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David Sparkman, Editor **Volume 10, Issue 20** **October 15, 2022**

Shipping Act Targets Ocean Lines

When President Biden signed the Ocean Shipping Reform Act (OSRA) into law, the aim was to broaden the regulatory oversight over ocean ship lines and increase competition of the in the industry. But there is doubt the act will be able to succeed.

"During the pandemic, ocean carriers increased their prices by as much as 1,000%," Biden said at the June 16 signing ceremony. "And, too often, these ocean carriers are refusing to take American exports back to Asia, leaving with empty containers instead. That's costing farmers and ranchers – and our economy – a lot of money."

The legislation grants the Federal Maritime Commission (FMC) greater authority to regulate certain ocean carrier practices while promoting the growth of exports from the United States "through a maritime system that is transparent, efficient and fair," the president claimed.

According to the National Industrial Transportation League, one of the bill's biggest boosters, said the FMC now "will have better tools at its disposal to address global ocean carriers' operating practices which have contributed to high inflation and supply chain disruptions experienced by NITL members and their customers."

One of those members is Lori Fellmer, vice president, logistics and carrier management with BassTech International and chair of the NITL's Ocean Transportation Committee.

"Our members, like all U.S. businesses for which the ocean transportation network is fundamental, continue to suffer under a system plagued by deteriorating service levels and unreasonable fees and charges," she asserted.

Fellmer added that OSRA will further empower the FMC to address these concerns, which she said, "will greatly benefit U.S. exporters and importers."

American Trucking Associations also hailed the measure, which it hopes will address ocean carrier container demurrage practices truckers have had to contend with for many years. In ATA's view, these fees have been administered unfairly by the ocean lines, imposing unreasonable costs on truckers and shippers.

"This day has been a long time coming," ATA President Chris Spear said when the bill was signed. "This bill provides important tools to address unjustified and illegal fees collected from American truckers by the ocean shipping cartel – fees that have contributed to the shipping lines raking in $150 billion in profits just last year."

Jonathan Eisen, director of the ATA Intermodal Motor Carrier Conference, observed, "This is the first significant change to ocean shipping regulations in more than two decades – a period of time when the industry has been shaped into a cartel of 10 foreign-owned companies who have exercised

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a tremendous amount of power over American truckers and consumers."

He added, "Thanks to this bipartisan legislation, those carriers will no longer be able to charge truckers exorbitant and illegal detention and demurrage fees, increasing efficiency and reducing costs across the supply chain."

What the New Law Does

Among its many provisions, the new shipping act:

- Prohibits ocean carriers from unreasonably refusing cargo space accommodations for U.S. exports as well as from discriminating against U.S. exporters.

- Promotes transparency by requiring ocean common carriers to report to the FMC each calendar quarter on total import/export tonnage and twenty-foot equivalent (TEU) units (loaded/empty) for every vessel that makes port in the U.S.

- Authorizes the FMC to self-initiate investigations into any ocean common carrier's business practices and apply enforcement measures where appropriate

- Establishes new authority for the FMC to register shipping exchanges to improve the negotiation of service contracts

- Directs the FMC to initiate new rulemakings regarding prohibited practices involving the assessment of detention and demurrage charges.

- Adds provisions dealing with charge complaints, allowing them to be submitted directly to the FMC regarding the kinds and levels of charges assessed by a common carrier.

- Expands prohibited carrier activities to include unreasonable refusal of otherwise available cargo space, improperly assessing charges, and the imposition of inaccurate/incomplete detention and demurrage invoicing.

The World Shipping Council, which represents the ocean liner companies, took issue with the heated rhetoric coming from Biden and several of the industry's other critics among shippers and other modes. It said these too often fail to note changes that have reshaped the ocean shipping industry.

"Recent weeks have seen several attempts to demonize ocean carriers by deploying 'us versus them' rhetoric," it said. "That is not only inaccurate but dangerous, as it undermines the ability to understand and work towards solving the root causes of America's supply chain problems."

WSC made the point that ocean carriers are the longest link in the global supply chain which delivers vital supplies to American business, government and consumers. "The supply chain is not foreign; it is global," the council said.

The council also referred to an earlier FMC investigation that found the industry is actually quite competitive at present, with a 13 more ocean liner companies added so far this year alone, which are currently responsible for more than 30% of the sailings from Asia to the U.S.

"There is no dispute that carriers, after two decades of low or no margins and cheap and abundant capacity for shippers, are actually making profits. These profits are invested in building capacity for the future on land and sea," WSC declared.

It also pointed out that in 2021, carriers ordered a record-breaking 561 new ocean-going vessels worth $43.4 billion, and 208 vessels worth $18.4 billion have been ordered year-to-date in 2022.

The council also didn't hesitate to be quite blunt about where it believes the bulk of the supply chain failures occur – in this country

"As long as America's ports, railyards and warehouses remain overloaded and unable to cope with the increased trade levels, vessels will remain stuck outside ports to the detriment of importers as well as exporters."

The FMC is required to begin rulemaking processes in the next few months to establish new regulations related to OSRA, and some of the new final rules must be issued within one year of the law's enactment, no later than June 2023.

Just before OSRA was enacted, the FMC launched three initiatives to help U.S. shippers and improve performance in the ocean supply chain. They include establishing a new International Ocean Shipping Supply Chain Program, re-establishing the Export Rapid Response Team, and requiring carriers, marine terminal operators and ports to employ a designated FMC Compliance Officer

Making Hiring Based on Skills

More than half of employers – 56% -- have chosen to deploy pre-employment assessments to gauge job applicants' knowledge, skills and abilities, new research shows.

The study conducted by the Society for Human Resource Management of nearly 1,700 HR professionals found that 79% say that scores on skills assessments are just as or more important than traditional criteria in hiring decisions.

In addition, 36% of they say a job candidate who scores high on an assessment but doesn't meet the required minimum years of experience is very likely to make it onto the list of final candidates.

"With employers still struggling to fill vacant positions, HR professionals are leading the way in using skills-based hiring and skilled credentials to acquire top talent," said Emily M. Dickens, SHRM chief of staff and head of government affairs, when she spoke on this topic before officials of the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs.

SHRM has said it will continue to partner with government and business leaders to reach untapped talent pools and grow diversity in the workplace.

In the survey 28% of HR pros also said a job candidate who scores high on the assessment but doesn't meet the minimum education requirement would be very likely to make it onto the list of final candidates for consideration, and 40% said that would be somewhat likely in the same scenario.

In addition, 82% of organizations that require work samples or work simulation tests do so for applicants identified for further consideration, while 78% say the quality of their organization's hires has improved due to their use of assessments.

Also, 23% note that the diversity of their hires has improved using these assessments, and of those, one in four plan to expand their use of assessments in the next five years. Of organizations that don't use pre-employment assessments, one in 10 said they plan to start using them in the next five years.

How Remote Work Is Done

Workers share more similarities than differences when it comes to remote working, the Robert Half staffing and consulting firm has found.

"Understanding work habits and preferences, and focusing on results, is key to maximizing productivity," says Paul McDonald, senior executive director. Half says team members who communicate schedules and are aligned on goals prove to be more effective.

Half says its survey of more than 2,400 professionals uncovered five productivity trends.

Productivity peaks early in the week. Employees get the most done on Monday and Tuesday, whether at home or in the office. These results are consistent with a similar survey conducted in 2019, before the rise of remote and hybrid work in the pandemic.

Concerns about flexible work are waning. Two-thirds of employees (66%) feel their boss cares more about their contributions to the company than when and where they work. Separate research shows 27% of managers don't mind if their direct reports put in fewer than 40 hours a week – as long as the job gets done.

Professionals have defined power hours. Most workers hit their stride in the late morning (9 a.m. to 12 p.m.) and early afternoon (1 to 4 p.m.), regardless of where they sit. Very few tackle their to-dos during lunch or evening hours.

Meetings are getting in the way. When asked to what most impedes their productivity, the top responses were unnecessary calls and meetings (35%), and conversations with colleagues (25%).

Home is where it happens. While one in five (21%) said they're equally productive wherever they work, 35% reported accomplishing more at home. Those commuting to the office perform best in a private space (43%) versus a collaborative one (16%).

Return Customer Drives eGrocery

It turns out that the biggest driver of ecommerce success in the grocery world, appears to originate with return customers, according to the industry consulting firm of Brick Meets Click.

It was long-term, established online grocery customers who collectively generated more than 3.5 times the revenue for conventional grocers than new customers, found a study sponsored by Cardlytics, Mercatus and Hussmann.

"Grocers need to build more meaningful engagement with their online customers," explained David Bishop, partner at Brick Meets Click.

The more established customers, those who have shopped online with a grocer for over 60 weeks, spent 2.4 times more than new customers who started shopping within the past four weeks.

Relationship dividends are generated by increased order frequency and spending per order. Comparing the two customer cohorts quantifies that the more established customers' order frequency is 1.9 times higher than for new customers, and their average order values are 1.3 times greater.

Most customers have strong preferences when receiving online orders from conventional grocers. When given the option, fewer than 5% used both pickup and delivery services from the same grocery brand during a 12-week period studied in 2021. So, if a grocer only offers one receiving method, it could be sending the 54% of shoppers who prefer delivery and 42% who prefer pickup to a rival.

Attracting new customers is important, but nurturing existing ones is essential, BMC stresses. During the study, 34% of online customers had used the grocer's service for 60 weeks or longer and accounted for 46% of overall online sales, while 23% of customers who placed their first order with the grocer accounted for just 13% of sales.

Workers Can Be Safety Partners

An organization's employees may turn out to be its greatest untapped safety resource, according to an annual survey conducted by the industrial equipment and services company Fluke.

The broad-based poll of industrial workers found just over half (55.9%) said they have ideas on how to make the industry a safer place to work.

The importance of a workplace culture of safety has remained steady in surveys conducted over the past three-year-period. Respondents agree that the right culture positively impacts worker safety.

"Gaining buy-in for a safety culture has proven to be the most challenging piece, but at the same time it is the most important part," one repondent said.

Despite 98% of the 2022 workers polled agreeing (strongly agree or agree responses) that a strong culture of safety is important in keeping workers safe, only 37% agree that most companies have one.

Fluke notes that responses to this issue have become more negative over the three years of the survey. As one worker put it succinctly, "Signs and verbiage are not a safety culture."

In addition, over the past three-year-period, sentiment around the adequacy of safety training has moved 11.5% away from disagree (disagree and strongly disagree). However, less than 1% of that change in sentiment wenty toward agree (strongly agree and agree).

This adjustment could be due to changing sentiment, a lack of agreement on what "adequate" safety training looks like and what it means, or may represent an actual increase or decrease in training, Fluke says. At least 68.1% of respondents agree (strongly agree and agree) that they participate in safety training and classes.

Also, 72.3% say they rely on the technology in their tools and other equipment to keep them safe at work, although it is not known if this includes innovative technologies, safety standards or some combination of the two

Retaining Talent the Legal Way

When you consider implementing employment incentives, enhanced benefits and retention bonuses to retain talent, you also should take a close look at how to legally impose restrictive covenants that also can promote retention, according to attorneys James Cromley and Matthew F. Prewitt of the ArentFox Schiff [CQ] law firm.

As companies offer employees new incentives to increase retention, those same incentives provide opportunities to seek enhanced covenants in return, the lawyers hold. "In a competitive labor market, these agreements become all the more important – no one wants an employee using knowledge of their company as a sales pitch to a prospective employer (who just might also be their biggest competitor)."

One problem is that your non-compete agreement from just one year ago now may no longer be enforceable. The law in many states has changed and continues to change in ways that can already have rendered your current non-competes obsolete.

Within the past year, changes in Illinois, Nevada and Oregon law have significantly limited the enforceability of restrictive covenants. In Illinois and Oregon, non-competes can't be enforced if the employee makes less annually than $75,000 and $100,533, respectively. Nevada invalidated all non-competes for employees paid an hourly wage.

In Illinois, even non-solicitation covenants (for employees or customers) are now unenforceable for employees making less than $45,000 annually.

Additional consideration may be required to make your restrictive covenants enforceable, Cromley and Prewitt point out. More states require employers to pay extra for restrictive covenants, including Wyoming and Massachusetts,

The silver lining is that if you consider offering bonuses for retention or otherwise, it might be the perfect time to pair them with refreshed covenants.

A workforce requires extra attention when employees live (and work) in locations other than the office location to which they are assigned. The rise of fully remote employment positions means that some employees may never actually set foot in the physical office location to which they are assigned. This divergence can have far-reaching effects on the governing law and enforceability of restrictive covenants, the attorneys say.

States like Massachusetts, California and Washington restrict choice-of-law or forum-selection provisions from being enforced against their citizens. In other states, these provisions also may be unenforceable depending on public policy considerations.

If an employee working from home in California is assigned to an Arizona office, and agreed to covenants that include Arizona choice-of-law and forum-selection provisions, both may be unenforceable. And the difference between Arizona and California law could mean the difference between an enforceable and an unenforceable agreement.

Employers also should not forget the employee non-solicitation covenant. Cromley and Prewitt stress.

Any departing employee can turn into a recruiter for their new employer. To prevent competitors from picking off talent, consider non-solicitation covenants in employment agreements. (These differ from "no-poach" agreements between employers agreeing not to solicit the other's employees, which can violate public policy and are under increasing scrutiny from the U.S Department of Justice.

In most states, the standard for enforcement of non-solicitation covenants between employers and employees is more lenient, employer-friendly and subject to less scrutiny than non-compete covenants. Drafting these agreements, however, still requires careful consideration of the current case law and relevant statutes.

"In this increasingly competitive market, it is more important than ever for companies to ensure compliance while maximizing the enforceability of their employment agreements," Cromley and Prewitt warn employers.