



Reclassifying Independent Contractor Drivers: The Current Environment

The controversial employment reclassification legislation that could upend the drayage industry is coming to the end of the road.

California's sweeping bill known as AB 5 could reclassify an array of independent contractors, including owner-operator truck drivers as employees, entitling them to the employer-provided benefits and protections, such as unemployment insurance, disability, sick leave and more.

The measure threatens the viability of many drayage companies in the Golden State that have built a longtime business model based on the lower costs of independent port truckers. Similar gig worker protection measures are being formulated in a number of other states.

The U.S. Court of Appeals for the Ninth Circuit in April granted the California Trucking Association's request for a stay of enforcement of AB 5, to allow it to appeal the ruling to the Supreme Court of the United States. The CTA in June confirmed it was one of two parties expected to file for review, but there is no way to predict whether the high court will hear the case and, if so, how it might rule.

The Ninth Circuit ruled 2-1 to uphold AB 5's ABC Test, a three-part test that considers a worker an employee and not an independent contractor unless the employer satisfies specific conditions.

"In light of the circuit split and the magnitude of the impact that AB 5 and analogous ABC tests in other states will have on the motor carrier industry, and the economy in general, I remain optimistic that the Supreme Court will accept certiorari and review the disappointing decision from the Ninth Circuit," said Marc S. Blubaugh, a partner at law firm Benesch Friedlander Coplan & Aronoff.

The stay will be lifted if the Supreme Court declines to hear the case, a decision due by November.

"The U.S. Supreme Court review of either the Cal Cartage Transportation Express Petition for a Writ of Certiorari, or review [filed in April] or the upcoming CTA vs. Bonta Cert. Petition, will be quite important to the trucking industry in general," said Greg Feary, president and managing partner of transportation law firm Scopelitis, Garvin, Light, Hanson & Feary. "Legal commentators generally agree that the recipe for a grant of the request for Supreme Court review exists, and there is some reasonable anticipation that the Court will indeed hear one of the cases. Yet, it is always hard to predict what the Court will do, and there are no guarantees of a hearing."

AB 5 was signed into law in 2019. The CTA has spent the intervening years delaying enforcement by asking courts to decide if the state law supersedes federal law.

Reclassification for truckers has been framed as a choice between entrepreneurial freedom or job security. In 2015, a study by the CTA showed independent truckers earn \$59,478 annually, about 40% more than the \$42,087 taken home by employee drivers.

The International Brotherhood of Teamsters, backing port drivers in California, has come out in support of AB 5. Similar legislation is in process in New Jersey, spurring fears of a catastrophe for drayage companies at a time when the Covid-

19 pandemic has stretched the already-thin ranks of available drivers to the breaking point.

“AB 5 in place in New Jersey would be disastrous where government and legislature have worked against the independent contractor,” said Dave Hensal, president and chief executive officer of Eagle Systems, headquartered in New Jersey. “The industry is hopeful that SCOTUS will take up the AB 5 appeal. If not, [the industry is] in a lot of trouble.”

Feary agreed and emphasized how such legislation is tracking shifting political winds.

“It is likely that versions of AB 5 will surface in many left-leaning states such as Washington and Illinois,” he said. A similar bill remains in committee in the New Jersey legislature.

Blubaugh said the industry should temper expectations for any support from Washington.

“We should expect that the Biden Administration will remain hostile to the independent contractor model,” Blubaugh said. “The Administration has already rescinded certain favorable, proposed rules and guidance issued by the Trump Administration. The industry should expect no favors from the Department of Labor. Rather, the Department will likely pursue collaborative enforcement efforts, using memoranda of understandings, with other federal agencies as well as state governments such as tax departments, bureaus of workers compensation or unemployment, state labor agencies, and others.”

The industry could be whipsawed in Congress, where the Protecting the Right to Organize Act seeks to make historic changes in labor law regarding employee protections and union activity. It includes its own version of the ABC Test.



“President Biden, along with his Secretary of Labor, Marty Walsh, has made no secret of his view that workers need employment protection, and independent contractors are frequently misclassified as such,” Feary said. “During the Obama administration, Chief of the Department of Labor Wage and Hour Division David Weil issued guidance memos interpreting independent contractor status and joint employment status in a manner leading to a likely finding of employment status in many instances. Those memos were retracted by the Trump Administration. David Weil has been reappointed to DOL in the same position, and it is quite predictable for him to reissue the very left-leaning and paternal guidance memos.”

The three years ahead, Feary said, could be problematic on the worker reclassification issue with Biden’s public support for unions and his predicted move to interpret more contractors as employees.

Trucking companies want legislators to take a closer look at the driver situation that takes into account more than partisan politics.

“Our biggest fear is that the PRO Act would be terrible,” Hensal said. “People don’t truly understand what the independent contractor wants to do. Not everyone wants to be an employee, a union driver.”

Until reclassification is settled, drayage companies are urged to be prepared, analyze their options and keep an eye on developments.

“Those businesses using independent contractors likely face higher risks of government audit,” said Feary, “especially in **blue** states, and likely also face civil class action and collective action lawsuits. Exploring different models and platforms to deliver trucking services is advised, and looking to legal experts for advice in planning is a responsible planning step.”

Blubaugh advised motor carriers as well as shippers to build coalitions aimed at educating legislators about the critical importance of the independent contractor model to the nation’s supply chains, and support state officials and candidates who will be advocates for the model.