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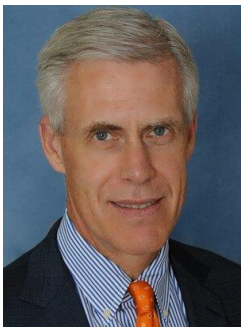
Justices Prolong Calif. Trucking Industry's Employment Woes

By **Gregory Feary** (July 12, 2022, 5:28 PM EDT)



Gregory Feary

A California wage and hour lawsuit concerning the status of courier drivers as employees or independent contractors, Dynamex Operations West Inc. v. Lee, resulted in a 2018 decision from the California Supreme Court. That ruling has sparked both disruptive legislation and controversy for the past four years.

On June 30, the U.S. Supreme Court denied certiorari in CTA v. Bonta, the trucking industry's challenge to the California legislation — known as A.B. 5 — bringing this leg of a long and costly legal journey to an end. But the legal issue remains open.

The question of A.B. 5 as a proper test of work status — both in California and in other states where similar legislation might emerge — remains just as open. And it seems likely that efforts to seek balance on an issue that pits entrepreneurship against paternal protection of workers are far from over.

The California Supreme Court's dramatic importation of a test largely used in several other states' unemployment tax laws was, as the court reasoned, "important to ensure that those workers who need and want the fundamental protections of [wage and hour laws] do not lose those protections." This test, called the ABC test, provides it is only proper to deem a worker an independent if the hiring entity establishes that:

> (A) The worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such 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 for the hiring entity.

The ABC test is distinctive not so much in its three factors — which can be found in other work-status tests laws across the country — but rather in its combination of placing the burden of proof on the hiring entity, and the requirement that all three factors must be proven, or employment status results.

In reaching its decision in Dynamex, the California Supreme Court rejected the prior multifactor totality of the circumstances test used in California for decades, known as the Borello test. Such fact-sensitive balancing tests, which require a court to determine if a worker is properly classified as an independent

contractor through a weighing of various factors, were characterized by the court as inviting "employers to structure their relationships in whatever manner best evades liability."

While the Dynamex decision was only directly applicable to California's Wage Order No. 9 — addressing minimum wage, overtime wage and a few other wage laws affecting transportation — it soon spawned a bill by California Assembly Member Lorena Gonzales, A.B. 5. This legislation broadened the use of the ABC test, to apply it to additional labor laws in California, as well as to workers' compensation and unemployment tax laws.

Gonzales — who has left the Legislature and returned to her former work with labor unions — was forthright in her pronouncements that her bill was aimed at transportation and gig economy companies, such as Uber Technologies Inc., Lyft Inc. and DoorDash Inc. A.B. 5 included numerous carveouts or exemptions for non-transportation industries and occupations.

While it first appeared as a law of general applicability, by the time accounting is taken of all the exemptions to the law, almost the only vital link to our day-to-day lives left within its reach is the transportation of goods — i.e., the trucking industry. In fact, the voters of California extracted from A.B. 5 the app-based services that Gonzales was targeting, through Proposition 22, a ballot referendum that exempts such services based on several prerequisites.

The California Trucking Association's legal challenge to A.B. 5 in CTA v. Bonta was primarily focused on the language of the Federal Aviation Administration Authorization Act, Title 49 of the U.S. Code, Section 14501, and specifically subpart (c)(1), which prohibits states from enacting laws related to a "price, route or service" of a motor carrier, private carrier, broker or freight forwarder.

The federal district trial court issued a preliminary injunction in favor of the CTA, which halted A.B. 5's application to trucking within weeks of the law's Jan. 1, 2020, effective date. The U.S. Court of Appeals for the Ninth Circuit reversed the lower court's decision in a 2-to-1 panel vote.

The Ninth Circuit reasoned that federal preemption of a law of general applicability requires something more significant than simply a relation to a price, route or service of a motor carrier — it requires a finding that the state law actually binds the provider to a price, route or service.

From the Ninth Circuit, the CTA appealed to the U.S. Supreme Court, and the Teamsters and the state of California opposed. During the pendency of the appeal to the high court, the preliminary injunction remained in place. On June 30, a simple cleanup order from the court denied the appeals of CTA v. Bonta, as well as two other cases asserting challenges to state laws by transportation providers under federal preemption.

Opponents of A.B. 5 say California's ports are, by all accounts, the most congested, and losing this stage of the case creates havoc within an industry already under siege. Port drayage trucks move containers to staging areas for the next step in the supply chain. In each step, trucking is the critical link to carrying goods to the American public.

And each step requires a multitude of various trucking operations working in concert. Reducing the number of small businesses — i.e., owner-operators — through a law that calls them, in most instances, employees takes food off the tables of their families, while making Americans wait longer, pay more and face greater hardships at a time when supply chain issues are possibly more challenged than at any other point in our history.

These workers have chosen to be independent, contrary to the assumption made by the California Supreme Court, which envisaged that all workers "want the fundamental protections" of California's wage and hour laws. A.B. 5 ignores the choice of these workers.

Proponents of the law argue that the owner-operator small businesses are victims of nefarious manipulations by the motor carriers seeking to evade liability from California labor and employment laws. But the reality of the trucking industry seems to defy these arguments.

That reality includes a devastating driver shortage, where the opportunity to become an employee driver is possibly at its greatest, giving workers a choice about the type of work arrangement they prefer. The reality also includes port congestion, regulations that will ban the use of trucks with engines built before 2010, and labor union contract negotiations that threaten to further stall throughput in the supply chain.

A.B. 5 may be rooted in the social welfare doctrinal philosophy set up by Dynamex. But in its blatantly political approach, the law may be said to pick winners and losers by virtue of its many carveouts — which include not only doctors, lawyers, accountants, journalists, insurance brokers, realtors and financial investors, but also cosmetologists, barbers, fisherman and music industry workers.

Somehow, it seems these occupations do not need the protection of the ABC test. Is it possible that they are occupations immune from the kind of abuses and traps that prompt the paternalism the California Supreme Court used in justifying its decision in Dynamex, and that presumably remain as justification for the codification of Dynamex via A.B. 5?

In fact, whatever makes these occupations special — and allows these entrepreneurs to retain their small businesses as usual under A.B. 5 — it is unlikely to be any consideration of abuses or traps. Such issues tend to be fringe concerns in any industry, and they likely exist in all or most of these special carveout occupations as well as in the businesses covered by A.B. 5.

Truthfully, one need look no further than the carveout in A.B. 5 for construction trucking to get to the heart of the reality of the law. Why would the type of cargo in the truck define the work status of who is transporting it?

A.B. 5 is a law with little purpose in the 21st century — and the more it is applied without exception, the more that point is revealed. This will almost certainly become more apparent as more exceptions are inevitably made to minimize its dilatory impact.

Such exceptions chip away at A.B. 5's doctrine of paternalism, in favor of the reality that small businesses, even in California, need to exist beyond just those that organized labor does not see as a priority, trial attorneys do not see as fertile ground for fee generation, and the state does not feel merit additional taxation.

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