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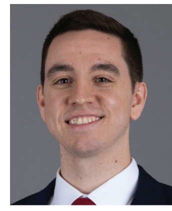
Independent Contractor Owner-Operators and the Second Trump Administration: Motor Carrier Expectations for the Road Ahead

Jonathan R. Todd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The role of independent contractor owner-operators (ICOOs) in the trucking industry has a long history as a business model and also as a lightning rod for scrutiny. At the start of 2025, the popular consensus is that the legal status of independent contractor relationships will see a markedly different approach under the second Trump Administration compared to the Biden Administration.

As one example, many commentators in the transportation industry expect the second Trump Administration to roll back the Biden Administration's rules and policies regarding independent contractor classification, in an effort to support the traditional independent contractor model. However, as a practical matter, the Department of Labor (DOL) will likely have minimal ability to independently influence independent contractor classification analyses nationwide. This article explores how, if at all, the Trump Administration's policies might impact motor carriers relations with independent contractor drivers.

Comparing and Contrasting the Biden and First Trump Administrations

The first Trump Administration and Biden Administration differed significantly in their approaches to independent contractor misclassification. Under the first Trump Administration, the DOL rescinded a 2015 memorandum that instructed businesses and agencies to treat ICOOs as employees. Further, just before President Trump left office in January 2021, the DOL issued a proposed rule that would have established "core factors" for determining whether a worker is properly classified as an independent contractor in relation to the Fair Labor Standards Act (FLSA). The proposed rule

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prioritized two core factors in determining worker status: (1) the nature and degree of the worker's control over the work; and (2) the worker's opportunity for profit or loss. If an ICOO could establish these two factors, independent contractor status was established without the need to consider additional "guidepost" factors. The transportation industry largely viewed the "core factors" rule as more business-friendly and supportive of independent contractor classification.

The Biden Administration took a different stance on ICOOs. In May 2021, the Biden Administration's DOL withdrew the aforementioned proposed rule of the first Trump Administration prior to it taking effect. In January 2024, the DOL issued a new rule that went into effect in March 2024 and implemented a totality of the circumstances, "economic realities" test. This "economic realities" test considered six factors for determining whether a worker is properly classified as an independent contractor: (1) the contractor's opportunity for profit or loss; (2) the investments made by the contractor and the putative employer; (3) the degree of permanence of the relationship between the contractor and the putative employer; (4) the nature and degree of control by the putative employer over the contractor; (5) the extent to which the work performed by the contractor is an integral part of the putative employer's business; and (6) the contractor's skill and initiative. The Biden Administration's rule was seen as less favorable to independent contractor classification and caused frustration in the trucking industry.

Limitations on Executive Action

While the second Trump Administration may revisit federal worker classification rules, those rules issued by executive branch agencies will likely have a limited impact on disputes involving analysis of independent contractor classification. The Supreme Court in *Loper Bright Enterprises v. Raimondo* overturned the *Chevron* doctrine, which had required federal courts to defer to the reasonable determinations of executive agencies in interpreting ambiguous statutory language. Now, federal courts must engage in independent judicial interpretation and refrain from abdicating such responsibility to executive branch agencies. Courts may view executive agency interpretations and opinions as persuasive, but they can no longer exercise deference or view agency interpretations as controlling. Thus, courts will not defer to the DOL's interpretation of the FLSA, including "rules" regarding independent contractor classification.

Further, despite a possible return to the "two factors" rule by the DOL under the second Trump Administration, state laws governing worker misclassification will continue to be the primary determinant in many worker classification disputes. DOL interpretations of the FLSA *do not have an impact* on state laws, since states have the authority to enact and enforce their own wage & hour laws, which can be more stringent than federal laws. Some states that adopted more stringent tests for worker classification, such as those that adopted the ABC test. Thus, motor carrier businesses in states unfavorable to the ICOO model will continue to face disputes regarding worker classification. Simply put, this is the greatest challenge to ICOO relationships, and the Trump Administration is unlikely to alleviate that legal risk for motor carriers.

Policy Changes to Expect from the Second Trump Administration

Although the second Trump Administration will likely have minimal impact on federal courts' interpretations and state laws regarding worker classification, the Trump Administration appears nonetheless poised to address independent contractor classification at the federal level. Change may manifest through DOL enforcement policies. For example, the DOL may reduce resources dedicated to enforcement actions and audits for alleged independent contractor misclassification. The second Trump Administration is also likely to revert to the "core factors" test through the issuance of a new rule. However, even if there is a successful rulemaking on this or related issues, it will likely have minimal impact on federal courts reviewing actions involving alleged independent contractor misclassification.

The Road Ahead for Motor Carriers and ICOOs

The key takeaway is that while the second Trump Administration is likely to be more favorable to the domestic trucking industry, this pro-industry sentiment may be more symbolic in nature without the monumental impact on driver relationships that many commentators in the industry seem to expect. Even in the new Administration, motor carriers must continue to routinely scrutinize and update their driver models, lease agreements, and day-to-day operational practices. The trucking industry may not relent in its defense of proper independent contractor classifications for drivers under well-structured and legally compliant programs. The risks for this longstanding industry model will not subside within the next four years.

Benesch's Transportation & Logistics and Labor & Employment teams are experienced in counseling clients on the development of legally defensible ICOO models and all manner of federal and state legal compliance.

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The Devil You Don't Know – Might Not Be So Bad! Good News for Driver Credit and Background Checks

Eric L. Zalud

In this era of driver and employee shortages, employers of all kinds—motor carriers, freight intermediaries, and shippers—should be aware of a byzantine array of federal statutes that could confer liability upon them for simply making employment inquiries. It is particularly important in these days of nuclear verdicts (combined with driver shortages), to ensure that motor carriers hire—and are able to retain—high-quality, experienced commercial drivers. To do that, it is also imperative that motor carriers are able to thoroughly vet and ascertain the background and qualifications of putative drivers. Consequently, motor carriers use various third-party services, such as HireRight, to obtain information on the driver's past employment, driving history, and other pertinent information. This is a critical function, both for preserving the driver workforce and for minimizing the risk of catastrophic motor vehicle accidents, and commensurate punitive damage awards, based upon a driver's background and history.

One of these federal statutes in that array is the Fair Credit Reporting Act. 15 U.S.C. §1681 (the FCRA). The FCRA is a statutory scheme governing the creation, maintenance, and disclosure of consumer reports. Generally speaking, there are three categories of persons subject to the FCRA: (1) "furnishers" of information, who are persons that provide credit information to consumer reporting agencies; (2) "consumer reporting agencies" (CRAs) that prepare, maintain, and disseminate consumer reports; and (3) end "users" of consumer reports. [See, e.g., *Branch v. Fed. Home Loan Mortg.*, No. 5:04-cv-859, 2005 U.S. Dist. LEXIS 59054, *6-7 (E.D.N.C. July 25, 2005).] The FCRA imposes different obligations upon each category of persons and provides a private cause of action for certain violations. So, for example, a plaintiff could allege that his employer provided inaccurate credit information to the CRAs. [See, e.g., *Banga v. Experian Info. Solutions, Inc.*, No. 09-C-04867, 2013 U.S. Dist. LEXIS 144999, *2 (N.D. Cal. Sept. 30, 2013) ("Furnishers of information (i.e., creditors) report account information to Experian called 'trade lines,' which consist of data such as account number, account status, payment information, and balance information.").]

A recent case brought under the FCRA against a motor carrier is extremely helpful to that process, and provides further insulation as

> *"It provides a double-barreled bar to any troublesome state law claims relating to the background check and hiring process of commercial motor drivers."*

to liability for motor carriers—and others in the transportation schematic for such critical inquiries. In *McKenna v. Dillon Transp.* 97 F4th 471 (6th Cir. 2024), plaintiff Frank McKenna, a truck driver, was involved in an overturned truck accident on January 5, 2017. His employer, Dillon Transportation, a motor carrier, subsequently fired him, pursuant to its internal policies. Dillon also later submitted a "DAC Report" relating to McKenna to a company called HireRight.

HireRight is a consumer reporting agency that collects information about truck drivers. It then provides that information to employers who are considering hiring particular drivers. Pursuant to a subscription for HireRight's services, motor carriers like Dillon can use background checks

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on driver applicants. They can also provide HireRight with that information, based upon their experience with the driver. Consequently, Dillon provided to HireRight a report about McKenna. That report stated that he had an unsatisfactory safety record, noting that he had been involved in an accident. This information was available to anyone who would view HireRight's report. However, in this particular case, no motor carriers *had* requested McKenna's DAC Report. Nonetheless, McKenna brought suit against Dillon, alleging a cause of action for defamation and tortious interference with a business relationship, based upon the HireRight report.

In the lawsuit, McKenna contended that, to the extent that the report implied that he was responsible for the MVA, and had an unsafe driving record overall, it was defamatory and that it resulted in his inability to secure subsequent employment. At the trial court level, Dillon responded that these claims were completely preempted by the FCRA. McKenna contended though, that a DOT regulation, 49 CFR §391.23, applied instead of the FCRA, and thus permitted his defamation claim. The trial court granted summary judgment in favor of Dillon, finding that McKenna's claims were preempted by the FCRA, and McKenna appealed.

On appeal, the court first considered the predominant issue, i.e., *did* the FCRA federally preempt McKenna's defamation claim. The court noted that the FCRA provides that a "person shall not furnish any information relating to a consumer to any consumer reporting agency that the person knows or has reasonable cause to believe that the information is inaccurate." [15 USC §§ 1681S-2(a)(1)(A).] The FCRA also prohibits states from imposing a requirement or prohibition "with respect to any subject matter regulated under," i.e., a broad statutory preemption parameter.

The court found that the preemption clause of the FCRA *applied* to McKenna's claim. The court noted that the trial court had found, correctly, that under the FCRA, McKenna was a "consumer" and that HireRight was a "consumer reporting agency" and that Dillon was a "furnisher or provider of information." The court explained that "consumer reporting agency" generally includes companies like HireRight, that sell self-employment history reports. [See *Maiteki v. Martin Trans. Ltd.*, 828 F.3rd 1272, 1273 (10th Cir. 2016) (HireRight is a "consumer reporting agency").] Consequently, on its face, the FCRA barred McKenna's state law cause of action.

However, McKenna contended that a *different* source of law authorized his lawsuit, positing that CFR §391.23(a)(2), which requires motor carriers to investigate a driver's safety performance history with DOT regulated employers when they hire that driver, somehow gave him a cause of action for defamation. However, the court noted that *another* statutory preemption clause also negated *that* argument, 49 USC §508. That statutory section provided that "no action for defamation, invasion of privacy or interference with a contract is based upon the furnishing or use of safety regulations issued by the Secretary [of the DOT] may be brought against (1) a motor carrier requesting the safety performance, records of an individual under consideration for employment as a commercial motor vehicle driver… *or a person who has complied with such a request." Id. (emphasis added)*.

The court thus found that the statutes *did not* conflict with one another, but one (the FCRA) simply provided more protection for motor carriers like Dillon in these situations than the other, more specific provision. The court then gave both statutes full effect, rather than interpreting one as precedential over the other, and concluded that *either one* would suffice to preempt Dillon's claims.

This decision is helpful to motor carriers and others checking driver employment records. *It provides a double-barreled bar to any troublesome state law claims relating to the background check and hiring process of commercial motor drivers.* Also, it facilitates the free flow of information, to ensure that the safest commercial drivers are operating commercial motor vehicles on our public highways. Finally, it should be precedentially potent ammunition to nip any similar claims in the bud!

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Inflation Strikes Again: Limitations of Liability for International Air Transportation Are Rising

Marc S. Blubaugh

Jonathan R. Todd

Christopher C. Razek

"In practice, the limitation…[on the amount] a commercial user of international air cargo services may recover [has increased]."

The limitation of liability for cargo that is lost or damaged during international air transportation was increased on December 28, 2024, from 22 Special Drawing Rights (SDRs) per kilogram to 26 SDRs per kilogram.

The change in international law is due to an increase under the Montreal Convention 1999 (Montreal Convention), formerly known as the Convention for the Unification of Certain Rules for International Carriage by Air, which applies to traffic with signatory nations. The change was recently announced by the International Civil Aviation Organization (ICAO), a United Nations agency that leads international alignment of technical standards and strategies for international air shipments.

How the Limitation Is Calculated: An SDR is a unit of monetary measure defined by the International Monetary Fund (IMF). Its value is determined by the IMF based upon a basket of five currencies: the U.S. dollar, the euro, the Chinese renminbi, the Japanese yen, and the British pound sterling. The SDR metric is used to normalize international limitations across a number of transportation modalities, including for certain ocean shipments (under the Hague-Visby Rules), for EU road shipments (under the Convention on the Contract for the International Carriage of Goods by Road). For illustration, as of November 25, 2024, one SDR was approximately equivalent to US $1.31. Here, the increased limitation of liability for air cargo loss and damage will result in a new limitation of liability of approximately US $34.00 per kilogram, which is an increase from approximately US $28.80 per kilogram.

How Inflation Impacts the Limitation: The Montreal Convention requires review of the established limitation of liability every five years. This review takes into account the effective rate of inflation. This 2024 increase is the fourth review since the treaty came into force in 2003. It amounts to an 18% increase over the prior limitation. The most recent prior increase in the limitation of liability occurred in December of 2019, resulting in an approximately 15.5% increase from 19 SDRs to 22 SDRs.

Practical Implications of the Increase: The Montreal Convention governs all international carriage of persons, baggage, or cargo performed by aircraft for reward between or within member countries. While the Montreal Convention does not technically govern United States domestic air shipments, many parties to domestic air transportation contracts also rely on the Montreal Convention in negotiating terms and conditions of carriage. In practice the limitation means that the recovery a commercial user of international air cargo services may recover is limited to the lesser of actual loss or the 26 SDR per kilogram measure of damages. Parties are free to contract for higher limitations at commensurate rates but may not contract for lower limitations.

What This Increase Means for Shippers and Providers: The limitation in the Montreal Convention effectively creates a floor for a carrier's cargo liability exposure during international air shipments. Simply put, this increase in SDRs will potentially expose air transport providers, indirect air carriers, forwarders, and their insurers to approximately 18% greater cargo claims payments year over year. This also means that there will be a correspondingly greater recovery for shippers of those goods. It stands to reason that the cost of international air transportation services may see commensurate increases as service providers seek to internalize exposure.

Best Practices During Change: Now is the time for all parties involved in commercial air transportation to review and update their current template air waybills, contracts, or other service terms and conditions to conform with this change. In the absence of carefully updated terms, the parties to air transport risk falling appreciably outside market, which may impact volumes of tender or "leaving money on the table" for resolution of cargo claims, which may impact the total cost of transportation.

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Warehouses Watching Their Backs in California: Legislative and Regulatory Developments

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California legislators and regulators continue to create various challenges for warehouse owners and operators throughout the Golden State. Two recent developments in particular serve as stark reminders to owners and operators of warehouses—particularly those located in the Inland Empire and Southern California—that legal compliance must remain top of mind. First, warehouse operators in California are finding themselves increasingly the recipients of notices of violation arising from their failure to comply with certain emissions-related regulations. Second, California just enacted a new statute that restricts the manner in which new warehouses may be developed and in which existing warehouses may be expanded.

Notable South Coast AQMD Enforcement Activity:

The South Coast Air Quality Management District (SCAQMD), a regional government agency in California that governs air quality in Los Angeles County, Orange County, and significant portions of Riverside County and San Bernardino County, is ramping up its enforcement of air pollution regulations applicable to warehouse and distribution center operators. By December of 2023, over 500 noncompliant warehouse operators were slated for citation by the SCAQMD. As of late October 2024, the SCAQMD had already issued at least 102 violations to non-conforming operators with many more citations projected to be issued by the end of year. For instance, pursuant to a news release, SCAQMD officials stated that this was only the "first wave" of enforcement actions, and that SCAQMD will continue issuing violations to the remaining 400 noncompliant facilities unless those facilities take immediate action.

This enforcement action stems from a previous SCAQMD announcement in 2023 in which the SCAQMD stated that it would begin an enforcement initiative to bring warehouses into compliance with its Warehouse Indirect Source Rule (the ISR). The ISR, which became effective in 2021, aims to reduce emissions related to warehouse operations, particularly emissions generated from idling heavy-duty vehicles and

equipment. The ISR includes the Warehouse Actions and Investments to Reduce Emissions (WAIRE) Program. The first phase of the program applies to operators of warehouses having 250,000 square feet of space or more.

At a high level, the WAIRE Program requires applicable warehouse operators to earn a specified number of "WAIRE Points" annually based on the size of the warehouse and number of truck trips to and from the warehouse. Operators who fail to earn the requisite number of points are subject to monetary penalties and fines, as well as more significant enforcement action such as civil litigation to enforce compliance. In particularly serious cases, the SCAQMD may seek to impose restrictions on operations themselves.

The WAIRE fines can be particularly substantial. Operators who receive continuing violations are subject to a civil penalty of up to $11,710 *per day*. Citations may be issued to companies that did not meet the WAIRE Point pollution reduction requirements as well as to companies that failed to submit proper reports. Notably, the WAIRE Program's final phase commenced in January of 2025, at which time the program applied to all warehouses over 100,000 square feet in size. To avoid potential enforcement action, it is critical that operators promptly evaluate whether they are subject to the WAIRE Program and, if so, take immediate action to ensure compliance.

California Assembly Bill 98 Passes; Warehouses soon subject to strict building standards and restrictions:

California Governor Newsom signed Assembly Bill 98 into law on September 29, 2024. Key provisions of this new law are subject to take effect on January 1, 2026. The new law imposes significant new requirements on companies seeking to build new (or significantly develop existing) warehouses in California. The law contains various provisions intended to protect California residents from potential harm caused by emissions generated from warehouse operations. This includes various setback requirements for warehouses that are built near homes, schools, hospitals, and other facilities. Additionally, warehouses must be located on roads that are customarily subject to commercial traffic and must develop and obtain local government approval of a "truck routing plan" that minimizes congestion and truck traffic being routed through residential areas or other large population centers.

The law also requires the warehouse owners to compensate any displaced residents whose homes are demolished in the course of building the warehouse. In addition, the owner of the warehouse will also be required to build two replacement units of affordable housing for every home removed via the building of a new warehouse.

Finally, certain new warehouses will be required to use zero-emission technology, to meet specific energy efficiency standards, and to prevent trucks from idling their engines at the warehouse.

Existing warehouses are exempted from these new laws as long as they are not significantly modified in size. A significant expansion of an existing warehouse will potentially trigger imposition of these requirements to the expanded facility.

Entities seeking to build new warehouses or to develop existing warehouses in California should scrutinize all requirements contained in AB 98 to avoid potentially costly issues associated with any noncompliance with these new laws. And, of course, the higher costs imposed on companies building or developing warehouses will trickle down to the actual warehouse operators leasing such facilities (as well as to their customers). Those involved in the warehouse industry in California should plan accordingly.

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Artificial Intelligence Implementation for Supply Chain Applications

Jonathan R. Todd

Artificial intelligence is under close examination in many industries, including the transportation, logistics, warehousing, and supply chain services sectors. The quest for innovation, competitiveness, and organizational efficiency demands at least taking a look. Tangible benefits are by many accounts real for certain uses. Other benefits may be imaginary, at least at this point. One challenge for adoption of this technology is the yet-unsettled legal and regulatory framework.

Adoption of AI Technology in Operations

There are many anecdotal stories of deploying artificial intelligence. Some operations have found that AI can perform certain administrative fast quickly, effectively, and with very low error rates.

AI platforms on the market today can review and summarize new service requests and shipping documents, and prepare communications with vendors and customers. AI can help shippers and service providers better manage inventory levels, model anticipated traffic and lanes, and dial-in on fixed and variable costs. All of this is great from perspectives such as speed of execution and cost of overhead.

The operational challenge is that no AI platform is error-free. These are not unpaid personnel

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who do not sleep, eat, or get sick. They are assistants for day-to-day business or strategic planning. Limitations of these technologies can be alarming in the sense that human oversight is required and pro-tech bias must be overcome. These platforms have hallucinations, they don't yet understand human emotion, and they suffer from garbage-in-garbage-out scenarios.

US Legal Considerations for the Industry

Legal challenges for adoption of AI range from typical software license concerns to national security and data privacy. In some ways these platforms are no different from any other licensed system. You expect that it will work consistent with your service level agreement. You expect that it will not infringe or misappropriate any other party's intellectual property or misuse your proprietary information, which can be risks for this technology. You also expect that you will own and be free to use the outputs of this technology, which can also be a risk.

Some concerns extend far beyond your organization. The White House issued an Executive Order in 2023 focused on agency use of AI in ways that will protect the rights and safety of the public. The White House also issued a memorandum in 2024 intended to drive adoption of the technology, doing so responsibly, managing risks inherent in the technology, and managing risk in federal procurement of the platforms. If there is a future where private sector regulation is rolled out, these early indicators this may well serve as a framework.

Supply chain-focused agencies are also taking notice. The Department of Transportation is investigating development and use of AI in the space. In the fact-finding stage, this effort focused on current AI applications, opportunities for future applications, challenges of implementation specific to the transportation sector, and implications for autonomous mobility. Broader supply chain applications are also receiving attention. The White House released a Fact Sheet in 2023 that identified supply chain risks and opportunities, including by recommending an AI Hackathon for supply chain applications. At the same time a dizzying array of export restrictions and sanctions unfolded over the course of the Biden Administration to thwart perceived geopolitical threats as countries like China, Russia, Iran, and North Korea develop and seek access to critical technologies.

Foreign Legal Considerations for All Industries

Among our foreign allies the European Union is taking a more fulsome approach to AI regulation. The EU AI Act went into force in 2024 with an effective compliance date of 2026. The AI Act will apply to companies producing AI technology and to its users. Exploitative biometric and social scoring systems are prohibited. High-risk systems, including those deployed in some transportation applications, will be required to conduct periodic risk assessments while increasing safeguards around cybersecurity and data privacy. Fines for compliance failures may reach up to 35 million euros or 7% of global revenue.

Navigating Through the Unknowns

Planning is the key to navigating these uncharted waters for domestic U.S. businesses. It is more important than ever for technology leadership to identify appropriate roles within organizations, manage the procurement and contracting for these systems, thoughtfully implement to maximize ROI, and actively guard against the risks of poor output as well as threat actors and legal compliance. Fortunately, many in the industry should be on a good foundation to begin or continue these activities. For example, some segments of the industry are required by the TSA to appoint cybersecurity coordinators due to the increased activity by threat actors. Those segments typically include operations by air carriers, indirect air carriers, certain rail lines, and certain passenger carriers. AI represents one more complexity for industry technology professionals that will only grow in impact for years to come.

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Pick A State, But Not Just Any State: Key Considerations for Motor Carriers and Private Fleet Operators When Choosing Which State to Register and Plate Vehicles and Equipment

Brian Cullen

Robert Pleines, Jr.

Motor carriers and private fleet operators need to weigh several critical factors when deciding where to register and plate their motor vehicles and equipment (trailers, flatbeds, tanker units, etc.). Selecting the right state for registration and plating will impact a carrier's bottom line, as it can lead to substantial cost savings and smoother operations. Thus, motor carriers and private fleet operators may reflect upon the following considerations when choosing a state to register and plate their vehicles and equipment.

1. State Registration Fees and Tax Rates

One of the first items that motor carriers and private fleets should assess is the cost structure of commercial vehicle registration fees and state tax rates across the different states where the motor carrier or private fleet operator is eligible to register their motor vehicles and equipment. States vary widely in how they tax commercial vehicles and equipment or manage registration fees, and selecting a state with lower tax rates or an administratively simple registration process can result in significant cost savings. For motor carriers or fleet operators managing medium to large fleets, even marginal differences in fees can add up quickly, making it essential to analyze the cost-effectiveness of each state's tax structure and fee schedule.

2. International Registration Plan (IRP) Efficiency

The efficiency of a state's administration of the IRP is another key factor when deciding where to register a fleet of vehicles or equipment. Motor carriers should identify states with streamlined IRP processes and experienced registration staff, as this can minimize delays and simplify vehicle registration and distribution of the appropriate portions of fees to each member jurisdiction (state or province) based on the mileage driven within an individual member jurisdiction. States with efficient and mature IRP processes simplify cross-state operations and can significantly reduce the administrative burden of registration for motor carriers and private fleets in comparison to states with less efficient processes.

3. Strategic Location and Infrastructure

A state's geographical location and infrastructure may also influence the decision. For instance, states with central locations and well-developed transportation networks can provide some logistical advantages, especially for motor carriers and private fleet operators that operate nationwide or regionally. For example, some states require annual emissions testing on vehicles. This is also important for those who own equipment, as some states require state-specific in-person trailer inspections in addition to the FMCSA-standard inspection. These separate inspections add significant costs to trailer owners, as they may require separate trips simply to obtain inspections for trailers registered in specific states.

4. Additional Taxes on Commercial Vehicles and Trailers

Motor carriers and private fleet operators should consider whether a state imposes additional taxes, such as personal property taxes on commercial vehicles or trailers. Some states tax vehicles and equipment used for business purposes, while others offer exemptions. Avoiding states with high or additional taxes on commercial fleets can lead to cost savings, making it essential to understand each state's tax policies before determining where to register and plate vehicles and equipment.

5. Business Environment and Regulatory Support

Motor carriers and private fleet operators should also assess a state's business environment and the level of regulatory support available for the trucking industry. States with favorable tax laws and business-friendly regulations are often more attractive to motor carriers. On the other hand some states may have specific laws that apply to heavy-duty vehicles that indirectly increase a motor carrier's or private fleet operator's costs. For example, New Jersey requires all commercial motor vehicles registered in the state to maintain $1.5 million in automobile liability insurance, which is a higher policy limit than the FMCSA standard and what any other state requires of owners of registered commercial motor vehicles. Additionally, states that actively support the trucking industry through initiatives and advocacy can provide added value and resources to motor carriers and private fleet operators. Contrarily, other states have laws and business environments that are simply unfriendly to motor carriers or private fleet operators.

6. Access to Industry Support and Resources

Finally, motor carriers and private fleet operators should consider the presence of industry associations and resources within the state. Organizations like state-level trucking associations often offer support, educational resources, and advocacy, which can be highly beneficial. Being in a state with an influential and well-established trucking community can provide motor carriers and private fleets with the tools and support they need to navigate regulatory challenges and stay compliant.

Conclusion

The decision of where to register and plate vehicles and equipment is multifaceted, involving regulatory compliance, financial implications, and operational considerations. When choosing a state for vehicle and equipment registration and plating, motor carriers and private fleet operators should carefully consider factors like registration fees, IRP administration efficiency, strategic location, tax policies, the regulatory environment, and access to industry support. By thoroughly evaluating these elements with legal and tax professionals, motor carriers and private fleet operators can make informed decisions that optimize their operations and reduce costs.

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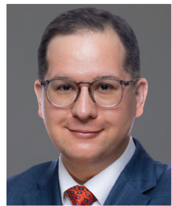
New CBP Customs Broker Continuing Education Requirement Finalized



Jonathan R. Todd

Ashley Corbin Rice

U.S. Customs and Border Protection (CBP) announced today that individually licensed customs brokers may begin completing continuing education courses on January 1, 2025 (89 FR 87387). Failure to comply risks suspension or revocation of not only individual licenses but also those company broker licenses secured by broker-officers. The announcement "starts the clock" for companies offering customs broker services to begin managing education obligations of their licensed brokers to avoid interruptions in servicing domestic importers.

Continuing Education Rulemaking – CBP began rulemaking four years ago for the continuing education requirements now shown at 19 CFR Part 111, Subpart F. The provisions of Subpart F establish continuing education as well as recordkeeping and reporting requirements. They also establish procedures for notice of noncompliance and the eventual suspension or revocation if those deficiencies are not timely corrected. CBP did so under the authority of 19 USC 1641. The Advanced Notice of Proposed Rulemaking published on October 28, 2020, followed by the Notice of Proposed Rulemaking on September 10, 2021, and the Final Rule on June 23, 2023.

Regulatory Compliance Obligations Today – The Notice commences the education and reporting process for the 2024–2027 triennial period with a reduced education credit requirement of 20 credits rather than 36. The compliance deadline is February 1, 2027. Individually licensed brokers may begin completing qualified continuing broker education courses as of January 1, 2025. The express purpose of continuing education found at 19 CFR 111.101 is to ensure that individual brokers "maintain sufficient knowledge of customs and related laws, regulations, and procedures, bookkeeping, accounting, and all other appropriate matters necessary to render valuable service to importers and drawback claimants." Today's Notice also announced five CBP-selected accreditors for the continuing education requirements following a public RFP process.

Consequences for Noncompliance – CBP may suspend or revoke an individual's customs broker license, which may impact company licenses held by those individuals, if continuing education requirements are not reported or fall short of the requirement. Brokers will receive notice of impending suspension and a 30-day period to correct deficiencies as described in 19 CFR 111.104. Failure to take corrective action within this window will result in suspension. If the deficiency is not resolved within 120 days following suspension then broker licenses will be revoked. In all events, the required corrective action is to certify completion of the required continuing education credits.

Benesch's Transportation & Logistics Practice Group has a long history of helping clients to launch and grow customs broker operations. Our large team represents clients in license application and maintenance, operational paperwork and contracting, day-to-day regulatory compliance, and mergers and acquisitions, as well as claims and enforcement defense.

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Breathe In That Rocky Mountain Air: Motor Carriers, Brokers, Freight Forwarders, and Private Fleets Operating in Colorado Face November 30, 2024, Deadline to Comply with State's New Emissions Reporting Requirements and Avoid Substantial Penalties.

Marc S. Blubaugh

Brian Cullen

Motor carriers, brokers, freight forwarders, and private fleets face substantial penalties if they fail to comply with Colorado's new Large Entity Reporting (LER) requirement, a relatively unpublicized new regulatory measure in the State of Colorado aimed at tracking and reducing emissions from heavy-duty vehicles. This requirement, overseen by the Colorado Department of Public Health and Environment (CDPHE) Air Pollution Control Division (APCD), is part of Colorado's efforts to promote a faster transition to lower- and zero-emission vehicles. The first deadline for reporting was November 30, 2024, however the CDPHE has announced that the deadline for filing has been extended to June 1, 2025. The next major reporting for applicable entities following the June 1, 2025, deadline will be due on December 31, 2027.

Who Must Comply?

Motor Carriers and Private Fleet Operators: The LER requirement applies to motor carriers and private fleet operators who: (i) in the tax year preceding each LER reporting year, had 20 or more vehicles with a GVWR greater than 8,500 lbs. under common ownership or control (i.e., they own or lease the vehicles); **AND** (ii) operated a facility in Colorado.

Brokers and Freight Forwarders: The LER requirement applies to brokers and freight forwarders who: (i) dispatched 20 or more vehicles with a GVWR greater than 8,500 lbs. into or throughout Colorado; **OR** (ii) operated a facility in Colorado, in the tax year preceding each reporting year.[1]

Reporting Requirements

Motor carriers, brokers, freight forwarders, and private fleet operators are required to provide detailed data about their fleet operations, including general business and financial information, as well as information regarding fleet composition and usage (i.e., facility locations, if applicable, vehicle types, vehicle identification numbers, fuel types, mileage for each vehicle, etc.) to the CDPHE. Notably, the magnitude of required information can quickly become quite substantial for larger motor carriers or private fleet operators. In addition, all records that support the reported data must be retained by the reporting entity for at least five (5) years following each reporting deadline.

Further, the CDPHE is expected to announce updated guidance regarding the reporting requirements for brokers. The updated guidance is expected to reduce the volume of information that brokers will need to provide to the CDPHE.

Penalties for Noncompliance

Although, the level of enforcement of this new law is yet to be determined, Colorado law provides that noncompliance may result in fines of up to $15,000 per day for each violation. These penalties underscore the importance of timely and accurate reporting in order to avoid substantial financial repercussions. The actual amount of the fine that will be issued will be within APCD's discretion and will likely vary based on the severity and duration of the noncompliance. Additionally, although the APCD has not yet disclosed to what extent it intends to enforce a subject party's compliance with the LER requirement, the APCD is authorized under Colorado law to undertake significant measures to enforce laws under its jurisdiction, which include the state potentially taking legal action against noncomplying entities or seeking to restrict a noncomplying entity's ability to operate within Colorado.

Conclusion

To avoid substantial penalties for noncompliance or any other enforcement actions, as well as possible reputational damage, motor carriers, brokers, freight forwarders, and private fleet operators must take swift action to ensure that they will be compliant with Colorado's new LER requirement by June 1 2025.

1 There is some confusion regarding the interpretation of the wording contained within the actual Colorado statute. The CDPHE has thus far contended that the statute's intent is that brokers who meet the criteria of either (i) dispatched 20 or more vehicles with a GVWR greater than 8,500 lbs. into or throughout Colorado or (ii) operated a facility in Colorado, in the tax year preceding each reporting year, are required to report.

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The Use of Mock DOT Audits

Thomas O'Donnell

A Department of Transportation (DOT) audit[1] is something that all motor carriers dread. A Federal Motor Carrier Safety Administration (FMCSA) investigation can often have adverse consequences. Violations found during a Department of Transportation (DOT) audit can result in fines, adverse safety ratings, and out of service orders that can negatively affect a carrier's business. However, a motor carrier can utilize an internal mock DOT audit to not only prepare for any potential actual DOT audit but can also create significant peace of mind in doing so.

What is a Mock DOT Audit?

A mock Department of Transportation (DOT) audit is a tool used to determine how a motor carrier complies with the Federal Motor Carrier Safety Regulations (FMCSRs) and would fare in the case of an actual DOT audit. The audit consists of a review of a motor carrier's policies, procedures, and records. Mock audits assist a motor carrier in identifying compliance gaps and correcting any deficiencies found in their safety program. A mock DOT is conducted in the same manner as an actual DOT audit. This includes the same areas, documents, files, and sampling quotas a DOT safety investigator (SI) would examine. The mock audit can mirror an FMCSA focused review or comprehensive review, depending on the carrier's preference and safety history. A focused mock audit should concentrate on areas of concern while a comprehensive mock audit will examine a full review of the carrier's safety and compliance program. To maximize effectiveness, it is important that both types of mock DOT audit follow a process similar to an actual FMCSA SI.

Who Performs a MOCK DOT Audit?

Internal personnel. A motor carrier's own personnel can perform a mock DOT audit. To be effective, any such personnel should have an intimate knowledge of the FMCSRs, and the procedures used during an actual DOT audit. This process can also be a burden on the operations of a motor carrier that does not have the resources available to conduct a time-consuming internal investigation outside their day-to-day compliance commitments.

Outside DOT consultants. There is a large number of outside DOT consultants that offer mock DOT audits services. Many are very skilled and competent in performing the mock DOT audits. They range in size, resources, and experience. Often these consultants are former motor carrier safety managers or law enforcement officers with DOT experience. The consultants will perform the mock DOT audit for a flat or hourly fee based on the type of audit and size of the motor carrier.

DOT attorneys. DOT attorneys specialize in providing FMCSRs compliance expertise to their clients. Often their practice includes performing mock DOT audits. They too will usually base their fee on the size of the motor carrier and the scope of the audit. One important distinction between a DOT attorney and consultant is that any mock DOT audit performed by a DOT attorney will be privileged work product. Therefore, the mock DOT audit findings, including any deficiencies discovered, would be protected from disclosure to third parties in case of any litigation discovery procedures.

Goals of a Mock DOT Audit

Identify gaps in a carrier's safety and compliance program. As with any type of gap analysis, a mock DOT audit's main purpose is to identify areas of deficiencies for correction. The deficiencies found can be in any compliance area examined and also range in significance. Simple recordkeeping deficiencies, like a missing document in a driver's qualification file, can be corrected immediately. More significant deficiencies, such as systemic operational issues involving hours of service violations, will be much more difficult to address.

Correct deficiencies found. As discussed, a mock DOT audit identifies deficiencies in a motor carrier's safety and compliance programs. This provides the carrier with sufficient time to correct any deficiencies before an actual audit occurs. It also allows a carrier to determine the effectiveness of its current policies and procedures. The correction of any issues identified will also reduce the odds of an actual DOT audit because they will result in a lower number of roadside violations and DOT crashes.

Assess policies and procedures. A mock DOT audit will often be an eye-opening experience for

a motor carrier. It can not only show deficiencies in current policies and procedures, but also find where none exist to address deficiencies found.

Determine a mock safety rating. The ultimate outcome of any actual DOT audit is the proposed safety rating determined by the FMCSA investigation. A DOT audit can result in a rating of satisfactory, conditional, unsatisfactory, or unrated. As the names suggest, satisfaction is the best outcome and unrated has no effect on a motor carrier. A conditional rating allows a carrier to operate but can increase insurance costs and impact customer relations and usage. An unsatisfactory safety rating will effectively shut down a motor carrier's operations. A mock DOT audit can simulate a safety rating if it follows the standards set forth in the FMCSRs and uses the same methods, sampling, and scoring as an actual FMCSA SI. That is why it is so important that any person(s) who conducts a mock DOT audit is familiar with these guidelines.

How to Conduct a Mock DOT Audit

The goal of any mock DOT audit is to simulate an actual audit and determine any potential outcome with regard to gaps, violations, and safety rating. In order to do so, the mock audit must look at the specific items and areas of a motor carrier operations that the FMCSA would in the case of an actual DOT audit.

Six Factors examined. During a comprehensive DOT audit, an FMCSA SI will look at six Factors that directly pertain to the FMCSRs. These six Factors, and the method used to determine a safety rating are contained in the FMCSRs' Appendix B to Part 385 – Explanation of Safety Rating Process (Appendix B). The Factors are:

- Factor 1: General—Parts 387 and 390 (e.g., MCS-90, accident register)
- Factor 2: Driver—Parts 382, 383, and 391(e.g., driver qualification file, drug and alcohol testing)
- Factor 3: Operational—Parts 392 and 395 (e.g., hours of service)
- Factor 4: Vehicle—Parts 393 and 396 (e.g., preventive maintenance, vehicle out of service rate)
- Factor 5: Hazmat—Parts 397, 171, 177, and 180 (e.g., hazmat papers, security plans)
- Factor 6: Accident rate per million miles

Each Factor is given a rating of "Satisfactory," "Conditional," or "Unsatisfactory," based on the number of acute and critical violations found. Based on these findings, the FMCSA uses a formula to determine a safety rating.

Acute and critical violations. A list of the various acute and critical violations is contained in Appendix B. Acute violations are those "where noncompliance is so severe as to require immediate corrective actions by a motor carrier regardless of the overall basic safety management controls of the motor carrier." An example is a violation of 49 C.F.R. §391.15(a) Using a disqualified driver. A critical violation is that "where noncompliance relates to management and/or operational controls." An example would be a violation of 49 C.F.R. §395.3(a)(1), requiring or permitting a property-carrying commercial motor vehicle driver to drive more than 11 hours.

A single acute violation is enough to affect a motor carrier's safety rating. However, a critical violation rate of at least 10 percent (a "pattern") of the samples examined is required to affect a safety rating.

Sampling. Another key component of an effective mock DOT is to know the sampling methods used by the FMCSA. This methodology depends on factors such as a motor carrier's size and also what Factor is being examined. Below is an example of sample size for driver qualification files for a motor carrier based on the number of drivers:

# of Drivers Subject to the FMCSRs	# of DQ Files to Review
1-5	All
6-25	5
26-50	8
51-90	13

Source: FMCSA Electronic Field Operations Training Manual (eFOTM), Appendix N

The number of drivers a motor carrier uses subject to the FMCSRs directly corresponds to how many driver qualification files should be audited. Knowing the sample size to audit for various records examined plays a significant role in the integrity of a mock DOT audit's result.

A mock DOT audit is a valuable tool used to determine where a motor carrier stands in their compliance program. It provides an opportunity to identify and correct gaps found in the program before an actual DOT audit occurs. It is very important that any mock DOT audit follows the actual process used by the FMCSA if the carrier wants to obtain a useful result. Carriers should conduct a mock DOT mock audit if they have reason to believe an FMCSA investigation may be imminent due to a major accident or high CSA scores. Even if this is not the case, a mock DOT is recommended at least once a year to gauge where a motor carrier's safety compliance program stands. While it may seem like an expensive proposition, it's hard to put a dollar figure on peace of mind.

[1] For the purposes of this article, the term "DOT audit" will be used to refer to what is often more formally known as a Federal Motor Carrier Safety Administration (FMCSA) investigation or compliance review.

For more information, please contact a member of the firm's Transportation & Logistics Practice Group.

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UPDATE: Trump Tariffs on Mexico, Canada, China – Supply Chain Impact and Strategies

Jonathan R. Todd

Vanessa I. Gomez

This article was originally published on February 2, 2025. It has been updated to reflect changes from additional Presidential Actions. Four additional Executive Orders released on February 3, 2025. A subsequent Executive Order dated for February 5, 2025 released on February 7, 2025 .

United States supply chains now have a degree of clarity following a flurry of verbal threats about new tariffs. The White House issued a Fact Sheet and three Executive Orders on February 1, 2025, following wide speculation about President Trump imposing new tariffs on Mexico, Canada, and China. The new Fact Sheet describes Administration policy for each of the top three trading partners. The first Executive Order published on February 1, 2025, only addresses trade with Canada. Subsequent Executive Orders published early on February 3, 2025, address trade with China and Mexico. Two additional Executive Orders released late on February 3, 2025, institute a pause on the implementation of tariffs on products imported from Canada and Mexico. Another Executive Order released on February 7, 2025, temporarily reinstates duty-free *de minimis treatment on low-value shipments for goods imported from China.*

The key provisions of the President's actions as known or expected to date include:

- All products imported from Canada and Mexico will bear a 25% duty for entry into the United States. Energy and energy resources from Canada will bear a lower 10% duty. All products imported from China will bear an additional 10% duty for entry into the United States.
- Application of the duties on products imported from China is expected to begin on February 4, 2025. Goods in transit prior to February 1, 2025, are excluded from the new tariffs together with a few other operational exceptions. Application of the duties on all products imported from Canada and Mexico is paused until March 4, 2025. A reservation to implement immediate tariffs exists.
- Duty-free *de minimis* treatment of low-value shipments will be unavailable for goods covered by these duties. Cessation of the duty-free *de minimis* treatment for goods imported from China is paused indefinitely until Commerce establishes systems to collect tariff revenue.
- No exclusion process will be available for domestic importers.
- No drawback will be available for duties paid under these actions.
- Any retaliation from our trading partners will be met with higher duty rates or expanded scope at the President's discretion.

President Trump declared a public health crisis and national emergency arising from the flow of illegal drugs into the United States in addition to his previously declared declaration of national emergency arising from illegal immigration. The legal basis cited for these actions was the International Emergency Economic Powers Act (IEEPA).

How Supply Chains Attempted to Prepare – These are the first formal written announcements of the President's intentions following the America First Trade Policy memorandum signed on Inauguration Day. Our team has been advising clients on this departure from 30 years of North American trade since the President's comments during Thanksgiving Week of 2024. See our "Trump Tariffs - 2025 Expectations, Facts, and Options" bulletin here:

China Supply Chain Impact – Domestic importers have responded to higher duties on imports from China since the Trump 45 Administration. The Biden Administration continued and even expanded those increased tariffs. Our recent publications on those developments are available here:

New China Tariffs January 1 – Biden Administration's Section 301 Modifications Effective at Start of 2025

China Tariffs – New Section 301 Customs Duties Effective September 27, 2024

Action Items for New China Tariffs

Immediate Next Steps for New China Tariffs

Some importers with sourcing relationships in China have already weathered near- and long-term cost negotiations due to landed cost volatility. Many importers also began strategic procurement tours throughout Southeast Asia and elsewhere beginning in 2018. Prior sole-source relationships in China for some supply chains grew into global relationships with many suppliers and manufacturers. Supplier diversity was understood as an effective means to mitigating tariff, logistics, and other geopolitical risk challenges. North America was a beneficiary of those "friendshore" and "nearshore" trends until now.

Canada and Mexico Supply Chain Impact – The USMCA (formerly NAFTA) was an achievement of the Trump 45 Administration that maintained continental free trade. The new agreement was ratified by each country's legislature to continue the three decades of investment and trade growth. USMCA was set for review next year in 2026. President Trump's Trade Policy memorandum called for internal United States review of relevant USMCA trade factors followed by a report of findings in April 2025. Now, many of those foundational understandings between our first and second greatest trading partners are called into question. Canada and Mexico have forecasted for some time that they will meet any tariff action with proportionate tariff increases on United States items entering their commerce. Canada met President Trump's February 1 announcement with a plan to scale 25% tariffs on United States imports into the country. Mexico announced that it would execute on a "Plan B" retaliation strategy. China also implemented its own set of retaliatory tariffs on United States origin items falling within key sectors. Details are forthcoming.

"Now, many of those foundational understandings between our first and second greatest trading partners are called into question."

Business and Legal Strategy Going Forward – We are counseling clients through immediate near-term strategies: (1) contingency planning with foreign suppliers, (2) updating as necessary written procurement and sale terms, (3) reviewing current terms for the availability of flexibility in performance obligations, (4) confirming correctness of tariff classification and duty applicability, and (5) identifying any commercial risk where committed production or sales will be loss-generating or are inherently inelastic. Long-term planning necessarily involves examining production and commercial relationships for adjustment.

The greatest challenge at this stage is how the one-time safe harbor for price volatility, North America, is now on the high-risk side of the geopolitical spectrum alongside China. The toolbox of options of course includes increasing supplier diversity by sourcing alternate producers for finished goods and raw materials. Domestic sourcing may be the best option even if it is presently unavailable for many supply chains. Retaliation by our trading partners may also necessitate exploring customer diversity options on a global basis.

One simple truth is that domestic United States importers and industry appear to be entering a volatile and higher-cost operating environment. There remain plenty of known unknowns right now, such as the duration of these actions, the degree and nature of foreign retaliation, whether the President will escalate these rates, and whether any legal challenges will be successful.

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Global Services Contracts – Going to Market with the Best Strategy for Your Case

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Global transportation and logistics services can amount to some of the largest expenses, and even the largest single contracts by spend, for enterprises with high traffic volumes. Among mature buyers and sellers of goods the common practice is to contract for services rather than buying on the spot market under ad hoc supplier paperwork. Contracting under one's own templates is both permitted under the applicable legal regimes and also a sensible approach to supply chain management. It allows the buyer of the transportation or logistics services to tailor terms to company policy and the precise needs of its inbound or outbound supply chain. The structure used in approaching global and domestic service can also vary widely based upon each particular use case.

"There is no one-size-fits-all supply chain. The same principle stands true for supply chain contracting."

Single-Service or Jurisdiction Contract Structures – Some procurement fact patterns benefit from single-use contract structures specific to a particular mode, geography, facility, or other unique practical application. For example, it is common that ocean carrier service contracts stand alone due to the degree of regulation for that mode and historic industry practice. An ocean contract can be incorporated in a Master Services Agreement (MSA), although doing so may be cumbersome for negotiation and contract administration over its life cycle. In the United States the same can be said for rail carrier agreements. Sensitive cargoes such as the transportation of temperature-controlled goods or bulk hazardous materials, hazardous waste, or dangerous goods are other common examples. The degree of regulation for those movements and the need for special handling often require targeted terms not suitable for broad-based contracts.

Multiple-Service or Jurisdiction Contract Structures – Other procurement fact patterns instead benefit from more complex contract structures. It is increasingly common to go to market with regional or global MSAs that establish the enterprise-wide terms for transportation and logistics services in a largely mode-agnostic fashion. The immediate benefit in doing so includes achieving harmony of terms across the portfolio of service providers and facilitating ease of adding or removing services, modes, and regions subject to the MSA. Those unique expressions of service often take the form of Scopes of Work (SOWs), Service Schedules, and similar contractual tools that can be added to or removed from an existing MSA. Ancillary services may be easily added as well, such as supply chain consulting or web-based transportation management system licenses. Enterprises with high degrees of vendor management often add Service Level Agreements or Key Performance Indicator terms under the MSAs.

Bridging Disparate Legal Regimes – The legal regimes that developed over centuries in the transportation and logistics sectors are as varied and nuanced as the modes and geographies they serve. Each mode, whether air, ocean, surface, or warehousing, operates under distinct legal liability regimes, often influenced by international treaties, national regulations, and industry practices. By clearly defining liability terms and conditions in transportation contracts, shippers and carriers can mitigate risks, ensure proper coverage, and establish clear protocols for claims and compensation. This contractual clarity helps parties navigate the complexities of different liability schemes, enhances predictability, and protects interests in the event of loss or damage. It can be accomplished with confident global contracting strategies that lower friction when negotiating during bid processes, allow for harmony of terms, and facilitate ease of updating services.

Developing the Best Contract Structure – There is no one-size-fits-all supply chain. The same principle stands true for supply chain contracting. Despite the factually intensive nature of transportation and logistics procurement, particularly on a global scale, the various applicable legal regimes allow for negotiating most terms and for developing new and novel structures in support of strong administrative practices. Those factors may weigh in favor of singular contract templates on a service, mode, or geographic basis (or even,

as we mentioned, on a facility-by-facility basis) or they may instead weigh in favor of a global transportation and logistics MSA-style approach. Firmly understanding the industry-specific legal landscape across the geographic territories is the first step to unlocking the creativity required for dynamic contracting structures.

Benesch's Transportation & Logistics Practice Group is experienced in practical strategies for managing risk and administrative burden in all types of global supply chain-related functions.

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Forced Labor – Compliance and Best Practices Across Emerging Global Requirements

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Combatting forced labor is growing from aspiration of company boards to a mission-critical focus impacting day-to-day operations. Companies with global footprints are not alone in witnessing acute compliance and reputational impacts. Any domestic U.S. company that sources product from abroad can face detention of imported goods followed by a lengthy process of defending the absence of forced labor. The U.S. is far from alone in this emerging trend of Western governments increasing requirements, and consequences, around the procurement and sale of goods.

This article surveys the current state of law in a few key jurisdictions, the practical implications, and best practices for taking risk-appropriate steps to manage compliance.

US Uyghur Forced Labor Prevention Act

The United States Uyghur Forced Labor Prevention Act (UFLPA) enacted in 2021 applies a rebuttable presumption that all imports to the U.S. from the Xinjiang Uyghur Autonomous Region of China (the XUAR) were produced with forced labor.

Application – The UFLPA applies to all items imported to the U.S. from the XUAR or with inputs sourced or produced from the XUAR. It superseded the previous United States Withhold Release Order (WRO) regime, which applied only to specific items (for example, cotton and tomatoes).

Practical Impact – Imports from the XUAR or suspected to be from the XUAR are denied customs entry by U.S. Customs and Border Protection (CBP) and its Forced Labor Enforcement Task Force (FLETF) unless the importer can rebut the presumption or demonstrate that an exception applies. Detained goods must be reexported or will be forfeited unless the importer can rebut the presumption. At a high level, rebuttal requires sourcing due diligence information, supply chain tracing information, supply chain management detail, and specific evidence that goods were not mined, manufactured, or produced in the XUAR or by the use of forced labor. CBP has discretion to determine the sufficiency of such information.

Practical Steps for Compliance – Companies that import products from China or that include China inputs are at risk of UFLPA detention and the presumption that forced labor exists in their supply chain. Preparing to avoid detention is an exercise specific to each company's supply chain, but a few preventive steps include:

Party Screening and Diligence. Strong and confident relationships with suppliers in China can be helpful for navigating UFLPA detentions. Supplier screening against the UFLPA entity list is an essential step because it contains a non-exhaustive roster known exporters of products made with forced labor.

Certificates of Origin. Certain aspects of the supplier relationship can be established under purchase agreements to help align expectations in the event of disruption and manage risk. Requiring certificates of origin that specify where production occurred, the source of all inputs, and the absence of forced labor can be a highly valuable procedural tool and expectation. Maintaining current certificates provides the first essential piece of evidence when challenged to prove the character of imports to the U.S.

Supply Chain Mapping. Supply chain maps showing origin, manufacture, and production of the goods as well as transportation along the chain helps to provide evidence of all inputs and chain of custody in response to CBP questions.

On-Site Audits. Companies can also engage third parties in China or send employees on-site to audit manufacturing and production processes on the ground, take photos of compliant operations with for-hire employees,

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Forced Labor – Compliance and Best Practices Across Emerging Global Requirements

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and document findings to support the absence of forced labor, if challenged.

UK Modern Slavery Act

The UK Modern Slavery Act requires UK companies (and those that have online presences and suppliers in the UK) generating turnover of at least £36 million to publish a statement of compliance to outline efforts to prevent and stop slavery in their supply chains.

Application – The UK Modern Slavery Act 2015 applies to all businesses that offer goods or services within the UK. Enforcement is interpreted as applying to companies with: physical presence within the UK; employees operating within the UK; online or e-commerce presence within the UK or that specifically targets the UK market; or significant long-term suppliers and clients that "operate" within the UK market. The substantive compliance obligation is to publish a modern slavery statement.

Regulatory Impact – The modern slavery statement requires companies to outline efforts to combat modern slavery in owned operations as well as within the supply chain. A company's modern slavery statement must be reviewed and approved by the company's board of directors. A company must then publish its approved modern slavery statement on the company's website with a clear and conspicuous link located on the company's website homepage. The company is required to review, obtain approval, and then, if necessary, update the website publication of its modern slavery statement on an annual basis no later than six months after the end of the company's annual financial year.

Practical Steps for Compliance – Similar to the UFLPA, the set of tools for compliance with the UK Modern Slavery Act includes supply chain mapping, certificates of origin, on-site audits, and screening practices. Other pragmatic steps specific to the Modern Slavery Act include:

Annual Modern Slavery Statement Review Process. Companies that will approach or meet the £36 million turnover threshold must develop processes to manage the requisite modern slavery statement and properly review it each year. Practical steps include delegating a point of contact to be responsible for managing the statement, and compliance violations.

Compliance Program Development. The UK Modern Slavery Act requires active and ongoing compliance, including steps to combat slavery in the supply chain. Regulated companies may establish internal processes to manage compliance and address forced labor issues across the supply and production base. This program can include "red flag" training for employees to identify signs of slavery in a supplier or vendor's operations, an internal reporting mechanism for suspected slavery issues, contract terms in all international dealings to require compliance, indemnity for violation of the same, and other tailored steps that are unique to the company's operation.

EU Forthcoming Forced Labor Regulation

The EU Forced Labor Regulation is set to be approved and implemented by 2027. It will prohibit import to the EU of any items made with forced labor and will track those items across the territory.

Application – The E.U. Parliament voted in April of 2024 to adopt the FLR, which will be implemented by member countries over the next three (3) years if the EU Council votes to approve it this year. The FLR is expected to be implemented by all countries in various phases through 2027.

Regulatory Impact – The FLR will prohibit the import into the EU of any item at any stage in the supply chain if it was made with forced labor. The FLR will also establish and publish a database of products deemed by the enforcement commission to be made with forced labor. Products listed in the database will be prohibited from import to the EU. As currently drafted, The FLR does not require any particular kind of protective diligence or affirmative "approval" process for products to enter the marketplace. Instead, it will identify and prohibit violative products.

Practical Steps for Compliance – In all cases, supply chain mapping, certificates of origin, on-site audits, and screening practices described for compliance with other forced labor compliance programs will be valuable for FLR compliance. The challenge in preparing for FLR compliance is that specific requirements of the FLR remain to be seen. The FLR has not yet been approved and implemented across the member states. Accordingly, establishing basic compliance practices as required by other EU laws, and member state laws, or otherwise required by U.S. and UK operations is a strong initial protective step alongside tracking of the FLR.

EU State-Specific Forced Labor Laws

EU member states have variously implemented other forced labor compliance obligations requiring awareness depending upon a company's footprint and supply chain. Examples of key legislative instruments include, without limitation, the French Duty of Vigilance Law, German Supply Chain Due Diligence Act, and the Netherlands Child Labor Due Diligence Law. Companies must adopt proactive and legally sound approaches to ensure compliance with these overlapping, yet sometimes distinct, legal requirements.

Practical Steps for Compliance – Best practice for all other forced labor compliance obligations have applicability here in addition to certain state-specific considerations, including:

Policy Development and Internal Controls. Each of the exemplar state-specific laws requires a company to establish robust policies that prohibit forced labor, aligning with the specific requirements of relevant national laws. Those policies must be operationalized through internal controls, corporate training of associates, and contractual obligations with a company. The implementation of policies must be demonstrable, as companies are legally required to show evidence of compliance efforts, particularly under the French, German, and Dutch laws' requirements regarding child labor.

Audit and Reporting Requirements. Each of the state-specific laws has unique reporting requirements. The French and German laws require audits of a company's supply chains on a recurring basis to assess compliance with certain human rights standards. Dutch law imposes reporting obligations that require companies to publicize the company's efforts to identify and eliminate potential child labor issues.

Continuous Monitoring and Internal Grievance Reporting. Compliance is always a process and these state-specific laws are no different in their requirement for continuous monitoring. For example, the German law requires specific grievance mechanisms to be in place where company workers can report potential violations or other concerns with the company or vendors.

EU Forthcoming Corporate Social Sustainability Directive

The EU's Corporate Social Sustainability Directive (the CSSD) will require companies that meet turnover thresholds to develop a plan to manage the ethics and impacts of their supply chains from a human rights, forced labor, and climate change perspective.

Application – The EU passed the CSSD in July of 2024 and EU member states must adopt and implement the national directive into law by 2026. Compliance dates depend on company revenue. The Directive will initially include the largest regulated EU companies with more than 5,000 employees and €1 500 million worldwide turnover, and non-EU companies with more than €1 500 million generated in the EU. In 2028, the Directive will apply to EU companies with more than 3,000 employees and €900 million turnover generated in the EU. By 2029, the Directive will apply to all other companies in the EU with more than 1,000 employees and €450 million net turnover worldwide, and to all other non-EU companies with €450 million net turnover in the EU.

Regulatory Impact – Regulated companies have many obligations under the CSSD but also have discretion to determine how to meet those obligations. The highest impact obligations include adopting and implementing a transition plan for climate change mitigation. Companies must also identify the human rights and environmental impacts along their supply chain, including as caused by their subsidiary and affiliate entities and the suppliers and vendors with whom they deal, and develop a plan to reduce or remedy any negative impacts. In doing so, companies must also engage with stakeholders to assess their impacts and allow stakeholders to participate in due diligence. Companies must integrate due diligence into corporate policies and risk management systems into their overall plan.s

Practical Steps for Compliance – Additional pragmatic steps for compliance with the CSSD in addition to those described here for other similar programs include ensuring that business teams have the ability to review and manage compliance with required metrics. This may require the utilization of new technology or third-party consultants with expertise in tracking the environmental and social impacts impact generally. Employees can also be trained by third parties to track and manage tracking against those metrics.

Planning to Meet the Challenge

The trendline for global efforts combatting forced labor is clear. Western countries are increasingly viewing the need to combat forced labor and broader human rights concerns as a moral imperative that companies must strive to accomplish. This is no longer discretionary for a company and its board—it is developing with real-world impacts to operations and compliance. The challenge for supply chain professionals is to develop scalable programs to maintain compliance, limit interruption and reputational harm, and achieve the objectives for those jurisdictions in which we operate. Fortunately, the themes for compliance in one jurisdiction have broad applicability in other territories. We can all do better in our sourcing, our efforts to protect against supply chain challenges, and the integrity of the goods that we sell regardless of where they may be produced.

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Recent Events

Transportation Lawyers Association (TLA) Transportation Law Institute (TLI)

Eric L. Zalud presented *From the Trenches: A Deep Dive Perspective, and Roadmap, on Regulatory Investigations and Audits.* **Christopher C. Razek** presented *Be Wary not Weary: Warehousing ABCs—from Accessorials to Bonds to Contracts—Practical Legal Advice Your Clients Need to Know.* **Marc S. Blubaugh, Martha J. Payne, Megan K. MacCallum,** and **Ashley Rice** attended.
November 7–9, 2024 | Pittsburgh, PA

Election Insights: Impact on Trade Seminar

Brian Cullen attended.
November 12, 2024 | Milwaukee, WI

Women in Supply Chain Forum

Megan K. MacCallum and **Ashley Rice** attended.
November 12–13, 2024 | Atlanta, GA

TerraLex 2024 Global Meeting

Eric L. Zalud attended.
November 13–16, 2024 | Santiago, Chile

The Canadian Transport Lawyers Association (CTLA) Annual General Meeting and Educational Conference

Jonathan R. Todd attended.
November 14–16, 2024 | Alberta, Canada

Fourth Annual Benesch Investing in the Transportation & Logistics Industry Conference

Marc S. Blubaugh moderated the "CEO Roundtable Panel." **Peter K. Shelton** moderated the "M&A Outlook 2025 Panel." **Jonathan R. Todd** moderated the "Mexico Business Environment Update – T&L Sector Panel." **Eric L. Zalud** moderated the "Post-Deal Integration Panel."
December 5, 2024 | New York, NY

Conference of Freight Counsel (CFC) 2025 Winter Meeting

Eric L. Zalud attended.
January 3–6, 2025 | Austin, TX

Council of Supply Chain Management Professionals (CSCMP)

Jonathan R. Todd presented *Ripple Effect: Navigating Global Trade Realities*.
January 9, 2025 | Virtual

Columbus Roundtable of the Council of Supply Chain Management Professionals Cleveland

Marc S. Blubaugh is moderating the "Annual Transportation Panel."
January 10, 2025 | Columbus, OH

BGSA Supply Chain Conference 2025

Marc S. Blubaugh, Peter K. Shelton, and **Eric L. Zalud** attended.
January 22–24, 2025 | Palm Beach, FL

Transportation Lawyers Association (TLA) Chicago Regional Conference

Marc S. Blubaugh was chair of the Freight Claims Boot Camp. **Eric L. Zalud** presented *What, Me Worry? Exploring Ways to Defend and Prevent Negligent Selection, Retention, Training, and Wrongful Termination Claims*. **Deana S. Stein** presented *Freight Broker Liability*. **Brian Cullen, Vanessa I. Gomez, Megan K. MacCallum, Christopher C. Razek, Robert Pleines, Jr., Jonathan R. Todd,** and **Ashley Corbin Rice** attended.
January 23–24, 2025 | Chicago, IL

Transportation Intermediaries Association (TIA) Lunch and Learn Webinar

Thomas B. Kern and **Eric L. Zalud** presented *Safeguarding, Leveraging, and Profiting from Your Technology and Intellectual Property.*
January 28, 2025 | Virtual

National Tank Truck Carriers (NTTC) 2025 Forum

Eric L. Zalud attended.
January 29–31, 2025 | Miami, FL

International Warehouse Logistics Association - Essentials of Warehousing Course

Marc S. Blubaugh presented *What Those New to Warehousing Need to Know about Transportation Law*.
January 30, 2025 | New Orleans, LA

Road Dog Truck Radio - The Dave Nemo Show

Marc S. Blubaugh and **Jonathan R. Todd** were interviewed.
February 5, 2025 | SiriusXM Radio International

Association of Defense Counsel (IADC) Midyear Meeting

Martha J. Payne attended.
February 9–14, 2025 | Dana Point, CA

Stifel Transportation Conference

Marc S. Blubaugh, Peter K. Shelton, and **Eric L. Zalud** attended.
February 10–12, 2025 | Miami, FL

What's Trending

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Follow us on LinkedIn:
http://www.linkedin.com/company/benesch-friedlander-coplan-&-aronoff/

On the Horizon

2025 AirCargo Conference
Christopher D. Hopkins is participating in the "Merger & Acquisition" panel. **Jonathan R. Todd** is participating in the "Transportation Compliance" panel. **Christopher C. Razek** is attending.
March 2–4, 2025 | Arlington, TX

Transpacific Maritime Conference (TPM) Annual Conference
J. Philip Nester is attending.
March 2–5, 2025 | Long Beach, CA

International Association of Defense Counsel (IADC) Webinar
David M. Krueger, Kelly E. Mulrane, and **Martha J. Payne** are presenting on Carmack Liability.
March 3, 2025 | Virtual

American Trucking Association's (ATA) Moving & Storage Conference
Jonathan R. Todd and **Peter K. Shelton** are presenting *Thinking About Selling Your Company? How to Prepare and What to Expect.* **Jonathan R. Todd** is presenting *Contracts Education Session.*
March 9–11, 2025 | Nashville, TN

21st Annual Reverse Logistics Association (RLA) Conference and Expo
Eric L. Zalud is attending.
March 11–13, 2025 | Las Vegas, NV

Institute for Supply Management (Cleveland Chapter) Meeting
Christopher C. Razek and **Megan MacCallum** are presenting *Supply Chain Contracts – Best Practices in Legal and Risk Management.*
March 12, 2025 | Virtual

Transportation Megaconference XVII
Eric L. Zalud is attending.
March 13–14, 2025 | New Orleans, LA

2025 Transportation Logistics Counsel Annual Conference
Marc S. Blubaugh and **Eric L. Zalud** are participating in the "Transportation Attorneys Panel." **Martha J. Payne** is attending.
March 16–19, 2025 | Houston, TX

Truckload Carriers Association (TCA) Annual Convention
Jonathan R. Todd is presenting *AI and Its Use in the Trucking Industry Workshop.*
March 15–18, 2025 | Phoenix, AZ

American Trucking Association Webinar
Robert Pleines, Jr., Christopher C. Razek, and **Jonathan R. Todd** are presenting *Hauling for Uncle Sam – Government Contracting Primer and Hot Topics.*
March 25, 2025 | Virtual

Trucking Industry Defense Association (TIDA) Cargo Skills & Liability Skills Seminar
Marc S. Blubaugh is presenting *Cargo Claims.*
April 1–3, 2025 | Charlotte, NC

2025 Transportation Intermediaries Association (TIA) Capital Ideas Conference
Eric L. Zalud is presenting *Wrapped Up and Tied With a Bow – Packaging Your Logistics Company for the Marketplace (Navigating the M&A Process).* **Jonathan R. Todd** is presenting *International Trade for Intermediaries - Current Events Edition!* **Kristopher J. Chandler** is presenting *The Rise of the Machines – Practical Legal Solutions for AI & Logistics.* **Marc S. Blubaugh** is participating in the "Regulatory/Legal Update Panel." **Martha J. Payne** is attending.
April 9–11, 2025 | San Antonio, TX

Jefferies 2025 Logistics & Transportation Conference
Marc S. Blubaugh, Eric L. Zalud, and **Peter K. Shelton** are attending.
April 16–17, 2025 | Coral Gables, FL

2025 Transportation Lawyers Association (TLA) Annual Conference
Marc S. Blubaugh, Martha J. Payne, Eric L. Zalud, and **Richard A. Plewacki** are attending.
April 30–May 3, 2025 | Rancho Mirage, CA

2025 Intermodal Association of North America (IANA) Business Meeting
Marc S. Blubaugh is attending.
May 5–7, 2025 | Kansas City, MO

International Warehouse Logistics Association (IWLA) Annual Convention and Expo
Christopher C. Razek is attending.
May 4–6, 2025 | Tucson, AZ

William Blair Transportation & Logistics Summit
Marc S. Blubaugh is attending.
May 7–9, 2025 | Charleston, SC

TerraLex Global Meeting
Jonathan R. Todd is presenting *Supply Chains in Crisis: Navigating Geopolitical Risk, Trade Wars, and Sanctions.* **Eric L. Zalud** is attending.
May 14–17, 2025 | Toronto, Canada

Institute for Supply Chain Management (ISM) World 2025
Jonathan R. Todd is presenting *What To Do NOW About International Trade Compliance - 2025 News Headlines Edition!*
June 1–3, 2025 | Orlando, FL

Conference of Freight Counsel
Martha J. Payne and **Eric L. Zalud** are attending.
June 7–9, 2025 | Boston, MA

2025 International Association of Defense Counsel (IADC) Annual Meeting
Martha J. Payne is attending.
July 5–10, 2025 | Quebec, Canada

Reuters Supply Chain USA 2025
Eric L. Zalud is attending.
June 9–10, 2025 | Chicago, IL

2025 American Trucking Associations (ATA) Trucking Legal Forum
Marc S. Blubaugh, Reed W. Sirak, and **Jonathan R. Todd** are presenting *Clean Air, Don't Despair: Breezing Through Emissions Compliance Challenges!* **Eric L. Zalud** is attending.
July 27–30, 2025 | Denver, CO

Intermodal Association of North America (IANA) Intermodal Expo
Marc S. Blubaugh and **Eric L. Zalud** are attending.
September 15–17, 2025 | Long Beach, CA

For further information and registration, please contact **MEGAN THOMAS**, Director of Client Services, at mthomas@beneschlaw.com or 216.363.4639.

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