



California Trucking Prepares For “Radically New World” Under Independent Contractor Law AB5

Description

USA: It is going to be a radically new world in California’s trucking sector with the imposition of AB5, and it isn’t clear what parts of the industry — if any — are ready for it.

“Most immediately, motor carriers must evaluate and adopt alternative operating models to mitigate risk if they intend to continue to do business in California” was the admonition from the Benesch law firm in the wake of the Supreme Court decision in the case of California Trucking Association vs. (state Attorney General) Bonta. The decision opens the door for the imposition of AB5, the law on independent contractors that leans heavily toward classifying workers as employees rather than ICs.

“Motor carriers should immediately evaluate their California operations to determine what steps, if any, should be taken to respond to the changed backdrop for trucking” was the call to action from the trucking-focused Scopelitis law firm.



On the other side of the divide, there was celebration, including a victory lap by Lorena Gonzalez, the former and future labor leader who successfully pushed for AB5's passage in the California legislature in 2019.

The fact that trucking companies will have to abide by basic labor laws in CA takes us one step closer to rebuilding the middle class that was almost deregulated out of existence. Proud of my [@Teamsters](#) union, [#defendingDynamex](#) hasn't been easy... but nothing good ever is. [#AB5](#)

— Lorena Gonzalez Fletcher (@LorenaSGonzalez) [June 30, 2022](#)

"The fact that trucking companies will have to abide by basic labor laws in CA takes us one step closer to rebuilding the middle class that was almost deregulated out of existence," Gonzalez said in a tweet.

In denying a review of the appellate court decision, the Supreme Court returned the case to the 9th U.S. Circuit Court of Appeals. A 9th Circuit ruling in 2021 overturned a lower court injunction that had kept AB5 at bay from California's trucking sector, even as the law that seeks to define independent contractors was implemented in other parts of the economy.

The original injunction from the lower court was based on its conclusion that AB5 was in conflict with provisions in the Federal Aviation Administration Authorization Act of 1994 (F4A). Attorneys for the trucking industry were heartened when the court agreed to consider questions of state preemption of F4A, including looking at a case involving C.H. Robinson ([NASDAQ: CHRW](#)). But ultimately, the court failed to take up both the CTA and C.H. Robinson cases.

The appellate court had allowed the injunction against the law to remain in effect while the CTA pushed to have the Supreme Court hear its appeal. With that denied, the stay is expected to be lifted within days and AB5 will go into effect, retroactively, to Jan. 1, 2020. That creates the prospect of litigation or state action for past actions.

A mixed bag of earlier exemptions

The implementation of AB5 throughout the California economy in 2020 came with a Swiss cheese lineup of exemptions, both in the original bill and in AB 2257, which sought to address the concerns of sectors that said they had been particularly hard-hit by AB5.

Among the exempted professions: doctors, dentists and hairstylists. Among those exempted in the second bill: translators (who were particularly vocal about the damage to their industry under AB5,) youth sports coaches and insurance inspectors.

Critics of AB5 have held that the lengthy, seemingly random list of exemptions was evidence that AB5 was largely targeting two sectors: trucking and gig drivers such as those at Uber, Lyft and with parcel services. So far, that latter group has not come under AB5 because of voter approval of Proposition 22 on Election Day 2020, though a court later ruled Prop 22 unconstitutional. That court decision is on appeal, and a stay has allowed gig drivers protected by Prop 22 to remain outside the control of AB5.

AB5 is particularly problematic for the trucking sector. That's because it is based on the ABC test to define independent contractors, the B prong of which is being interpreted as a possible death knell or at least a major hindrance to the independent owner-operator model in trucking.

The B test defines an independent contractor as a worker who is engaged in "work that is outside the usual course of the hiring entity's business." A trucking company hiring an independent owner-operator to move freight is seen as likely in violation of the B prong.

Unions eye drayage drivers as an opportunity

The question now turns to what the trucking industry does specifically in response to the hard reality that AB5 has arrived on the doorstep.

From the organized labor side, recommendations on how trucking companies should proceed include turning drivers into employees.

"If I was advising the trucking sector, I would be getting ready for AB5 to be the law of the land in California, and for the state to begin enforcing it," Doug Bloch, political director for Teamsters Joint Council 7, which represents the union in Northern California and northern Nevada, told FreightWaves.

Bloch said the Teamsters "recognizes there are legitimate owner-operators out there in trucking." But he pivoted when discussing trucking to a specific part of the trucking ecosystem: drayage drivers.

"In places like the ports, the state has found misclassification to be the norm," Bloch said. Drayage drivers should now be "looking at where I am going to end up working," he said, predicting that port companies that now utilize the services of independent drayage drivers will turn to an employee model.

Bloch said the Teamsters ran a campaign "a decade ago" that was successful in converting some drayage companies to an employee model rather than one utilizing independent owner-operators.

"That is our goal, to have owner-operators hired as drivers," Bloch said. "Our goal is for the shipping industry to take responsibility for these drivers." If the workers are converted to employees, he said, it will be easier for them to be paid an amount that reflect at least the minimum wage, and it would push the responsibility for buying new zero-emission vehicles on to the port companies, rather than on to the drivers. "We'll be asking fleet owners to do this," Bloch said.

Given the state's focus on regulatory issues surrounding the ports, it is reasonable to think actions by California under AB5 might first arrive in the drayage industry.

Matt Schrap, the CEO of the Harbor Trucking Association, which represents drayage companies,

issued a brief but harsh statement in response to the high court's decision.

"It is extremely unfortunate that this Court couldn't see through their own political agenda to identify the obvious preemption that exists under the F4A," he wrote in an email to FreightWaves. "This ruling will have far reaching impacts that will upend the industry as we know it. Tens of thousands of truck drivers will be driven out of established business relationships within a week. No doubt this will further stress the supply chain."

Bloch was asked what would be the impact on freight movement in lanes away from the ports — specifically an example in which an independent owner-operator moves freight between Riverside County outside of Los Angeles and Northern California. What might that person's legal status become?

"It's a good question," he said. But he came back to the issue of misclassification. "I don't really care what sector of the trucking industry you're in, I would be concerned about misclassification."

Bloch added that "what we've seen is that every time the laws change, the industry finds some way to adapt."

CTA issues blistering statement

Not surprisingly, the statement issued by the CTA after the SCOTUS non-action held little back.

"Gasoline has been poured on the fire that is our ongoing supply chain crisis," the organization said. "In addition to the direct impact on California's 70,000 owner-operators who have seven days to cease long-standing independent businesses, the impact of taking tens of thousands of truck drivers off the road will have devastating repercussions on an already fragile supply chain, increasing costs and worsening runaway inflation."

Existing trucking company models may need to change

In a note Marc Blubaugh of the Benesch law firm sent to clients, he discussed several alternatives to the traditional model.

One is an employee driver model, along the lines of what union officials would like to see. Another is largely turning a carrier that now utilizes independent owner-operators into a brokerage house, and putting freight in the drivers' hands in the same way that a traditional brokerage would do. Since freight movement would no longer be part of the company's activity, the independent owner-operators would be engaged in "work that is outside the usual course of the hiring entity's business," the specific wording in the B prong.

Blubaugh did not mention it, but AB5 came with the business-to-business exception, a multipronged test that must be fully met to legally hire an independent contractor who might otherwise violate the ABC test. There is disagreement in the industry about whether the exception's rigorous tests and need for 100% compliance make it largely unworkable.

Greg Feary, a partner with the Scopelitis law firm, said Thursday he already had discussions with

clients who are “starting to take action. You are going to see the trucking industry respond to this relatively rapidly.”

He said there was a “laundry list of options on the table.” Some of them are extreme, like halting all business in California, particularly if it’s a relatively small part of a company’s business. “Why take the risk?” Feary said.

A push by a company to bring on more employee drivers might come into conflict with what Feary said was the “conventional wisdom ... that most of these independent contractors don’t want to be employee drivers.”

The brokerage option as discussed by Feary would involve drivers who are now independent but are leased to a company, and operating under their DOT authority, would obtain their own authority. The company they are leased to would then broker freight to that driver.

“For me, motor carriers are going to have to be making decisions and review all of the potential options,” Feary said.

Action by the state might come quickly, Feary said. The state agencies most likely to bring legal action for what are seen as violations of AB5 would be the state Division of Labor Standards Enforcement or the state’s Employment Development Department.

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