



PLUGGED IN

AN EV NEWSLETTER

Volume 1, Number 6

Editor's Notes

This is the sixth edition of *Plugged-In*, our monthly EV newsletter. In the last six months, we have covered multiple topics such as the United States' decoupling agenda from China (and how that may not work in the short-term), Toyota's hesitance to commit to an all-in EV strategy, the SEC's and EPA's regulations relating to carbon emissions, and even the role of immigration laws in drawing much needed talent to a rapidly growing EV industry. In this edition, we go further into suggesting immigration reforms to TN visas granted to our North American neighbors, discuss the Ford legal team's strategy to escape a class-action lawsuit, and cover interesting topics relative to electricity needs in light of an inadequate charging infrastructure. We hope you enjoy the newsletter.

We also have an administrative announcement. We will be taking a brief hiatus during the summer so we will not be publishing for the next few months. Our EV Group is working through some interesting research projects in the meanwhile and we hope to release the findings from those in our next edition. Until then, stay *Plugged-In*!

Rasika A. Kulkarni | Editor and Associate Attorney

Electrification of U.S. Immigration: A Vehicle for Charging Forward – 8 Proposed Policy Changes to Modernize the TN Visa

From the Flintstones to the Jetsons, transportation has always been, and will continue to be, a priority for humankind. We are a dinosaur's leap ahead of the bird and dinosaur operated machines of the Flintstones, but not quite light speed ahead of the aerocars of the Jetsons. The

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technology of today and of the foreseeable future is the Electric Vehicle (EV). While EVs have not been captured by an animated sitcom, they sit high on the Federal Government's list of strategy priorities for the United States (U.S.).

Local municipalities, states, and the Federal Government are investing in ways to eliminate climate related emissions from transportation. Local governments are also focused on building sustainable cities with a major focus on sustainable transportation. In fact, in December of 2015, the U.S. Department of Transportation (USDOT) launched a [Smart City Challenge](#) resulting in a \$50 million grant and designation as America's Smart City to the winner. There is also a growing number of [EV Alternative Fuel Corridors](#) charging across the U.S. in order to build a national electric vehicle charging network to make electric vehicles more accessible and affordable.

How Immigration can support the Electric Vehicle Strategic Priority?

In order to build the mobility ecosystems, it requires the talent of professional and skilled workers. Whether it is an Engineer responsible for the design and development of battery systems, or an Architect focused on eco-friendly urban planning, or a Technician working in a manufacturing plant, it is the human capital responsible for building the infrastructure.

As preparations are underway for the ongoing expansion of EV production, there remains a critical skills gap in the automotive and mobility industry.¹ As with any new technology, it is constantly evolving and improving. The workforce will need the knowledge to keep up with new technology development, as well as, related improvements, maintenance, and repairs. Another factor to consider is the pivot from mechanical engineering to electrical engineering and software development for EVs. The current mechanically-focused workforce is not equipped with the skills for such a pivot. Employers may focus on skills re-training of their workforce but this is a long-term solution, and one which may not keep up with the quickly evolving technologies and growing demand for electric vehicles. It also does not address the labor shortage crisis in the U.S.² There is another option for employers to keep abreast with EV manufacturing, and that is to also rely upon foreign workers to fill the skill gaps.

¹ See: <https://www.cnn.com/2023/02/27/how-a-shortage-of-workers-could-put-the-brakes-on-the-shift-to-evs.html>; and, <https://www.businessinsider.com/automakers-jobs-desperate-workers-fuel-electric-vehicle-transition-batteries-2022-12>.

² See: Rodriguez-Sanchez, Jose Ivan, "Immigrants in Strategic Sectors of the U.S. Economy and America's Labor Shortage Crisis," Rice University's Baker Institute for Public Policy, June 14, 2022, <https://www.bakerinstitute.org/research/immigrants-in-strategic-sectors-of-the-us-economy-and-americas-labor-shortage-crisis>.

TN NAFTA Professionals: A Solution to Filling the Skills Gap

U.S. immigration laws provide an option to fill the skills gap for employers in the U.S. Since there is a limited talent pool to draw from for support within the U.S., employers may need to rely upon our North American neighbors to the north and south to provide immediate relief for employers struggling to find professional and skilled workers.

The North American Free Trade Agreement (NAFTA) created special economic and trade relationships for the United States, Mexico and Canada. It gave birth to the Trade NAFTA (TN) visa category which came into effect in 1994. On July 1, 2020, the United States-Mexico-Canada Agreement (USMCA) entered into force and replaced NAFTA, which governed continental trade for more than two and a half decades. Despite the USMCA make-over, the immigration related sections for TN professionals remained basically unaffected. See our blog post, [here](#).

In spite of the missed opportunity to modernize and improve the TN visa category, it continues to be a positive and beneficial solution for employers. The National Foundation for American Policy (NFAP) issued a Policy Brief in April 2018 addressing the background and history of NAFTA, along with the positive contributions and economic impact of USMCA (formerly NAFTA) on immigration.³ According to the report, the “benefits of cross-border mobility, accessibility to essential workers, and its related investment in the United States and creation of U.S. jobs are critical,” which is supported by inclusion of the immigration chapter in the USMCA.

Specifically, the TN visa category allows qualified Canadian and Mexican citizens to seek temporary work authorization in the U.S. to perform certain professional work activities through sponsorship by an employer in almost all cases. The eligibility criteria includes the following:

- Applicant is a citizen of Canada or Mexico.
- Profession is on [USMCA list](#) (Appendices 1 and 2 of Annex 16-A of USMCA, Chapter 16).
- Job in the U.S. requires a USMCA Professional.
- Applicant has an offer to work in a pre-arranged job for an employer.
- Applicant satisfies the requirements including education and/or work experience of the profession.

³ See Walker, Kathleen Campbell, “NAFTA TN and E Visas Support U.S. Consumers, Investment and Jobs,” National Foundation for American Policy (NFAP) Policy Brief, April 2018. <https://nfap.com/wp-content/uploads/2018/04/DAY-OF-RELEASE.TN-and-E-Visas.April-2018-1.pdf>.

There are limited professions or occupations that qualify for TN sponsorship. The most commonly used TN categories for the automotive industry from OEMs to automotive suppliers include Engineers and Scientific Technicians/Technologists. Other TN categories used less frequently in the automotive industry, may include Computer Systems Analysts, Industrial Designers, and Management Consultants.

A significant advantage of the TN visa category is that there is no annual quota. As a result, an employer may sponsor a TN worker at any time. It can also be renewed indefinitely so long as a job offer exists. In addition, the process and timeline for securing TN work authorization is generally quicker than other visa categories with a higher probability of success.

For example, TN-1 Canadian Professional Workers may apply for TN status at the U.S. Port-of-Entry (POE). TN-2 Mexican Professional Workers normally apply for a TN visa at the U.S. Embassy or Consulate abroad with some exceptions. If a Mexican TN worker has a valid TN visa, and they need to change employers, they may present their TN application for adjudication at a land crossing POE. This option is not uniformly applied at the POEs; and in addition, the electronic version of the [form I-94](#) online unfortunately includes no designation as to the sponsoring employer in such circumstances at present. With the possibility of a TN visa for Mexican nationals now being valid for up to 48 months, this longer validity period saves time, energy and cost for a quick adjudication. Also a nonimmigrant petition is not required to be filed with the United States Citizenship and Immigration Services (USCIS), which translates into cost savings and quicker results. Please note that the maximum period of admission in TN status for any Canadian or Mexican national is three years.

8 Policy Changes to Improve TN Visa

U.S. immigration laws offers employers an opportunity to find talented workers to fill the skills gap in the U.S. However, like everything else, there is room for improvement. Unfortunately, the TN category often does not have clear guidance regarding the scope of the professional category. USCIS, the Department of State (DOS) and Customs and Border Protection (CBP) have issued a variety of clarifications on TN professions over the years, which are not necessarily consistent. In addition, even though there is no minimum wage required under U.S. immigration law for TN professionals, adjudicators should assess if the wage offered meets federal and state law requirements as well as if the wage appears to be sufficient for the duties and occupation. It is also important to note that lawsuits have been filed recently against certain employers in the automotive industry for allegedly failing to comply with representations in TN visa applications as to the scope of the proposed work. Compliance oversight is always of critical importance in any visa application representations.

The TN category should be modernized by implementing policy changes to further support employers, who need qualified TN professionals during this critical time in history, especially since EV is a key priority for the Federal Government. A detailed paper presented by The George W. Bush Institute lays the groundwork and makes the case for enhancing the USMCA.⁴

Below are 8 suggested improvements to help the U.S. economy grow in this critical EV expansion period:

1. **Expand the TN Professionals List.** This suggestion is the most obvious and much needed change to improve and expand upon the qualifying occupations for sponsorship. The current TN USMCA Professionals List is antiquated and does not account for modernization since the agreement went into effect. NAFTA was signed by all three countries in 1992, came into effect in 1994, and is now over 30 years old. It was established before the internet took off in 1995, and before smart phones became affordable and accessible in the 2000s. Expanding the TN Professionals list will allow for additional critical occupations to be included, which may have evolved over time, such as the Computer Systems Analyst category, which is currently the only computer-related occupation on the list. IT related jobs have progressed by leaps and bounds since then.
2. **Allow TN nonimmigrants to have dual intent to simplify permanent residence sponsorship.** The regulations only permits citizens of Mexico or Canada to be eligible for TN status. Thus, the pool of beneficiaries is limited. The H-1B and L categories recognize dual intent, which allows international travel to be uninterrupted while pursuing adjustment of status to permanent residence in the U.S. Dual intent benefits should be extended to our USMCA partners, who of course being along the border are often travelling within North America as part of their duties.
3. **Extend Work Authorization Incident to Status to TN Dependents.** L and E dependents (spouses) are now able to qualify to work in the U.S. incident to their status. Just as dual intent should be expanded as noted above to the TN category, so should spousal work authorization.

⁴ See Miller, Eric and Laura Collins, "How the United States-Mexico-Canada Agreement can address U.S. labor market mismatches," The George W. Bush Institute – SMU Economic Growth Initiative at The George W. Bush Institute, December 2022. <https://www.bushcenter.org/publications/how-the-united-states-mexico-canada-agreement-can-address-u-s-labor-market-mismatches>.

4. **Open up TN to Managers.** The TN visa category is designed for specialty occupation/professional workers. It limits opportunities for managers and executives, and professionals who supervise other professional or skilled workers more than 50% of their time. Similar to visa categories such as the H-1B Specialty Occupation Workers, H-1B1 Chile and Singapore Free Trade Agreement Specialty Occupation Workers, and E-3 Australian Specialty Occupation Workers, the TN Canadian/Mexican Professional Worker category is designed for professionals. U.S. immigration laws define a professional as “persons holding a bachelor’s degree or its equivalent in the specific field in which they are to be engaged.”⁵ However, the other visa categories allow for sponsorship of managers. To be in line with the other visa categories, policies should be issued to clarify that the TN category may include managers of occupations that are currently in the TN Professionals List, i.e. Engineering Manager. A policy clarification to clearly support the use of the TN category for managers of qualifying professionals will allow employers to bring in key leadership into the U.S., to help lead the charge on EV.

5. **Permit TN Work Experience Equivalencies.** The regulations allow a candidate to qualify for H-1B, H-1B1 and E-3 sponsorship based on a U.S. bachelor’s degree equivalency through an evaluation of work experience gained within the field. For a work experience evaluation, the general rule is for every 3 years of work experience gained within the field, it is equivalent to 1 year of formal education. As such, 12 years of work experience gained in the field can be equated to 4 years for degree equivalency in support of an H-1B, H-1B1, and E-3 sponsorship, in addition to the straight formal education. However, the same rule does not apply in the context of TN sponsorship. Only a formal education is considered for U.S. degree equivalency purposes. By adopting a policy that falls in line with the other visa categories, it would allow skilled workers with no formal education but more than 12 years of work experience to qualify for TN sponsorship. Given the growing field of skilled, technical workers in the EV space, this change would provide critical support for the automotive industry.

6. **Relax the “cedula” or “titulo” requirement for Mexican citizens.** A TN Canadian or Mexican worker being sponsored for an engineering position in the TN Engineer category requires the U.S. equivalent of a Bachelor’s degree. However, Mexican citizens are also required to have a cedula professional (a professional credential) or a “titulo” (a university diploma) as this serves as evidence of completion of a degree program for certain

⁵ See 8 CFR 204.5(l)(2) (definition of professional).

professions. The consular posts will not accept a “carta de pasante,” which serves as proof of completion of coursework, but not full completion of degree requirements for “licenciatura” (a bachelor’s degree). The additional requirement for cedula professional can take an additional 6 months or more after completion of all coursework. If this rule were refined to allow Mexican candidates with the “carta de pasante” to apply for TN sponsorship, it would streamline the process and give employers an opportunity to consider this pool of talent.

7. **TN Scientific Technician/Technologist Category.** Immigration officials are often quick to consider a job offer to a candidate in the TN Scientific Technician/Technologist category as overqualified if the candidate holds a “titulo” or “licenciatura” and deny their application. A candidate with the equivalency of a 4 year U.S. degree still satisfies the requirements and as such, they should not be penalized for having the degree.
8. **Education requirement for Skilled Workers.** Immigration officials are also quick to dismiss the TN Scientific Technician/Technologists if they did not complete at least 2 years of post-secondary education. This education may be in the form of technical, vocational school or an Associates program. However, in Mexico, their secondary or high school programs offer technical training programs. A policy change to allow for trained skilled workers to secure TN work sponsorship based on their technical education or training should be adopted.

Positive Automotive Impact

As the Federal Government continues to prioritize and spend money on EV, and as employers in the U.S. continue to struggle in filling the skills gap, implementing policy changes to facilitate the TN visa process may become crucial to their overarching strategic priorities. The antiquated policies and laws from over 30 years ago must also keep up with new technologies and advancements of today. Employers contemplating expanding manufacturing capabilities, research and development, technical services, etc. will need the Federal Government’s support to implement positive TN policy changes to charge forward into the future.

Suzanne K. Sukkar | Member

Federal Preemption to Ford's Rescue

Even more than in an individual action, as a defense tactic, a motion to dismiss is a critical point of inflection for resolving putative class actions. [Inflection Points and Class Action Litigation](#) As the class action plaintiffs' bar begins to challenge conduct surrounding EVs, manufacturers and sellers should be aware of all the potential defenses and affirmative defenses giving rise to motions to dismiss class actions. One such affirmative defense is preemption, both expressed and implied.

Ford successfully used one type of implied preemption to defeat a putative class action in *In re Ford Motor Co. F-150 and Ranger Truck Fuel Economy Marketing and Sales Practices Litigation*, 65 F.4th 851 (6th Cir. 2023) (the "*Ford Case*"). This defense may be available to EV manufacturers and sellers facing putative class actions.

What is Preemption?

Preemption is a constitutionally-derived doctrine that, among other things, prevents valid state statutory and common law claims from going forward in court — even if the claims would otherwise have merit. The Supremacy Clause of the US Constitution dictates preemption law. Because of the Supremacy Clause, when state law and federal law conflict, federal law displaces, or preempts, state law. The doctrine can be used, as Ford did here, to defeat a putative class action.

There are multiple types of expressed and implied preemption. In this case, Ford moved to dismiss on implied preemption grounds set out in *Buckman*. *Buckman Co. v. Plaintiffs Legal Comm.*, 531 U.S. 341 (2001). In sum, *Buckman* preemption provides that if the putative class' claim requires reference to federal regulatory requirements and/or standards, the claim is preempted. The regulatory context of the *Buckman* preemption doctrine is the Federal, Drug and Cosmetic Act but has been expanded to other federal regulatory schemes. This preemption doctrine is read broadly and has been expanded well beyond its original context, even applying when a state adopts regulatory requirements and/or standards similar to the federal regulatory requirements and/or standards and the putative class alleges only violation of the state regulatory requirements and/or standards.

The Sixth Circuit's decision in the *Ford Case*, expanded *Buckman* preemption to the EPA:

Buckman and its progeny apply with equal force here—the regulatory scheme governing the EPA's approval of fuel economy estimates preempts plaintiffs' state-law claims. Both the EPCA and its corresponding regulations set the standards for testing that a manufacturer must follow. The regulations dictate how a manufacturer must test on a dynamometer, see, e.g., 40 C.F.R. § 1066.401, et seq., and how to input correct road-load figures to simulate normal drag and friction, id. §§ 1066.301, 1066.1010. They set specific standards for testing, id. § 1066.301(b), and provide formulas to calculate city

and highway fuel mileage, *id.* § 600.210-12. Throughout this process, the EPA is empowered to investigate suspected fraud. See 49 U.S.C. §§ 32910–12. If it suspects a manufacturer is not following proper testing procedures, the agency may require the manufacturer to submit the vehicle for inspection or to conduct additional testing. 40 C.F.R. § 600.008. When a manufacturer later submits proposed figures, the EPA must review them for reasonableness before adopting those figures; if those figures are not reasonable, the EPA may again require additional testing. *Id.* Manufacturers have an obligation to submit truthful information, and the EPA may take corrective or punitive action if information is incomplete or false. 40 C.F.R. § 1066.2. The EPA thus “has at its disposal a variety of enforcement options that allow it to make a measured response to suspected fraud upon the Administration.” *Buckman*, 531 U.S. at 349, 121 S.Ct. 1012. And, ultimately, the fuel economy figure is the EPA’s own; it is not adopted or published unilaterally by Ford (or by any other manufacturer). See 49 U.S.C. §§ 32904(c), 32901(a)(11).

The Sixth Circuit emphasized that the *balance* in the EPA regulatory scheme is an important driver as to why *Buckman* implied preemption to claims asserting violations of the EPA regulations:

The EPA uses this regulatory scheme to “achieve a somewhat delicate balance of statutory objectives” in providing fuel economy estimates. See *Buckman*, 531 U.S. at 348, 121 S.Ct. 1012. The testing regime—whereby manufacturers test the vehicles and submit the figures before the EPA may confirm those figures in several ways—is “designed to represent a reasonable balance between the need for accurate fuel economy data and the need to contain the cost of testing for both industry and EPA.” Fuel Economy Labeling of Motor Vehicles, 71 Fed. Reg. at 77881. The “criteria for use of the mpg-based approach ... are based on the balance of three factors.” *Id.* at 77897. “First, [the EPA] designed them to be sufficiently large so that typical test-to-test variability would not cause a test group to fail the criteria.” *Id.* “Second, [the EPA] want[ed] to minimize the potential error in the fuel economy label.” *Id.* “Third, [the EPA] want[ed] to avoid requiring additional fuel economy testing that will have little to no impact on the label values.” *Id.* This balance is reflected in what the EPA requires for approval of fuel economy figures: that they be “reasonable and representative.” 40 C.F.R. § 600.008(c)(1). The EPA does not require the figures to be strictly accurate; rather, they must be reasonably related to the testing performed and the EPA’s expected fuel economy ratings. This demonstrates that the EPA has significant discretion throughout this process.

The Court further found that preemption applied because the EPA accepted Ford’s data for compliance with EPA regulations; allowing a court to challenge this data would rebalance the EPA’s regulatory interests; as the EPA has the authority to approve or reject fuel economy figures, its “federal statutory scheme amply empowers the [agency] to punish and deter fraud;” and if

the state law claim went forward the practical effect would be that the jury's judgment is substituted for the EPA's judgment. It further held the EPA regulatory scheme governing fuel economy standards requires the EPA to approve those figures and publish them as its own, and this approval provides remedial opportunities.

Author's Take

Turning to EVs, these vehicles are also highly regulated, including that the EPA has a thoroughgoing regulatory scheme and balance. In this light, the holding and reasoning of *Ford Case* – regarding *Buckman* implied preemption doctrine – means that the doctrine would apply as a result of EPA regulations of EVs. For example, the EPA recently proposed regulations that, if adopted in the proposed form, will mandate reduced emissions from light- and medium-duty vehicles, such as passenger cars and pickup trucks. See our discussion on this topic [here](#). As such, *Buckman* implied preemption should be available as an affirmative defense, subject to a possible motion to dismiss, to EV manufacturers and sellers facing putative class actions.

Dan W. Goldfine | Member

In Case You Missed It

In this edition of “In Case You Missed It,” we provide commentary and links to several interesting articles providing different perspectives regarding the challenges and opportunities (mostly challenges from my perspective) relating to the development of adequate electricity capacity, distribution and charging infrastructure to support the exponential increase in electricity consumption associated with the rapid transition to EVs.

[Your Coming Summer of Blackouts.](#) (May 26th edition of *Wall Street Journal*) In an Opinion piece in its May 26th edition, the *Wall Street Journal* editorial board addresses a recent report by the North American Electric Reliability Corporation (NERC) and references NERC's forecast that this summer no less than two-thirds of the U.S. could experience power outages due to a confluence of factors, including the recently finalized EPA's Good Neighbor Plan, which requires fossil-fuel power plants in 22 states to reduce NOx. Although the opinion doesn't directly address the increasing demands of EV charging as a contributing factor, and indeed it probably isn't today, it raises the question, at least in my mind, that if we are facing blackouts in our current energy demand and regulatory environment, how comfortable should we be in relying on the adequacy of the grid to satisfy the exponential increase in demand resulting from the rapid adoption of EVs.

[Why the US Electric Grid Isn't Ready for the Energy Transition.](#) (June 12th edition of *New York Times*) In this article in the June 12th edition of the *New York Times*, the author addresses the challenges to improving the electrical grid because, as a starting point, that there is no single U.S. electric grid. Rather there are three separate regional grids that have limited connections and share little power among them.

On the other hand, in March, the *Wall Street Journal* ran a fascinating article entitled [Can the EV Help Save the Electric Power Grid?](#) (May 26th edition of *Wall Street Journal*). The author explores the concept of whether the batteries of EVs could help supply electricity to a region's power grid during emergencies or peak demands. It already has associated acronyms - V2G (vehicle to grid) and V2X (vehicle to anything). It is an interesting read.

Finally, it's a hat trick for the *Wall Street Journal* with another Opinion by the Editorial Board entitled [Targeting Toyota for Its Electric-Vehicle Heresy.](#) (June 4th edition of *Wall Street Journal*). The article suggests that progressive investors are seeking to oust Chairman Akio Toyoda in retaliation for Toyota's contrarian non-all EV strategy, producing and promoting its hybrid and plug-in hybrids as part of a holistic approach toward carbon neutrality. As you may recall, I made a similar point (Toyota is being unfairly criticized because of its refusal to accede to the industry norm) in an opinion piece in this newsletter. See the links to the above and to my [article](#) in our March In Plugged edition. As of the date of this article, the shareholders had voted to retain Akio Toyoda as its Chairman.

Robert B. Weiss | Of Counsel

To learn more about our EV practice, visit our website at <https://www.dickinson-wright.com/practice-areas/electric-vehicles?tab=0>.

Issue Authors:



Suzanne Sukkar | Member
SSukkar@dickinsonwright.com
Tel.: 734-623-1694



Dan Goldfine | Member
DGoldfine@dickinsonwright.com
Tel.: 602-285-5038



Robert Weiss | Of Counsel | Co-Chair, EV Initiative
RWeiss@dickinsonwright.com
Tel.: 954-991-5455



Editor: **Rasika Kulkarni** | Associate Attorney | Silicon Valley, CA
RKulkarni@dickinsonwright.com
Tel.: 408-701-6192