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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

FLASH NO. 76 FEDERAL COURT TEMPORARILY ENJOINS ENFORCEMENT OF AB5 AGAINST CALIFORNIA MOTOR CARRIERS



Marc S. Blubaugh

Champagne bottles popped earlier than expected on New Year's Eve when Judge Roger T. Benitez of the United States District Court for the Southern District of California granted a temporary restraining order prohibiting the State of California from enforcing Assembly Bill No. 5 ("AB5") against any motor carriers operating in the state. Enforcement under AB5 was to begin on the legislation's effective date of January 1, 2020.

AB5 requires the use of the "ABC Test," a three step analysis used to determine the status of a putative employee for purposes of the California Labor Code, Unemployment Insurance Code, and Industrial Welfare Commission Wage Orders. Under AB5, a person providing labor or services for remuneration is 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.

On December 24, 2019, in a federal case brought by the California Trucking Association and others (collectively, "CTA"), CTA moved for a temporary restraining order to prohibit the enforcement of AB5 against motor carriers operating in California. Among other things, CTA argued that AB5 was preempted by 49 U.S.C. § 14501(c)(1), known as the Federal Aviation Administration Authorization Act ("FAAAA"), as well as by the dormant Commerce Clause of the U.S. Constitution.

The FAAAA prohibits a state from enacting or enforcing a law, regulation, or other provision having the force and effect of law that is "related to" a price, route, or service of any motor carrier with respect to the transportation of property. CTA argued that AB5 is necessarily such a law. Specifically, CTA argued that the "B" prong of the ABC Test makes it impossible for owner-operators in California to be classified as independent contractors as their work is indistinguishable from that of the "hiring" motor carrier.

(continued)

On December 31, 2019, Judge Benitez agreed with CTA's request for an emergency order enjoining enforcement of AB5 as against motor carriers. The judge found that that the "B" prong of the ABC test embodied in AB5 "is likely preempted by the FAAAA" because AB5 "effectively mandates that motor carriers treat owner-operators as employees, rather than as the independent contractors that they are." The judge concurred with CTA that motor carriers cannot satisfy the "B" prong of AB5 because drivers are performing work within the usual course of the motor carrier's business. The judge stated that he was not addressing CTA's argument under the dormant Commerce Clause "because the Court is persuaded by the likelihood of [CTA]'s success on the FAAAA preemption ground."

In order to grant the emergency relief requested, Judge Benitez also agreed that CTA established that imminent, irreparable harm was likely because motor carriers would face government enforcement actions (including criminal and civil penalties) unless they transformed their operations. The judge found that such transformative compliance measures would be "significant and costly." The court also agreed that the equities weighed in favor of CTA and that granting the emergency relief was in the public interest. The court noted that the State of California had expressly declined to withhold enforcement of AB5 for even a short period of time.

Of course, the restraining order issued by Judge Benitez is temporary. The court has scheduled a preliminary injunction hearing for January 13, 2020. At that time, the court will hear evidence and further arguments from both sides on the merits. While Judge Benitez could certainly change his mind at the preliminary injunction hearing based on the evidence and arguments presented at that time, his findings in the December 31, 2020 temporary restraining order are surely encouraging and bode well for motor carriers wrestling with AB5 compliance efforts in California.

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Marc Blubaugh is partner and Co-Chair of the firm's Transportation & Logistics Practice Group. Marc regularly consults with clients regarding contracting practices and operating procedures, helps clients navigate the changing regulatory landscape, manages regulatory investigations, advises regarding best supply-chain practices, and provides strategic and business advice to help clients not only minimize liability but, just as importantly, to grow their businesses.

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