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Get Organized! With NLRB's "Ambush Election Rules" Looming, Employers Must Be Proactive in Their Union-Free Message

Counsel for the Road Ahead®

Get Organized! With NLRB's "Ambush Election Rules" Looming, Employers Must Be Proactive in Their Union-Free Message

What's Cooking?: The FDA's Proposed Regulations on Sanitary Food Transport

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Recent Events

On the Horizon



Christopher J. Lalak

Shippers, carriers of all modes, warehouse operators, and transportation and logistics intermediaries of every kind are pulled between competing forces in balancing the costs of doing business with maintaining competitive pricing. For many in the industry, avoiding the unnecessary inefficiencies that are inherent to collective bargaining is key in striking this balance. Staying union-free, however, is about to get more challenging than ever before.

With midterm elections in the rearview mirror, and the expiration of Board Member Nancy Schiffer's term looming on December 16, 2014, the National Labor Relations Board is poised to finalize its new union election rules. The driving force for these rules is clear: unionization is, and has been, steadily declining. Today, only 6.7% of America's private-sector workforce is unionized, down from rates in excess of 20% in the 1980s. Looking to turn the tide, a union-friendly NLRB is prepared to stack the deck in favor of organized labor, changing the rules governing union elections to inhibit an employer's ability to disseminate a union-free message prior to an election.

Under existing procedure, unit determination hearings are generally conducted seven to 14 days from the filing of the petition. Currently, the median number of days from the filing of a petition to an election is 38 days. The new rules will shorten this time period dramatically, requiring that all pre-election hearings be conducted within seven days, and most elections to be held within 14 to 21 days of the filing of the petition.

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WHAT'S TRENDING



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If you would like to receive future issues of the newsletter electronically, please email **SAM DAHER** at sdaher@beneschlaw.com.

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Get Organized! With NLRB's "Ambush Election Rules" Looming, Employers Must Be Proactive in Their Union-Free Message

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Unions do not do their recruiting in plain view of the employer—and with good reason. As a result, the first time most employers learn about a union's recruiting campaign is when they receive the petition to organize. By then, the union already has been recruiting for a period of time, and has what it thinks is the support of the majority of the workforce.

For an employer who wishes to remain union-free, the current 38-day window between learning of a union's intent to organize and the election is priceless, providing the employer time to get involved in the debate it only recently learned was happening. The new rules nearly shut this window, effectively working an ambush on the union-free employer.

An employer cannot effectively run a purely reactive union-free campaign in this new climate. Instead, employers must be proactive and communicate their union-free message in advance of receiving a petition to organize. Furthermore, as time will be of the essence under the new rules, an employer seeking to remain union-free must put its plan in place for how it will react to a petition in the event one is received.

The NLRB loses its union-leaning majority when Member Schiffer's term expires on December 16, 2014, and will finalize its new rules sometime before that happens. Make no mistake—the unions are eagerly awaiting the new rules and will jump at the opportunity to take advantage of them. To increase its odds of success on an uneven playing field, an employer who wishes to remain union-free should prepare now by putting a union-free policy and response plan in place.

For more information, please contact **CHRISTOPHER J. LALAK** at clalak@beneschlaw.com or 216.363.4557.

CHRISTOPHER J. LALAK is an associate in the firm's Labor & Employment Practice Group. He focuses his practice on representing employers in employment litigation and counseling, as well as representing employers in traditional labor law matters. Chris has experience litigating discrimination claims, covenants not to compete, trade secrets and worker's compensation cases.

Chris brings additional industry experience to the firm's Transportation & Logistics Group. Having worked as a distribution manager in grocery wholesale operations for over four years prior to joining Benesch, Chris is intimately familiar with all of the "real world" operational aspects of refrigerated, frozen and dry warehousing and distribution. Prior to joining Benesch, Chris served honorably as an Officer in the United States Marine Corps.

Chris works out of the firm's Cleveland office, attends industry conferences and is an active participant in multiple organizations dedicated to transportation, logistics and warehousing.

What's Cooking?: The FDA's Proposed Regulations on Sanitary Food Transport



Stephanie S. Penninger

The Food and Drug Administration (FDA) published its proposed new regulations concerning the sanitary transportation of human and animal food on February 5, 2014, in the *Federal Register*. The period for providing comments on the proposed rules closed on July 30, 2014. The FDA's proposed rule, required by the Sanitary Food Transportation Act of 2005 and Food Safety Modernization Act of 2011,

and incorporated into 21 C.F.R. at § 1.900 *et seq.*, obligates those who transport food to use sanitary transportation practices to ensure food safety. The FDA intends to prevent practices that create food safety risks, including the failure to properly refrigerate food, inadequate cleaning of vehicles between loads, and failure to properly protect food during transportation.

Covered shippers, carriers and receivers should keep a finger on the pulse of the proposed regulations, and prepare to incorporate the requirements into their policies, contracts and general business practices. Although not specifically mentioned in the regulations, freight intermediaries should also be cognizant of what the regulations require, as contracting with FDA-compliant carriers will be essential in satisfying customer requirements and minimizing exposure to negligent selection liability.

What is Required and Who is Covered?

The proposed FDA regulations require shippers, carriers and receivers to use sanitary transportation practices to ensure the food they transport is safe for human and animal consumption and not "filthy, putrid, decomposed or otherwise unfit for food." (Proposed § 1.906). Although not necessarily the intent of the FDA, a property broker could arguably be considered a "shipper," defined under the regulations as "a person who initiates a shipment of food by motor vehicle or rail vehicle." (Proposed § 1.904). The FDA has also sought comments on whether any "other persons engaged in the transportation of food" should be subject to the requirements, suggesting the possibility that the FDA could revise the proposed rules to expressly include brokers.

Exemptions

Currently exempt from governance under the regulations are: (1) shippers, receivers and carriers engaged in food transportation operations with less than \$500,000 in total annual sales; (2) the transportation of shelf stable food that is completely enclosed by a container; (3) live food animals and raw agricultural commodities when transported by farms; (4) food that is transshipped through the U.S. to another country; and (5) food that is imported for future export that is neither consumed nor distributed within the U.S. Brokers will have to note which carriers will be regulated under the new regulations. According to the American Trucking Associations' 2013 Trends Report, roughly 90% of licensed motor carriers operate six or fewer trucks, and, therefore, many would fall within the small-company exemption. Exempt motor carriers could lose business for failure to comport with the regulations if they are incorporated into a shippers' requirements. (Proposed §§ 1.900, 1.904).

Highlights of the Regulations

Shippers will be required to specify to carriers, in writing, what the sanitary requirements are for the carrier's vehicle and transportation equipment, including any specific design requirements, cleaning procedures or temperature control requirements. (Proposed § 1.908). There are also inspection, verification and recordkeeping requirements for shippers. (Proposed §§ 1.908, 1.912). Carriers will be required to show shippers and, upon request, receivers that they have maintained appropriate temperature control for food subject to temperature control requirements during transport. (Proposed § 1.908). Carriers will also have to provide shippers information about previous cargos hauled in bulk vehicles offered for transportation of food, and the intervening cleaning of those vehicles. Carrier personnel will have to develop, implement and document procedures describing how they will comply with the regulation requirements, train in sanitary transportation practices, and document the training. (Proposed §§ 1.908, 1.910). The FDA will only waive regulatory requirements if it is in the public's interest and will not result in the transportation of food under unsafe conditions. (Proposed § 1.916). Food that has been transported or offered for transport by a shipper, carrier or receiver under conditions that are not in compliance with the rules will be considered "adulterated" within the meaning of Section 402(i) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 342(i)). (Proposed § 1.902).

Burden Shift?

Unlike the Carmack Amendment, which requires the claimant to establish that the goods were delivered in good condition at the point of origin to the carrier, that they arrived at destination in bad condition, and the amount of damages, the proposed regulations link a carrier's failure to adhere to shipper-defined standards with adulteration and damages. This could switch the burden of proof in a cargo claim dispute from the shipper to a carrier to show it complied with the shipper's requirements in the event of loss or damage to a shipment.

Effective and Compliance Dates

The FDA has proposed that when the final rule is issued, it will become effective 60 days after its publication in the *Federal Register*, with staggered compliance dates. Small businesses that are not also shippers or receivers with less than 500 employees, as well as motor carriers with less than \$25.5 million in annual receipts, will have two years to comply with the final rule once it is published. Any other businesses will have one year to comply after the final rule publication.

Shippers, carriers, receivers and transportation intermediaries should begin taking steps to comply or facilitate compliance with the new FDA regulations governing the sanitary transport of food for human and animal consumption. This includes updating business policies and standard practices, transportation agreements and related shipping documents to limit exposure to litigation, and help ensure the safe and sanitary transportation of food product.

For more information, please contact **STEPHANIE S. PENNINGER** at spenninger@beneschlaw.com or 317.685.6188.

Missouri-based Motor Carrier's Same-Sex Training Policy Found Discriminatory by Federal Court



Katie Tesner

The road to success is littered with legal landmines, one of which is the EEOC's increasingly aggressive pursuit of transportation companies. A decision this past summer by a federal judge sitting in Missouri marked the (partial) end of a five-year long legal battle for trucking company New Prime, Inc., that began with a singular charge brought before the EEOC by one female job applicant, and ended with a U.S. federal district court ruling that the company's over-the-road training policy violated federal anti-discrimination laws with respect to an entire class of female applicants. It was only a *partial* end to New Prime's legal battle because the company must now proceed to trial and convince a jury that it should not be liable for punitive damages on account of the policy, and that backpay and reinstatement are not appropriate remedies for each of the 45 other women who applied for truck driver jobs with New Prime during the relevant period.

New Prime, a trucking company with over 2,500 employees, implemented a "same-sex trainer policy" in 2004, primarily in response to a sexual harassment suit brought by three female trainees. Under the policy, inexperienced applicants were required to complete over-the-road training with an instructor of the same gender. Therefore, a female applicant could not be hired unless

and until a female driver was available to train her—but because New Prime had a limited number of available female drivers, most female applicants were put on a "female waiting list" for stretches of time often exceeding one year. There was no corresponding "male waiting list."

In 2009, a female applicant told New Prime that she was willing to be trained by a man in order to enter the training program, but New Prime declined to deviate from its policy. Instead, she was placed on the female waiting list and told "not to hold her breath." After six months of waiting, the applicant went to the EEOC, charging New Prime with sex discrimination. The EEOC ultimately brought suit against New Prime in the Western District of Missouri, alleging that the company engaged in a pattern or practice of discrimination in violation of Title VII of the Civil Rights Act of 1964 by denying women applicants certain training and employment opportunities that were not denied to similarly situated males. The federal district court sided with the EEOC and granted summary judgment to the agency.

The district court stated that where an employment policy limits opportunities for one gender, it is discriminatory *unless* the employer can prove the existence of an affirmative defense that permits the policy. New Prime asserted that sex was a bona fide occupational qualification, or "BFOQ," and that the training policy was based on the company's safety and privacy concerns for women. The court rejected New Prime's argument and admonished that

the BFOQ defense does not extend to the protection of employees. Rather, according to the court, a BFOQ in this context is limited to instances in which sex actually *interferes with* the employee's ability to perform the job. Here, New Prime admitted that a woman's gender did not interfere with her ability to drive a truck.

New Prime is not the first trucking company targeted by the EEOC for a same-sex training policy. In 1997, the agency brought suit against trucking giant Swift Transportation for an almost identical policy. Swift ultimately entered into a Consent Decree with the EEOC prior to court resolution and agreed voluntarily to make its training policy gender neutral. Same-sex trainers could only be elected upon a showing of good cause.

Together, these cases make clear that the EEOC will not hesitate to go after employment policies that are not gender-neutral, regardless of whether the policy is well-intentioned. Federal courts simply will not permit employers to take unilateral measures to keep its employees "safe" where the effect of the measure ultimately deprives a protected class of individuals of certain employment opportunities in comparison to similarly situated non-class members.

For more information, please contact **KATIE TESNER** at ktesner@beneschlaw.com or 614.223.9359.

RECENT EVENTS

Truckload Carriers Association Independent Contractor Division Annual Meeting

Richard A. Plewacki attended.
September 4, 2014 | Chicago, IL

The Knowledge Group – Webcast

Marc S. Blubaugh presented during a webcast on *Understanding Transportation and Logistics Law: 2014 Perspective LIVE Webcast*
October 23, 2014

International Warehouse Logistics Association Annual Safety Conference

Marc S. Blubaugh presented *Forewarned, Forearmed: A Survey of Top Legal Issues in Transportation in 2014*.
September 11–12, 2014 | Fort Worth, TX

2014 CTLA Annual Conference

Marc S. Blubaugh, Martha J. Payne and **Eric L. Zalud** attended.
September 24–27, 2014 | Halifax, Nova Scotia

FTR 2014 Annual Transportation Conference

Stephanie S. Penninger attended.
September 9–11, 2014 | Indianapolis, IN

Arkansas Trucking Seminar

Eric L. Zalud attended.
September 17–19, 2014 | Rogers, AR

Ohio Freight Conference

Marc S. Blubaugh attended.
September 18–19, 2014 | Columbus, OH

TIA Intermodal Expo 2014

Martha J. Payne and **Stephanie S. Penninger** attended. **Marc S. Blubaugh** also attended and presented *Avoid Legal Sinkholes and Protect Your Business*.
September 21–23, 2014 | Long Beach, CA

IMTA 83rd Annual Convention

Stephanie S. Penninger attended.
September 25–27, 2014 | French Lick, IN

ATA Management Conference & Exhibition

Marc S. Blubaugh and **Richard A. Plewacki** attended.
October 4–7, 2014 | San Diego, CA

International Warehousing Logistics Association “Essentials” Course

Marc S. Blubaugh presented *Fundamentals of Transportation Law: What Those New to Warehousing Need to Know About Transportation*.
October 7–10, 2014 | Adelphi, MD

Indiana Logistics Summit

Stephanie S. Penninger attended.
October 7–8, 2014 | Indianapolis, IN

Annual Conference on Transportation Innovation & Cost Savings

Eric L. Zalud attended.
October 8, 2014 | Toronto, Ontario

OTA/OAM Annual Convention

Richard A. Plewacki attended.
October 19–21, 2014 | Wheeling, WV

2014 TIDA 22nd Annual Industry Seminar

Eric L. Zalud attended.
October 22, 2014 | Las Vegas, NV

Transportation Lawyers Association Transportation Law Institute

Eric L. Zalud moderated a panel on Ethics in the Transportation Industry. **Marc S. Blubaugh, Martha J. Payne** and **Stephanie S. Penninger** attended.
November 7, 2014 | St. Louis, MO

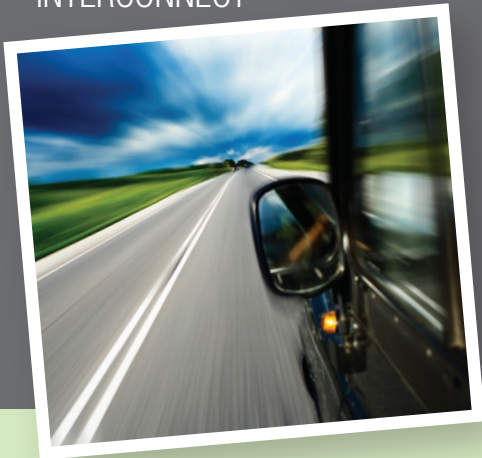
Transportation Lawyers Association Executive Committee Meeting

Marc S. Blubaugh and **Eric L. Zalud** attended.
November 8, 2014 | St. Louis, MO

Indiana Motor Truck Association’s Future Leaders of Indiana (FLI) Conference

Stephanie Penninger attended
November 13–14, 2014 | Bloomington, IN

INTERCONNECT



ON THE HORIZON

Private Equity Investing in Transportation, Distribution & Logistics Companies Capital Roundtable Conference

James M. Hill will be speaking. Marc S. Blubaugh, Richard A. Plewacki, Peter K. Shelton and Eric L. Zalud will be attending.
December 3, 2014 | New York, NY

Transportation Lawyers Association—Webinar

Marc S. Blubaugh will be moderating a panel on *Shedding Light into the Dark Corners of Warehouse Law: What Every Transportation Attorney Needs to Know about Storing Freight*.
December 9, 2014

Transportation Intermediaries Association—Webinar

Eric L. Zalud will be speaking on *Thoughts on Minimizing Broker Liability*.
December 10, 2014

Winter Conference of Freight Counsel Meeting

Eric L. Zalud will be attending and presenting.
January 10–12, 2015 | Sanibel Island, FL

Transportation Lawyers Association Chicago Regional Conference

Marc S. Blubaugh, J. Allen Jones, Kelly E. Mulrane, Stephanie S. Penninger, Richard A. Plewacki and Eric L. Zalud will be attending.
January 15–16, 2015 | Chicago, IL

BGSA Supply Chain Conference

Marc S. Blubaugh, James M. Hill and Eric L. Zalud will be attending.
January 22–24, 2015 | Palm Beach, FL

Council of Supply Chain Management Professionals

Marc S. Blubaugh will be moderating a panel during the annual CSCMP Columbus Roundtable Transportation Panel.
January 23, 2015 | Columbus, OH

The Trucking Industry Defense Association Advanced Seminar

Eric L. Zalud will be attending.
January 29–30, 2015 | Tampa, FL

2015 National Tank Truck Carriers Winter Membership & Board Meeting

Richard A. Plewacki and J. Allen Jones will be attending.
February 5–7, 2015 | Las Croabas, Puerto Rico

BB&T Capital Markets 30th Annual Transportation Conference

Marc S. Blubaugh will be presenting and Eric L. Zalud will be attending.
February 12, 2015 | Coral Gables, FL

American Conference Institute's 4th Annual Forum on Admiralty & Maritime Claims and Litigation

Stephanie S. Penninger will be attending.
February 27–28, 2015 | Houston, TX

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

Transportation & Logistics Group

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