SMALL BUSINESS LEGISLATIVE COUNCIL

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POSITIVE START TO THE NEW YEAR

The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act is officially law. From the 100 percent depreciation bonus to the payroll tax relief for employees (and self-employed) to the unemployment benefits extension, there are plenty of stimulus type measures in there to give the economy a bit of boost. While many in Washington say it was not meant to be a stimulus, let's hope it does the trick anyway.

EARLY RECKONING

The 111th Congress went out with an appropriations whimper. It passed another short-term Continuing Resolution to fund the government only through March 4, 2011. This presents an early opportunity to see how the new Republican majority manages itself. In particular, how much influence will the Tea Party-identified members have on the next funding decision?

The subplot is the looming debt ceiling increase decision. Shortly after Congress deals with the fiscal year funding, Congress will be asked to increase the debt ceiling, currently $14.294 trillion, so the government can continue to borrow. Some Tea Party candidates campaigned on a platform of refusing to vote for an increase. The Republican majority is set to repeal a House procedural rule that had been in place for decades to "finesse" a vote. The so-called "Gephardt rule" provided for the automatic engrossment and transmittal to the Senate of a joint resolution changing the public debt limit, upon the adoption by Congress of the budget resolution, thereby avoiding a separate vote in the House on the public debt-limit legislation. Instead, the House will have to deal with the issue straight on.

This two-tiered challenge will give us some insights on how easy or difficult life will be for Soon-to-be Speaker John Boehner (R-OH).

The new House majority is poised to repeal its "pay-go" procedural rule. It will allow them to pass legislation in the House without bickering about offsets, but I am not sure that it makes much difference since the Senate is likely to keep its "pay-go" rules AND more significantly there is the statutory pay-go requirement on the books, passed by the last Congress, so at the end of the day, some sort of pay-go compromise will be necessary to pass tax or spending legislation. "Pay-go" requires spending increases or tax revenue decreases to either be offset by spending decreases or tax revenue increases elsewhere.

HOURS OF SERVICE

Do you have truck drivers on the road?

Hate to start the year on a sour note, but it sticks in my craw when regulators release proposals when everybody (including Congress) has headed home for the holidays. The U.S. Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) issued a regulatory proposal that would revise the HOS requirements for commercial truck drivers - on the day Congress left town.

While the existing rule is often associated with long-haul drivers in the media, aspects apply to short-haul drivers and smaller trucks as well. It gets a bit convoluted with some special provisions based on the size of the truck and distance traveled.

For those of us who are not full time members of the trucking industry, the U.S. Department of Transportation uses different Commercial Motor Vehicle (CMV) definitions for different rules. It can get confusing because the same acronym (CMV) is used. For example, for Commercial Driver License purposes, the vehicles are larger but the Commercial Motor Vehicle (CMV) for the purposes of the HOS rule is generally a truck, or truck-tractor with a trailer, that:

•Is involved in interstate commerce and weighs (including any load) 10,001 pounds (4,536 kg) or more or

•Is involved in interstate commerce and has a gross vehicle weight rating or gross combination weight rating of 10,001 pounds (4,536 kg) or more, or

•Is involved in interstate or intrastate commerce and is transporting hazardous materials in a quantity requiring placards.

(Note: the interstate versus intrastate distinction is minor since most states adopt the Federal rules in order to receive federal funds.)

The proposal would require commercial truck drivers to complete all driving within a 14-hour workday, and to complete all on-duty work-related activities within 13 hours to allow for at least a one-hour break. It also leaves open for comment whether drivers should be limited to 10 or 11 hours of daily driving time. Eleven hours is the current standard and the FMCSA said it favors a 10-hour limit but left the question open-ended in the proposal. Under the proposed HOS rule, there is an option of extending a driver's daily shift to 16 hours twice a week to accommodate for issues such as loading and unloading at terminals or ports, and allowing drivers to count some time spent parked in their trucks toward off-duty hours. The new HOS proposal would retain the "34-hour restart" provision allowing drivers to restart the clock on their weekly 60 or 70 hours by taking at least 34 consecutive hours off-duty.

The document is 109 pages long. A copy of the rulemaking proposal is available on FMCSA's Web site at http://www.fmcsa.dot.gov/HOS. There is also a lot of other information on that page that you might find useful to your assessment.

We would welcome any input from you on the provisions. You will see some commentary in the 109 pages about the existing 100 and 150 mile driving distance special rules (See SBLC Issue Paper on Hours of Service for a full explanation) that are for recordkeeping and some drive time nuances.

My suspicion is that there may be retailers, service providers (e.g. electrical, plumbing, air conditioning), and distributors who do not even know their drivers are covered by the current rules. They are not in violation but just are not aware the rule theoretically applies. The vehicles are above the HOS weight threshold, but below the weight that would require a CDL driver, and the drives are within the 150-mile “exception.” and the 10 or 11 hour driving time is the exception rather than the daily occurrence.

RED FLAGS RULE

It’s back. Effective January 1, 2011, the identify theft prevention rule, known as the “Red Flags” rule will be enforced by the Federal Trade Commission (FTC). Forgotten what the Red Flags rule is?

The rule was developed under the Fair and Accurate Credit Transactions Act, in which Congress directed the FTC and other agencies to develop regulations requiring “creditors” and “financial institutions” to address the risk of identity theft. The resulting Red Flags rule required all such “entities” that have “covered accounts” to develop and implement written identity theft prevention programs to help identify, detect, and respond to patterns, practices, or specific activities – known as “red flags” – that could indicate identity theft. The FTC’s original definitions seemed to cover everybody and their brothers. While the rule was effective as of January 1, 2008, with full compliance for all covered entities originally required by November 1, 2008, the FTC delayed enforcement; the most recent delay until December 31, 2010.

Lawyers, accountants and doctors led a legislative campaign to get themselves out from under the Red Flags rule. They were successful. Congress passed and the President signed into law as Public Law 111-319, the “Red Flag Program Clarification Act of 2010, which narrows the application of the law. (Even the title of the legislation does not clarify. The title of the law uses the phrase “Red Flag” and the FTC uses the term Red Flags” in the title of its rule.)

The FTC will not delay enforcement any further and will revise the materials, and I would assume the rule itself, "on the fly." The "clarifications" in the new law are not clear so I do not see how businesses that might be on the "bubble" of the narrowed scope can be certain of whether they are in or out. There is also some language in the new law that lets the FTC expand the coverage. I suppose the FTC would argue assume you are in, unless you know you are out.

The new definition of creditor is one that regularly and in the ordinary course of business: (1) obtains or uses consumer reports, directly or indirectly, in connection with a credit transaction; (2) furnishes information to certain consumer reporting agencies in connection with a credit transaction; or (3) advances funds to or on behalf of a person, based on the person's obligation to repay the funds or on repayment from specific property pledged by or on the person's behalf.

Just to make sure, the lawyers et al added another clause, which benefits other service-providing small businesses, that excludes from the definition of creditor, any creditor that advances funds on behalf of a person for expenses incidental to a service the creditor provides to that person.

The FTC may determine by rule, based on a determination that a business that offers or maintains accounts that are subject to a reasonably foreseeable risk of identity theft, should be covered.

The FTC has a lot of material on how to comply at http://www.ftc.gov/redflagsrule.

TRADE PREFERENCES

When you hear the words "trade policy," you usually think of something like "Free Trade Agreements," "China," or maybe the "World Trade Organization Dispute." How about "GSP?" No, not GPS, but GSP – the Generalized System of Preferences. It is a U.S. law, (or I should say "was" a law) that has a subtle but significant impact on our economy.

The GPS program was created by the Trade Act of 1974. The idea was to promote economic growth in the developing world by providing preferential duty-free entry for specific products from specific countries. The program has grown to about 4,800 products from 131 designated beneficiary countries and territories. U.S. imports under GSP exceeded $20 billion in 2009 and were on pace to exceed $27 billion in 2010. The amount of "duties-foregone" was nearly $577 million in 2009. The list of products is extraordinary and permeates all corners of our economy. The United States Trade Representative manages the process to determine which products secure GSP status and also when to remove them. It is an elaborate process to say the least.

The GSP program has to be re-authorized by Congress on a regular basis and it was set to expire on December 31, 2010. Guess what? In its haste to get out of town, the 111th Congress failed to renew the program. As of January 1, 2011, all of the 4800 products are now subject to regular tariffs.

Either you love or hate the GSP program, depending on whether you benefit from the imports with lower tariffs or whether you compete with the imports. It can come down to a company by company analysis rather than by industry. In fact, one of the reasons it was not renewed was because of the concern of one Senator for one company in his state.

Will Congress renew the GSP program? Well, if history is any guide, between 1993 and 2002 the program expired seven times with lapses that varied between one and 15 months. Each renewal during this period was made retroactive to the expiration of the program.

How soon? Maybe very soon. Congress did renew two other trade programs – the Trade Assistance Act, and the Andean Trade Preferences Act – but only until mid February.