NEWSLETTERS

InterConnect FLASH! No. 79 – Mr. AB-5 Goes to Washington – And Brings A Lot of Baggage! (The Assault on the IC Citadel Continues)

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Introduction: The PRO Act Overall

Early last week, the U.S. House of Representatives passed the "Protecting the Right to Organize Act," H.R.2474 ("PRO Act"), which would fundamentally shift various important employee/employer relationships, and commensurate laws and regulations, in favor of employees, and as importantly, unions. In fact, the bill, if passed by the Senate (highly unlikely) and signed into law by President Trump (even more unlikely), would constitute the most tectonic shift in U.S. labor and employment laws in over a half century. Generally, the PRO Act would:

- Expand unfair labor practices to include prohibitions against replacement of or discrimination against workers who participate in strikes;
- Make it an unfair labor practice to require or coerce employees to attend employer meetings designed to discourage union membership;
- Permit workers to participate in collective or class action litigation;
- Allow injunctions against employers engaging in unfair labor practices involving discharge or serious economic harm to an employee;
- Expand penalties for labor law violations, including interference with the NLRB, or causing serious economic harm to an employee;
- Allow any person to bring a civil action for harm caused by labor law violations or unfair labor practices.

The 34 page bill also contains numerous other sundry provisions which would also deleteriously impact employers.

The PRO Act and the Transportation Industry

Most critical to the transportation industry, and specifically motor carriers, is language within the PRO Act that mirrors that of California's now notorious AB-5 legislation. That legislation set forth a three part test for determining whether a worker who provides services to another (such as a motor carrier) is actually - under the test - an *employee* of that person or company, and thereby subject to and eligible for a smorgasbord of costly employee benefits. (An amendment attached to the bill

clarifies that its cloned AB-5 test does not preempt any state laws governing wages, hours, workers' compensation, or unemployment insurance of employees).

AB-5 Redux

As a quick refresher, AB-5's ABC Test states that: 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**).
- (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.

Thus, Part B specifically makes it virtually impossible 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. Also, because the term "hiring entity" is not limited to businesses within California, out-of-state trucking companies would arguably have had to ensure that they engage in shipping contracts with truly independent owner-operators. Under AB-5's draconian provenance, if an independent contractor is statutorily deemed an "employee" he or she becomes eligible for paid sick leave, state family leave, workers' compensation benefits, unemployment compensation benefits, union organization, overtime, minimum wage, Social Security and Medicare tax deductions. The estimated average engagement cost increase to putative employers for AB-5 compliance would be 35%. Also, individual drivers would be able to file a complaint/claim to a California government agency, which would trigger an audit of contracting/hiring practices of the motor carrier by the California Attorney General or City Attorney.

An AB-5 Rescue, and Respite, from the Courts

There is an extant AB-5 reprieve, however. On January 3, 2020 in the case captioned *California Trucking Assn. v. Becerra*, (S.D. Cal.) 3:18-cv-02458, Judge Roger Benitez, of the Southern District Court of California, issued the Court's decision granting a preliminary injunction against AB-5 with respect to motor carriers in the State of California. The Court found 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. Such a result is preempted by the Federal Aviation Administration Authorization Act (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. The fluid nature of the industry and its fluctuating demand for highly varied services, many of which are performed by independent-contractor drivers. Specifically, "an all or nothing state law like AB-5 that categorically prevents motor carriers from exercising their freedom to choose between using independent contractors or employees" is likely preempted by the FAAAA.

The Court also acknowledged the importance of allowing drivers who own and operate their own rigs to be considered independent contractors under California law. An appeal of his decision to the

United States Court of Appeals for the Ninth Circuit will almost inevitably follow. However, for now, motor carriers and their customers can take solace that operations may continue without fear of reprisal under AB-5.

Operational Responses to AB-5/Structure, Contracting, Compliance

So, as explained in detail in Interconnect FLASH Nos. **76**, **77**, and **78**, the State of California is currently enjoined from enforcing AB-5 against motor carriers. Although AB-5 is now in abeyance in California, trucking companies are already channeling more freight through their brokerage divisions as a hedge against the possibility that AB-5 will withstand legal challenges. Some owner-operator drivers are even taking it a step further, establishing themselves as licensed motor carriers and receiving freight from those brokerage arms. Other motor carriers have begun to implement various "solutions" to AB-5, including: Converting owner-operators to employees, initiating contractual relationships with other third-party buffers, contracting with separate and unrelated freight brokers to insulate loads to owner-operators, and the formation of fleet owner operators structures. However, any putative "other entity" must not be in the "same business" as owner-operator (the B" test). So, it must be a separate company, with separate personnel, financials and equipment.

No Preemption Defense for PRO Act and No Carve Outs

One of the key differences between the PRO Act and AB-5 is that while the AB-5 is a state law, and thus it is capable of being preempted by federal laws such as FAAAA, the PRO Act is *itself* a federal law. Consequently, the principal defense in AB-5 related litigation, *i.e.* that the statute is preempted by an overarching and pervasive federal statutory schematic, *would not* be available as a defense to the codification of the PRO Act. Indeed, the exact *obverse* would be true. Also, if it were ever to become law, motor carriers and their independent contractor drivers could not utilize the "other states solution" either in terms of their own registration or their independent contractors' driver's licenses, to attempt to skirt the strictures of AB-5. Instead, the PRO Act would be the universal, federal law of the land. Interestingly too, the ProAct does not have a single word in it, that mentions "transportation," or "truck." So, there is very little likelihood that there would ever be a carved out exception for the trucking industry within its statutory framework.

The Legislative Fate of the PRO Act

As noted, the bill is extremely unlikely to be passed by the U.S. Senate in any form, and even less likely to be signed into law by President Trump. In threatening a veto, the Trump administration has stated that: "The administration is willing to work with Congress to strengthen protections for union members. Unfortunately, [this bill] contains provisions that would kill jobs, violate workers' privacy, restrict freedom of association and roll back the administration's successful deregulatory agenda." The Trump administration specifically commented upon the mirroring of AB-5 in the PRO Act: "The bill appears to cut and paste the core provisions of California's controversial AB-5, which severely restricts self-employment. AB-5 is actively threatening the existence of both the franchise business sector and the gig economy in California. It would be a serious mistake for Congress to impose this flawed job-killing policy on the entire country."

The Senate has not scheduled consideration for the bill. Specifically, Republican managers in the Senate have not outlined a path forward for the bill. (Notably, seven house Democrats voted against the legislation, and five Republicans crossed the aisle to help pass the bill.)

The Post AB-5/PRO Act Forecast

So, for now, the PRO Act merely constitutes a startling, but presently nascent upheaval of the independent contractor model under which many motor carriers and other transportation companies thrive. Also, AB-5 itself is effectively stayed in California, pending the CTA case as it wends its way through the courts. On February 10, 2020, Judge Benitz granted the defendants' motion to dismiss two counts of the CTA's complaint, but permitted the count alleging that AB-5 is preempted by F4A, to remain as a viable cause of action in the lawsuit. That tells us that the case will be ongoing, and will undoubtedly be appealed.

So, there is now an AB-5 hiatus for motor carriers and logistics companies operating in California. Prior models and tests relating to overall indicia of control over independent contractor drivers remain as the law in California, for the short term. For the long term, though, in light of the very promulgation of AB-5, and of its codification in the unenacted PRO Act on a federal level, it is worthwhile for any motor carrier or logistics company operating in the state of California, with workers of any kind, to assess its operational structure in light of this looming, but now dormant legislation, and reassess both that structure, *and its underlying contracts*, in light of the AB-5 specter.

For any questions on this topic, please contact a member of Benesch's Transportation & Logistics Practice Group.

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