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# HPCLC Legal & Regulatory Update

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# Hot Topics

## TRANSPORTATION

- 118th Congress
- Rail Derailments and Safety
- OSRA '22 Implementation & Ocean Industry Issues
- Driver Classification and FMCSA Update
- FAA and STB Update

## TRADE

- Section 301 Tariffs
- Forced Labor
- USMCA
- Inflation Reduction Act
- Build American/Buy American

# **TRANSPORTATION HOT TOPICS**

# 118th Congress



- House majority flips to **R**
  - Speaker McCarthy
  - Rules Changes
  - Check on Biden Agenda
- Senate majority moves slightly **D** (51/49)

# 118<sup>th</sup> Congress—Key Issues

- House Investigations
- Debt Ceiling
- War in Ukraine
- Svb—more shoes to drop?
- Supply Chain



# Rail Derailments & Safety

- Railroad Safety Act
- DERAILED Act
- Hazmat focus
- DOT/FRA/EPA
- States & Localities

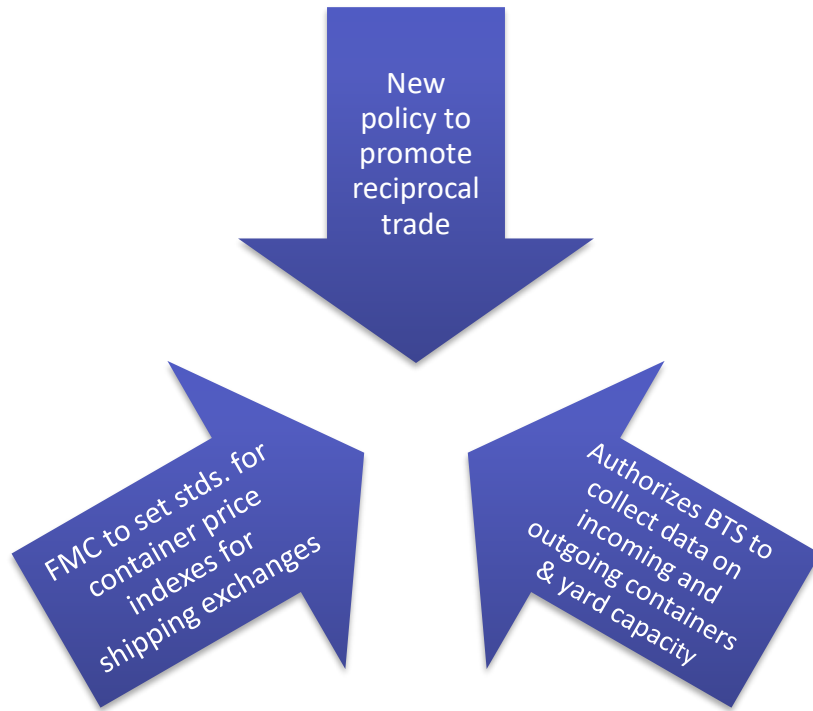


# Rail Derailments & Safety



- Community and industry impacts
- Rail cars maintenance and inspection
- Labor—2 man crews
- Costs/shipment delays?

# OSRA22 Technical Corrections Bill



- DOT to set an “open data” std. for maritime logistics
- Prohibition Against Chinese Logistics Platforms
- Independent Study of China’s Shanghai Shipping Exchange



# OSRA '22 Implementation

- **FMC Rulemakings**
  - Unreasonable Refusals to Deal—*Supplemental NPRM*
  - D&D Billing Requirements
  - Unreasonable Discrimination
  - D&D Reasonableness
- FMC Charge Complaints
- GAO Study on Hazmats
- Chassis Best Practices

# Ocean Issues to Watch

- ILWU / PMA contract
- 2M Disbandment 2025
- FMC Maritime Transportation Data Initiative
- Intermodal rail demurrage



# Trucking Update: DOL Rulemaking



- DOL Independent Contractor rulemaking
- Affects classification of drivers as “contractors” or “employees” under FLSA

# DOL Rulemaking



Rule applies broadly to most industries, including trucking



Involves a highly fact-specific inquiry



Burden on trucking companies that rely on independent contractor model to show that their drivers qualify as independent workers and not employees



Differs from CA AB-5 (ABC Test)



Impacts on capacity and interstate commerce

# DOL Rulemaking

## Factors to be Considered:

- Opportunity for profit or loss depending on managerial skill
- Investments by the worker and the employer (capital and entrepreneurial)
- Exclusivity of work relationship
- Degree of control (scheduling, prices, ability to work for others)
- Extent to which the work performed is an integral part of the employer's business
- Skill and initiative
- Any other relevant factors

# FMCSA Update



## Broker Financial Responsibility:

*NPRM Issued 1/5/23*



## Automated Driving Systems CMVs:

*NPRM 2/1/23*



## Automatic Emergency Braking Systems: *Projected NPRM 3/23*



## Safety Fitness Procedures:

*Projected ANPRM 3/23*



## Heavy Vehicle Speed Limiters:

*Projected SNPRM 6/23*



# Air (FAA) and Rail (STB) Update

- **FAA NOMINEE:** Phil Washington hearing
- **NOTAM BACKUP:** Following national groundstop
- **RUNWAY SAFETY:** Surface Safety Risk index to measure runway collision risks
- **NAS MODERNIZATION:** Tech., ops., management
- **SERVICE/LABOR:** Strike averted but systemic challenges continue
- **MERGERS:** CP/KCS
- **COMPETITION:** Reciprocal Switching (EP 711)
- **RATES:** Final Offer Rate Review; Voluntary Arbitration of Rate Disputes

# **INTERNATIONAL TRADE HOT TOPICS**



# The Balance and Costs of Trade?

- Inflation – Costs will go up? Whether we can reach 2% target
- Worker-Centric Trade – Costs, Compliance Procedures with HR, Collective Bargaining as Default?
- Manufacturing / Industrial Policy / “Friendshoring” – Buy America(n) and definition of FTAs
- Climate Change / “Green Shoring”

# China Section 301 Developments



- Section 301 tariffs (Lists 1, 2, 3 and 4A) still in effect on \$350 million in Chinese goods
- 6,804 product exclusions granted
- No current product exclusion process – most exclusions have expired
- 81 (of 99) COVID-19 product exclusions extended through May 15, 2023
- 352 product exclusions expiring Dec. 31, 2022, extended through Sept. 30, 2023

# China Section 301 Developments *(cont.)*

- China Section 301 tariffs currently subject to USTR four-year review
- Comments portal closed Jan. 17, 2023 – 1500 responses on continuation, termination, new product exclusion process, and *de minimis* decrease (\$800 to \$200)
- **Likely outcome:** Continuation with new product exclusion process
- Tariffs are now status quo, and U.S. government wants negotiating chip with China

# China Section 301 Developments *(cont.)*

- CIT Section 301 tariff refund litigation over Lists 3 and 4A products (Sept. 2020)
- **Initial CIT April 2022 ruling:** Within President's authority to assess these tariffs, but USTR did not follow Administrative Procedure Act when it failed to provide adequate responses and explanations
- On remand, CIT instructed USTR to show adequate responses and explanations
- February 7, 2023 oral argument on August 1, 2022 USTR remand determination
- Final CIT decision expected by summer – vacate tariffs, further remand or affirm
- Any decision will be appealed by losing side to CAFC; CAFC decision could be appealed to and certified by U.S. Supreme Court
- **Outcome:** This won't be resolved for a long time

# Substantial Transformation

## Trendlines in post-COVID environment

Vietnam, Philippines, India, Thailand, Taiwan, Mexico, favorable if originate/“start there” and still acceptable if final assembly/finishing in China. “Rebalance by Reversal” (e.g., “steel from global sources”)



Focus on “Enabling Technology” (e.g., security cameras, PCBAs)



Pharmaceuticals/APIs, Automotive/Aerospace (EVs, batteries), Chemicals, Metals, Critical Minerals warrant close attention, less so on consumer goods

# “At the Border” Issues

- CBP push for import certifications or permits for pharma and other life sciences.
- APIs will be a focus of “at the border” issues



# Forced Labor Legal Trends



2012

California Transparency in Supply Chains Act



2015

UK Modern Slavery Act



2018

EU Non-Financial Reporting Law



2020

Dutch Child Labor Due Diligence Law



2021

Uyghur Forced Labor Prevention Act



2022-2024

EU Forced Labor Ban Proposal



2015

US Trade Facilitation & Trade Enforcement Act



2017

French Duty of Care Law



2019

Australia Modern Slavery Act



2021

German Human Rights Due Diligence Law



2022-2024

EU Directives on Corporate Sustainability Due Diligence and Corporate Sustainability Reporting

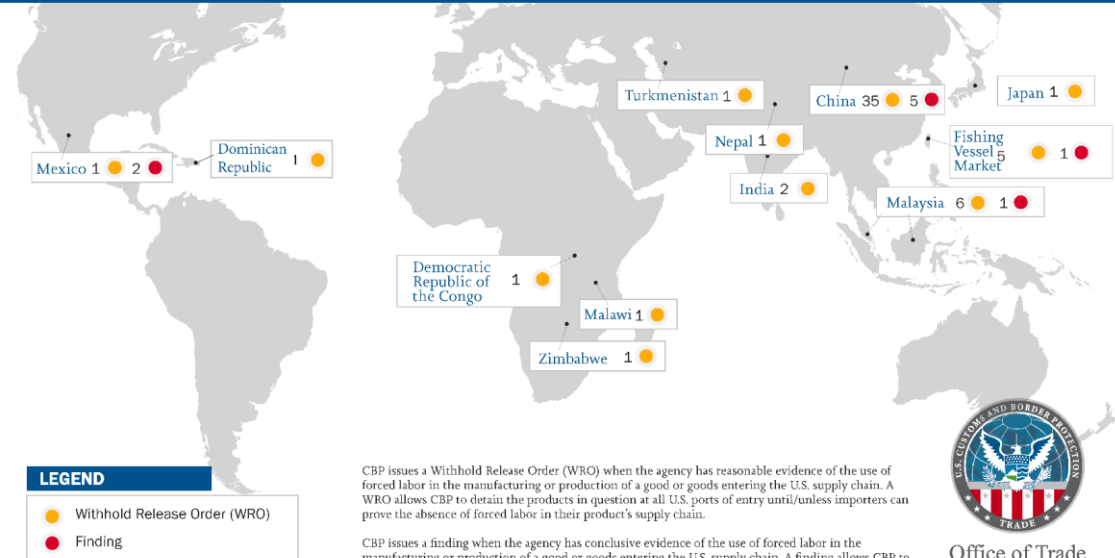


# U.S. Forced Labor Trends

- 54 active WROs and 9 findings
- 35 WROs and 5 findings related to China

## Active Withhold Release Orders & Findings

This map provides an overview of all active WROs and Findings around the world. CBP is currently enforcing 55 active WROs and 9 Findings across the globe.



CBP issues a Withhold Release Order (WRO) when the agency has reasonable evidence of the use of forced labor in the manufacturing or production of a good or goods entering the U.S. supply chain. A WRO allows CBP to detain the products in question at all U.S. ports of entry until/unless importers can prove the absence of forced labor in their product's supply chain.

CBP issues a finding when the agency has conclusive evidence of the use of forced labor in the manufacturing or production of a good or goods entering the U.S. supply chain. A finding allows CBP to seize the product(s) in question at all U.S. ports of entry.



Office of Trade



# Focus on Xinjiang

- Xinjiang Business Advisories, issued in 2020 and 2021, warn companies about the import/export risks of doing business in certain industries and in the region
- Uyghur Forced Labor Prevention Act (UFLPA) was signed into law and became effective on June 21, 2022
- UFLPA establishes a rebuttable presumption that imports of goods produced in whole or in part in the XUAR or involving a UFLPA Entity List person are produced from forced labor



# 2023 – Forced Labor Focus



- Continued focus on supply chains tied to Xinjiang with spotlight on new industries
- Certain industries move out of spotlight as these industries improve supply chain management, but continue to see detentions
- CBP's enhanced resources continue to lead to new WROs
  - Companies should pay close attention to DOL List and news reports

# Outside the United States

EU Corporate Due  
Diligence Directive

EU Forced Labor  
Proposal

EU Corporate  
Sustainability Reporting  
Directive

Canada – Modern  
Slavery Act



# And More China

- Export Controls
- CFIUS / FDI
- Investment in China (semi-conductors)
- Various Congressional Committees and Reviews



# Key USMCA Developments



- Rapid Response Labor Enforcement Mechanism (May 2023)
- Labor Value Content / Forced Labor
- Key Disputes (e.g., auto ROO) and Potential Retaliation
  - Expect new US-CBP guidance on Auto RoO and Uniform Regs

# Key USMCA Developments



- USMCA PSRO & Auto ROO + Substantial Transformation when 301, 232, 201 and AD/CVD
- Certification of Origin (verb) vs. Certificate of Origin
  - Know your supplier's supplier
- Terms and Conditions

# Key IRA Developments

- **Inflation Reduction Act of 2022 (IRA)**
  - Comments pending with Treasury and expected in March 2023 – “substantially all of the manufacturing or assembly activity” and definition of FTA
  - Tax vs. Trade Dispute (Canada, Mexico, E.U., Japan)
  - Extensions of existing programs likely acceptable; new investment credits (e.g., EVs) likely subject to challenge
  - Large focus on processing of critical minerals



# Key BAA Developments



- **Buy American Act (BAA)**
  - Steel and Iron thresholds increasing to 60% (October 2022), 65% (2024) and 75% (2029)
  - Fallback to 55% if not available
  - Commercial Off the Shelf, WTO Government Procurement Agreement, and Domestic Content Test all remain in effect
  - Price Preference program



# Key BABA Developments

- **Build America, Buy American**

- Broader types of projects (broadband, telecom, etc.)
- Iron and Steel – Melted And Poured
- Construction Materials – 60%
- Manufactured Products – 60% AND manufactured in U.S.
- COTS limited only to 60% threshold – still must be in U.S.
- Still unclear as to WTO GPA



# Biden Administration and FTAs

No further FTA discussions with EU, UK and Kenya (currently, 14 FTAs with 20 countries)

No renewal of TPA (expired July 2021) needed or required (i.e., no Congressional involvement); executive agreement mechanism only

No FTAs addressing market access issues and lower tariff barriers expected the next two years

# Biden Administration and FTAs *(cont.)*

## Trade framework/dialogue talks launched instead

- India-Pacific Economic Framework (IPEF) on certain trade issues, supply chains, clean energy, infrastructure, anti-corruption, etc.; reestablish U.S. economic presence in Asia in the wake of Trans-Pacific Partnership (TPP) withdrawal
- December 2022 U.S. Memorandum of Understanding with African Continental Free Trade Area (AfCFTA) to promote sustainable trade, economic integration, investment and infrastructure development
- U.S.-E.U. Trade & Technology Council (TTC) on digital trade, export controls, regulatory standards and coordinated trade response to Russia and China
- Americas Partnership for Economic Prosperity (APEP) to build on existing FTAs to pursue worker-centric trade policies; ministerial last Friday
- U.S.-Taiwan Initiative on 21<sup>st</sup> Century Trade negotiating round January 14-17 on trade facilitation, anti-corruption, SMEs, regulatory practices and China's "economic coercion"
- Minerals Security Partnership with Korea, Japan, E.U., Canada, Australia, etc. to ensure secure, diversified critical minerals supply chain away from China and emphasize ESG principles



**QUESTIONS?**

# Thank you!

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