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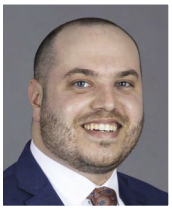
Private Carriage Stand-Up: Where to Begin When In-Sourcing Transportation

In this issue:

Jonathan R. Todd



Christopher C. Razek

An emerging trend in this era of supply chain disruption is the interest of large enterprise shippers, often in the consumer retail space, to in-source transportation operations at the strategic direction of their boards of directors and supply chain leadership. The motivating factor extends far beyond the mission-critical need for capacity and the current challenges in transportation procurement. Many we assist when embarking on this effort seek to closely manage service levels, branding, market reputation, the user experience of customers, cost variance, and overall risk exposure.

Enterprises with any material size of supply chain are often well versed in transportation procurement. Those services that are otherwise bought on the market may in many instances be in-sourced where the appetite exists, including an array of transportation, logistics, and supply chain management services. The potential to build out last mile residential delivery often receives the greatest attention, but additional tactical options are available. Some enterprises are building out entire middle-mile over the road, warehousing, and fulfillment networks to gain "ownership" over as many nodes in the supply chain as possible.

Practical Starting Point for Private Carriage

The nuts and bolts of building a private carrier are not all that distinct from building for-hire operations except that, as a private carrier, there is a clear interest in the goods that are transported in furtherance of the core non-transportation business. This fact means that certain regulatory filings may be different, as well as certain day-to-day practices, although the substantive regulatory and operational safety concerns that would otherwise apply to traditional trucking companies remain applicable. In short, decisions to launch private carriage are essentially decisions to start transportation companies regardless of whether transportation is sold to third parties.

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Private Carriage Stand-Up: Where to Begin When In-Sourcing Transportation

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Viewed from an attorney's perspective, the stand-up of private carriage is primarily a task of satisfying regulatory compliance obligations and employing internal procedures designed for lawful operation as well as risk mitigation. These compliance efforts include obtaining federal and state operating authorities where necessary, maintaining adequate insurance, and building out the processes and tools necessary for driver management and recordkeeping. Safety is the paramount theme across these compliance efforts and, in practice, the observance of those requirements may be far afield from the day-to-day compliance obligations associated with the core business of the enterprise.

This article provides a clear roadmap of the path toward launching private carriage, with four specific milestones: (1) licensure; (2) drivers; (3) equipment; and (4) safety protocols.

Milestone 1 - Licensure for Private Carriers

Federal and state licenses may be required for private carrier operations just as one would expect to see a U.S. DOT No. held by for-hire motor carriers. The initial jurisdictional determination is dependent on the age-old constitutional question regarding nature of commerce. This is often a fact-specific and counterintuitive analysis focusing on the goods moving through the supply chain rather than the point-to-point movement of any particular vehicle or on the type of vehicle that is used.

If the goods serviced by private carrier operations are in "interstate commerce," then obtaining a U.S. DOT No. from the Federal Motor Carrier Safety Administration (FMCSA) will be required. However, private carriers transporting their own cargo typically do not need to obtain operating authority (i.e., an MC Docket number) as part of their registration. Private motor carriers must comply with all other registrations commensurate for the type of operation, such as the Unified Carrier Registration, the International Fuel Tax Agreement, and International Registration Plan.

If the goods serviced by private carrier operations are in "intrastate commerce," then the private carrier will need to assess whether the states having jurisdiction over that commerce require private motor carriers to obtain operating authority or other registrations to operate within the state. This is of course a state-by-state analysis. The state requirements for obtaining operating authority for private carriage vary widely such that there are even some states that do not regulate motor carriers (private or for-hire) any differently than the FMCSA. Certain other states take a more lenient approach in regulating for-hire and private motor carriers operating in intrastate commerce quite differently. For example, some states only regulate private motor carriers that operate heavy commercial motor vehicles for their deliveries.

Milestone 2 - Driver Compliance for Private Carriers

Speed to market is often front of mind for those tasked with launching private carriage. One trend that we often see is for private motor carriers to maximize speed by engaging third-party driver leasing companies to place drivers within the carriers at the commencement of operations. These third-party companies can help alleviate the burden of sourcing drivers and complying with the regulatory scheme required in the Federal Motor Carrier Safety Regulations (FMCSRs).

One of the primary concerns of those who utilize third-party driver leasing companies is contractual, as the underlying contract with the third-party leasing company is customarily heavily negotiated so that it is clear which party bears responsibility for qualifying, testing, and certifying drivers pursuant to the FMCSRs. Importantly, even when private carriers initially utilize a third-party driver leasing company to stand up its driver force, the obligations under the FMCSRs will remain with the private carrier and cannot be delegated to the third-party driver leasing company.

Regardless of how drivers are sourced, the pertinent FMCSRs for the primary carrier obligations for drivers apply to private carriers. For example, if the private carrier is utilizing commercial motor vehicles, defined in the FMCSRs as a property-carrying vehicle with a gross vehicle weight rating or gross vehicle weight of 10,001 lbs. or more, in interstate commerce, then the traditional obligations of driver qualification (49 CFR Part 391), maintenance of driver qualification files, and required compliance with the Hours of Service regulations (49 CFR Part 395) will also apply to a private carrier's operations. Similarly, if the private carrier is operating vehicles also requiring a Commercial Driver's License, the additional obligations, including in regard to driver qualification and drug and alcohol testing (49 CFR Part 382), will apply in a similar fashion as a for-hire carrier.

Milestone 3 - Equipment Compliance for Private Carriers

Speed to market and commercial feasibility often lead enterprises to source equipment through traditional leasing companies rather than purchasing outright. Those leases can vary in term and the inclusiveness of maintenance or other requirements, which can have the effect of easing the practical compliance burden at the outset. These engagements tend to require close contractual negotiation between the private carrier and the equipment leasing company so that, similar to driver leasing, it is clear whether and to what extent the equipment lessor will assist with compliance.

Here also, a private motor carrier will remain responsible for its continuing obligations for equipment in the FMCSRs, subject to the contractual rights negotiated between the entities. At a high level, the general equipment obligations for motor carriers, including the general vehicle safety requirements in 49 CFR Part 393, the equipment inspection requirements found in Appendix G of Part 396, Subchapter B, and the Electronic Logging Device requirements found at 49 CFR Part 395, Subpart B, will also apply to private motor carriers.

Milestone 4 - Safety Protocols for Private Carriers

Enterprises and their in-house counsel are well versed in the need to bring in risk management and human resources teams during the launch of private carriage. A point that is often recognized later in the endeavor is the need to build out safety and operations leadership as well as reasonable compliance programs. Hiring a knowledgeable transportation operations manager, or tasking well-qualified individuals existing within the organization, is a critical step in building carriage safely and scaling as efficiently as possible.

Many new private carriers will develop driver training materials, compliance protocols, emergency response procedures, and similar functional tools based upon the obligations under the FMCSRs. Consideration of other influences such as litigation risk or the set of standards that the FMCSA will apply during audit are also helpful in dialing-in the baseline for size-appropriate compliance activities. The precise elements of a strong compliance program will vary based upon the nature of operations, including whether operations will be interstate or intrastate in nature, the type of vehicles utilized, and the sourcing strategy for drivers and equipment. Though the regulatory framework is dense, taking care when standing up private motor carriage offers companies additional control over safety, costs containment, and operational performance in an otherwise unpredictable space. Additionally, there are many third-party safety compliance companies that can assist new private carriers in standing up regulatory-compliant procedures and operations.

Reducing Surprise and Maximizing Opportunity

The team at Benesch has built private and for-hire carrier operations across a wide range of industries, geographies, and operation types. Savvy transportation counsel can be helpful beyond level-setting with industry practice, obtaining required licenses and permits, negotiating with third-party vendors, structuring driver programs, and building defensible compliance regimes that mitigate risk. Private carriers yield other creative opportunities many rarely consider at the outset, including the possibility of offering for-hire carriage to provide backhaul for offsetting overall transportation cost. Our deep bench of knowledgeable counsel, many of whom come from industry, yields the "shop talk" that goes beyond helping to sleep well at night by also maximizing opportunities for the project.

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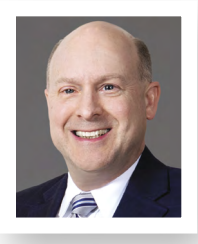
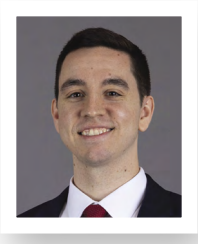
A Powerful "One-Two" Punch: NLRB and DOL Signal Contractor Classification Crackdown



Marc S. Blubaugh



Jordan J. Call

Transportation providers would do well to pay close attention to twin developments unfolding before the NLRB and the DOL that could have a very detrimental effect on those providers who use independent contractors as drivers, sales agents, or otherwise. Likewise, commercial users of transportation services should similarly be attuned to the implications that these developments could have on capacity, overall transportation spend, and their relationships with their providers.

A Potential New NLRB Standard for Worker Classification

The National Labor Relations Board (NLRB) has indicated it may return to a more worker-friendly standard for evaluating whether independent contractor classification is proper. On December 27, 2021, the NLRB invited public comment on whether it should replace the current standard for determining whether a worker is properly classified as an independent contractor or is instead an "employee" under the National Labor Relations Act (NLRA). Such a shift would have a significant impact on the treatment of independent contractors in the transportation industry.

The case at issue, *The Atlanta Opera, Inc.*, NLRB No.10-RC-276292 (2021), involves a determination of whether the subject workers are independent contractors or are actually employees of The Atlanta Opera, Inc. In reconsidering the standard for contractor classification, the NLRB has invited interested *amici* to provide responses to the following two questions: First, should the NLRB adhere to the existing independent-contractor standard most recently set forth in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019); and if not, what standard should substitute, such as a return to the Obama-era standard set forth in *FedEx Home Delivery*, 361 NLRB 610, 611 (2014), either in its entirety or with modifications?

In *SuperShuttle*, the NLRB adopted the traditional common law agency test for determining whether a worker is an employee or independent contractor, as originally explained in the 1968 Supreme Court decision, *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968). This common law agency test includes an analysis of the following 10 factors:

1. The extent of control which the "master" may exercise over the details of the work;
2. Whether or not the worker is engaged in a distinct occupation or business;
3. The kind of occupation, including whether the work is usually done under the direction of an employer or by a specialist without supervision;
4. The skill required in the particular occupation;
5. Whether the putative employer or worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
6. The length of time for which the worker is employed or engaged;
7. The method of payment, whether by time or by job;
8. Whether or not the work is part of the regular business of the putative employer;
9. Whether or not the parties believe they are creating a master-servant relationship; and
10. Whether the principal is or is not in business.

In *SuperShuttle*, the NLRB determined that *FedEx* did not "refine" the independent contractor test as it claimed, but instead "fundamentally shifted" the analysis for policy-based reasons, which greatly diminished the significance of entrepreneurial opportunity. The NLRB overruled that "refinement" and restored the long-standing independent contractor test. Rather than restrict entrepreneurial opportunity to just one part of one of the 10 factors of the test, the NLRB in *SuperShuttle* instead found that entrepreneurial opportunity, like employer control, is an "animating principle by which to evaluate" all 10 of the factors. Pursuant to this standard, companies have been able to emphasize the "entrepreneurial opportunity" for economic gain when determining employment status.

In the recent *Atlanta Opera* case, the NRLB split 3-2 on inviting public comment on the test. The dissenting members assert there is no need to reconsider the *SuperShuttle* standard, since no party in *Atlanta Opera* asked the NLRB to overrule or modify the precedent. The majority argue previous NRLB majorities have overruled precedent *sua sponte*. As President Biden promised to implement an aggressive, pro-union platform and to roll back management-side gains under Trump, it was only a matter of time until the NLRB decided to revisit the test.

Overturning *SuperShuttle* and replacing it with a more restrictive independent contractor test could make it easier for independent contractors and "gig" workers to be deemed to be employees of those companies and consequently allow them to engage in collective bargaining under the NLRA. Interested parties may electronically submit briefs not exceeding 20 pages in length with the NLRB by Thursday, February 10, 2022.

NLRB and DOL Reach "Memorandum of Understanding" on Information-Sharing for Contractor Misclassification

On January 6, 2022, the U.S. Department of Labor's Wage and Hour Division (DOL) and the NLRB announced a "memorandum of understanding" (MOU) between the agencies to share information and collaborate on investigations of potential violations of federal labor and employment laws, placing particular emphasis on worker misclassification.

Based on the MOU unveiled, employers may see the following efforts toward collaboration between the NLRB and DOL:

- **Referral of Workers Between DOL and NLRB.** The agencies are aiming to create a formal referral process, including advising workers of potential violations of laws enforced by the other agency and providing workers with contact information for the other agency.
- **Information Sharing.** The agencies are aiming to create a system to exchange information and data. This includes sharing confidential information and data not otherwise subject to public disclosure, such as the identity of individuals providing information during an investigation, internal opinions of investigators, and information covered by the attorney-client privilege or the work product doctrine.
- **Coordinated Investigations and Enforcement.** The MOU calls for coordinated investigations between the DOL and NLRB when matters fall within the agencies' jurisdictions. The MOU states that where there are overlapping statutory violations, "they shall explore whether it is appropriate for one agency to settle or litigate the matter while the other holds it in abeyance, considering under which statute it would be most feasible and practical to proceed." This presents the possibility that a company could resolve or litigate a matter with one agency only to learn of a new enforcement proceeding by the other agency shortly thereafter.
- **Increased Scrutiny of Employment Relationships**. The MOU indicates that the agencies will target companies with "complex or fissured employment structures, including joint employer, alter ego, and business models designed to evade legal accountability, such as the misclassification of employees."

These measures represent an active effort to increase enforcement and scrutiny on companies—including those in the transportation industry—that engage independent contractors as drivers, sales agents, or otherwise. In connection with the MOU, the DOL and NLRB will be holding joint training sessions for their field staff and will collaborate on efforts involving worker classification issues and other violations of law.

On account of these two developments, now is an excellent time for transportation companies to minimize risk by taking care to audit not only their independent contractor agreements but also, just as importantly, their worker classification practices. In addition, advocates of the independent contractor model must continue to make their voices heard at the NLRB and DOL even in the face of strong and chilly political headwinds.

For more information on these topics, contact a member of the firm's Transportation & Logistics or Labor & Employment practice groups.

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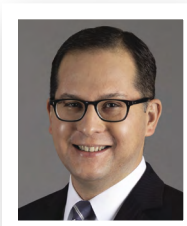
EAPA Investigations: Top 5 Considerations When Customs Comes Knocking



Jonathan R. Todd

Abby Riffee

The Enforce and Protect Act of 2015 (EAPA) and subsequent regulations promulgated by U.S. Customs and Border Protection (CBP) allow the agency to conduct intensive investigations of alleged customs evasion, including avoidance of antidumping (AD) and countervailing (CV) duty orders. The EAPA is an administrative proceeding that permits and encourages participation by domestic industry, the alleged evading party, and CBP. This article explores the top five considerations for those alleged evading parties against whom EAPA investigations are lodged.

CBP has 15 business days from receipt of an allegation to determine whether an investigation under the EAPA is appropriate. CBP will initiate such an investigation if the merchandise described in the allegation has been entered for consumption into the customs territory of the U.S. through evasion. [19 CFR § 165.15(b))] At the end of the EAPA process, CBP will conclude its investigation by issuing a determination as to whether evasion occurred. The determination, and what it means for the parties alleged to be in violation, are then subject to optional administrative and judicial reviews.

The period between initiation of an investigation and the ultimate determination can be a complex and labor-intensive process. In our experience, the top five considerations when embarking on defense of an EAPA investigation are: (1) the precise sequence of events and timing; (2) the burden of proof and information requirements; (3) the breadth for negative adverse inferences and their impact on other supplier relationships; (4) the public nature of proceedings and mechanisms to protect confidentiality; and (5) the potential for review of an initial adverse determination.

Consideration 1 - EAPA Sequence of Events and Timing

Recipients of EAPA investigation notices must bear in mind that the process proceeds on a strict timeline with a potentially wide range of participants. During its investigation, CBP may choose to request information from: (1) the party making the allegation; (2) the party alleged to have evaded AD/CV duties; (3) the foreign producer or exporter of the merchandise; or (4) the foreign government of the country from which the merchandise was exported. [19 CFR. § 165.23] The deadline for responses are provided in CBP's written request. [*Id.*] CBP will not consider information that is submitted outside of the required periods.

The cadence of filings generally involves long periods for initial submissions due to the volume of information involved, with much shorter periods to rebut or otherwise respond to another parties' submission. For example, all parties to the investigation may voluntarily submit factual information within 200 calendar days of initiation. [19 CFR. § 165.23] Rebuttal information may be submitted within 10 days of service of the factual information. Likewise, parties may also submit written arguments to CBP within 230 calendar days of initiation. [19 CFR. § 165.26] Other parties may respond to those written arguments and must submit responses no later than 15 calendar days after the written arguments were filed. [*Id.*]

Fortunately, good-faith extensions are available. For good cause, any party may request an extension of any time limit, but must do so in a separate, stand-alone submission. [19 C.F.R. § 165.5] The request must be submitted no less than 3 business days before the time limit expires unless there are extraordinary circumstances. CBP has broad discretion to grant or deny the request for an extension.

CBP's timeline for its own analysis and determination also involves a relatively long but certain period. CBP must determine whether evasion occurred within 300 days of initiating the investigation unless that period must be adjusted due to extension of deadlines. [19 CFR § 165.22] Still, if the investigation is extraordinarily complicated, CBP may extend the determination deadline, but may not extend beyond 60 calendar days. Within 5 business days of the determination as to evasion, CBP will issue a summary of the determination to all parties to the investigation.

If any party is unsatisfied with a determination then it may request an administrative review.[1] Requests for review must be filed no later than 30 business days after the issuance of the initial determination. Written responses to third-party requests for review are available and must be submitted no later than 10 business days from the commencement of the administrative review. [19 CFR § 165.42] The administrative review will be completed within 60 business days of its commencement. [19 CFR § 165.45] The final administrative determination is subject to judicial review and must be filed with the Court of International Trade (CIT) within 30 days of the administrative review decision.

Consideration 2 - Burden of Proof and Informational Requirements

The objective of CBP's investigation is to determine whether "substantial evidence" exists to show that merchandise was entered through evasion. [19 CFR § 165.45] Evasion means "the entry of covered merchandise into the customs territory of the United States for consumption by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the covered merchandise." [19 CFR § 165.1]

Critically, the alleged violator's level of culpability is not a determining factor into CBP's decision. In practical terms this means that defense of EAPA investigations requires a showing through documentary evidence that the underlying violation amounting to evasion did not in fact occur. In fact, the entirety of CBP's review is based upon information in the administrative record developed during investigation. This information includes, for example, materials obtained by CBP through the course of an investigation, factual information submitted by the parties and results of any verification conducted pursuant to § 165.25, materials from other agencies provided to CBP pursuant to the investigation, written arguments and rebuttals, and summaries of oral discussions with interested parties relevant to the investigation. [19 C.F.R. § 165.21]

Consideration 3 - Potential Adverse Inferences

Another critical point is contending with the fact that CBP is permitted to make negative adverse inferences where its questions go unanswered to its satisfaction. Essentially, CBP is free to "fill in the blanks" in ways against the interest of the alleged evader. This can necessitate fulsome disclosure as well as prompting any third parties, such as foreign manufacturers, who may also receive information requests to likewise comply. If any party fails to cooperate and comply "to the best of its ability" with CBP's requests for information, then CBP is free to apply an adverse inference to the interests of that party when making an evasion determination. [19 CFR § 165.6] CBP may also apply an adverse inference based on a prior CBP determination or "any other available information."

Consideration 4 - Confidentiality of Information Submitted

Generating fulsome responses to CBP queries can mean offering high volumes of competitively sensitive information such as supplier or customer contacts and the cost of goods. CBP will treat a party's information submitted in response to the investigation as business confidential information (BCI) so long as the submitting party properly designates it as such.[2] [19 CFR § 165.4] To designate BCI, the party must submit both a public version and a BCI version. The first page of the BCI version must clearly state that the submission contains BCI. The party must then identify the BCI by enclosing the claimed confidential information within single brackets. The party must also provide an explanation of why each item of bracketed information is entitled to business confidential treatment.

The public version must be filed on the same date as the BCI version and must be clearly marked as a public version on the first page. This version must "contain a summary of the bracketed information in sufficient detail to permit a reasonable understanding of the substance of the information." When applicable, any information that CBP places on the administrative record will include the public summary of the BCI. When providing the public version, the party must certify that the information is either information from its own business records (and not BCI of another entity) or information that was publicly obtained or in the public domain.

CBP will reject a submission that includes a request for business confidential treatment but does not meet the precise documentary requirements. Still, CBP will treat the relevant portion of the submission as BCI until the appropriate corrective action is taken or the submission is rejected.

Consideration 5 - Right of Appeal and CIT Review

Administrative reviews of initial CBP determinations may be requested, but thereafter they cannot bet withdrawn. [19 CFR § 165.43] The standard of review is "de novo," which means that CBP will review the entire administrative record upon which the initial determination was made, the filed request(s) for review and responses, and any additional information that was received. [19 CFR § 165.45] After the administrative review is decided, a party to the administrative review may file suit with the Court of International Trade

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U.S. Shippers and Intermediaries Take Note: New Requirements for Transportation Services Provided Within Mexico

Martha J. Payne

Carlos M. Sesma

"If the CFDI and Complement Bill of Lading are not properly completed and issued, both the party who hires the transportation services (either intermediary or shipper) and the carrier may be liable before the Mexican authority."

Tax Authorities in Mexico have issued new requirements for tax documentation for the transport of cargo within Mexico. Carriers operating in Mexico are required to issue a digital Income or Transfer Invoice (in Spanish, *Comprobante Fiscal por Internet or CFDI*[1] *de Ingreso / Traslado*) as applicable, compliant with Mexican tax provisions, to which a Complemento Carta Porte, or Complement Bill of Lading, must be added, and these documents must accompany the cargo transported within Mexico.

When is the new regulation effective? As of January 1, 2022, shipments moving within Mexico, both domestically and as part of an international shipment, must be accompanied by an **Income/Transfer CFDI and a Complement Bill of Lading**. However, according to the *Miscellaneous Tax Resolution for 2022* published on the Official Federal Gazette on December 27, 2021, from *January 1 to March 31, 2022*, the **Income/Transfer CFDI with Complement Bill of Lading** will be considered in compliance, and the Tax Authority shall not impose any sanctions for taxpayers, even if such documents contain errors or do not include all the requirements listed in the instruction manuals and catalogs published on the Administrative Tax Service (SAT) website.

What information is required in the Complement Bill of Lading? Among the information to be provided in a Complement Bill of Lading are the specific product codes (*clave del catálogo*) of the cargo, as such codes are described in the "Complement Catalogs" (Catálogos del Complemento) published in the website of the Tax Authority: http://omawww.sat.gob.mx/tramitesyservicios/Paginas/complemento_carta_porte.htm, as well as information regarding the origin, destination, and weight of the cargo, among others.

Who is affected by the new requirement? This new requirement affects shippers, intermediaries, and carriers involved in transportation within Mexico.

Motor Carriers shall be required to issue an Income CFDI to which they must incorporate the Complement Bill of Lading. These tax documents—either in printed or digital format—must be in the possession of the driver at all times during the transportation of the cargo, as they may be subject to inspections by Federal Authorities.

Intermediaries, such as a brokers or other 3PLs, must obtain the specific product information from the shipper and are now legally bound, as contractors of the transportation services, to correctly transmit such information to the motor carriers before a trip, in order for carriers to be able to issue the documents. The intermediary must confirm that the carrier issues the appropriate Income CFDI and Complement Bill of Lading before shipment.

Shippers must provide for either the intermediary or the carrier the exact and complete information of the goods to be transported, as specified in the *Instructivo de Llenado del CFDI al que se le incorpora el Complemento Carta Porte*. It is important to consider that there are different instructions for completion, depending on the applicable transportation modality: land, air, rail, or maritime. Each of the completion instructions specify the information that the CDFI and Complement Bill of Lading must include, as well as the catalogs that must be considered for their completion.

What are the consequences for noncompliance? If the CFDI and Complement Bill of Lading are not properly completed and issued, both the party who hires the transportation services (either intermediary or shipper) and the carrier may be liable before the Mexican authority. Such liabilities include fines, non-deductibility sanctions, and even seizure of the cargo.

For more information, please contact:

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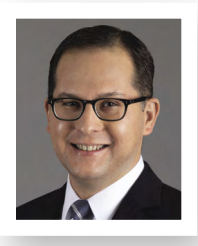
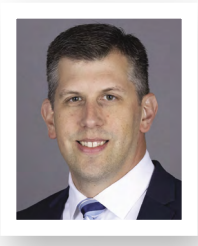
[1] CFDI, which stands for *Comprobante Fiscal Digital por Internet*, is the electronic billing schema defined by the Mexican Federal Tax Code. It has been mandated for companies doing business in Mexico since 2011.

Withhold Release Orders (WROs): Supply Chain Diligence, Compliance, and Best Practices



Jonathan R. Todd



J. Philip Nester

The Biden Administration's interest in reducing the occurrence of forced labor or indentured child labor in the global supply chain, and the parallel goals of corporate social responsibility, are driving increased attention on Withhold Release Orders (WROs) enforced by U.S. Customs and Border Protection (CBP). The challenge of strategically implementing responses to these objectives and the enforcement risk can be daunting to say the least. Today and for the foreseeable future, enterprise leadership and their in-house counsel are tasked with scrutinizing, mapping, and documenting the entire end-to-end supply chain, from the earliest procurement of raw materials through foreign manufacturing and ultimately import to the United States. This article provides high-level commentary on the WRO legal regime and what it can mean in practical terms for global sourcing.

WRO Legal Authority

U.S. Congress tasked CBP with enforcement of a prohibition against importing any goods that are mined, produced, or manufactured wholly or in part with forced labor, which means all work or service that is enacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer voluntarily. [19 USC § 1307] CBP has broad enforcement discretion under regulations at 19 CFR § 12.42. Enforcement involves withholding any import where there is "reason to believe" that forced labor practices were used in the production. Targeted imports may involve high-risk commodities, geographic regions, or foreign manufacturers. The subject of WRO interest over the last year has largely focused on the Xinjiang Uyghur Autonomous Region in the People's Republic of China, although many other active WRO programs are in effect.

Compliance Risk and Enforcement Defense

Importers are required by statute to observe and exercise reasonable care by ensuring imported goods comply with U.S. laws and regulations. [19 USC § 1484] This requirement applies to all imports; however, it has high practical significance in the context of forced-labor discussions because of the resulting need for consideration of the entire global supply chain, places of production, and manufacturing processes. Violations of the forced-labor prohibition on imports can include civil penalties "by fraud, gross negligence, or negligence" where goods are imported by means of false information or material omissions. [19 USC § 1592] In the extreme, companies and individuals can face criminal and civil penalties under anti-trafficking laws, where they knew or recklessly disregarded how the labor was obtained on imported goods. [*Id.*]

If CBP chooses to withhold release of goods under a WRO program, then the burden of proof shifts to the importer, who must submit documentary evidence supporting the lawful entry of those goods. [19 CFR § 12.43] This exercise largely amounts to demonstrating due diligence and the source of the item, as well as its inputs, to show the absence of forced labor (essentially, proving the negative). The importer must provide a Certificate of Origin signed by the foreign seller or owner of the goods, consistent with 19 CFR § 12.43. Additionally, the importer must submit documentary evidence that it made every reasonable effort to: (1) determine the source of the merchandise, including its component parts and (2) ascertain the character of labor used in the production, including the results of the investigation coupled with a statement of the importers' beliefs with respect to the class of labor used during production. Other supporting documentary evidence may be helpful to trace the movement of goods through the supply chain from point of origin to production, processing, and importation to the U.S., including: (1) affidavits from producers; (2) purchase orders, invoices, and proof of payment; (3) a list of producers across the production steps; (4) transportation documents; and (5) worker timecards, wage payment receipts, and the like. Every supply chain and every detention is fact-specific, and the persuasive value of available supporting documentation will vary case by case.

The presentation of sourcing documents and other relevant materials must occur within three (3) months following detention of the goods. CBP determines whether to release the goods only after the importer submits this evidence. Even if the goods are released, CBP reserves the right to demand their redelivery if it is later suspected that they violate WRO within 30 days of the release. If CBP is unsatisfied that there is clear evidence the goods were not produced by forced labor, and the goods are not exported from the U.S., then the items will be forfeited to the U.S. government.

WRO Best Practices

Starting with the foundational understanding that importers must exercise "reasonable care" in their compliance activities, pragmatic processes and business practices can be developed for the supply chain under review. A comprehensive grasp of inputs and production is required, including assessing the risk of forced labor for the particular items, manufacturers, and regions. Four basic types of compliance activities can be built upon this set of facts to assist in meeting the duty of care standard: (1) conducting supply chain due diligence; (2) maintaining a comprehensive social compliance system; (3) obtaining Certifications of Origin and additional supporting documentation; and (4) including a forced labor prohibition provision in contracts.

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Export Reporting Requirements: Comment on Proposed Foreign Trade Regulation Changes Due February 14, 2022

Jonathan R. Todd

Megan K. MacCallum

"If implemented the change will require shippers of goods to provide additional detail on their sourcing so that international freight forwarders tasked with filing Electronic Export Information (EEI) in the Automated Export System (AES) may truthfully complete a new country of origin field."

The Biden Administration's Executive Order 14017 titled "America's Supply Chains" seeks to address supply chain disruption by strengthening domestic production in a multi-agency effort. As part of that effort, the Census Bureau now proposes additional reporting requirements designed to yield greater visibility of trade imbalances for certain goods. Specifically, Census seeks to identify the export of goods having a foreign origin, including those exported following withdrawal from bonded warehouses and foreign trade zones.

If implemented the change will require shippers of goods to provide additional detail on their sourcing so that international freight forwarders tasked with filing Electronic Export Information (EEI) in the Automated Export System (AES) may truthfully complete a new country of origin field. Census is seeking public comment from data users, businesses, and others impacted by this proposed change. Comments will be accepted on a wide range of issues associated with this expansion of EEI reporting, including: potential uses of trade statistics; the value of the proposed change; the time a user might need to implement the change; business practices needed to ensure compliance; and challenges arising when warehousing goods from multiple origins.

The reporting changes would appear in the Foreign Trade Regulations at 15 CFR Part 30. Complete details of the requirement are published in the Federal Register (86 FR 71187). Comments must be received by the Census on or before **February 14, 2022**, and can be submitted online through the Federal eRulemaking Portal or via email to gtmd.frnotices@census.gov with the subject line RIN 0607-AA59.

JONATHAN TODD is a partner in Benesch's Transportation & Logistics Practice Group whose practice includes advising clients on technical aspects of international freight forwarding and trade regulation. Jonathan may be reached at (216) 363-4658 or jtodd@beneschlaw.com. **MEG MacCALLUM** is an associate in the Transportation & Logistics Practice Group who may be reached at (216) 363-4185 and mmaccallum@beneschlaw.com.

EAPA Investigations: Top 5 Considerations When Customs Comes Knocking

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(CIT) to contest CBP's determination. The CIT will examine: (1) whether the CBP fully complied with all regulatory procedures and (2) whether any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

How EAPA Investigations End

CBP's determination is not final until the right of appeal is closed and, even then, the immediate consequences of an adverse determination may not be immediately clear. If CBP determines that evasion occurred, CBP will cease applying any interim measures and liquidate the entries in the normal course. It is reasonable to expect that the evading party will be required to pay any lost duties, plus interest, and any penalties or damages CBP seeks to impose. CBP may choose to conduct additional investigations or enforcement actions, including by notifying other government agencies, such as the U.S. Department of Commerce, so that those sister agencies may take action within their jurisdiction as well. [19 CFR §§ 165.47, 165.28(b)]

JONATHAN TODD is a partner in Benesch's Transportation and Logistics Practice Group whose practice includes U.S. Customs matters. He may be reached at (216) 363-4658 and jtodd@beneschlaw.com. **ABBY RIFFEE** is an associate in the Transportation and Logistics Practice Group who may be reached at (614) 223-9387 and ariffee@beneschlaw.com.

[1] The contents of the administrative review are found at 19 CFR § 165.41(f).

[2] Still, certain information will not be treated as "business confidential." See 19 C.F.R. § 165.4(c).

Benesch Continues to Add to Its Roster of Top-Notch Legal Talent

We are pleased to welcome Robert Naumoff and Megan (Meg) MacCallum to the Transportation & Logistics Practice Group.

Robert Naumoff

Robert joins Benesch as Of Counsel after years spent serving as in-house counsel for several publicly traded transportation and logistics companies. He has a strong understanding of the issues facing motor carriers, freight forwarders, freight brokers, third-party logistics providers (3PLs), and commercial shippers. In addition to his vast experience with drafting, reviewing, and negotiating a variety of commercial transactions, he brings experience in a number of matters impacting clients in the transportation and logistics space, including, but not limited to, information technology (IT), data privacy, intellectual property (IP), customs, and compliance.

Robert has also served as primary counsel on a variety of marketing-related matters, including influencer agreements, Federal Trade Commission (FTC) disclosure requirements, CAN-SPAM, California Consumer Privacy Act (CCPA), and General Data Protection Regulation (GDPR).

Robert received his J.D. from the University of Arkansas School of Law, Fayetteville, and his B.S. in Biology from the University of Arkansas at Fayetteville.

Robert can be reached at rnaumoff@beneschlaw.com or (614) 223-9305.

Megan K. MacCallum

Meg joins Benesch as an associate after clerking with the firm in 2019 and 2020. Prior to joining Benesch, Meg served as a Legal Extern for the United States Coast Guard Ninth District Legal Office. There, she researched and drafted guidance on complex legal questions related to administrative law, regulatory compliance, and jurisdictional issues.

Since joining the firm, Meg has worked with retailers, carriers, brokers, and forwarders to meet their diverse business and legal needs. In doing so, Meg frequently drafts contracts and helps clients prepare for negotiation, advises on customs and compliance matters, and provides counsel in mergers and acquisitions.

Meg received her J.D. from Case Western Reserve University School of Law, and her B.A. in Community Health and Peace and Justice Studies, *magna cum laude*, from Tufts University.

Meg can be reached at mmaccallum@beneschlaw.com or (216) 363-4185.

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Recent Events

IADC Annual Meeting
Eric L. Zalud attended.
August 15–19, 2021 | Chicago, IL

American Trucking Association Webinar
Eric L. Zalud presented *Where Worlds Collide: Legal Issues at the Interstices Between Brokers and Motor Carriers*.
August 31, 2021 | Virtual

Transportation Intermediaries Association (TIA) Webinar
Marc S. Blubaugh presented *A Deep Dive Into Risk Mitigation*.
September 7, 2021 | Virtual

International Warehouse Logistics Association (IWLA) Safety & Risk Conference
Marc S. Blubaugh presented *Reptile Theory and Nuclear Verdicts*.
September 8, 2021 | Atlanta, GA

Intermodal Association of North America (IANA) Intermodal Expo 2021
Marc S. Blubaugh attended.
September 12–14, 2021 | Long Beach, CA

Ohio Trucking Association (OTA) Annual Conference
Kelly E. Mulrane attended.
September 13–14, 2021 | Columbus, OH

Columbus Logistics Breakfast Club
Marc S. Blubaugh presented *Chaos in the Courts: A "Supreme" Opportunity!*
September 24, 2021 | Columbus, OH

Truckload Carriers Association (TCA) Truckload 2021 Conference
Jonathan R. Todd attended.
September 25–28, 2021 | Las Vegas, NV

Transportation Intermediaries Association (TIA) 3PL Policy Forum
Marc S. Blubaugh and **Martha J. Payne** attended.
September 28–29, 2021 | Washington, D.C.

Trucking Industry Defense Association (TIDA) 2021 Annual Seminar
Eric L. Zalud attended.
October 13–15, 2021 | Philadelphia, PA

Transportation Intermediaries Association (TIA) 3PLXtend
Marc S. Blubaugh and **Helen M. Schweitz** participated in the "Playing Catch-Up: The Intersection of Technology and Law" panel. **Eric L Zalud** participated in the "Recruiting & Retaining Top/Talent" panel. **Martha J. Payne** attended.
October 21–22, 2021 | San Antonio, TX

2021 American Trucking Association (ATA) Management Conference & Exhibition (MCE)
Jonathan R. Todd and **J. Philip Nester** attended.
October 23–26, 2021 | Nashville, TN

Association for Supply Chain Management (ASCM) Connect 2021
Jonathan R. Todd presented *Global Logistics Learnings and Enhancements Post-COVID*.
October 24–26, 2021 | San Antonio, TX / Hybrid

International Warehouse Logistics Association (IWLA) Convention & Expo 2021
Marc S. Blubaugh, Christopher C. Razek, and **Eric L. Zalud** attended.
November 1–3, 2021 | San Antonio, TX

Transportation and Logistics Council – Webinar
Martha J. Payne presented *Bills of Lading: What You Need to Know.*
November 10, 2021 | Virtual

2021 Transportation Law Institute
Eric L. Zalud attended and was the Social Chairman for the event. **Marc S. Blubaugh, Martha J. Payne, Kelly E. Mulrane, J. Philip Nester, Christopher C. Razek, Richard A. Plewacki**, and **Jonathan R. Todd** attended.
November 12, 2021 | Cleveland, OH

Benesch's Private Equity Investing in the Transportation & Logistics Industry Conference
Marc S. Blubaugh moderated the panel "New and Disruptive Technologies in the Industry." **Peter K. Shelton** moderated the panel "Consolidations, Deal Activity and Strategic Partnerships." **Jonathan R. Todd** moderated the panel "Emerging Last Mile Transportation Trends and Myths (Debunked) and Shifting Consumer Preferences." **Eric L. Zalud** moderated the panel "Deal Structuring, Valuation and Diligence Issues, and Post-Closing Integration."
December 8, 2021 | Midtown, Manhattan, NY

Conference of Freight Counsel
Martha J. Payne and **Eric L. Zalud** attended.
January 9–10, 2022 | Monterey, CA

The Columbus Roundtable of the Council of Supply Chain Management Professionals' Annual Transportation Panel
Marc S. Blubaugh moderated the panel "Transportation & Logistics In 2022: If You Don't Know Where You Are Going, You Might Not Get There!"
January 14, 2022 | Columbus, OH

International Warehouse Logistics Association's Essentials Course
Marc S. Blubaugh presented *Fundamentals of Transportation Law: What Those New To Warehousing Need to Know about Transportation*.
January 19, 2022 | Nashville, TN

Air Cargo Conference
Martha J. Payne attended.
January 17–19, 2022 | New Orleans, LA

BGSA Holdings Supply Chain Conference
Marc S. Blubaugh, Peter K. Shelton, and **Eric L. Zalud** attended.
January 19–21, 2022 | West Palm Beach, FL

Transportation Lawyers Association (TLA) Chicago Regional Seminar
John C. Gentile, Robert Naumoff, J. Philip Nester, Martha J. Payne, Christopher C. Razek, and **Jonathan R. Todd** attended.
January 21–22, 2022 | Chicago, IL

The Reverse Logistics Association Annual Conference 2022
Eric L. Zalud attended.
February 6–8, 2022 | Las Vegas, NV

Stifel Transportation Conference
Marc S. Blubaugh, Peter K. Shelton, and **Eric L. Zalud** attended.
February 8–9, 2022 | Virtual

On the Horizon

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

NTTC 2022 Winter Membership & Board Meeting
Eric L. Zalud is attending.
February 9–11, 2022 | West Palm Beach, FL

FreightWaves Virtual Global Supply Summit
Marc S. Blubaugh is presenting *AB5 and General Trucking Regulations*.
February 14–18, 2022 | Virtual

International Association of Defense Counsel (IADC) Midyear Meeting 2022
Martha J. Payne is attending.
February 19–24, 2022 | Scottsdale, AZ

Truckload Carriers Association (TCA) Annual Convention—Truckload 2022
Jonathan R. Todd is attending.
March 19–22, 2022 | Las Vegas, NV

Transportation and Logistics Council – 48th Annual Conference
Marc S. Blubaugh is a panelist on the "Transportation Attorney Panel." **Martha J. Payne** is moderating the panel "Bills of Lading—What You Need to Know." **Eric L. Zalud** is presenting *Loss Prevention and Mitigation of Damages*.
March 21–23, 2022 | Orlando, FL

2022 IWLA Warehouse Legal Practice Symposium
Marc S. Blubaugh is providing an update on transportation law and presenting on alternative dispute resolution. **Kevin M. Capuzzi** is presenting on bankruptcy issues.
March 30–April 1, 2022 | Indianapolis, IL

Trucking Industry Defense Association's (TIDA) Cargo & Skills Course Seminars
Eric L. Zalud is presenting *Hurry up and Wait: A Primer on Delay Damages*.
March 30–April 1, 2022 | Tempe, Arizona

Transportation Intermediaries Association (TIA) Capital Ideas Conference
Marc S. Blubaugh is presenting *Innovating Your Freight Brokerage Against Potential Risk*. **Eric L. Zalud** is presenting *Where Worlds Collide: Legal Issues at the Interstices Between Brokers and Motor Carriers*. **Helen M. Schweitz** is presenting *Data Strategy in 2022*. **Martha J. Payne** is also attending.
April 6–9, 2022 | San Diego, CA

DRI 2022 Trucking Law Seminar
Eric L. Zalud is attending.
April 27, 2022 | Austin, TX

Intermodal Association of North America's (IANA) Operations and Maintenance Business Meeting
Marc S. Blubaugh and **Jordan J. Call** are presenting on independent contractors.
May 2–5, 2022 | Oak Brook, IL

Jefferies 2022 Logistics & Transportation Conference
Peter K. Shelton and **Eric L. Zalud** are attending.
May 3–4, 2022 | Coral Gables, FL

Transportation Lawyers Association (TLA) Annual Conference
Marc S. Blubaugh, Martha J. Payne, and **Eric L. Zalud** are attending.
May 11–14, 2022 | Williamsburg, VA

ATA Mid-Year Management Session
Jonathan R. Todd is attending.
May 14–18, 2022 | Scottsdale, AZ

Supply Chain Execution 2022
Marc S. Blubaugh and **Eric L. Zalud** are attending.
June 1–2, 2022 | Chicago, IL

Conference of Freight Counsel
Martha J. Payne and **Eric L. Zalud** are attending.
June 11–13, 2022 | Orlando, FL

American Trucking Association – 2022 Trucking Legal Forum
Marc S. Blubaugh is presenting *You Can Walk and Chew Gum: Managing Risk When Delivering Multiple Services*. **Eric L. Zalud** is presenting *Smiting the Reptile - Extrajudicially: Using Preemptive Best Practices, Pre-discovery, Discovery, and Legislative Means to Defuse Reptilian Tactics in Casualty Litigation*. **Jonathan R. Todd** and **Kelly E. Mulrane** are presenting *Final Milestone: Lawfully Finishing the Intrastate Race*. **Martha J. Payne** is attending.
July 10–13, 2022 | Austin, TX

The Canadian Transport Lawyers Association Meeting
Martha J. Payne is attending.
October 13–15, 2022 | Toronto, Ontario

Transportation Intermediaries Association (TIA) 3PL Technovations Conference
Martha J. Payne is attending.
October 26–28, 2022 | Phoenix, AZ

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

Pass this copy of *InterConnect* on to a colleague, or email **MEGAN THOMAS** at mthomas@beneschlaw.com to add someone to the mailing list.

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Withhold Release Orders (WROs): Supply Chain Diligence, Compliance, and Best Practices

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These activities will help manage the risk of sourcing products from outside the U.S. while generating documentary evidence for use in the event of detention due to a suspected WRO violation. However, many additional pragmatic compliance tools are available and may be incorporated into the supply chain sourcing program where appropriate based upon the importer enterprise's risk profile, tolerances, and foreign relationships. Thoughtfulness in designing the compliance program is often key, since the penalties associated with WRO noncompliance may pale in comparison to the effect this may have on preventing or delaying products from coming to market or the reputational harm it may cause in the minds of consumers and investors. The team at Benesch are well versed in all aspects of the global supply chain, as well as the impact of recent disruptions, and are available to assist in developing pragmatic approaches to today's supply chain challenges.

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