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California Dreaming-A Worker Classification/MRB Update From the Vortex!

MARCH 25, 2020

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Benesch's Transportation and Logistics team continues to track pertinent worker classification and meal and rest-break case developments in the Golden State. Below is a brief update and prognosis on where key cases stand.

AB-5: The Backdrop

California Assembly Bill 5 codified the *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County*, 4 Cal.5th 903 (2018) decision relating to classification of independent contractors/employees in California. We have discussed this evolution in prior Interconnect Flashes; *InterConnect Flash Nos. 76, 77, & 79 (see link: https://www.beneschlaw.com/resources/index.html?nt=7317.* AB-5 would require use of the "ABC Test" when determining the status of putative employees for purposes of the California Labor Code, Unemployment Insurance Code, and Industrial Welfare Commission Wage Orders. The 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 (the big transportation sticking point); and (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. Part B specifically makes it difficult for California-based owner-operators to be classified as independent contractors, since their work can be difficult to distinguish from that of the "hiring" motor carrier.

So, to remain in business as independent contractors, owner-operators would have to create their own businesses, e.g., by forming LLCs, obtaining required state and federal permits, and obtaining insurance (along with various other recommended structures). Shippers and brokers would need to rely either upon their own employees, or hire unequivocal third-party carriers to ship freight-or else risk misclassification penalties (along with other recommended structures). Also, because the term "hiring entity" is not limited to businesses within the Golden State in the language of AB-5, out-of-state motor carriers would have to ensure that they engage in shipping contracts with truly independent owner-operators. AB-5 *was* scheduled to go into effect January 1, 2020. *It did not*.

AB-5 Preemption and the California Trucking Association Case

On January 16, 2020, in *California Trucking Assn. v. Becerra*, 20 WL 248993, Judge Roger Benitez of the Southern District of California issued his decision granting a preliminary injunction against enforcing AB-5 with respect to motor carriers in the State of California. (Judge Benitez's earlier decisions regarding his temporary restraining order granted on New Year's Eve and the extended order were the subject of Interconnect FLASH! *(See link: https://www.beneschlaw.com/resources/index.html?nt=7317.* Judge Benitez concluded that AB-5 would, if enforced, make it impossible for motor carriers to utilize owner-operators and would, instead, force classification of all drivers as employees. The court ruled that such a result is preempted by the FAAAA. Judge Benitez noted that for decades, the trucking industry has used an owner-operator model to provide transportation of property in interstate commerce. Also, the fluid nature of the industry and its fluctuating demand for highly varied services, many of which are performed by independent-contractor drivers, evoked federal preemption. The court found that the "all or nothing" approach to independent owner-operators contained in AB-5 ran afoul of the Federal Aviation Administration Authorization Act's preemption parameters. Judge Benitez aligned with both federal and state courts in California, holding that because the ABC Test effectively prohibits motor carriers from using independent contractors to provide transportation services, the test has a significant, impermissible effect on motor carriers' prices, routes, and services and, thus, is preempted by the F4A. Indeed, according to Judge Benitez: "With AB-5, California runs off the road and into the preemption ditch of the FAAAA."

The Update and Prognosis

On January 29, 2020, defendants Xavier Becerra, et al. filed a notice of appeal of the preliminary injunction order to the Ninth Circuit Court of Appeals. The appellate briefing is underway. In the meantime, the District Court case is scheduled for Early Neutral Evaluation and a Case Management Conference before the magistrate at the end of March 2020. *During these proceedings, there is essentially an operational reprieve from the draconian strictures of AB-5*. Prior IC operations can continue, with an eye toward developments in the Ninth Circuit. Some motor carriers, shippers, and brokers are nonetheless preemptively restructuring their operational structures and contractual regimes, out of an abundance of caution.

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