

InterConnect FLASH! No. 82 – Disappointing Decree: Ninth Circuit Rules California’s AB5 Is Enforceable Against Motor Carriers

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On April 28, 2021, the United States Court of Appeals for the Ninth Circuit held that the application of California’s Assembly Bill 5 (“AB5”) to motor carriers is not preempted by the Federal Aviation Administration Authorization Act of 1994 (“FAAAA”). See *Cal. Trucking Ass’n v. Bonta*, No. 20-55106. This ruling reverses a California district court’s decision to grant a preliminary injunction to prevent enforcement of AB5 against motor carriers operating within California. The FAAAA preempts any state law “related to a price, route, or service of any motor carrier... with respect to the transportation of property.” In granting the preliminary injunction, the district court had concluded that the FAAAA preempted AB5 and stated, “there is little question that the State of California has encroached on Congress’ territory by eliminating motor carriers’ choice to use independent contractor drivers, a choice at the very heart of interstate trucking.”

The Ninth Circuit found the district court abused its discretion by granting the preliminary injunction. In a 2-1 decision, the Ninth Circuit’s panel ruled that AB5 is a generally applicable labor law that affects a motor carrier’s relationship with its workforce. The court included an extensive discussion of the history of the FAAAA and relevant Ninth Circuit precedent, concluding, “[b]ecause AB-5 is a generally applicable labor law that impacts the relationship between a motor carrier and its workforce, and does not bind, compel, or otherwise freeze into place a particular price, route, or service of a motor carrier at the level of its customers, it is not preempted by the [FAAAA].”

As a reminder, AB5 codified into statutory law the “ABC” test set forth by the California Supreme Court, which is used for determining whether a worker is an employee or an independent contractor. This test requires that a worker be classified as an employee unless the employer can demonstrate each of the following:

- (a)** the worker 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 worker performs work that is outside the usual course of the hiring entity’s business; and
- (c)** the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

The preliminary injunction preventing enforcement of AB5 against motor carriers will not be lifted immediately, but enforcement of AB5 against motor carriers could begin sometime in May 2021. It is

likely that the CTA will appeal the Ninth Circuit's decision to the U.S. Supreme Court or seek a rehearing from the Ninth Circuit. A review by the Supreme Court or a rehearing by the Ninth Circuit *are not* guaranteed. Also, this decision by the Ninth Circuit comes after two California state courts of appeals have reached the same conclusion that the FAAAA does not preempt AB5.

In light of the foregoing, motor carriers may need to explore and evaluate alternative operating models to mitigate risk, such as changing their practices to qualify for the business-to-business exemption provided in AB5. Other ways in which transportation companies may try to avoid the implications of the Ninth Circuit's decision include deploying a freight brokerage model, utilizing a "two-check" system of compensation, or implementing a "taxi cab medallion" model. Regardless, responsible California motor carriers must make it a priority to evaluate their use of independent contractor owner-operators in California in light of the Ninth Circuit's regrettable decision.

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

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