CALIFORNIA'S PREEMPTION ANALYSIS CREATES CIRCUIT SPLIT MAKING AB-5 RIPE FOR SUPREME COURT REVIEW

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On 30 April 2018, the California Supreme Court issued the seminal decision in *Dynamex Operations West, Inc. v. Superior Court,* adopting the "A-B-C Test" for determining independent contractor status in the state. The A-B-C Test, which superseded the prior, less stringent common law *Borello* test,[1] was later codified by the state legislature in California Assembly Bill 5 (AB-5). Under AB-5, a worker is presumed to be an employee and not an independent contractor unless the entity can establish the following three elements:

(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.

The California Trucking Association (CTA) challenged AB-5 on the ground that Prong "B" of the A-B-C Test is preempted by the Federal Aviation Administration Authorization Act's (FAAAA) prohibition against laws that relate to the "price, route, or service of any motor carrier. . . with respect to the transportation of property."[2]

The Southern District of California found in favor of CTA and enjoined the enforcement of AB-5 against motor carriers. On 28 April, 2021, in a 2–1 panel decision that came almost three years to the day after *Dynamex*, the 9th Circuit voided the injunction in *California Trucking Association v. Bonta*.[3] Citing 9th Circuit jurisprudence subjecting motor carriers to "generally applicable" labor laws, such as California's prevailing wage laws,[4] meal and rest break rules,[5] and the *Borello* test,[6] the court concluded that AB-5 is a "generally applicable" law and not preempted by the FAAAA.

In reaching its conclusion, the 9th Circuit reasoned that AB-5's potential increase on motor carriers' costs of doing business would represent only an indirect, remote, or tenuous relation to prices, routes, and services offered, because the law only affects the carrier's relationship with its workforce, not its consumers. Therefore, AB-5 can be differentiated from laws that would "compel[] a motor vehicle carrier to a certain result in its relationship with consumers, such as requiring a motor carrier 'to offer a system of services that the market does not provide' or that 'would freeze into place services that carriers might prefer to discontinue in the future,' and 'that the market would not otherwise provide.'" Such a law, the panel stated, binds the carrier to a particular price, route, or service and interferes with the competitive market forces within the industry; therefore, it may be preempted by the FAAAA.

California continues to blaze its own trail with respect to labor and employment laws. The *CTA* decision represents an express deviation from the 1st Circuit's 2016 decision striking Massachusetts's A-B-C Test on preemption grounds.[7] The split in the circuits may mean that the issue is ripe for guidance from the U.S. Supreme Court, and CTA has announced its intent to seek further review of the issue. Until and unless the 9th Circuit's *CTA* decision is overturned, however, motor carrier employers in California, particularly those who utilize the owner-operator model, should carefully reevaluate the classification of their driver workforce.

FOOTNOTES

[1] *S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels.*, 48 Cal.3d 341 (1989).

[2] 49 U.S.C. § 14501(c)(1).

[3] Formerly known as *California Trucking Association v. Javier Becerra*.

[4] *Safe and Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998).

[5] *Dilts v. Penske Logisitics, LLC*, 769 F.3d 637, 643 (9th Cir. 2014).

[6] *Cal. Trucking Ass'n v. Su*, 903 F. 3d 953, 966 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1331 (2019).

[7] *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429 (1st Cir. 2015).

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