Transportation Alert

Rail Safety Improvement Act of 2008 – Key Issues for Railroad Industry Contractors

Introduction
On October 16, 2008, the President signed the Rail Safety Improvement Act of 2008 (the “Safety Act”). The Safety Act is the most comprehensive new railroad safety law in the past 30 years. It contains dozens of new mandates for freight railroads, commuter railroads and Amtrak1. The Safety Act is equally important for railroad industry contractors, because several of the most significant new mandates directly apply to railroad contractors2 and many of the other new requirements for freight and commuter railroads and Amtrak will have an indirect effect on contractors.

The primary direct requirements for contractors are the changes in the Hours of Service Act, new requirements for employee training, certification of train conductors (and possibly other classes of workers) and drug and alcohol testing of maintenance-of-way employees. The most important indirect requirements are new railroad obligations with respect to safety risk reduction plans, the national railroad crossing inventory and railroad crossing malfunctions and obstructions.

Direct Requirements for Railroad Contractors
The following provisions apply to railroad contractors:

Hours of Service Act Changes
Section 108 of the Safety Act makes several significant changes in the Hours of Service Act (the “HSA”). The Safety Act makes employees of signal contractors subject to the HSA, which previously governed only signal employees of railroads. It retains the signal employee on-duty time limit of 12 consecutive hours, but increases off-duty time from 8 to 10 consecutive hours in a 24-hour period. The Safety Act limits the combined on-duty and limbo time for train employees to 276 hours per month; retains the train employee on-duty time limit of 12 consecutive hours but increases off-duty time from 8 to 10 consecutive hours in a 24-hour period; requires 48 consecutive hours off-duty if a train employee works six consecutive days; and requires 72 consecutive hours off-duty if a train employee works seven consecutive days. It also caps train employee limbo time to 40 hours per month during the first year after enactment of the Safety Act, and 30 hours per month thereafter.3 Railroad carriers are prohibited from communicating with train and signal employees during their off-duty time. Except as noted in footnote 2, the above-listed signal and train employee changes all become effective nine months after enactment.

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1 For a general overview, see our November 19th Alert, “Key Provisions of the Rail Safety Improvement Act of 2008.”
2 The new requirements pertaining to contractors also apply to subcontractors at all levels.
3 Train employees providing commuter rail or intercity rail passenger transportation will be governed by the pre-Safety Act requirements of 49 U.S.C. § 21103 until the earlier of the effective date of new hours of service requirements promulgated by the Federal Railroad Administration or three years after enactment of the Safety Act.
FRA also has authority to promulgate regulations reducing the maximum hours of service, increasing minimum rest periods or further limiting or eliminating limbo time. FRA has a mandate to revise the HSA record keeping and reporting requirements within the next six months.

**New Employee Training Requirements**

Under Section 401 of the Safety Act, FRA must within one year establish minimum training standards and qualifications for operating employees, track maintenance employees, rolling stock inspection, repair and maintenance employees and any other craft or class of employee who directly affects railroad safety as determined by the FRA. The minimum training requirements will apply to the employees of railroad contractors. The regulations also will require railroads and contractors to document the proficiency of such employees on federal railroad safety laws and regulations, and railroad rules and procedures. The regulations also will require railroads and railroad contractors to submit their training and qualification plans to FRA for approval. The regulations will include special provisions for railroad and contractor employees responsible for inspection of track or equipment.  

**Conductor Certification and Possible Certification of Other Crafts/Classes**

Under Section 402 of the Safety Act, FRA must within eighteen months establish regulations requiring the certification of train conductors. The certification requirements for train conductors will apply to contractor employees, will conform to the mandated training requirements (discussed above) and likely will follow the logic and format of the existing locomotive engineer certification rule codified in 49 C.F.R. Part 240.

In addition, no later than six months after promulgating the rule on training requirements, FRA must issue a report to Congress on whether the certification of certain other crafts or classes of railroad or railroad contractor employees is “necessary to reduce the number and rate of accidents and incidents or to improve railroad safety.” The report must consider craft or class certification of car repair and maintenance employees; on-board workers (not already covered by the locomotive engineer and conductor certification requirements); rail welders; dispatchers; signal repair and maintenance employees; and any other craft or class of employees FRA deems appropriate. The Safety Act gives FRA authority to promulgate regulations to implement the recommendations in its report.

**Alcohol and Drug Testing for Maintenance-of-Way Employees**

Under Section 412 of the Safety Act, FRA must within two years establish a rule for the alcohol and drug testing of maintenance-of-way employees of railroads and railroad contractors, in accordance with the procedures and requirements of the existing railroad employee drug testing programs.

**Indirect Requirements for Railroad Contractors**

The following provisions do not apply directly to contractors, but will have a significant indirect effect:

**Railroad Safety Risk Reduction Program**

Section 103 of the Safety Act requires FRA to issue regulations within the next four years requiring Class I freight and commuter railroads and Amtrak to develop a railroad safety risk reduction program that systematically evaluates safety risks and manages those risks in order to reduce the number and rate of accidents, incidents, injuries and fatalities. The railroad safety risk reduction program must be submitted to FRA for review and approval. The program must include an analysis of rules and practices, infrastructure, equipment, employee levels and schedules, safety culture, management structure, employee training and any other matters deemed appropriate by FRA, including issues not covered by current railroad safety regulations. In addition, the railroad safety risk reduction program must include a ten-year technology implementation plan.

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4 The employee training requirements will be codified in a new Section 20162 of Title 49 of the U.S. Code.
7 The railroad safety risk reduction program requirement also applies to any non-Class I freight railroad that FRA determines to have an inadequate safety record.
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The new railroad safety risk reduction program requirements will have an indirect effect on contractor activities, as railroad customers will ask contractors to assist in the preparation, approval, implementation of and compliance with the program.

**National Crossing Inventory**

Under Section 204 of the Safety Act, within one year all rail carriers must report to FRA certain grade crossing warning device and signage information on each previously unreported crossing. Information on new crossings must be provided within six months after a new crossing becomes operational and all crossing information must be updated on the second anniversary of enactment of the Safety Act and thereafter annually on or before September 30th. The reporting obligation applies to at-grade and grade separated crossings, including private crossings, pedestrian and bike crossings and excluding only rail-to-rail crossings.  

8 The technology implementation plan must include installation of positive train control technology by December 31, 2018, unless the line in question has more than 5 million gross ton-miles of freight per year and either handles passenger trains or poison- or toxic-by-inhalation substances, in which case the earlier deadline (December 31, 2015) in Section 104 applies.

9 These requirements will be codified in new Section 20156 of Title 49 of the U.S. Code.

10 These new requirements will be codified in new Section 20160 of Title 49 of the U.S. Code.

**Reporting Grade Crossing Malfunctions**

Under Section 205 of the Safety Act, FRA must within eighteen months require each railroad to establish a toll-free telephone service for lines it dispatches to directly receive calls reporting grade crossing signal or gate malfunctions, obstructive disabled vehicles, crossing view obstructions or other safety information. Railroads will be required to notify trains operating in the area and public safety authorities, and to investigate the reports and take corrective action. See 49 U.S.C. § 20152.

**Conclusion**

Besides the items summarized above, there are numerous less significant new requirements in the Safety Act and many other changes in the way FRA must regulate railroad safety and report its activities to Congress. All railroad contractors should review the Safety Act in its entirety and watch for additional developments as FRA rolls out new requirements under the Safety Act.