



The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

Best Lawyers

BEST
LAW FIRMS

U.S. News & World Report

TRANSPORTATION LAW • TIER 1

NATIONAL
2021

For the eighth consecutive year, Benesch received a **national first-tier ranking** in Transportation Law by Best Law Firms/ U.S. News & World Report.

The U.S. News & World Report/Best Lawyers® "Best Law Firms" rankings are based on an evaluation process that includes the collection of client and lawyer evaluations, peer review from leading attorneys in their field, and review of additional information provided by law firms as part of the formal submission process.

For more information on Best Lawyers, please visit www.bestlawyers.com.

FLASH NO. 82 DISAPPOINTING DECREE: NINTH CIRCUIT RULES CALIFORNIA'S AB5 IS ENFORCEABLE AGAINST MOTOR CARRIERS



Marc S. Blubaugh



Adam Primm



Richard A. Plewacki



Jordan J. Call

On April 28, 2021, the United States Court of Appeals for the Ninth Circuit held that the application of California's Assembly Bill 5 ("AB5") to motor carriers *is not* preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"). *See Cal. Trucking Ass'n v. Bonta*, No. 20-55106. This ruling reverses a California district court's decision to grant a preliminary injunction to prevent enforcement of AB5 against motor carriers operating within California. The FAAAA preempts any state law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." In granting the preliminary injunction, the district court had concluded that the FAAAA preempted AB5 and stated, "there is little question that the State of California has encroached on Congress' territory by eliminating motor carriers' choice to use independent contractor drivers, a choice at the very heart of interstate trucking."

The Ninth Circuit found the district court abused its discretion by granting the preliminary injunction. In a 2-1 decision, the Ninth Circuit's panel ruled that AB5 is a generally applicable labor law that affects a motor carrier's relationship with its workforce. The court included an extensive discussion of the history of the FAAAA and relevant Ninth Circuit precedent, concluding, "[b]ecause AB-5 is a generally applicable labor law that impacts the relationship between a motor carrier and its workforce, and does not bind, compel, or otherwise freeze into place a particular price, route, or service of a motor carrier at the level of its customers, it is not preempted by the [FAAAA]."

As a reminder, AB5 codified into statutory law the "ABC" test set forth by the California Supreme Court, which is used for determining whether a worker is an employee or an independent contractor. This test requires that a worker be classified as an employee

(continued)

unless the employer can demonstrate each of the following:

- (a) the worker 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 worker performs work that is outside the usual course of the hiring entity's business; and
- (c) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

The preliminary injunction preventing enforcement of AB5 against motor carriers will not be lifted immediately, but enforcement of AB5 against motor carriers could begin sometime in May 2021. It is likely that the CTA will appeal the Ninth Circuit's decision to the U.S. Supreme Court or seek a rehearing from the Ninth Circuit. A review by the Supreme Court or a rehearing by the Ninth Circuit *are not* guaranteed. Also, this decision by the Ninth Circuit comes after two California state courts of appeals have reached the same conclusion that the FAAAA does not preempt AB5.

In light of the foregoing, motor carriers may need to explore and evaluate alternative operating models to mitigate risk, such as changing their practices to qualify for the business-to-business exemption provided in AB5. Other ways in which transportation companies may try to avoid the implications of the Ninth Circuit's decision include deploying a freight brokerage model, utilizing a "two-check" system of compensation, or implementing a "taxi cab medallion" model. Regardless, responsible California motor carriers must make it a priority to evaluate their use of independent contractor owner-operators in California in light of the Ninth Circuit's regrettable decision.

For more information on this topic, contact a member of the firm's [Labor & Employment](#) or [Transportation & Logistics](#) practice groups.

Marc S. Blubaugh at MBlubaugh@beneschlaw.com or (614) 223-9382.

Adam Primm at APrimm@beneschlaw.com or (216) 363-4451.

Richard A. Plewacki at RPLewacki@beneschlaw.com or (216) 363-4159.

Jordan J. Call at JCall@beneschlaw.com or (216) 363-6169.

Additional Information

For additional information, please contact:

Transportation & Logistics Practice Group

Eric L. Zalud, *Co-Chair* at (216) 363-4178 or ezalud@beneschlaw.com

Marc S. Blubaugh, *Co-Chair* at (614) 223-9382 or mblubaugh@beneschlaw.com

Michael J. Barrie at (302) 442-7068 or mbarrie@beneschlaw.com

Dawn M. Beery at (312) 212-4968 or dbeery@beneschlaw.com

Allyson Cady at (216) 363-6214 or acady@beneschlaw.com

Kevin M. Capuzzi at (302) 442-7063 or kcapuzzi@beneschlaw.com

Kristopher J. Chandler at (614) 223-9377 or kchandler@beneschlaw.com

Nora Cook at (216) 363-4418 or ncook@beneschlaw.com

John N. Dagon at (216) 363-6124 or jdagon@beneschlaw.com

William E. Doran at (312) 212-4970 or wdoran@beneschlaw.com

John C. Gentile at (302) 442-7071 or jgentile@beneschlaw.com

Joseph N. Gross at (216) 363-4163 or jgross@beneschlaw.com

Jennifer R. Hoover at (302) 442-7006 or jhoover@beneschlaw.com

Trevor J. Illes at (312) 212-4945 or tilles@beneschlaw.com

Whitney Johnson at (628) 600-2239 or wjohnson@beneschlaw.com

Peter N. Kirsanow at (216) 363-4481 or pkirsanow@beneschlaw.com

Ryan M. Krisby at (216) 363-6240 or rkrisby@beneschlaw.com

David M. Krueger at (216) 363-4683 or dkrueger@beneschlaw.com

Charles B. Leuin at (312) 624-6344 or cleuin@beneschlaw.com

Ashleigh Morpeau at (312) 624-6390 or amorpeau@beneschlaw.com

Michael J. Mozes at (614) 223-9376 or mmozese@beneschlaw.com

Kelly E. Mulrane at (614) 223-9318 or kmulrane@beneschlaw.com

Margo Wolf O'Donnell at (312) 212-4982 or modonnell@beneschlaw.com

Lianzhong Pan at (011-8621) 3222-0388 or lpan@beneschlaw.com

Megan J. Parsons at (216) 363-6177 or mparsons@beneschlaw.com

Martha J. Payne at (541) 764-2859 or mpayne@beneschlaw.com

Joel R. Pentz at (216) 363-4618 or jpentz@beneschlaw.com

Richard A. Plewacki at (216) 363-4159 or rplewacki@beneschlaw.com

Julie M. Price at (216) 363-4689 or jprice@beneschlaw.com

David A. Rammelt at (312) 212-4958 or drammelt@beneschlaw.com

Christopher C. Razek at (216) 363-4413 or crazek@beneschlaw.com

Abby Riffée at (614) 223-9387 or ariffée@beneschlaw.com

Helen M. Schweitz at (312) 624-6395 or hschweitz@beneschlaw.com

Peter K. Shelton at (216) 363-4169 or pshelton@beneschlaw.com

Reed W. Sirak at (216) 363-6256 or rsirak@beneschlaw.com

Deana S. Stein at (216) 363-6170 or dstein@beneschlaw.com

Clare Taft at (216) 363-4435 or ctaft@beneschlaw.com

Joseph G. Tegreene at (216) 363-4643 or jtegreene@beneschlaw.com

Jonathan R. Todd at (216) 363-4658 or jtodd@beneschlaw.com

As a reminder, this Advisory is being sent to draw your attention to issues and is not to replace legal counseling.

UNITED STATES TREASURY DEPARTMENT CIRCULAR 230 DISCLOSURE: TO ENSURE COMPLIANCE WITH REQUIREMENTS IMPOSED BY THE IRS, WE INFORM YOU THAT, UNLESS EXPRESSLY STATED OTHERWISE, ANY U.S. FEDERAL TAX ADVICE CONTAINED IN THIS COMMUNICATION (INCLUDING ANY ATTACHMENTS) IS NOT INTENDED OR WRITTEN TO BE USED, AND CANNOT BE USED, FOR THE PURPOSE OF (i) AVOIDING PENALTIES UNDER THE INTERNAL REVENUE CODE, OR (ii) PROMOTING, MARKETING OR RECOMMENDING TO ANOTHER PARTY ANY TRANSACTION OR MATTER ADDRESSED HEREIN.