NEWSLETTERS

InterConnect FLASH! No. 69 – California Lawmakers Drag in Shippers and Their Intermediaries to IC Battlefront

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Authors: Richard A. Plewacki

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.

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.

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 mselby@beneschlaw.com or (216) 363-4459.

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.

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[1] Flash No. 67.

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