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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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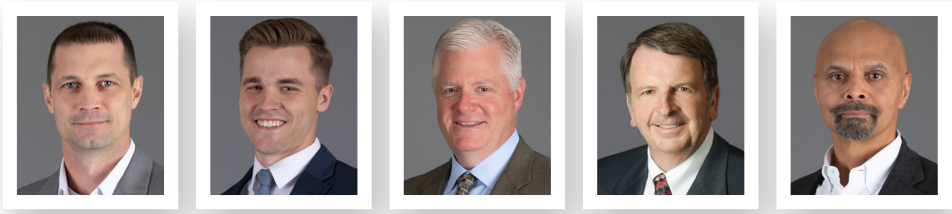
FLASH NO. 75
GOV. SIGNS BILL EXPANDING STRANGLEHOLD ON IC'S IN CA: WHAT NOW IN CALIFORNIA?



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California Gov. Gavin Newsom signed the recently passed Assembly Bill 5 ("AB-5") codifying the *Dynamex* decision relating to the classification of independent contractors/ employees in California and further "clarifying the decision's application in state law." (*For a refresher on the Dynamex decision please read previously published Flash No.67.)* The impact of AB-5 further complicates the use of independent contractors across a multitude of transportation segments within the industry.

Effective January 1, 2020, AB-5 will require the use of the ABC Test, a three-step analysis adopted in the *Dynamex* decision, when determining the status of a putative employee for purposes of the Labor Code, Unemployment Insurance Code, and Industrial Welfare Commission Wage Orders. AB-5 is an expansion from *Dynamex* as it was only applicable to Wage Orders. The ABC Test as codified in AB-5 is stated as follows: A person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:

(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(B) The person performs work that is outside the usual course of the hiring entity's business.

(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

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

(continued)

Moreover, owner-operators are unlikely to satisfy the 12-step business-to-business exception outlined in Section 2750.3(e) of AB-5. Specifically, the requirement that owner-operators provide evidence that the owner-operator conducts the same type of business as the motor carrier, on behalf of multiple, unrelated entities, and holds itself out to the public as generally providing transportation services. *(See Section 2750.3(e)(1)(F–H)).* Furthermore, if an owner-operator satisfies the business-to-business exception, it then requires further scrutiny under the *Borello* test. *(See S. G. Borello & Sons, Inc. v. Dept. of Indus. Relations, 48 Cal.3d 341, 769 P.2d 399, 256 Cal.Rptr. 543 (1989).)* As such, in most cases, the business-to-business exemption will not provide a safe haven for owner-operators attempting to establish independent contractor status under AB-5.

Prior to AB-5, the transportation industry began pursuing protections for independent contractors through Federal Aviation Administration Authorization Act ("FAAAA") preemption lawsuits. Specifically, the California Trucking Association ("CTA"), two individual drivers, and the Western States Trucking Association ("WSTA") filed two separate lawsuits challenging *Dynamex* in the Southern District of California. WSTA recently dismissed its appeal to the Ninth Circuit, which resulted in the Southern District lifting the stay in the CTA action, allowing the court to move forward with the case. (*See California Trucking Assn. v. Becerra, Case No. 3:18-CV-02458 (S.D. Cal.).)* CTA's lawsuit contended that the *Dynamex* standard for determining whether a worker in the transportation industry is an employee or independent contractor for purposes of California Wage Orders is preempted by the FAAA and violates the Commerce Clause of the United States Constitution.

On September 24, 2019, United States District Judge Roger T. Benitez of the Sothern District of California entered an Order granting the defendants' motions to dismiss the case. In the Order, Judge Benitez dismissed the action without prejudice, allowing the plaintiffs (CTA) to file an amended complaint within sixty (60) days. The court made no findings on the merits of the parties' arguments within the motions, but instead granted the motions to dismiss for lack of standing and for mootness due to the passage and signing of AB-5. Specifically, the court noted AB-5's effective date of January 1, 2020 poses standing issues because the circumstance *"leaves unclear whether Defendants will enforce the Dynamex decision against Plaintiffs before AB-5 takes effect."* Additionally, the court noted that the effective date of AB-5 causes CTA's complaint, as currently plead, to leave the court with *"theoretical possibilities,"* which it is not authorized to decide under the mootness doctrine.

Conversely, another California court has ruled that the FAAAA preempts *Dynamex*. *(See Alvarez v. XPO Logistics Cartage LLC,* 2018 WL 6271965, *5 (Nov. 15, 2018). *Alvarez* involves a class of plaintiffs comprised of current and former owner-operator drivers for defendants, a federally licensed trucking company that transports containers, alleging the following misclassification claims: (1) failure to pay minimum wage; (2) failure to pay wages for missed meal periods; (3) failure to pay wages for missed rest periods; (4) failure to reimburse business expenses; (5) failure to provide accurate, itemized wage statements; (6) waiting time penalties; (7) unfair competition; and (8) civil penalties under the Private Attorney General Act arising from willful misclassification. Defendants successfully moved for judgment on the pleadings by arguing that FAAAA preempted plaintiffs' claims. The court explicitly held that the FAAAA preempts the ABC Test, following dicta from the Ninth Circuit in *California Trucking Assn. v. Su*, 903 F.3d 953, 955 (9th Cir. 2018), cert. denied, 139 S.Ct. 1331, 203 L.Ed.2d 567 (2019) and stating:

> The Court agrees with this dicta and finds that the ABC test—as adopted by the California Supreme Court—"relates" to a motor carrier's services in more than a "tenous" manner and is therefore preempted by the FAAAA. However, there is a distinction to be made between a statutory cause of action and the test for interpreting the statute in question. Thus, the Court would emphasize that it is the application of the Dynamex ABC test that is preempted by the FAAAA, not the underlying California Labor Code claims.

Alvarez, at *5.

Logically, it appears that this issue will be headed to the U.S. Supreme Court to determine the apparent conflict in laws. There has also been rumblings of various industry giants attempting to create carve-out exceptions to AB-5 by placing the initiative on the Ballot for voters to ultimately decide. In the interim, AB-5 has left motor carriers and the transportation industry without many options when operating within the State of California.

To discuss the implications of AB-5 and next steps in California, please contact Benesch's experienced Transportation Team for guidance.

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