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## Battlefield Triage: Five Practical Steps to Vaccinate Your Business Against COVID-19

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Marc S. Blubaugh



Jonathan R. Todd

Both the speed of business disruption and depth of uncertainty created by COVID-19 have been unparalleled in our experience. Developments over the past week alone have emerged at an exponential rate and have impacted every aspect of our personal and professional lives. Not a single economic sector or specialty has proven immune from the effects of the virus, and the transportation and logistics sector is obviously no exception.

### The Transportation and Logistics Sector

Providers and commercial users of international transportation services were among the very first businesses to begin experiencing the implications of COVID-19, well before the virus struck the public consciousness. Initial outbreaks of COVID-19 were of course localized in Hubei

Province, PRC. The impact from these outbreaks was largely limited to those shippers who relied upon industrial production capacity in Wuhan. Next, trucking capacity constricted in China followed by closure of Chinese ports of call. The liner industry then responded with blank sailings. What began as an inventory management problem for global shippers became a significant transportation and logistics challenge.

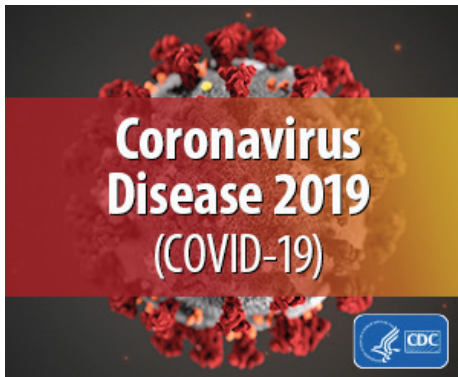
Like many tactical supply chain issues, the COVID-19 outbreak is essentially an extreme Sales & Operations Planning (S&OP) exercise for both the providers and the commercial users of transportation and logistics services. Professionals have been tasked with balancing available services for both inbound and outbound logistics with real cost and market demand. In this fast-changing reality, the playbook is constantly evolving across transportation mode, lanes, customer base, and even commodity. The grand theme that emerged is the need to closely manage expectations for service and price.

At the time of this writing, it is widely reported that air cargo rates on some trans-Pacific lanes have spiked as much as 60%. The air cargo market is particularly impacted because the inventory shock forced the air movement of

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## Battlefield Triage: Five Practical Steps to Vaccinate Your Business Against COVID-19

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critical cargo that would otherwise constitute ocean traffic. The available capacity of air cargo was simultaneously impacted by restrictions in passenger flights on a global basis greater than those immediately following the attacks of 9/11, on the order of 40-50% reductions. The virus has similarly impacted ocean rates, which in response to infrastructure closure and blank sailings has caused rates for some lanes to reportedly increase as much as 35%. Some are even predicting a particular impact on the 2020 ocean bid season that is underway, including the extension of the relative speed of negotiation and intense focus on the precise terms under negotiations.

The transportation and logistics challenges began at points of production and constrained inbound logistics. As can be expected, the interruption has and will continue to extend to outbound logistics operations, distribution, fulfillment, and the final mile. Consider for example the S&OP challenge facing many enterprise shippers looking to balance the lightning-fast changes in consumer retail demand for certain products with the already constricted supply chain. The textbook “bullwhip effect” inefficiency that is evident in these times of extreme demand disruption directly impacts not only the supply chain but also key transportation and logistics elements. At the level of consumption, the intervention of government authority to shutter operations and the health of professionals in warehousing and delivery may yield the final bottleneck tightening available supply and driving service cost.

### Five Practical Tips

One benefit of once-in-a-lifetime events is the gift to examine and improve our operations based on a clear and indisputable data. What was previously hypothetical is now a comprehensive global case study to make transportation and logistics providers, and the shippers who rely on those systems to move their cargo around the world, stronger and more efficient than ever before. To kick off this exercise, consider the following suggestions.

- 1. Manage expectations.** Customer relationship management and vendor management has grown into a specialty, and in some regards a subindustry. The principles and best practices for those endeavors have been called to task amid the COVID-19 impact. As early as the new year, it became critically important for many organizations to communicate thoughtfully with producers, providers, and customers in order to effectively manage expectations. Those needs continue each day in light of unprecedented changes to business and social life. Providers should continue to alert shippers to the potential for delay or increased charges. In some instances, such communications should be broadcast to entire supplier, provider, or customer groups and in other cases issued tactically. This activity is both a service to production planning as well as a means to gain assent, if required, to any necessary increase in costs.
- 2. Evaluate force majeure.** Nearly every organization in the supply chain is collecting current contracts and closely reviewing force majeure clauses. Force majeure is the contract principle and equitable doctrine under common law that excuses nonperformance due to the occurrence of certain events outside of the performing party’s control. Specific references to “epidemics,” “pandemics,” “acts of the government,” and similar language can now be applied to real-world facts. The World Health Organization declared coronavirus as a global pandemic

on March 11, 2020, and government authorities around the world swiftly shuttered operations in many communities. Courts may ultimately agree that specific delays and nonperformances are excused due to a force majeure. However, this analysis is always fact specific. The viability of claiming a force majeure depends on the applicable language or law, whether the intervening event actually caused the breach, whether alternate measures or other mitigation efforts were available, and the procedural requirements such as notice, cure, and termination rights. All providers and participants are well served to have meaningful force majeure provisions and thoughtful approaches to their consideration and exercise.

- 3. Explore price and volume mechanisms.** Additional mechanisms available under contract or service terms provide a pathway to navigating the range of possibilities as COVID-19 spreads. For example, even where interruption does not necessarily constitute force majeure, well-drafted contracts permitted relief through the reduction of service, adjustment of performance schedules or volume commitments, and recouping of increases in the cost of service delivery. Many organizations had built out contract tools for surcharges, price fluctuations, the right to decline orders or tender, and options for calling breach or default as well as available cure periods. The exercise of these tools can be essential to short-term performance, depending on the commercial relationship that had been negotiated and the efficacy of expectation setting. In all events, the crafting of these mechanisms and consideration of their applicability as facts developed can assist all contract parties to gain visibility into those eventualities.
- 4. Track regulatory relief and guidance.** Both shippers and providers must remain attuned to regulatory relief and guidance emerging from various federal and state agencies. For instance, on March 13, 2020, the Federal Motor Carrier Safety Administration issued an



## Benesch COVID-19 Resource Center

The COVID-19 situation is dynamic and fluid, requiring constant attention and appropriate measures for the health and safety of all. Benesch's COVID-19 Task Force is plugged in and reviewing the latest developments to ensure we are taking appropriate steps to help educate and respond to our clients during this time of uncertainty.

At the [Benesch COVID-19 Resource Center](#) you will find topics we have recently addressed in webinars and client bulletins. Benesch will continue to monitor COVID-19 as the situation develops, so please check back for additional information.

Emergency Declaration for motor carriers and drivers providing direct assistance in support of relief efforts related to COVID-19, waiving certain hours-of-service requirements. See Emergency Declaration at <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2020-03/FMCSA%20Emergency%20Declaration%203.13.20.pdf>. Certain states have granted similar relief to intrastate transportation. Likewise, on March 16, 2020, a coalition of shippers, transportation intermediaries, and motor carriers urged the Federal Maritime Commission to adopt an "interpretive rule" related to demurrage and detention charges at United States ports. The immediate concern and renewed urgency is driven by reduced gate hours that flow from COVID-19 and the associated dislocation of equipment. All involved in the supply change benefit from better understanding the regulatory landscape and, in particular, where regulators are willing to be flexible in a time of crisis.

**5. Evaluate insurance policies.** Proactive parties are examining their existing insurance policies to understand what coverage, if any, they may have for business disruption of this nature, for cargo claims that may arise as a result of COVID-19, and for other possible losses. For instance, certain policies may provide coverage for disruption caused by a communicable disease but exclude coverage if the disease is officially declared to be a global pandemic. Having further clarity about insurance coverage permits a party to make a more informed business decision when contending with the many forms of economic injury that are related in one form or another to COVID-19.

These steps are actionable right now, even as the COVID-19 interruption continues to sweep rapidly through global supply chains. As the day-to-day urgency subsides, these suggestions can also serve as a near-term checklist for consideration of immediate improvements to contractual relationships and standard operating procedures. In other words, the transportation and logistics community should soberly examine the recent course of events and consider how to best prepare for the next global interruption. The totality of lessons learned from the global impact of COVID-19 will require years to understand and implement. However, if the transportation and logistics industry has taught us anything during the spread of COVID-19, it is that speed of implementation is everything.

The Benesch Transportation & Logistics Practice stands ready to counsel and represent clients throughout the resolution of the pandemic and the rebuilding that will follow.

**MARC S. BLUBAUGH** is a partner and Co-Chair of the firm's Transportation & Logistics Practice Group. You may reach Marc at [mblubaugh@beneschlaw.com](mailto:mblubaugh@beneschlaw.com) or (614) 223-9382.

**JONATHAN R. TODD** is a partner in Benesch's Transportation & Logistics Practice Group. You may reach Jonathan at [jtodd@beneschlaw.com](mailto:jtodd@beneschlaw.com) or (216) 363-4658.

**Please note that this information is current as of the date of this newsletter, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by CDC and local officials.**

## What's Trending



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- Apprehend company property from those with suspected involvement in the breach (company smartphones, laptops, iPads, etc.).
  - This is an uncomfortable, albeit necessary step. Consulting legal counsel to develop policies that clearly state what is and is not company property is prudent. Remember, it is your property.
- Have your IT department or a third-party vendor standing by to forensically image the collected devices.
  - While smartphones and laptops are the most obvious devices, consider nontraditional electronic data sources as well. These may include employee security cards, parking garage logs, machine hard drives, and surveillance camera footage.
- Do not resume an employee’s access to trade secret information unless said employee has been cleared.
- Document your response.
  - This will include recording all response actions, such as suspending and strengthening passwords, logging company property apprehended and searched, collecting and maintaining signed and written witness statements gathered during the interviews, etc. If litigation is needed, your documentation will be critical.
- Consult legal counsel to determine whether your jurisdiction has any applicable laws or regulations that govern how to respond to such an incident.
  - This is a vitally important step to place

your company in the best position should litigation become necessary to protect your secret sauce.

- Your legal counsel can work with you to enforce your rights. This might include drafting reminder letters to employees of their obligations, cease and desist or other notice letters indicating knowledge of the breach, and ultimately litigation and appropriate remedies, such as a temporary restraining order or preliminary injunction.

**MATTHEW D. GURBACH** is Co-Chair of Benesch’s Products Liability practice and can be reached at [mgurbach@beneschlaw.com](mailto:mgurbach@beneschlaw.com) or (216) 363-4413. **ALYSSA A. MOSCARINO** is an associate in Benesch’s Litigation Practice Group and can be reached at [amoscarino@beneschlaw.com](mailto:amoscarino@beneschlaw.com) or (216) 338-7939.

## California Dreaming—A Worker Classification Update From the Vortex!



Eric L. Zalud



Elizabeth R. Emanuel

Benesch’s Transportation and Logistics team continues to track pertinent worker classification case developments in the Golden State. Below is a brief update and prognosis on where key cases stand.

### AB-5: The Backdrop

California Assembly Bill 5 codified the *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County*, 4 Cal.5th 903 (2018) decision relating to classification of independent contractors/employees in California. We have discussed this evolution in prior *InterConnect FLASH!es*; *InterConnect FLASH! Nos. 76*,

77, & 79 (See link: <https://www.beneschlaw.com/resources/index.html?nt=7317>). AB-5 would require use of the “ABC Test” when determining the status of putative employees for purposes of the California Labor Code, Unemployment Insurance Code, and Industrial Welfare Commission Wage Orders. The test, as codified in AB-5, is stated as follows: A person providing labor or services for remuneration shall be considered an employee, rather than an independent contractor, unless the hiring entity demonstrates that all of the following conditions are satisfied: (A) the person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (B) the person performs work that is outside the usual course of the hiring entity’s business (the big transportation sticking point); and (C) the person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. Part B

specifically makes it difficult for California-based owner-operators to be classified as independent contractors, since their work can be difficult to distinguish from that of the “hiring” motor carrier.

So, to remain in business as independent contractors, owner-operators would have to create their own businesses, e.g., by forming LLCs, obtaining required state and federal permits, and obtaining insurance (along with various other recommended structures). Shippers and brokers would need to rely either upon their own employees, or hire unequivocal third-party carriers to ship freight—or else risk misclassification penalties (along with other recommended structures). Also, because the term “hiring entity” is not limited to businesses within the Golden State in the language of AB-5, out-of-state motor carriers would have to ensure that they engage in shipping contracts with truly independent owner-operators. AB-5 was scheduled to go into effect January 1, 2020. *It did not.*

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## California Dreaming—A Worker Classification Update From the Vortex!

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### **AB-5 Preemption and the California Trucking Association Case**

On January 16, 2020, in *California Trucking Assn. v. Becerra*, 20 WL 248993, Judge Roger Benitez of the Southern District of California issued his decision granting a preliminary injunction against enforcing AB-5 with respect to motor carriers in the State of California. (Judge Benitez's earlier decisions regarding his temporary restraining order granted on New Year's Eve and the extended order were the subject of *InterConnect FLASH!* (See link: <https://www.beneschlaw.com/resources/index.html?nt=7317>). Judge Benitez concluded that AB-5 would, if enforced, make it impossible for motor carriers to utilize owner-operators and would, instead, force classification of all drivers as employees. The court ruled that such a result is preempted by the Federal Aviation Administration Authorization Act (F4A). Judge Benitez noted that for decades, the trucking industry has used an owner-operator model to provide transportation of property

in interstate commerce. Also, the fluid nature of the industry and its fluctuating demand for highly varied services, many of which are performed by independent-contractor drivers, evoked federal preemption. The court found that the "all or nothing" approach to independent owner-operators contained in AB-5 ran afoul of the F4A's preemption parameters. Judge Benitez aligned with both federal and state courts in California, holding that because the ABC Test effectively prohibits motor carriers from using independent contractors to provide transportation services, the test has a significant, impermissible effect on motor carriers' prices, routes, and services and, thus, is preempted by the F4A. Indeed, according to Judge Benitez: "With AB-5, California runs off the road and into the preemption ditch of the [F4A]."

### **The Update and Prognosis**

On January 29, 2020, defendants Xavier Becerra, et al. filed a notice of appeal of the preliminary injunction order to the Ninth Circuit

Court of Appeals. The appellate briefing is underway. In the meantime, the District Court case is scheduled for Early Neutral Evaluation and a Case Management Conference before the magistrate at the end of March 2020. *During these proceedings, there is essentially an operational reprieve from the draconian strictures of AB-5.* Prior IC operations can continue, with an eye toward developments in the Ninth Circuit. Some motor carriers, shippers, and brokers are nonetheless preemptively restructuring their operational structures and contractual regimes, out of an abundance of caution.

**ERIC L. ZALUD** is Co-Chair of Benesch's Transportation & Logistics Practice Group. You may reach Eric at (216) 363-4178 or [ezalud@beneschlaw.com](mailto:ezalud@beneschlaw.com). **ELIZABETH R. EMANUEL** is an associate in Benesch's Transportation & Logistics Practice Group. You may reach Elizabeth at (216) 363-4559 or [eemanuel@beneschlaw.com](mailto:eemanuel@beneschlaw.com).

# Despite Recent Challenges, California Meal and Rest Break Remains Pre-empted, While Briefing Closes in the Ninth Circuit Case

**Department of Transportation dismisses the California Labor Commissioner's Petition for Reconsideration of California's Meal and Rest Break Rules. While briefing in the Ninth Circuit closes, oral Argument in *Intl Brotherhood of Teamsters, et al. v. FMCSA* is expected in summer 2020.**



John N. Dagon



Matthew J. Selby

## I. Background

On February 21, 2020, the Department of Transportation, Pipeline and Hazardous Materials Safety Administration (PHMSA) dismissed the California Labor Commissioner's most recent attempt at overturning PHMSA's previous ruling, preempting the application of California's Meal and Rest Break Rules (MRB Rules) as applied to drivers of motor vehicles transporting hazardous materials. This decision, as noted by DOT/PHMSA, will be subject to reconsideration pending the Ninth Circuit's decision in *Intl Brotherhood of Teamsters, et al. v. FMCSA*, Court of Appeals Docket No.: 18-73488. Notably, briefing in the Ninth Circuit recently closed, also on February 21, 2020, and the Ninth Circuit has indicated that it will schedule oral argument some time during the summer of 2020.

This adds to a laundry list of currently pending issues in the California motor carrier and logistics industry. As explained in detail in *InterConnect FLASH!* Nos. 76, 77, 78 and 79, the State of California is currently enjoined from enforcing AB-5—a law that would make it virtually impossible for most California-based owner-operators to be classified as independent contractors without some type of structure modification.

Additionally, in February 2020, the U.S. House of Representatives passed the "Protecting the Right to Organize Act," H.R.2474 (PRO Act), which would fundamentally shift various important employee-employer relationships in concert with AB-5 at the federal level, and commensurate laws and regulations, in favor of employee status, and ultimately, unions. As noted, it is unlikely that the Senate and President Trump will pass and sign the bill into law. Yet, if it were pushed through in some format, it would severely limit preemption arguments under the Federal Aviation Administration Authorization Act. (See details in *InterConnect FLASH!* No. 79 here: [https://www.beneschlaw.com/images/content/1/9/v3/19591/Benesch\\_TL\\_Flash79.pdf](https://www.beneschlaw.com/images/content/1/9/v3/19591/Benesch_TL_Flash79.pdf).)

## II. The Current State of California's Meal and Rest Break Rules

On September 21, 2018, PHMSA published a determination responding to a petition from the National Tank Truck Carriers, Inc. (NTTC) stating that the MRB Rules are preempted, under 49 U.S.C. 5125, as applied to drivers of motor vehicles transporting hazardous materials. In response to the PHMSA decision, the California Labor Commissioner submitted a petition for reconsideration of the issue.

After the California Labor Commissioner filed its petition for reconsideration, on September 24, 2018, the American Trucking Association (ATA) and the Specialized Carriers and Rigging Association (SCRA) separately petitioned the Federal Motor Carrier Safety Administration (FMCSA) to preempt the California MRB Rules as applied to drivers of commercial motor vehicles subject to FMCSA's hours of service regulations.

On December 28, 2018, FMCSA determined that the MRB Rules are preempted, under 49 U.S.C. 31141, as applied to property-carrying commercial motor vehicles drivers covered by FMCSA's hours of service regulations. FMCSA concluded that the MRB Rules are state laws or regulations that are incompatible with and additional to or more stringent than FMCSA's HOS rules. Further, FMCSA concluded that the MRB Rules have no safety benefit, and enforcement would cause an unreasonable burden on interstate commerce. As such, FMCSA granted the petitions for preemption under 49 U.S.C. 31141.

After receiving inquiries, FMCSA's Office of the Chief Counsel issued a legal opinion on March 22, 2019, concluding that FMCSA's preemption decision precludes courts from granting relief pursuant to the preempted state law, regardless of when the underlying lawsuit was filed or when the underlying conduct occurred.

PHMSA followed suit, finding that the NTTC's petition for reconsideration of the MRB Rules' applicability to motor vehicles transporting hazardous materials was moot. PHMSA stated: "While PHMSA's determination applied to drivers of motor vehicles transporting hazardous materials, FMCSA's determination applies to a broader class of drivers: All drivers of property-carrying CMVs subject to FMCSA's HOS rules." Therefore, because the NTTC's drivers are subject to FMCSA's HOS rules, FMCSA's decision precludes enforcement of the MRB Rules against NTTC's members.

However, in closing, PHMSA noted that in "the event the FMCSA decision is overturned and the state requirements become enforceable again,

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## TSA Voluntary Self-Disclosure Policy Revisited—Your NEW Action Plan



Jonathan R. Todd



Abby Riffée

Those regulated by the Transportation Security Administration (TSA) are familiar with a range of TSA policies that govern agency relationships during enforcement actions. For example, the Voluntary Disclosure Program Policy (VDPP), the Resolution Corrective Action Policy for U.S. Locations, and the Vulnerability Mitigation Policy for U.S. Locations have served as the framework for addressing compliance incidents and their responsible response. Now, as of August 26, 2019, the TSA has implemented its new approach to these policy matters that is referred to as the Action Plan Program.

### The Action Plan Program

The Action Plan Program has revised the TSA's voluntary self-disclosure procedure under the VDPP to reduce vulnerabilities and increase security, compliance, and industry partnership. Now, regulated parties may self-disclose *both* noncompliance *and* security vulnerabilities. Additionally, parties may now make a disclosure even if the noncompliance or vulnerability is discovered by the TSA. As one would expect,

noncompliance that is egregious, flagrant, continuous, wanton, in bad-faith, extraordinary, conspicuously bad, or that glaringly deviates from the TSA's regulatory requirements will not be eligible for the Action Plan Program. The noncompliance or vulnerability also cannot include deliberate, intentional, or reckless deviations from the TSA's regulatory requirements or activities involving criminal activity or fraud.

### Updates to the Voluntary Disclosure Program

Like the VDPP, the Action Plan Program still applies to: aircraft operators, foreign air carriers, indirect air carriers, certified cargo screening facilities (including Third-Party Canine-Cargo Program—3PK9-C Program), airport operators, flight training providers, all freight and passenger railroad carriers, certain facilities that ship or receive specified hazardous materials by rail, and rail transit systems. These parties are collectively referred to as eligible parties. The Action Plan Program effectively helps eligible parties avoid the TSA's traditional civil enforcement process. Traditionally, if an eligible party was determined to be noncompliant or failed to disclose a security vulnerability, the TSA would issue a sanction or impose a monetary civil penalty. While the VDPP also allowed eligible parties to avoid these typical sanctions, the Action Plan Program takes a much more collaborative approach to reaching a resolution.

Under the Action Plan Program, the eligible party will first disclose the noncompliance to the TSA. The Action Plan Program's initial disclosure procedures are generally the same as the procedures under the VDPP, with the exception of several timing and specification revisions. The eligible party must then submit a Voluntary Disclosure Report. The Action Plan Program's Voluntary Disclosure Report requires less detail and description than what was required under the VDPP.

Perhaps the most significant change between the Action Plan Program and VDPP is the corrective action process. In order to address noncompliance, a corrective action must be proposed and eventually implemented. Under the VDPP, the disclosing party had the responsibility of drafting the corrective action on its own, then submitting it for TSA review. However, now under the Action Plan Program, the eligible party and the TSA will work together to negotiate the corrective action and ultimate resolution. This procedure is now referred to as the action plan. It is imperative that an eligible party wishing to make a voluntary self-disclosure thoroughly review the Action Plan Program and carefully follow each step.

### Choosing to Participate, and Expectations

Participation in the action plan is, of course, voluntary. As part of the negotiation with the TSA, the eligible party must still be prepared to discuss the general details it was required to disclose under the VDPP. For example, the party should expect to discuss the root cause of the noncompliance and submit supporting materials. Failure to properly follow certain Action Plan Program procedures could lead to the TSA issuing an Letter of Rejection, opening an investigation into the noncompliance, or ultimately imposing a sanction or civil monetary penalty.

**JONATHAN R. TODD** is a partner in Benesch's Transportation & Logistics Practice Group who regularly advises clients on air cargo security and related enforcement matters. You may reach Jonathan at (216) 363-4658 or [jtodd@beneschlaw.com](mailto:jtodd@beneschlaw.com). **ABBY RIFFÉE** is an associate in the firm's Litigation Practice Group. You may reach Abby at (614) 223-9387 or [ariffee@beneschlaw.com](mailto:ariffee@beneschlaw.com).



# A Practical Understanding of U.S. Anti-Boycott Compliance



Jonathan R. Todd



Grant Gieseke

United States anti-boycott laws are an often overlooked part of export compliance. Our practice has seen the frequency of suspicious requests rise. In response, we wanted to take the time to remind our readers of the basics for U.S. anti-boycott compliance and its practical application in day-to-day operations. These rules are significant for all U.S. interests, whether manufacturers, distributors, freight forwarders, or even the foreign subsidiaries of domestic interests.

## What Are Anti-Boycott Regulations?

The United States has implemented anti-boycott regulations to address how companies can and should respond when receiving requests from foreign parties to effectively boycott certain countries or businesses from those countries that are friendly to the United States (e.g., Israel). The anti-boycott rules are found at 15 CFR Part 760 and at 26 USC § 999. Typical boycott requests that can trigger these provisions include requirements to refuse business to another country, or a company domiciled in that country, and agreement to otherwise discriminate against businesses or persons based on their race, sex, national origin, or nationality. The Dept. of the Treasury publishes a list on a periodic basis identifying frequent boycotting countries, but boycott-related requests are actionable regardless of whether the issuing country or entity is on such a list. In general, boycott requests must be reported to the federal government regardless of whether or not they are acted upon.

## Who Must Report Boycott Requests?

United States persons must report boycott requests received in connection with transactions or activities in the interstate or foreign commerce of the United States. [15 CFR § 760.1] The term “United States person” refers to any person who is a United States resident or national, including individuals, domestic concerns, and “controlled in fact” foreign subsidiaries, affiliates, or other permanent foreign establishments of domestic concerns. This includes any foreign concern’s subsidiary, partnership, affiliate, branch, office, or establishments in the U.S. as well as any domestic concern’s foreign subsidiary, partnership, affiliate, branch office, or establishments controlled in fact by such domestic concern. [15 CFR § 760.1(b)(1)] Also, foreign “controlled groups” that hold a parent-subsidiary relationship in which a parent holds a majority interest in one or more chains of corporations are included in the category of companies subject to these provisions. [IRC § 999] A request received by a U.S. person located outside the United States (that is, a foreign subsidiary, partnership, affiliate, branch, office, or other permanent foreign establishment that is controlled in fact by any domestic concern, as determined under § 760.1(c)), is reportable if it is received in connection with a transaction or activity in the interstate or foreign commerce of the United States. [15 CFR § 760.5]

## What Are the Reporting Requirements?

The *mere receipt* of a boycott request triggers compliance obligations. Any United States person that receives a boycott request is required to report that receipt to the Department of Commerce. [15 CFR § 760.5] Importantly, boycott-related requests are generally reportable regardless of whether the recipient complies with the request or not. If the request was received in the United States, the report must be filed with the Department of Commerce

within one month following the end of the quarter during which the request was received. If received outside the United States, the United States person receiving the request has one additional month to report. Form BIS 621-P is available for use on single requests, and form BIS 6051-P may be used for multiple requests. Additional reporting requirements exist under the Internal Revenue Code, which requires a taxpayer to report whether it or any member of its controlled group has participated in or cooperated with a boycott at any time during the taxable year. [26 USC § 999(a)(2)] Reports to the Internal Revenue Service pursuant to § 999 must be filed annually with a U.S. taxpayer’s tax return using IRS form 5713.

## What Are the Consequences of Failing to Report?

Violations of the reporting requirements can result in civil and criminal penalties, including fines, imprisonment, and denial of export privileges. Civil penalties include fines of up to \$11,000 per violation and applicable restrictions. Criminal penalties imposed for each “knowing” violation can be a fine of up to \$50,000 or five times the value of the exports involved, whichever is greater, and imprisonment of up to five years. Under certain circumstances, the criminal penalties for each “willful” violation can be a fine of up to \$50,000 and imprisonment for up to 10 years. Fortunately, voluntary self-disclosure procedures are available and may serve as mitigating factors during enforcement. [15 CFR § 764.8]

**JONATHAN R. TODD** is a partner in Benesch’s Transportation & Logistics Practice Group. You may reach Jonathan at (216) 363-4658 or [jtodd@beneschlaw.com](mailto:jtodd@beneschlaw.com). **GRANT GIESEKE** is an associate in the firm’s Litigation Practice Group. You may reach Grant at (216) 363-6269 or [ggieseke@beneschlaw.com](mailto:ggieseke@beneschlaw.com).



in the application of the terms. These changes are surgical in nature rather than imposing some drastic change to the scope of obligations and the allocation of risk under the INCOTERMS. In short, the 2020 version of INCOTERMS will offer buyers and sellers, and their service providers, a more suitable opportunity to memorialize party intent when participating in the international trades.

It is important for sellers and buyers to review their contractual relationships and make any required amendments to reflect the changes to the INCOTERMS. Further, with these changes comes the increased need for clarity in contract drafting to ensure which version of the INCOTERMS—2010 or 2020—applies to your contractual relationship. Buyers and sellers should explicitly identify which iteration of the terms apply in the contract at issue. As these updated INCOTERMS are placed into practice,

the scope and impact of the modifications should continue to be monitored by supply chain stakeholders to ensure that that organizations adequately understand their responsibilities, obligations, and allocated risk under the INCOTERMS.

We very often remind our clients that INCOTERMS are only shorthand. They should not be taken for granted. While simple, INCOTERMS convey the responsibilities, obligations, and risks of both seller and buyer from the point of origin, through transportation, to the point of delivery. Every supplier and importer must consider the totality of its deal terms before looking to memorialize those in contract language. Drafting in plain language, especially on complex issues such as responsibility for duties, is sometimes preferred if the INCOTERMS convey different or conflicting meanings. Some parties take this a step further by expressly stating that

the INCOTERMS are for convenience only and do not change the parties' intentions. Clearly drafting deal terms, and taking time to consider unintended consequences, can mean the difference between having the upper hand in price negotiations or accepting a 25% ad valorem increase in duties due to three simple letters.

**JONATHAN R. TODD** is a partner in Benesch's Transportation & Logistics Practice Group. You may reach Jonathan at [jtodd@beneschlaw.com](mailto:jtodd@beneschlaw.com) or (216) 363-4658. **KRISTOPHER J. CHANDLER** is an associate with the firm who practices in the areas of commercial transactions, transportation, and intellectual property. You may reach Kris at [kchandler@beneschlaw.com](mailto:kchandler@beneschlaw.com) or at (614) 223-9377.

<sup>1</sup><https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-history/>

## DOT Guidance Portal is NOW AVAILABLE



Jonathan R. Todd

The United States Department of Transportation (DOT) has launched a searchable online portal for all guidance documents issued by the DOT and its nine operating administrations. The Guidance Portal is available here: <https://www.transportation.gov/guidance>.

The impetus behind the DOT's launch of this Guidance Portal is found in Executive Order 13891 titled "Promoting the Rule of Law Through Improved Agency Guidance Documents," which was signed on October 9, 2019. The Executive Order directs each federal agency to establish or maintain on its website a single, searchable, indexed database that contains or links to all guidance documents in effect from that agency or its components. The Office of Management and Budget (OMB) subsequently issued Memorandum M-20-02 requiring all federal agencies to establish such databases by February 28, 2020.

The Guidance Portal permits easy-to-use access of all informal guidance available from the agency. These materials do not carry the force of law and may not be cited, however, although they carry tremendous value for internal teams tasked with operations compliance. For example, informal guidance serves to explain the current administration's interpretation of existing laws and regulations as well as their application to particular facts and circumstances. This viewpoint is priceless when building compliance programs, developing incident responses, and preparing to defend enforcement actions.

**JONATHAN R. TODD** is a partner with Benesch's Transportation & Logistics Practice Group. He may be reached at (216) 363-4658 or [jtodd@beneschlaw.com](mailto:jtodd@beneschlaw.com).

## Recent Events

### International Warehouse Logistics Associations (IWLA's) Annual Safety & Risk Program

Marc S. Blubaugh presented *Slaying Godzilla: Reptile Theory and Auto Liability*.  
September 12, 2019 | Columbus, OH

### Intermodal Association of North America (IANA) Intermodal Expo 2019

Marc S. Blubaugh and Martha J. Payne attended.  
September 15–18, 2019 | Long Beach, CA

### Council of Supply Chain Management Professionals EDGE Conference

Marc S. Blubaugh presented *Transportation Regulatory Developments: An Overview from FMCSA*.  
Marc Blubaugh and Verlyn Suderman attended as Track Co-Chairs for this conference.  
September 16, 2019 | Anaheim, CA

### Ohio Trucking Association and Ohio Association of Movers—2019 Annual Conference

David A. Ferris and Matthew J. Selby presented *Art of Negotiating*.  
September 16–17, 2019 | Cleveland, OH

### 2019 Association for Supply Chain Management (ASCM) Conference

Jonathan R. Todd presented *Keys to Effective Global Logistics Outsourcing in 2019*.  
September 16–18, 2019 | Las Vegas, NV

### Arkansas Trucking Seminar

Eric L. Zalud and David A. Ferris attended.  
September 18–19, 2019 | Rogers, AK

### The 2019 Annual Conference on Transportation Innovation and Savings

Eric L. Zalud attended.  
September 19, 2019 | Toronto, Ontario

### Canadian Transport Lawyers Association (CTLA)—AGM & Educational Conference 2019

Michael J. Mozes presented on M&A in the logistics space. Jonathan R. Todd presented on cabotage regulation. Martha J. Payne attended.  
September 19–21, 2019 | Winnipeg, Canada

### Oregon Trucking Association Annual Conference

Martha J. Payne attended.  
September 25–27, 2019 | Glendon Beach, OR

### Women in Trucking Conference

Margo Wolf O'Donnell presented *Challenges in Employment Law and Gender Issues*. Martha J. Payne attended.  
September 30, 2019 | Dallas, TX

### International Warehousing Logistics Association's (IWLA's) Essentials Course

Marc S. Blubaugh presented *Fundamentals of Transportation Law*.  
October 2, 2019 | Jacksonville, FL

### American Trucking Association (ATA) Management Conference & Exhibition

Marc S. Blubaugh, Jonathan R. Todd, and Matthew J. Selby attended.  
October 5–9, 2019 | San Diego, CA

### The Truck Industry Defense Association (TIDA) 27th Annual Seminar

Eric L. Zalud attended.  
October 23–25, 2019 | Tampa, FL

### The Logistics and Transportation National Association (LTNA) National Conference

Megan Parsons attended.  
October 23–25, 2019 | Nashville, TN

### 2019 Transportation Law Institute (TLI)

Suzanne Alton de Eraso presented *How the Ever-Changing State of Biometric Litigation Can Impact Your Business: Must-Know Information*. Marc S. Blubaugh, Martha J. Payne, Jonathan R. Todd, and Eric L. Zalud attended.  
November 8, 2019 | Minneapolis, MN

### Transportation Lawyers Association (TLA) Board Meeting

Marc S. Blubaugh and Eric L. Zalud attended.  
November 9, 2019 | Minneapolis, MN

### Transportation Intermediaries Association's (TIA's) 3PL Technovations Conference

Eric L. Zalud presented on M&A in the logistics sector. Martha J. Payne attended.  
November 12–13, 2019 | Amelia Island, Florida

### Capital Roundtable: PE Investing in Transportation & Logistics Companies

Jonathan R. Todd presented on M&A in the transportation sector. Marc S. Blubaugh, Peter K. Shelton, and Eric L. Zalud attended.  
November 21, 2019 | New York, NY

### Conference of Freight Counsel

Martha J. Payne and Eric L. Zalud attended.  
January 4–6, 2020 | Palm Springs, CA

### GlobalTranz Annual Agent Conference

Marc S. Blubaugh attended.  
January 8–9, 2020 | Scottsdale, AZ

### Columbus Roundtable of Council of Supply Chain Management Professionals

Marc S. Blubaugh presented *Reading the Tea Leaves: Transportation in 2020*.  
January 21, 2020 | Columbus, OH

### APICS and ISM Akron Chapter Meeting

Jonathan R. Todd presented *Global Transportation & Logistics Procurement*.  
January 21, 2020 | Akron, OH

### BG Strategic Advisors Supply Chain Conference

Marc S. Blubaugh, Peter K. Shelton, and Eric L. Zalud attended.  
January 22–24, 2020 | Palm Beach, FL

### Transportation Law Association (TLA) Chicago Regional Seminar and Bootcamp

Bob Morgan presented *"SHEDD"ing Some 'Aquarium' Light on the Challenges Facing Cannabis Companies When Expanding Their Businesses Across Interstate, Interprovincial, and International Borders*.  
Marc S. Blubaugh, Kevin M. Capuzzi, William E. Doran, David A. Ferris, John C. Gentile, Ashleigh

Morpeau, Steven A. Oldham, Martha J. Payne, and Jonathan R. Todd attended.  
January 22–24, 2020 | Chicago, IL

### Air Cargo Conference

Martha J. Payne and Jonathan R. Todd attended.  
January 26–28, 2020 | Nashville, TN

### Southern Motor Carriers Association (SMC3) Jump Start

Megan Parsons attended.  
January 27–29, 2020 | Atlanta, GA

### Stifel Transportation Conference

Marc S. Blubaugh, Peter K. Shelton, and Eric L. Zalud attended.  
February 11–12, 2020 | Miami, FL

### Jeffries Logistics & Transportation Conference

Marc S. Blubaugh attended.  
February 12–13, 2020 | Miami, FL

### Great West Risk Management Retreat and Conference

Eric L. Zalud presented *Who Am I And For Whom Do I Work? Employee Classification Issues From The Vortex*.  
February 13–16, 2020 | Palm Springs, CA

### Specialized Transportation Symposium 2020

David A. Ferris and Matthew J. Selby attended.  
February 18–21, 2020 | Charlotte, NC

### Customized Logistics and Delivery Association (CLDA) Final Mile Forum & Expo

Matthew J. Selby attended.  
February 19–21 | Miami, FL

### 81st Truckload Carriers Association (TCA) Annual Convention

Jonathan R. Todd and Matthew J. Selby attended.  
March 1–3, 2020 | Kissimmee, FL

### Ohio Trucking Association: Emerge OTA

Marc S. Blubaugh and John Burnside presented *Legal Update and Deposition Training*.  
March 3, 2020 | Columbus, OH

### MODEX Expo 2020

Jonathan R. Todd attended.  
March 9, 2020 | Atlanta, GA

### APICS Albuquerque Chapter Meeting

Jonathan R. Todd presented *Global Logistics Outsourcing*.  
March 12, 2020 | Albuquerque, NM

### 2020 International Warehouse Logistics Association (IWLA) Convention & Expo

Marc S. Blubaugh presented *Transportation Potpourri: Independent Contractors, Government Regulations, Technology & More!* Eric L. Zalud attended.  
March 15–17, 2020 | San Diego, CA

# On the Horizon

## American Trucking Associations (ATA) Webinar

Marc S. Blubaugh is presenting *Freight Claims: Recent Lessons from the Courts*.  
March 24, 2020 | Webinar

## Columbus Logistics Breakfast Club

Marc S. Blubaugh is presenting *Damaged, Lost, and Stolen Freight: Tales from the Courts!*  
March 27, 2020 | Columbus, OH

## 2020 Transportation Intermediaries Association (TIA) Capital Ideas Conference

Marc S. Blubaugh is co-presenting *Legal/Claims: Evaluating Business Opportunity Risk*. Bryna Dahlin is presenting on issues related to cannabis transportation. Martha J. Payne is presenting *Latest Issues in Contracting*. Eric L. Zalud is co-presenting *Hot Topics: Consolidation in the 3PL Market and Why It Is Happening*.  
April 1–4, 2020 | Austin, TX

## Raymond James Transportation & Logistics and Diversified Industrials Conference

Marc S. Blubaugh and William E. Doran are attending.  
April 14–15, 2020 | Sea Island, GA

## APICS Research Triangle Chapter Meeting

Jonathan R. Todd is presenting *Global Transportation & Logistics Risk*.  
April 15, 2020 | Raleigh, NC

## National Customs Brokers & Forwarders Association of America (NCBFAA) Annual Conference

Jonathan R. Todd is attending.  
April 19–22, 2020 | Las Vegas, NV

## Transportation and Logistics Council (TLC) 46th Annual Conference

Marc S. Blubaugh is a panelist on the “Transportation Attorney Panel.” Martha J. Payne is moderating the “Transportation Insurance Panel.” Eric L. Zalud is a panelist on the “Transportation Service Providers—Selection and Compliance Panel.”  
April 27–29, 2020 | Orlando, FL

## Transportation Lawyers Association (TLA) Annual Conference

Eric L. Zalud is presenting. Marc S. Blubaugh is attending and serving as Co-Chair of the Program. Matthew D. Gurbach and Martha J. Payne are attending.  
April 29–May 3, 2020 | Amelia Island, FL

## DRI 2020 Trucking Law Seminar

Eric L. Zalud is attending  
April 30–May 1, 2020 | Austin, TX

## National Tank Truck Carriers (NTTC) 72nd Annual Conference & Exhibits

Matthew J. Selby is attending.  
May 3–5, 2020 | Washington, DC

## Intermodal Association of North America’s Operations and Maintenance Business Meeting

Marc S. Blubaugh is moderating the “Intermodal and the Independent Contractor Panel.”  
May 5–7, 2020 | Oak Brook, IL

## 2020 IWLA Economics of Warehousing & 3PL Sales

Marc S. Blubaugh is attending.  
May 13–15, 2020 | Denver, CO

## ATA Management Meeting

David A. Ferris, Matthew J. Selby, and Jonathan R. Todd are attending.  
May 16–20, 2020 | Tucson, AZ

## Columbus Logistics Conference

David A. Ferris is presenting.  
May 20, 2020 | Columbus, OH

## 2020 Supply Chain Sustainability Summit

Jonathan R. Todd is a speaker during the breakout session “Parted Veil.”  
May 28, 2020 | Nashville, TN

## 2020 TerraLex Global Meeting

Eric L. Zalud is attending.  
June 10–13, 2020 | Oslo, Norway

## The Association of Transportation Logistics Professional’s 91st Annual Meeting

Eric L. Zalud is attending.  
June 12–15, 2020 | Vancouver, Canada

## Conference of Freight Counsel

Martha J. Payne and Eric L. Zalud are attending.  
June 13–15, 2020 | Dearborn, MI

## 3PL & Supply Chain Summit

Marc S. Blubaugh and Eric L. Zalud are attending.  
June 16–18, 2020 | Chicago, IL

## DHL 2020 Forum

Eric L. Zalud is attending.  
June 22–23, 2020 | Washington, DC

## American Trucking Associations (ATA) Legal Forum

Martha J. Payne, Eric L. Zalud, and Matthew J. Selby are attending.  
July 19–22, 2020 | Austin, TX

## National Tank Truck Carriers (NTTC) 2020 Summer Membership & Board Meeting

Matthew J. Selby is attending.  
August 6–8, 2020 | Whistler, Canada

## Intermodal Association of North America (IANA) Intermodal Expo 2020

Marc S. Blubaugh and Martha J. Payne are attending.  
September 13–15, 2020 | Long Beach, CA

## Association Supply Chain Management (ASCM) Summit 2020

Jonathan R. Todd is attending.  
September 13–15, 2020 | New Orleans, LA

## Arkansas Trucking Seminar

Eric L. Zalud is attending.  
September 15–18, 2020 | Rogers, AK

## Canadian Transport Lawyers Association 2020

Martha J. Payne and Eric L. Zalud are attending.  
September 19, 2020 | Toronto, Canada

## Ohio Trucking Association’s Annual Convention

Marc S. Blubaugh is presenting. David A. Ferris is attending.  
September 20, 2020 | Columbus, OH

## Women in Trucking (WIT) Accelerate! Conference & Expo

Martha J. Payne is attending.  
September 26–25, 2020 | Dallas, TX

## American Trucking Association (ATA) Management Conference & Exhibition (MCE) 2020

Marc S. Blubaugh, David A. Ferris, Matthew J. Selby, and Jonathan R. Todd are attending.  
October 24–28, 2020 | Denver, CO

## 2020 Transportation Law Institute (TLI)

Marc S. Blubaugh, Martha J. Payne, Jonathan R. Todd, Eric L. Zalud, and Matthew J. Selby are attending.  
November 13, 2020 | New Orleans, LA

## Transportation Intermediaries Association (TIA) 3PL Technovations

Martha J. Payne and Eric L. Zalud are attending.  
November 12–13, 2020 | Amelia Island, FL

## Capital Roundtable: PE Investing in Transportation & Logistics Companies

Marc S. Blubaugh, Peter K. Shelton, Jonathan R. Todd, and Eric L. Zalud are attending.  
November 16, 2020 | New York, NY

Please note that some of these events have now been canceled or postponed due to the COVID-19 pandemic. Check with event representatives for more information.

For further information and registration, please contact **MEGAN THOMAS**, Client Services Manager, at [mthomas@beneschlaw.com](mailto:mthomas@beneschlaw.com) or (216) 363-4639.

## Despite Recent Challenges, California Meal and Rest Break Remains Pre-empted, While Briefing Closes in the Ninth Circuit Case

*continued from page 7*

the California Labor Commissioner may petition the PHMSA to reopen the docket so that it may refile its petition for reconsideration.” This is important, as four petitions for review challenging FMCSA’s decision are consolidated and currently pending in the U.S. Court of Appeals for the Ninth Circuit, in the case captioned, *Intl Brotherhood of Teamsters, et al. v. FMCSA*, Court of Appeals Docket No.: 18-73488.

In March 2020, an extensive briefing period—beginning when the challenges were filed shortly after the FMCSA’s decision in December 2018—finally closed. Several interested groups have submitted briefs in amici curiae on both sides. This includes: ATA (joined by the California Trucking Association, Washington Trucking

Association, Intermodal Association of North America, and the American Moving and Storage Association), the Chamber of Commerce, the Armored Car Association, and a group of motor carriers (CRST, Heartland Express, John Christner Trucking, Penske, Rail Delivery Services, and U.S. Xpress) filing in support of FMCSA’s determination. Those filing in support of the challengers were the State of Washington and a group of state and national employment lawyers associations.

### III. Conclusion

The Ninth Circuit previously indicated that it planned to schedule oral arguments in the case during the summer of 2020. However, in

light of the COVID-19 pandemic, it is likely that such dates will be further delayed, and thus the MRB Rules and AB-5 will remain preempted in California. In the interim, motor carriers can operate as the rules intended and without interruption of the federal preemption.

Please look for updates on this issue from Benesch’s transportation team in upcoming Bulletins, *FLASH!es*, and *InterConnects*.

**JOHN N. DAGON** and **MATTHEW J. SELBY** are transportation and logistics attorneys practicing at Benesch. John may be reached at [jdagon@beneschlaw.com](mailto:jdagon@beneschlaw.com) or (216) 363-6124. Matthew may be reached at [mselecty@beneschlaw.com](mailto:mselecty@beneschlaw.com) or (216) 363-4458.

### For more information about the Transportation & Logistics Group, please contact any of the following:

ERIC L. ZALUD, Co-Chair | (216) 363-4178  
[ezalud@beneschlaw.com](mailto:ezalud@beneschlaw.com)

MARC S. BLUBAUGH, Co-Chair | (614) 223-9382  
[mblubaugh@beneschlaw.com](mailto:mblubaugh@beneschlaw.com)

MICHAEL J. BARRIE | (302) 442-7068  
[mbarrie@beneschlaw.com](mailto:mbarrie@beneschlaw.com)

DAWN M. BEERY | (312) 212-4968  
[dbeery@beneschlaw.com](mailto:dbeery@beneschlaw.com)

KEVIN M. CAPUZZI | (302) 442-7063  
[kcapuzzi@beneschlaw.com](mailto:kcapuzzi@beneschlaw.com)

KRISTOPHER J. CHANDLER | (614) 223-9377  
[kchandler@beneschlaw.com](mailto:kchandler@beneschlaw.com)

JOHN N. DAGON | (216) 363-6124  
[jdagon@beneschlaw.com](mailto:jdagon@beneschlaw.com)

WILLIAM E. DORAN | (312) 212-4970  
[wdoran@beneschlaw.com](mailto:wdoran@beneschlaw.com)

ELIZABETH R. EMANUEL | (216) 363-4559  
[eemanuel@beneschlaw.com](mailto:eemanuel@beneschlaw.com)

DAVID A. FERRIS | (614) 223-9341  
[dferris@beneschlaw.com](mailto:dferris@beneschlaw.com)

JOHN C. GENTILE | (302) 442-7071  
[jgentile@beneschlaw.com](mailto:jgentile@beneschlaw.com)

JOSEPH N. GROSS | (216) 363-4163  
[jgross@beneschlaw.com](mailto:jgross@beneschlaw.com)

MATTHEW D. GURBACH | (216) 363-4413  
[mgurbach@beneschlaw.com](mailto:mgurbach@beneschlaw.com)

JENNIFER R. HOOVER | (302) 442-7006  
[jhoover@beneschlaw.com](mailto:jhoover@beneschlaw.com)

TREVOR J. ILLES | (312) 212-4945  
[tilles@beneschlaw.com](mailto:tilles@beneschlaw.com)

WHITNEY JOHNSON | (628) 600-2239  
[wjohnson@beneschlaw.com](mailto:wjohnson@beneschlaw.com)

THOMAS B. KERN | (614) 223-9369  
[tkern@beneschlaw.com](mailto:tkern@beneschlaw.com)

PETER N. KIRSANOW | (216) 363-4481  
[pkirsanow@beneschlaw.com](mailto:pkirsanow@beneschlaw.com)

RYAN M. KRISBY | (216) 363-6240  
[rkrisby@beneschlaw.com](mailto:rkrisby@beneschlaw.com)

DAVID M. KRUEGER | (216) 363-4683  
[dkrueger@beneschlaw.com](mailto:dkrueger@beneschlaw.com)

CHARLES B. LEUIN | (312) 624-6344  
[cleuin@beneschlaw.com](mailto:cleuin@beneschlaw.com)

JENNIFER A. MILLER | (628) 216-2241  
[jamiller@beneschlaw.com](mailto:jamiller@beneschlaw.com)

MICHAEL J. MOZES | (614) 223-9376  
[mmozses@beneschlaw.com](mailto:mmozses@beneschlaw.com)

KELLY E. MULRANE | (614) 223-9318  
[kmulrane@beneschlaw.com](mailto:kmulrane@beneschlaw.com)

MARGO WOLF O'DONNELL | (312) 212-4982  
[modonnell@beneschlaw.com](mailto:modonnell@beneschlaw.com)

STEVEN A. OLDHAM | (614) 223-9374  
[soldham@beneschlaw.com](mailto:soldham@beneschlaw.com)

LIANZHONG PAN | (011-8621) 3222-0388  
[lpian@beneschlaw.com](mailto:lpian@beneschlaw.com)

MEGAN J. PARSONS | (216) 363-6177  
[mparsons@beneschlaw.com](mailto:mparsons@beneschlaw.com)

MARTHA J. PAYNE | (541) 764-2859  
[mpayne@beneschlaw.com](mailto:mpayne@beneschlaw.com)

JOEL R. PENTZ | (216) 363-4618  
[jpentz@beneschlaw.com](mailto:jpentz@beneschlaw.com)

RICHARD A. PLEWACKI | (216) 363-4159  
[rplewacki@beneschlaw.com](mailto:rplewacki@beneschlaw.com)

JULIE M. PRICE | (216) 363-4689  
[jprice@beneschlaw.com](mailto:jprice@beneschlaw.com)

DAVID A. RAMMELT | (312) 212-4958  
[drammelt@beneschlaw.com](mailto:drammelt@beneschlaw.com)

MATTHEW (Matt) J. SELBY | (216) 363-4458  
[mselecty@beneschlaw.com](mailto:mselecty@beneschlaw.com)

PETER K. SHELTON | (216) 363-4169  
[ps Shelton@beneschlaw.com](mailto:ps Shelton@beneschlaw.com)

VERLYN SUDERMAN | (312) 212-4962  
[vsuderman@beneschlaw.com](mailto:vsuderman@beneschlaw.com)

CLARE TAFT | (216) 363-4435  
[ctaft@beneschlaw.com](mailto:ctaft@beneschlaw.com)

JONATHAN R. TODD | (216) 363-4658  
[jtodd@beneschlaw.com](mailto:jtodd@beneschlaw.com)