

NOZZLE & WRENCH

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- >> Potential Remedies for Excessive Wholesale Motor Fuel Pricing
- >> When Bonuses Bite Back and Other Wage and Hour Woes



The amendment would add telematics to the Right to Repair law and 75% of Massachusetts voters approved the bill.



KIRK'S CORNER

Problem and Solution? Repair Facilities



By Kirk McCauley,
Director Of Member
Relations &
Government Affairs

Problem

Amendment to Right to Repair bill in Massachusetts that requires any data sent from vehicle wirelessly be sent to location picked by owner. The bill is stuck in Federal Judge Woodlock chambers with one excuse after another why he hasn't ruled, makes you wonder. The amendment would add telematics to the Right to Repair law and 75% of Massachusetts voters approved the bill. Something smells fishy in judge Woodblock's chambers. This Amendment would pave the way for bills in all states.

Alliance for Automotive Innovation (AAI) challenged the law in Federal court in 2020 and has been stuck there ever since. A.A.I. represents manufacturers.

Solution

Illinois U.S. Representative Bobby L. Rush introduced H.R. 6570 – The Right to Equitable and Professional Auto Industry Repair Act on February 3, 2022.

The REPAIR Act is supported by the Automotive Aftermarket Suppliers Association (AASA), Auto Care Association, CAR (Consumer Access to Repair) Coalition and Specialty Equipment Market Association (SEMA). WMDCAR supports the bill along with along with Service Station Dealers of America and Allied Trade (SSDA-At).

President Biden issued an Executive Order supporting Right to Repair and directed the Federal Trade Commission to support independent automotive repair shops by policing anti-competitive barriers and ensuring that consumers have access to the repair shop of their choice.

H.R.6570 as written would give all repair facilities access to the same information as a manufacturer's dealer network and give consumers a choice of who receives data from the vehicle they own, and paid for. [H.R.6570 - 117th Congress \(2021-2022\): REPAIR Act. | Congress.gov | Library of Congress](#)

There are 16 co-sponsors on the bill now, and not one of them represents Maryland or Delaware, D.C. has no voting representative. I think it's time to turn up the heat on our representative to U.S. congress.

Maryland and Delaware repair facilities, stand alone or gas with bays can change that by asking their federal legislators for support on a bill that is critical to repair industry.

In May 2021, the FTC [released a report](#) highlighting the barriers auto manufacturers have



Continues on page 4

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Connect with us!



Send a message to your representative now, ask congressional members to support and become co-sponsors, and ask your state representatives to send a letter to our congressional legislators to show support.

instituted to block consumers' Right to Repair. In the report, the FTC supported expanding consumer repair options and found "scant evidence" for the repair restrictions imposed by original equipment manufacturers. In a subsequent [policy statement](#) on the report, the FTC noted that these repair restrictions create hardships for families and businesses and that the Commission was "concerned that this burden is borne more heavily by underserved communities, including communities of color and lower-income Americans." In July, President Biden issued an [executive order](#) encouraging the FTC to address anti-competitive repair restrictions.

Give owners a choice of where vehicle is repaired with transparency of information needed to service and repair vehicle that was purchased by consumer.

Require owners to be informed of their right to have vehicle repaired at the location of their choice.

Give owners a choice of where repair and diagnostic data is wirelessly sent (telematics) if available on their model. They bought it, they should decide.

The Repair Act would save vehicle owners, your constituents, money, let them use a repair facility closer to home, use less fuel, and help support hundreds of thousand small businesses.

With the rush to electric cars, urgency for Repair Act become more important, consumer confidence along with environment would both be helped by enactment of H.R.6570

"Nixing the FIX" letter to congress from FTC – Restricting

consumers and businesses from choosing how they repair products can substantially increase the total cost of repairs, generate harmful electronic waste, and unnecessarily increase wait times for repairs. In contrast, providing more choice in repairs can lead to lower costs, reduce e-waste by extending the useful lifespan of products, enable more timely repairs, and provide economic opportunities for entrepreneurs and local businesses.

Send a message to your representative now, ask congressional members to support and become co-sponsors, and ask your state representatives to send a letter to our congressional legislators to show support.

FTC is enforcing some right to repair cases now through regulations, HR6570 would seal the deal, and keep an independent repair facility from being locked out of new technology. **I have said this before – to legislators, state and federal, nothing gets there attention more than a request from business owners.**

[Members - Find My Representatives \(maryland.gov\)](#) - Federal and state

[Find My Legislator - Delaware General Assembly](#) – Federal and state

Maryland - Delaware - District of Columbia

WMDA/CAR will engage legislators to support Right to Repair legislation HR 6570, and hopefully our members do the same. We are in the lull before the storm at the moment with a new Maryland governor and a sprinkling of new legislators in the house and senate. In Delaware

all house members were up for election (88) and D.C. has few new council members.

Our members face a strong headwind in all 3 jurisdictions with labor bills and environmental issues. We will advocate for our members' concerns and at the same time we want to be fair to our workers and environment. WMDA/CAR wants to be part of the solution, not part of the problem. We will work with legislators to provide sensible compromises and solutions or oppose bad bills.

Montgomery County passes a bill for building Decarbonization

The Montgomery County Council passed an amended [Bill 13-22](#) this past week paving the way for an all-electric building code for new construction in the future. The amended bill requires the County Executive to issue all-electric building standards no later than December 31, 2026. The legislation does establish an alternative compliance pathway for buildings that are carbon-neutral or net-zero even if they are not all-electric. Also included are a number of exemptions, including generators and emergency back-up systems, agriculture, gas fireplaces, and outdoor gas grills.

This has potential to affect our member, especially those that use natural gas for cooking or heating. I am a little confused about where all this electric power is going to come from. Currently during peak usage times, we have power suppliers asking us to cut back on electricity use. Seems like they are putting the cart in front of the horse.

Have a Good Holiday Season and Stay Safe. ■



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DETAILS TO COME – BE ON THE LOOKOUT

PRESIDENT'S ADDRESS



Sandi Weaver
BA Auto Care, Inc.

It's the time of year we celebrate holidays with family and friends. We reflect on the past year taking note of what we have accomplished and set goals for the New Year. At WMDA/CAR we are all looking forward to celebrating with a new location for the Expo and Awards dinner and, it's new name. In 2023, WMDA/CAR will host the Mid-Atlantic Fuel, Convenience and Auto Repair show at Maryland Live! With the new venue comes a new experience. With larger booths, more booths spaces available and an elegant awards dinner.

We are working to bring back hospitality suites with a twist, possibly some classes/general sessions for managers and owners, along with the awards dinner so many people love. With a hotel just a few floors up, you can enjoy your Friday night celebrating your team and take an elevator upstairs to rest up and enjoy all that Maryland Live! has to offer on Saturday. We look forward to seeing everyone there as it's sure to be a night to remember.

Happy Holidays to all our members and their families! ■



When Bonuses Bite Back and Other Wage and Hour Woes

Ask One New Jersey Service Station Owner



Christine V. Walters, J.D.,
MAS, SHRM-SCP, SPHR
www.FiveL.net
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The Fair Labor Standards Act (FLSA) requires that the value of any non-discretionary bonus be included in the employee's regular rate of pay for overtime calculations.

'Tis the season for year-end bonuses, for some. For others, there may be bonus opportunities throughout the year, such as for merit, working certain shifts or weekends, and more. If your company offers any type of bonus to non-exempt employees, be sure you know whether the bonus is (non)discretionary.

The Fair Labor Standards Act (FLSA) requires that the value of any non-discretionary bonus be included in the employee's regular rate of pay for overtime calculations. The U.S.

Department of Labor recently [announced](#) how it reminded one employer of this rule to the tune of more than **\$1.1M**.

So what is a discretionary bonus? The name may be misleading. It does not refer to the employer's discretion to continue or stop the bonus program at any time. The DOL [describes](#) a discretionary bonus as one that may be excluded from the regular rate of pay if:

1. Both the fact that the bonus payment is to be made and the amount of the bonus payment are at the sole discretion of the employer at or near the end of the period; and
2. the bonus payment is not made according to any prior contract, agreement, or promise causing an employee to expect such payments regularly.

Think it can't happen to you? The U.S. DOL also recently [announced](#) a federal court order to the owner and business manager of three full-service **gas stations** in New Jersey to pay more than \$226K to six employees for wage and hour violations under the Fair Labor Standards Act (FLSA). The six employees were station attendants whose duties included pumping gas for customers, operating cash registers, cleaning and maintaining the premises. The stations' owner and business manager were found personally and jointly liable with the business entity. The [original claim](#) alleged Violations of the FLSA included and were not limited to:

- paying the attendants a fixed salary that did not provide at least minimum wage for all hours worked;
- failing to pay overtime for all hours worked over 40 in each workweek;
- failing to maintain records of all hours worked; and
- failing to maintain records of wages paid each pay period.

Practical Application: Keep yourself and your business safe! Whether you pay your non-exempt employees on an hourly or salaried basis, ensure your wage payments meet not only FLSA requirements but those of your state and local jurisdiction. At least 30 states, approximately 90 local jurisdictions, plus the District of Columbia and two U.S. territories have a minimum wage rate higher than the federal rate. For more information and a practical tool or employers *and* employees, click here for the U.S. DOL's FREE [Timesheet App](#) for tracking hours worked and calculating wages due. ■



Potential Remedies for Excessive Wholesale Motor Fuel Pricing

Brought to you by James L. Parsons, Jr., Lynott, Lynott & Parsons, P.A.

Wholesale pricing for motor fuel is governed by the terms of the motor fuel supply agreement between a fuel supplier and a dealer. If the pricing arrangement is a “rack plus” deal, then the price will be the agreed upon difference between the rack price and the margin over rack, for example, rack plus 3 cents. However, if the arrangement is based upon a “dealer tankwagon” or “DTW” price, then the price will be determined by the supplier, and the price will be typically described in the supply agreement as the price “in effect” for the dealer’s area. How does a dealer address the situation where a supplier is raising and/or discriminating in DTW prices with an improper motive, such as attempting to force the dealer out of business?

The prices for motor fuel charged by a jobber/distributor are subject to the limitations of Uniform Commercial Code (UCC) Section 2-305. That section requires that where a contract includes an “open price term” to be set by the seller (such as a DTW price), the price must be set in “good faith,” which is defined under Section 1-201(20) of the UCC as “honesty in fact in the conduct or transaction concerned.” The comments to Section 2-305 provide that good faith “includes observance of reasonable commercial standards of fair dealing in the trade.” The comments also provide for a “safe harbor” for the seller, by stating that “in the normal case a ‘posted price’ or . . . ‘price in effect,’ . . . or the like satisfies the good faith requirement.”

Where a dealer claims that a supplier is setting the price for fuel in bad faith, the supplier may try to defend the allegation by asserting that the price charged to the dealer is the “price in effect” for the dealer’s location, and that the safe harbor provision applies to defeat the claim of bad faith. There is some case law support for the proposition that even when the wholesale price charged by the supplier is a commercially reasonable “price in effect,” if it is alleged to be fixed in bad faith, then the seller may not be entitled to the safe harbor good faith presumption. *See, Allapatah Servs. Inc. v. Exxon Corp.*, 61 F.Supp.2d 1308 (S.D.Fla. 1999). On the other hand, some courts interpreting Section 2-305 have held that if the price is commercially reasonable and within the range charged by other suppliers to their dealers, then the subjective intent of the supplier in setting the price may be disregarded. *See, Shell Oil Co. v. HRN, Inc.*, 144 S.W. 3d 429 (Tex. 2004). Considering the differing opinions on this issue, a dealer that




is able to show that (i) the price is not commercially reasonable, *and* (ii) is being set in bad faith, has the best chance of asserting a successful claim under Section 2-305.

On a related note, if a fuel supplier is charging a dealer a higher price for motor fuel than it is charging other dealers for the same fuel, this may support a claim for unlawful price discrimination under the Robinson Patman Act (RPA)(or possibly applicable state price discrimination laws), if an “injury to competition” can be shown. To succeed on a claim alleging a violation of the RPA, the dealer would have to prove competition between the favored purchaser and the dealer, and provide direct evidence of lost sales or profits caused by the discrimination.

Fuel suppliers defending claims under the RPA may assert statutory or other defenses available to them, including the “meeting competition” defense, where a supplier acts “in good faith to meet an equally low price of a competitor.” One of the ways that a supplier may try to avail itself of the meeting competition defense is by setting up price “zones,” and charging each dealer in the same zone the same price for fuel. However, the price zones may be subject to challenge if they are arbitrary and do not represent actual areas of competition in the sale of gasoline. And where a dealer is placed in its own price “zone,” this may raise a question as to whether the price zones relied upon by the dealer are legitimate.

A more detailed description of Section 2-305 and the RPA is beyond the scope of this article, but dealers should be aware that if their supplier is pricing motor fuel in a manner that places them in a position where they cannot possibly compete, there may be some legal recourse available under these (and possibly other) laws. Whether these laws are implicated will depend on the factual circumstances of each case. In circumstances where a dealer has direct evidence of a subjective intent by the supplier to put the dealer out of business, combined with evidence of discriminatory pricing, the chances of a successful claim by the dealer are significantly higher. ■

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Government Affairs Congressional Wrap Up



By Roy Littlefield IV

WMDA/CAR being represented by SSDA-AT on the federal level has been analyzing the results of the midterm elections and addressing the lame duck session as the 117th Congress wraps up priorities and legislative actions for 2022. The 118th Congress will be split, and SSDA-AT will explore opportunities to pass bipartisan legislation.

Recently, SSDA-AT wrote to Congress in strong support of the Family and Small Business Taxpayer Protection Act, H.R. 9092. This legislation would rescind the Inflation Reduction Act of 2022's billions in

funding for the Internal Revenue Service's (IRS) expanded enforcement efforts, while retaining funding for the IRS to focus on improving taxpayer services and modernizing operations to serve taxpayers.

It is disheartening that Congress would earmark \$45.6 billion (58%) for enforcement efforts while only providing \$3 billion (4%) for taxpayer services from the \$80 billion allocated to the IRS in the Inflation Reduction Act of 2022. Before considering how to penalize taxpayers, the agency should address the immense backlog facing the agency and how to better assist taxpayers with compliance.

In late August 2022, the Treasury Inspector General for Tax Administration (TIGTA) detailed how the IRS's processing delays have prevented businesses from receiving key pandemic relief benefits. More specifically, the IRS did not begin processing claims for qualified Sick and Family Leave Credits and Employee Retention Credit for 12 months. As of October 21, 2022, the IRS reported the agency still has 5.1 million unprocessed individual returns to process. SSDA-AT will continue to follow up with Congressional members on this issue.

Recently, SSDA-AT took part in a Policy and Government Affairs Committee Meeting as part of the American Highway Users Alliance. SSDA-AT continues to serve as a member of the Committee and as a member of the Alliance. Implementation of the bi-partisan infrastructure package remains a focus for the group and SSDA-AT plans to head up a coalition letter that will be sent to the House and Senate once Congress reconvenes for the 118th Congress. The letter will be a call to Congressional members to prioritize funding the infrastructure package for 2023 in a swift and appropriate manner with no new industry taxes.

SSDA-AT attended the 2022 Highway Users Annual Meeting featuring key Congressional and Administration policy makers, as well as top industry experts examining critical transportation issues. At the event SSDA-AT connected with Senator Deb Fischer (R-NE), House Transportation & Infrastructure Committee Chairman Peter DeFazio (D-OR), Representative Earl Blumenauer (D-OR), Carlos Monje, U.S. Department of Transportation Under Secretary for Transportation Policy, Jack Ruddy, Staff Director, House Transportation & Infrastructure Committee, Adam Tomlinson, Staff Director, Senate Environment & Public Works Committee, Dean Foreman, Chief Economist, American



SSDA-AT wrote to Congress in strong support of the Family and Small Business Taxpayer Protection Act, H.R. 9092.

GOVERNMENT AFFAIRS

Petroleum Institute, Congressional Staff Panel, Jack Ruddy, House Transportation & Infrastructure Committee Staff Director, Samantha Silverberg, Deputy Infrastructure Implementation Coordinator, White House, and Adam Tomlinson, Senate Environment & Public Works Committee Staff Director.

SSDA-AT took part in a Small Business Legislative Council (SBLC) meeting in Washington to discuss the latest legislative activities in Washington and to discuss the upcoming elections and future course of action for the 118th Congress. At the meeting, SSDA-AT met Meagan Singer of the SBA Office of Advocacy who just took the role. SSDA-AT had a strong relationship with Charles Jeane who just left the position. SSDA-AT received an update on the new goals for the Office of Advocacy and current issues they are working on. SSDA-AT will continue to build a strong relationship with the SBA.

Just a reminder that comments for DOL's Independent Contractor Proposed Rule are due on December 13th. Please remember to submit comments on [Regulations.gov](https://www.regulations.gov). As Context: On October 13, 2022, the Department of Labor's Wage and Hour Division (DOL) proposed a rule that would determine whether a worker is an independent contractor or an employee under the Fair Labor Standards Act (FLSA). Under the FLSA, companies are required to provide benefits such as minimum wage and overtime to employees, but not to independent contractors. To determine whether a worker is an employee or an independent

contractor, the employer must analyze whether the worker is economically dependent on the employer for work or is in business for themselves. The proposed rule would rescind a prior Trump administration

rule, which adopted an economic reality test focused on two core factors – control and profit. DOL proposes an economic realities test that requires a totality-of-the-circumstances analysis of multiple factors. ■

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Leaders Renew Talks for Tax Law Provisions on Funding Bill



By Roy Littlefield III

If Senate and House leaders can overcome severe obstacles these final days to pass a Fiscal Year Omnibus Appropriations Act by December 16th, tax writers will have virtually unlimited scope to write both new tax law and changes, and see it all pass on the Omnibus.

There are a number of tax provisions due to expire between 2021-2025. The Work Opportunity Tax Credit expires at the end of 2025. There will be another election in 2024, and if our goal is to enact permanent WOTC, or

another 5-year extension of WOTC, by the end of 2024, then our campaign must start on January 3rd, 2023!

As Democrats are still in control of the Senate, Finance Committee Chairman Wyden and Ways and Means Chairman Neal (both Democrats) have begun talks for agreement on tax provisions they're now exploring. Time is short, but they say they'll communicate speedily till consensus is reached on a tax law package to be enacted on the Omnibus.

In the Senate, appropriations to fund the government haven't been brought to the floor yet, but House appropriations bills for the twelve appropriations blocks have been completed, and some sent to the Senate.

Senator Schumer is in position to bring to the floor a budget reconciliation bill from last September, which is an appropriations measure. But reconciliation means Democrats going it alone, and the GOP can use the rules to delay as time runs out on the 117th Congress.

Passing an Omnibus at this late date could require Leader Schumer (D-NY) and Leader McConnell (R-KY) to cooperate.

Failing that, the outcome might ditch the Omnibus and fund the government via continuing resolution lasting to around March 1.

Senators and congressmen remain the same as before until the 117th Congress gavels the end in December. The 118th Congress begins January 3rd.

A Senate seat in Georgia will be decided by election on December 6th, but incumbent Senator Warnock (D-GA) holds his seat until the end of 117th Congress, should he lose the election. ■



Passing an Omnibus at this late date could require Leader Schumer (D-NY) and Leader McConnell (R-KY) to cooperate.

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-
- **Ban on menthol cigarettes** in District of Columbia means there will be copycat bills in Maryland and Delaware this year.
 - California **bans gas powered cars** by 2035, will Maryland be next?
 - Baltimore council members want to **ban new service stations** in the city, ban plastics, Styrofoam & sugary drinks. They have shut down many retailers with pad locks on doors, blaming business for crime. Police are telling our retailers you are on your own, hire security guards. They need to focus on crime, not plastic bags. The absurdity of actions like this underscores the need for new legislators.
 - Labor and employee bills in all three jurisdictions would add thousands of dollars in **payroll cost** per year. While we have been successful in stopping or amending most bills, they will all be back this year.
 - **Right to Repair/Telematics** – New cars manufactured are installing devices in vehicles that send information over wireless networks to dealerships automatically.

As absurd as some of these bills are, they are real and affect all our members. These issues will be or already are in the legislative process. We need legislators who support retail business, do not be on the side lines.

Support your PAC and PROTECT your business.

We suggest \$150 per location however, any amount is welcome.

Please send contributions to: WMDAPAC 1532 Pointer Ridge Place, Suite F Bowie, MD 20716

Your fellow business owners and PAC officers,

Rick Agoris, *PAC Chairman*

Riaz Ahmad, *PAC Treasurer*

