Benesch

September 2019

The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

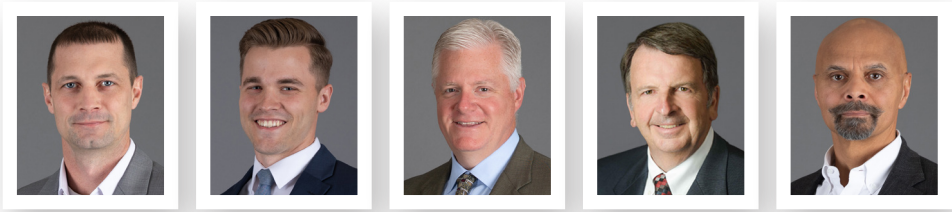
Best Lawyers BEST LAW FIRMS U.S.News & WORLD REPORT TRANSPORTATION LAW TIER 1 NATIONAL 2019

Benesch has been ranked in the First Tier nationally in Transportation Law in the 2019 Edition of U.S. News & World Report/ Best Lawyers® "Best Law Firms" ranking.

The U.S. News & World Report/Best Lawyers® "Best Law Firms" rankings are based on an evaluation process that includes the collection of client and lawyer evaluations, peer review from leading attorneys in their field, and review of additional information provided by law firms as part of the formal submission process.

For more information on Best Lawyers, please visit www.bestlawyers.com.

FLASH NO. 74
GOV. SIGNS BILL EXPANDING STRANGLEHOLD ON IC'S IN CA: WHAT NOW IN CALIFORNIA?



Matthew J. Selby | John N. Dagon | David A. Ferris | Richard A. Plewacki | Peter N. Kirsanow

California Gov. Gavin Newsom signed the recently passed Assembly Bill 5 ("AB-5") codifying the *Dynamex* decision relating to the classification of independent contractors/ employees in California and further "clarifying the decision's application in state law." (*For a refresher on the Dynamex decision please read previously published Flash No.67.)* The impact of AB-5 further complicates the use of independent contractors across a multitude of transportation segments within the industry.

Effective January 1, 2020, AB-5 will require the use of the ABC Test, a three-step analysis adopted in the *Dynamex* decision, when determining the status of a putative employee for purposes of the Labor Code, Unemployment Insurance Code, and Industrial Welfare Commission Wage Orders. AB-5 is an expansion from *Dynamex* as it was only applicable to Wage Orders. The ABC 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.

(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.

Consequently, Part B specifically makes it difficult for California-based owner-operators to be classified as independent contractors as their work can be difficult to distinguish from that of the 'hiring' motor carrier.

(continued)

Moreover, owner-operators are unlikely to satisfy the 12-step business-to-business exception outlined in Section 2750.3(e) of AB-5. Specifically, the requirement that owner-operators provide evidence that the owner-operator conducts the same type of business as the motor carrier, on behalf of multiple, unrelated entities, and holds itself out to the public as generally providing transportation services. *(See Section 2750.3(e)(1)(F–H)).* Furthermore, if an owner-operator satisfies the business-to-business exception, it then requires further scrutiny under the *Borello* test. *(See S. G. Borello & Sons, Inc. v. Dept. of Indus. Relations, 48 Cal.3d 341, 769 P.2d 399, 256 Cal.Rptr. 543 (1989).)* As such, in most cases, the business-to-business exemption will not provide a safe haven for owner-operators attempting to establish independent contractor status under AB-5.

Prior to AB-5, the transportation industry began pursuing protections for independent contractors through Federal Aviation Administration Authorization Act ("FAAAA") preemption lawsuits. Specifically, the California Trucking Association ("CTA"), two individual drivers, and the Western States Trucking Association ("WSTA") filed two separate lawsuits challenging *Dynamex* in the Southern District of California. WSTA recently dismissed its appeal to the Ninth Circuit, which resulted in the Southern District lifting the stay in the CTA action, allowing the court to move forward with the case. (*See California Trucking Assn. v. Becerra, Case No. 3:18-CV-02458 (S.D. Cal.).)* CTA's lawsuit contended that the *Dynamex* standard for determining whether a worker in the transportation industry is an employee or independent contractor for purposes of California Wage Orders is preempted by the FAAA and violates the Commerce Clause of the United States Constitution.

On September 24, 2019, United States District Judge Roger T. Benitez of the Sothern District of California entered an Order granting the defendants' motions to dismiss the case. In the Order, Judge Benitez dismissed the action without prejudice, allowing the plaintiffs (CTA) to file an amended complaint within sixty (60) days. The court made no findings on the merits of the parties' arguments within the motions, but instead granted the motions to dismiss for lack of standing and for mootness due to the passage and signing of AB-5. Specifically, the court noted AB-5's effective date of January 1, 2020 poses standing issues because the circumstance *"leaves unclear whether Defendants will enforce the Dynamex decision against Plaintiffs before AB-5 takes effect."* Additionally, the court noted that the effective date of AB-5 causes CTA's complaint, as currently plead, to leave the court with *"theoretical possibilities,"* which it is not authorized to decide under the mootness doctrine.

Conversely, another California court has ruled that the FAAAA preempts *Dynamex*. *(See Alvarez v. XPO Logistics Cartage LLC,* 2018 WL 6271965, *5 (Nov. 15, 2018). *Alvarez* involves a class of plaintiffs comprised of current and former owner-operator drivers for defendants, a federally licensed trucking company that transports containers, alleging the following misclassification claims: (1) failure to pay minimum wage; (2) failure to pay wages for missed meal periods; (3) failure to pay wages for missed rest periods; (4) failure to reimburse business expenses; (5) failure to provide accurate, itemized wage statements; (6) waiting time penalties; (7) unfair competition; and (8) civil penalties under the Private Attorney General Act arising from willful misclassification. Defendants successfully moved for judgment on the pleadings by arguing that FAAAA preempted plaintiffs' claims. The court explicitly held that the FAAAA preempts the ABC Test, following dicta from the Ninth Circuit in *California Trucking Assn. v. Su*, 903 F.3d 953, 955 (9th Cir. 2018), cert. denied, 139 S.Ct. 1331, 203 L.Ed.2d 567 (2019) and stating:

> The Court agrees with this dicta and finds that the ABC test—as adopted by the California Supreme Court—"relates" to a motor carrier's services in more than a "tenous" manner and is therefore preempted by the FAAAA. However, there is a distinction to be made between a statutory cause of action and the test for interpreting the statute in question. Thus, the Court would emphasize that it is the application of the Dynamex ABC test that is preempted by the FAAAA, not the underlying California Labor Code claims.

Alvarez, at *5.

Logically, it appears that this issue will be headed to the U.S. Supreme Court to determine the apparent conflict in laws. There has also been rumblings of various industry giants attempting to create carve-out exceptions to AB-5 by placing the initiative on the Ballot for voters to ultimately decide. In the interim, AB-5 has left motor carriers and the transportation industry without many options when operating within the State of California.

To discuss the implications of AB-5 and next steps in California, please contact Benesch's experienced Transportation Team for guidance.

About the Authors

Matthew J. Selby at mselby@beneschlaw.com or (216) 363-4459.

Matthew is Of Counsel in Benesch'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.

John N. Dagon at jdagon@beneschlaw.com or (216) 363-6124.

John is an associate in the firm's Litigation Practice Group and focuses his practice on complex commercial litigation, including contract disputes and business torts. He also has experience litigating product liability matters and defending clients in medical and legal malpractice claims.

David A. Ferris at dferris@beneschlaw.com or (614) 223-9341.

David is a partner at in the firm's Transportation & Logistics Practice Group, representing clients in the areas of manufacturing and supply-chain management, information technology (IT) and intellectual property (IP), and land development and management. David regularly consults with clients on a wide range of commercial transactions and claims, operational and regulatory matters, labor issues and negotiations, and development of commercial space.

Richard A. Plewacki at rplewacki@beneschlaw.com or (216) 363-4159.

Richard is Of Counsel 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.

Peter N. Kirsanow at pkirsanow@beneschlaw.com or (216) 363-4481.

Peter is a partner with Benesch's Labor & Employment and Transportation & Logistics Practice Groups. He focuses his legal practice on representing management in employment-related litigation and in contract negotiations, NLRB proceedings, EEO matters and arbitration. Peter recently finished his third consecutive term on the U.S. Commission on Civil Rights in December 2019.

Additional Information

For additional information, please contact:

Transportation & Logistics Practice Group

Eric L. Zalud, *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
Kevin M. Capuzzi at (302) 442-7063 or kcapuzzi@beneschlaw.com
Kristopher J. Chandler at (614) 223-9377 or kchandler@beneschlaw.com
David A. Ferris at (614) 223-9341 dferris@beneschlaw.com
John C. Gentile at (302) 442-7071 or jgentile@beneschlaw.com
Joseph N. Gross at (216) 363-4163 or jgross@beneschlaw.com
Matthew D. Gurbach at (216) 363-4413 or mgurbach@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
Thomas B. Kern at (614) 223-9369 or tkern@beneschlaw.com
Peter N. Kirsanow at (216) 363-4481 or pkirsanow@beneschlaw.com
David M. Krueger at (216) 363-4683 or dkrueger@beneschlaw.com
Charles B. Leuin at (312) 624-6344 or cleuin@beneschlaw.com
Jennifer A. Miller at (628) 216-2241 jamiller@beneschlaw.com
Michael J. Mozes at (614) 223-9376 or mmozes@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
Steven A. Oldham at (614) 223-9374 or soldham@beneschlaw.com
Lianzhong Pan at (86 21) 3222-0388 or lpan@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
Matthew (Matt) J. Selby at (216) 363-4458 or mselby@beneschlaw.com
Peter K. Shelton at (216) 363-4169 or pshelton@beneschlaw.com
Verlyn Suderman at (312) 212-4962 or vsuderman@beneschlaw.com
Clare R. Taft at (216) 363-4435 or ctaft@beneschlaw.com
Jonathan Todd at (216) 363-4658 or jtodd@beneschlaw.com

www.beneschlaw.com