

Government Relations Update – December 17, 2021

1. Latest on NAW's Effort to Defeat Amazon's Monopoly Power in Federal Procurement

This week, NAW scored a major victory in our ongoing fight against Amazon. In 2017, NAW organized its Online Procurement Working Group ("NAW Working Group") comprised of several NAW members who have significant sales of commercial off-the-shelf (COTS) products to federal agencies. Due to the hard work and dedication of these NAW Working Group members, NAW has moved one step closer in our mission to stop Amazon from securing a government granted federal procurement monopoly.

Working with Rep. Veronica Escobar (D-TX-16), NAW helped draft and include a provision in S. 1605, the FY'22 National Defense Authorization Act (NDAA) to expand a General Service Administration (GSA) e-commerce pilot program that enables federal agencies to access procurement opportunities. The amendment requires the GSA to go beyond solely using Amazon's e-marketplace and begin testing several different e-commerce models in the pilot program. This provision would ultimately allow NAW members to participate in the program's e-commerce portal and compete in this process, without being pushed out due to limited competition and unfair practices in the federal e-commerce marketplace. S. 1605 passed both the House and Senate this week and is now on its way to President Biden's desk to become law.

However, the fight against Amazon's monopoly in government procurement continues. The NAW Working Group is currently working with Rep. Escobar on bipartisan legislation that would also prevent Amazon from selling their own products on its e-marketplace in direct competition with third-party sellers. This legislation will broaden competition and instill fairness benefitting third-party sellers and American taxpayers. As the battle moves forward with the flawed GSA pilot program, the NAW Working Group remains active and engaged with the Members of the House and Senate, key committee staff, and Administration officials to stop Amazon from securing a government granted monopoly.

Background: Section 846 of the FY'18 National Defense Authorization Act (Public Law 115-91) established a framework for determining whether commercial e-commerce portals would be appropriate for government agencies use to make non-contract purchases of commercial off-the-shelf (COTS) products. The law charged the General Services Administration (GSA) with establishing and managing the testing of three models.

As originally introduced, the language of Section 846, the so-called "Amazon Amendment," could be met by only one existing commercial e-marketplace provider, that being Amazon. Due in significant part to our Working Group's advocacy meetings with key Members of Congress and senior committee staff, Congress instead directed GSA to go beyond a single e-marketplace and include multiple commercial e-commerce portal providers in three distinct pilot tests to validate their suitability for federal agencies. Despite this, GSA chose to ignore the Congressional mandate. Although GSA identified three credible e-commerce purchasing channels, its June 2020 award tests only one model, the Amazon platform.

Under GSA's flawed plan, Amazon may pursue multiple roles. They may own, operate and manage a platform made up of third-party sellers who are chosen by Amazon and who will pay a fee to Amazon. Amazon can also list its own products on the platform. GSA provides no guidance to protect third-party proprietary information. Instead, it designates Amazon as the sole gatekeeper to sell COTS products to federal agencies.

GSA's approach will deny government customers the benefits of competition. NAW members' hard experience with Amazon's e-marketplace demonstrates that it ultimately results in fewer choices available to purchasers. Congressional testimony and media reports show that Amazon has used its position to appropriate and misuse supplier information and transactional data to favor Amazon's own products. The platform provider's ability to favor its own products over the platform competitors is unchecked in the GSA pilot.

2. Latest on OSHA Emergency Temporary Standard – Litigation and Comments

Litigation: There has been some movement in the case this week, some of it coming as a surprise. As we expected, the 6th circuit court of appeals denied the motion for en banc consideration of the case. However, the vote was a surprise in that the judges generally seen as opposed to en banc consideration in fact voted for it in this case. The vote was an 8 to 8 tie, the motion for en banc consideration would have had to receive a majority vote to prevail, so failed on the tie vote.

The chief judge in the circuit, Judge Jeff Sutton, wrote a strong dissent from the prevailing opinion, and six of the other Republican members of the court joined him in that opinion. Our attorneys think the vote may indicate that the 3-judge panel we drew (we do not know which judges are on the panel) was unfavorable to our position, which would explain why judges normally opposed to en banc consideration voted for it in our case. If so, the court may well vacate the stay.

However, we also expected the court to act quickly on the motion to vacate the stay following their decision on en banc consideration, but it has now been two days since that decision and as of this Friday morning writing, no decision on the stay has been handed down.

If, as our attorneys think likely, the 6th circuit does vacate the stay, we will immediately file an application for review by the Supreme Court. Our attorneys believe that our chances of ultimately succeeding in the Supreme Court and getting the stay extended remain very good, and that the dissent from the 6th circuit decision written by Judge Sutton and joined by 6 fellow judges will strengthen our argument in the Supreme Court.

Whether they extend or vacate the stay, things will move quickly to the Supreme Court once the 6th circuit rules on the motion, as we expect the government will apply to the Supreme Court for review if they extend rather than vacate the stay.

In either case, if the 6th circuit issues an order today and an application for review is filed immediately with the Supreme Court, the high Court would likely act very quickly asking for response and then reply briefs by mid-week next week. Our attorneys think it unlikely the Supreme Court would let this linger into Christmas. But everything remains up in the air until the 6th circuit rules on the motion to vacate the stay.

Comments: While we remain optimistic that our legal challenge will prevail, should the lawsuit not succeed OSHA will decide early next year whether to make the temporary standard permanent. NAW and our coalition partners are submitting comments to OSHA as part of their rulemaking process to urge modifications to the rule on behalf of our members. NAW along with 50 other groups joined comments filed last night by the Coalition for Workplace Safety (CWS), which you can read [HERE](#).

NAW will be filing separate comments before the mid-January deadline, most likely before the end of the year. Our comments will reflect the feedback and comments we have received from NAW

members on (1) the efforts they have made to encourage their employees to get vaccinated, and (2) how the OSHA ETS would impact them.

If you have not provided feedback to us on the ETS, please do so by completing a one-minute survey. Please click [HERE](#) to take the survey. Please use the “comments” section on the survey to provide additional information you think would be helpful as we prepare comments, including details on how the ETS will impact your company and workers.

3. Latest on Senate Action on Build Back Better (BBB) Reconciliation Bill

While the likelihood of Senate action on the BBB has been steadily declining, it is now a certainty that action will be put off until next year. This was not so much a pro-active decision by Senate Democratic leaders as acceptance of reality. The “Byrd Bath” scrubbing of the legislation to remove provisions that are not allowed under the strict reconciliation rules is nowhere near complete. And even if it were, negotiations between West Virginia Democratic Senator Joe Manchin and President Biden were notably unsuccessful, with Senator Manchin commenting that the President did not seem to be moving in his direction.

And the Democrats faced serious political headwinds on the issues that were at the core of Senator Manchin’s concerns: (1) a Congressional Budget Office “score” of the bill that showed that if the programs in the bill were permanent rather than temporary – the budget “gimmicks” that Senator Manchin objected to – the real cost of the bill would be close to \$5 trillion and the bill would increase the deficit by \$3 trillion, not the \$0.2 trillion claimed by Democratic leaders, and (2) inflation is at a 40-year high.

The inflation issue has been front and center with Senator Manchin, and for good reason, as a poll that NAW commissioned in West Virginia shows inflation is a major concern to voters there, and the BBB unpopular. [The survey results and its key findings memo may be found here.](#)

We will of course resume the battle on this bill next year, assuming the Senate makes another attempt to pass it. **In the meantime – we hope you all have wonderful, safe, and tax-free holidays!**

4. Employer Resources

As the Coronavirus Pandemic continues to impact the United States economy and businesses across the nation, it can be hard to decipher how new regulations and laws may impact your business. To help you manage these issues NAW is providing information about reports, webinars, and seminars that you may find useful:

From **Reed Smith Law Firm**: New York issues guidance on its latest mask mandate

As we previously reported, masks must be worn in New York State in “all indoor public places unless businesses or venues implement a vaccine requirement.” On Friday, December 10, 2021, the State issued guidance on the measure, clarifying the following key points: Definition of indoor public place – An indoor public place is..... [Continue Reading](#)

From **Reed Smith Law Firm**: OSHA ETS: Sixth Circuit denies initial hearing en banc

As noted in our prior post regarding the Sixth Circuit handling the challenges to the OSHA Emergency Temporary Standard (the ETS), several of the parties targeting the OSHA ETS filed or joined various petitions requesting an initial hearing en banc. On December 15, 2021, the Sixth Circuit denied the various petitions for initial hearing en..... [Continue Reading](#)

From **Reed Smith Law Firm**: NYC guidance addresses intersection of vaccine policies and workplace laws

In conjunction with New York City's recent employer vaccine mandate, the New York City Commission on Human Rights (NYCCHR) issued enforcement guidance on the equitable implementation of COVID-19 vaccine requirements for employees, independent contractors, and interns. Non-discriminatory application of vaccine policies In its guidance, the NYCCHR underscored that employers must ensure their policies and practices..... [Continue Reading](#)

You can find previous updates by [clicking here](#).

Many thanks—

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