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Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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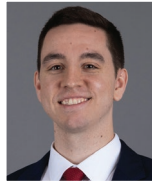
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FLASH NO. 80

CALIFORNIA APPEALS COURT RULES TRUCKERS ARE NOT EXEMPT FROM INDEPENDENT CONTRACTOR CLASSIFICATION TEST



Richard A. Plewacki



Jordan J. Call

In November 2020, a California state appeals court ruled in *People of the State of California v. Superior Court of Los Angeles County and Cal Cartage Transportation Express, LLC* that the Federal Aviation Administration Authorization Act ("FAAAA") *does not* preempt application of "ABC" test set forth in California Assembly Bill 5 ("AB 5") as to truck drivers. In reaching this holding, the California Court of Appeals, Second District,

stated that the "ABC test is a law of general application," and AB 5 "does not mandate the use of employees for any business or hiring entity." The state appeals court in *Cal Cartage* concluded that AB 5 does not amount to a ban of independent contractors in the trucking industry. The appeals court based this conclusion on ways in which companies can purportedly thread the needle such as the business-to-business exemption, despite the fact that, in practice, it is quite difficult for trucking companies to classify truckers as independent contractors and also comply with AB 5. In holding that the FAAAA does not preempt AB 5, this decision reversed the California state court's ruling from which a group of truckers appealed.

As a reminder, the California "ABC" test codified in AB 5 sets forth that hiring entities must classify workers as employees unless they meet all of the following three conditions:

- 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.

Previously in January 2020, California state trial court Judge William Highberger issued an opinion holding that the FAAAA preempts use of California's version of the "ABC" test (as adopted by the California Supreme Court in *Dynamex Operations West Inc. v. Superior Court*, which California later codified in AB 5) with respect to classification of independent contractors in the trucking industry. The state trial court held that "[b]ecause Prong B of the ABC Test . . . prohibits motor carriers from using independent contractors to provide

transportation services, the ABC Test has an impermissible effect on motor carriers' 'price[s], route[s], [and] service[s]' and is preempted by the FAAAA." As stated above, the California state appeals court disagreed with this ruling. The appeals court's opinion likely will be subject to further appellate review, as several parties involved in the case have indicated an intent to seek review from the California Supreme Court.

Also, review of the FAAAA's preemption of the AB 5 contractor classification test is pending in the federal court system in the matter captioned *CTA v. Becerra*. Relatedly and shortly after the state trial court's decision issued in *Cal Cartage* in January 2020, federal district court Judge Roger Benitez granted a preliminary injunction upon CTA's request, thereby preventing the state from enforcing the AB 5 classification test with respect to truckers. This decision is currently pending on appeal before the Ninth Circuit Court of Appeals. The parties to the federal appeal have both submitted letters to the Ninth Circuit citing the *Cal Cartage* decision and urging different interpretations. Still, the *Cal Cartage* decision is not binding on the Ninth Circuit. At this point in time, legal commentators generally have not predicted with any confidence whether the Ninth Circuit will rule one way or another. Some commentators believe that, in the event the Ninth Circuit does not affirm the preliminary injunction, any decision not to affirm will be due to a desire for a more developed record at the district court level. A more developed record could substantiate the impact of AB 5 on prices, routes, and services, and consequently whether the FAAAA preempts AB 5. Upon the Ninth Circuit's issuance of an opinion, the issue also potentially could reach the United States Supreme Court.

As parallel appeals could reach both the United States Supreme Court and the California Supreme Court, this issue continues to remain in limbo.

For more information on this topic, contact a member of the firm's Transportation & Logistics and Labor & Employment Groups.

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 lpn@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
Abby Riffiee at (614) 223-9387 or ariffiee@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

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