



The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

Best Lawyers

BEST
LAW FIRMS

& WORLD REPORT
U.S. News

TRANSPORTATION LAW
TIER 1
NATIONAL
2018

Benesch has been ranked in the First Tier nationally in Transportation Law in the 2018 Edition of U.S. News & World Report/ Best Lawyers® “Best Law Firms” ranking.

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. 69

CALIFORNIA LAWMAKERS DRAG IN SHIPPERS AND THEIR INTERMEDIARIES TO IC BATTLEFRONT

California Senate Bill No. 1402 (the “Act”) was recently signed into law by Governor Brown, further entrenching motor carriers, brokers and shippers into the on-going California independent contractor (IC) vs. employee battle. The Act comes on the heels of the recent *Dynamex*¹ decision and the more recent Ninth Circuit’s decision in *California Trucking Association v. Su*, supporting a different test than *Dynamex* to determine employee status, further confusing the workplace environment for motor carriers operating with ICs in California.²

Now, it’s the shippers’ (importers and exporters) turn to have their opportunity to participate in this unceasing attack on ICs in the Golden State.

The new law is intended to deter Customers from utilizing port drayage motor carriers (“MCs”) that have misclassified drivers as ICs. “Customer” is broadly defined in the Act and includes any business entity that engages or uses a MC to perform port drayage services, whether directly or indirectly through an agent, including a freight forwarder, broker, ocean carrier or other MC. The Act goes into effect January 1, 2019.

The prescribed deterrence superficially holds Customers who utilize MCs who have been adjudicated as having misclassified employees, jointly and severally liable for any future unpaid wages, unreimbursed expenses, damages, penalties and interest.

“Each and every Customer that engages or uses a port drayage motor carrier to provide port drayage services in a given work week shall be jointly and severally liable with the motor carrier for the full amount of all unpaid wages, unreimbursed expenses, damages and penalties, including applicable interest, which are found owed by the motor carrier for that work week. The Customer shall be jointly and severally liable from the time the driver is dispatched to begin work on behalf of the Customer until all tasks are completed incidental to that work, including the return of an on-laden chassis or intermodal container to its point of origin, and the driver is ready to be dispatched to haul freight on behalf of another Customer.”

More precisely, as to importers and exporters (e.g. large retailers and manufacturers), the new law states: “Each and every Customer that engages or uses a port drayage motor carrier to provide port drayage services in a given work week shall be jointly and severally liable with the motor carrier for the full amount of all unpaid wages, unreimbursed expenses, damages and penalties, including applicable interest, which are found owed by the motor carrier for that work week. The Customer shall be jointly and severally liable from the time the driver is dispatched to begin work on behalf of the Customer until all tasks are completed incidental to that work, including the return of an on-laden chassis or intermodal container to its point of origin, and the driver is ready to be dispatched to haul freight on behalf of another Customer.” Amazing!!

As with most legislation, there are limited exemptions from liability which are as follows: (1) drayage carriers with a collective bargaining agreement that includes a waiver of the Act’s joint and several liability provisions; (2) Customers with fewer than 25 employees; and (3) Customers with a preexisting contract with an offending carrier who terminate the contract when it expires or within 90 business days, whichever is shorter.

The Act requires the California Division of Labor Standards Enforcement (“CDLSE”) to post on its website a list of MCs that are subject to any unsatisfied final court judgments or orders/decisions whereby the MC has misclassified employees as ICs. The CDLSE is required to update the list by the 5th day of each month. Consequently, Customers only need to be concerned with those MCs on the list to be subject to the Act.

Prior to rendering such drayage services, The Act obligates MCs to provide Customers with the following:

1. A specified form describing certain provisions of the Act before the MC executes a transportation agreement with the Customer;

2. Notice of any unsatisfied final judgment against the MC for unpaid wages and related financial obligations; and
3. If a judgment within the scope of the Act is rendered against a MC, the MC must give written notice to all current Customers of that judgment within 30 days.

The Act allows for contracting parties to seek contribution and/or indemnity against one another. The MCs failure to provide the above notice to the Customer does not absolve Customer from its liability under the Act.

The Act, along with the recent *Dynamex* and *California Trucking Association* decisions, intensifies the risk for not only motor carriers utilizing ICs within the State of California, but also shippers and receivers that use port drayage services. The use of ICs prior to these recent developments was precarious at best but these recent developments have attempted to shift some onus onto additional parties such as importers and exporters. If the intended result motivates Customers to evaluate their use of partners utilizing ICs, then the driver shortage combined with limited freight capacity could further implode for those relying upon the California ports.

Accordingly, it is recommended that motor carriers, brokers and shippers involved in port drayage services within California, review their IC arrangements, customer agreements and any other such documents utilized in the procurement of such services.

Importers and exporters should develop internal procedures for monitoring the CDLSE list to determine if a potential MC is on the list and therefore subject to the Act. Such parties may also wish to seek counsel to discuss current contract provisions and other methods of minimizing potential liability under the Act.

¹ *Flash No. 67.*

² *California Trucking Assoc. v. Su*, No. 17-55133, 2018 WL 4288953 (Sept. 10, 2018).

Please contact us if you have questions or concerns regarding the far reaching nature of this new law as Benesch’s nationally-recognized Transportation & Logistics Practice Group has extensive experience with motor carriers use of ICs, but also regularly advises other entities in the supply chain, including shippers, receivers, and intermediaries.

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

Richard is a partner with the firm’s Litigation and Transportation & Logistics Practice Groups. He has been in the transportation and logistics industry, both as a businessman and an attorney, for over 45 years during which he has been heavily involved with the IC model within the trucking industry. His practice also includes advising and representing motor carriers, leasing companies, third party logistics providers, national shippers, large private fleets and water carriers in the domestic, non-contiguous trade lanes.

Matthew J. Selby at mselecty@beneschlaw.com or (216) 363-4458

Matt is Of Counsel in the firm’s Transportation & Logistics Practice Group. He currently advises and represents a variety of transportation based organizations including motor carriers, leasing companies, third party logistics providers, regional and national shippers, large private fleets, both domestically and internationally. He has experience with independent contractor issues/owner-operator issues, shipper/carrier matters, industry specific litigation, transportation related service agreements, freight claims, mergers and acquisitions, insurance, licensing and permitting.

Additional Information

For additional information, please contact:

Transportation & Logistics Practice Group

Michael J. Barrie at (302) 442-7068 or mbarrie@beneschlaw.com
Dawn M. Beery at (312) 212-4968 or dbeery@beneschlaw.com
Marc S. Blubaugh at (614) 223-9382 or mblubaugh@beneschlaw.com
Kevin M. Capuzzi at (302) 442-7063 or kcapuzzi@beneschlaw.com
Kristopher J. Chandler at (614) 223-9377 or kchandler@beneschlaw.com
Justin P. Clark at (216) 363-4616 or jclark@beneschlaw.com
John C. Gentile at (302) 442-7071 or jgentile@beneschlaw.com
Matthew D. Gurbach at (216) 363-4413 or mgurbach@beneschlaw.com
Jennifer R. Hoover at (302) 442-7006 or jhoover@beneschlaw.com
Trevor J. Illes at (312) 212-4945 or tilles@beneschlaw.com
Thomas B. Kern at (614) 223-9369 or tkern@beneschlaw.com
Peter N. Kirsanow at (216) 363-4481 or pkirsanow@beneschlaw.com
David M. Krueger at (216) 363-4683 or dkrueger@beneschlaw.com
Michael J. Mozes at (614) 223-9376 or mmoz@beneschlaw.com
Kelly E. Mulrane at (614) 223-9318 or kmulrane@beneschlaw.com
Steven A. Oldham at (614) 223-9374 or soldham@beneschlaw.com
Lianzhong Pan at (86 21) 3222-0388 or lp@beneschlaw.com
Martha J. Payne at (541) 764-2859 or mpayne@beneschlaw.com
Stephanie S. Penninger at (312) 212-4981 or spenninger@beneschlaw.com
Joel R. Pentz at (216) 363-4618 or jpentz@beneschlaw.com
Richard A. Plewacki at (216) 363-4159 or rplewacki@beneschlaw.com
David A. Rammelt at (312) 212-4958 or drammelt@beneschlaw.com
Matthew J. Selby at (216) 363-4458 or mselby@beneschlaw.com
Peter K. Shelton at (216) 363-4169 or pshelton@beneschlaw.com
Verlyn Suderman at (312) 212-4962 or vsuderman@beneschlaw.com
Clare R. Taft at (216) 363-4435 or ctaft@beneschlaw.com
Jonathan Todd at (216) 363-4658 or jtodd@beneschlaw.com
Joseph P. Yonadi, Jr. at (216) 363-4493 or jyonadi@beneschlaw.com
Eric L. Zalud at (216) 363-4178 or ezalud@beneschlaw.com

Labor & Employment Practice Group

W. Eric Baisden at (216) 363-4676 or ebaisden@beneschlaw.com
Maynard Buck at (216) 363-4694 or mbuck@beneschlaw.com
Emily C. Fess at (312) 624-6326 or efess@beneschlaw.com
Joseph Gross at (216) 363-4163 or jgross@beneschlaw.com
Rick Hepp at (216) 363-4657 or rhepp@beneschlaw.com
Peter Kirsanow at (216) 363-4481 or pkirsanow@beneschlaw.com
Charles B. Leuin at (312) 624-6344 or cleuin@beneschlaw.com
Margo Wolf O'Donnell at (312) 212-4982 or modonnell@beneschlaw.com

www.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.