years, outperformed other markets in 2013, ending the year with a 9.4% bump, consistent with fourth quarter growth of this segment at 9%.

"This has been a banner year and quarter for intermodal, underscoring the strong alternative it provides to over-the-road transport," IANA President Joni Casey declared.

IANA reported that international intermodal continued its comeback from previous quarters and recorded growth of 2.3% in 2013, as compared to 1.8% in 2012. Numbers for the fourth quarter of 2013 for the same sector jumped a solid 5.9% over the same quarter in 2012.

Due to depressed fourth quarter 2012 loadings, IANA said it expected a bump in international containers, but this quarter's uptick suggests a trend rather than easy year-over-year comparisons.

IANA said the increase posted by trailers was particularly impressive in fourth quarter, reaching almost 5% and nearly reversing an exceptionally slow performance earlier in the year. Overall, trailer shipments ended the year only 0.7% below 2012.

Of the seven largest volume corridors within the United States, the Midwest-Southwest was the clear winner; the lane expanded a notable 12.9% when compared with last year's fourth quarter.

The intra-Southeast saw key corridor growth rose 5.9% during the quarter. The Southeast had the highest gains, with a 10.4% year-over-year increase due to the region's exposure to domestic containers.

The Mountain Central, Northeast and Midwest regions also rose just under 10%. IANA said the Northwest region underperformed because of a sharp drop in international intermodal volumes.

STB to Hold Hearing About Rail Competitive Switching

A hearing by the Surface Transportation Board to explore the issues raised by a proposal to allow more railroad competitive switching will be held March 25-26 at STB headquarters in Washington, DC.

The National Industrial Transportation League petitioned earlier for the STB to modify its standards and grant captive shippers increased access to competing railroads if there is a working interchange within a reasonable distance (defined as 30 miles by NITL).

The board said it decided to schedule the hearing to deal with issues raised by the numerous comments it has received in response to NITL's proposal.

The league asserts that its proposal will make the railroads more competitive and save shippers with access to only one line about $900 million annually.

The Association of American Railroads told the STB that Class I railroads could lose revenue up to 80% of their entire annual capital budgets if competitive switching is adopted.

AAR says Class I railroads would suffer yearly revenue losses of up to $7.8 billion if the proposal is adopted, an amount that NITL disputes.

The league has informed the STB that its research shows 78% of the 28,000 places throughout the United States with rail service are served by a single major railroad, including 70% of chemical plants. NITL also told the board that for agricultural products, whole regions and in some cases entire states are served by only a single major railroad.

Scheduled to appear at the March hearing are representatives of NITL and AAR, along with individual shipper and individual rail companies, including coal, agricultural firms and both Class I and short-line railroads.

Independent Owner-Operators Under Assault

Unions have made major progress in getting their allies in federal and state governments to tighten the legal definition of truck owner-operators with the ultimate aim of eliminating their status as independent contractors.

The unions wish to eliminate independent contractors in trucking for a simple reason: They can't be organized – at least not legally.

Because independent contractors are considered individual business entities rather than employees, organizing them to bargain collectively over rates with the companies that use their services creates an antitrust violation because it is the legal equivalent of businesses ganging together to conspire to fix prices.

In recent years, this legal status was confirmed by the U.S. Supreme Court after the Teamsters union attempted to organize owner-operators performing drayage services at the Port of Los Angeles.

Bills have been introduced in Congress to address the issue of "misclassification" of employees as contractors. The most recent is a Senate measure that would require an employer subject to the Fair Labor Standards Act both "accurately classify" a worker as either an employee or "non-employee" and provide that person with written notice of this classification.

Under the bill, absent this notice a worker would be presumed to be an employee and the presumption could be rebutted only "through the presentation of clear and convincing evidence." Failure to do so would incur still financial penalties.

Thus far, the gridlock on Capitol Hill caused by having a Republican-controlled House and Democrat Senate has stymied national legislation aimed at helping the unions on this issue.

Federal Agencies Work With States

Unions have been far luckier when it comes to the Obama Administration's federal agencies and some state governments. In late 2013 New York became the 15th state to sign a memorandum of understanding aligning its efforts with the U.S. Department of Labor to crack down on misclassification of independent contractors.

New York had joined 14 other states (including California, Colorado, Illinois, Missouri, Minnesota, Connecticut, Maryland, Massachusetts and Washington State) that partnered with DOL to "root out bad actors and bring them to justice," as the Labor Department put it.

DOL also noted that since the implementation of these types of agreements with other states, it has collected 97% more in back wages over a two-year period, resulting in over $18.2 million obtained for more than 19,000 workers who it says had been classified improperly.

"Business models that attempt to change or obscure the employment relationship through the use of independent contractors are not inherently illegal, but they may not be used to evade compliance with federal labor law," DOL said at the time.

On Jan. 10 New York Gov. Andrew Cuomo signed a law which creates a presumption that anyone with a commercial driver's license who performs transportation services under contract to another company is classified as an employee.

Want to counter this presumption? The law says owner-operator services must be outside the contracting company's usual course of business.

To maintain independent contractor status, every one of 11 detailed criteria laid out in the law must be met. These include the driver being able to make its services available to the general public or the business community on a continuing basis; and to others on whatever basis and whenever it chooses.

Recently, a federal court in Massachusetts, upheld a similar law which includes the requirement that the independent contractor's service is performed outside the usual course of business of the company using that service. The court also rejected the Massachusetts Delivery Associations contention that federal law pre-empted the state statute.