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The Trucking Industry Breaks Even

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California courts have recently delivered two opinions significantly impacting the status quo of the trucking industry, with employers breaking even. The two fundamental controversies addressed by the courts are:

1. Whether the trucking industry must provide meal and rest breaks in accordance with California's wage and hour laws.

2. Whether the U.S. trucking industry must comply with California's newly enacted and significantly more stringent independent contractor test outlined in *Dynamex v. Super. Ct. of L.A.* (2018) 4 Cal.5th 903 and codified via Assembly Bill 5 ("AB5").

The Ninth Circuit Upholds FMCSA Preemption of California's Meal and Rest Break Requirement

In 2019, the Federal Motor Carrier Safety Administration ("FMCSA") issued an Order finding California's meal and rest break rules governing property carrying commercial vehicle drivers were preempted by the Motor Carrier Safety Regulations within the Motor Carrier Safety Act of 1984. In opposition to the ruling, the International Brotherhood of Teamsters filed a Petition for Review of the FMCSA Order to the Ninth Circuit Court of Appeals. On January 15, 2021, the Ninth Circuit denied the Teamsters' Petition providing a much needed win for the trucking industry plagued with California employment-based lawsuits.

At issue were California's oppressive meal and rest break requirements that require employers provide hourly employees an uninterrupted 30-minute lunch by the end of the fifth hour of work for shifts in excess of five hours and a duty-free, paid ten-minute rest break for each four hours worked, or major fraction thereof. Such laws frequently result in individual, class, and representative lawsuits under California's Private Attorneys General Act ("PAGA") against small and large employers alike.

On the federal side, the Motor Carrier Safety Regulations impose limits of daily driving time, require at least 30 minutes off duty no later than 8 hours after the start of duty, and prohibit drivers from operating a commercial motor vehicle if they are impaired (by illness, fatigue, or other cause). Importantly, the Motor Carrier Safety Act also contains a provision that provides for preemption of state laws "if they (1) have no

safety benefit; (2) are incompatible with federal regulations; or (3) would cause an unreasonable burden on interstate commerce." Based on this, many motor carriers argued that California's meal and rest break laws were preempted by the Motor Carrier Safety Act.

In its 2019 order, the FMCSA opined that California's meal and rest break laws triggered each of these three prongs and were thus preempted and unenforceable. In denying the Teamsters' Petition for Review, the Ninth Circuit Court of Appeals found that the FMCSA's decision "reflects a permissible interpretation of the Motor Carrier Safety Act of 1984 and is not arbitrary or capricious."

This is a win for the trucking industry and will settle many disputes that have remained in limbo awaiting the Ninth Circuit's decision.

The Trucking Industry's Use of Independent Contractor Owner Operators

Departing from the aforementioned win in the Ninth Circuit, the California Second District Court of Appeal delivered a confusing and ambiguous blow to a lower court's favorable ruling that California's infamous ABC test was preempted by federal law.

As background, the trucking industry commonly makes use of independent contractor owner-operators ("owner-operators") whereby the authorized carrier contracts with the owner operators to transport goods using the carrier's Department of Transportation authority. This relationship was both condoned and overseen by Congress by way of federal regulation. Specifically, in 1980, Congress passed the Motor Carrier Act of 1980, 49 U.S.C. § 10101, et seq., to eliminate the barriers that states had imposed on truckers seeking to enter the motor carrier industry. Fourteen years later, in 1994, Congress passed the Federal Aviation Administration Authorization Act's ("FAAAA") preemption provision which prohibits states from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." (49 U.S.C. § 14501(c)(1).)

The Motor Carrier Act of 1980 comported with California's then independent contractor test, the "*Borello* test" which has been in place for nearly 30 years. (*Borello v. Dept. of Indust. Rel.* (1989) 48 Cal.3d. 341.) The *Borello* test outlined a slew of factors (none of which were outcome determinative) to evaluate whether an individual was in fact an independent contractor. In effect, the test did not bar the trucking industry's customary use of independent contractor owner-operators. For this reason, the Ninth Circuit Court of Appeals held that courts could apply the *Borello* test to the trucking industry without running afoul of the Motor Carrier Act of 1980 and the FAAAA's preemption provision. (*California Trucking Association v. Su*, (9th Cir. 2018) 930 F.3d 953.)

This practice was disrupted in 2018 by the California Supreme Court's decision in *Dynamex v. Super. Ct. of L.A.* (2018) 4 Cal.5th 903, which effectively replaced the *Borello* test with a far more stringent three prong

test. In order to pass, an employer must satisfy each prong to support its independent contractor classification (the "ABC" Test). This test was then codified by California when Governor Newsom signed AB5 into law on September 18, 2019. The trucking industry argued against applying the ABC Test to the trucking industry in light of the FAAAA's preemption provision.

Courts have been grappling with how to address the new law and its substantial impact on the trucking industry. The Second District Appellate Court recently weighed in holding that California's ABC test was not preempted and thus could be used to determine whether an independent contractor in the trucking was properly classified as such.

The case itself is somewhat unique drawing into question whether the ruling was a sweeping determination on this issue or specific to the particular case before it. The appellate order was an appeal from a Superior Court ruling holding that California's ABC Test was preempted by the FAAA. The Superior Court, found that "*[b]ecause Prong B of the ABC Test under both Dynamex and AB5 prohibits motor carriers from using independent contractors to provide transportation services, the ABC Test has an impermissible effect on motor carriers' "price[s], route[s], [and] service[s]" and is preempted by the FAAA*."

The Appellate Court disagreed concluding that the ABC test was not preempted because the carrier had not "demonstrated… that application of the ABC test prohibits motor carriers from using independent contractors or otherwise directly affects motor carriers' prices, routes, or services." Somewhat bewilderingly, the Appellate Court commented that motor carrier defendants "offered no evidence, and the trial court made no factual findings, concerning the impact, if any, of application of the ABC test on motor carriers' prices, routes, and services," potentially leaving open the door for future motor carriers to argue the ABC test may be preempted if they present specific facts relating to prices, routes, and services. The Appellate Court also seemed convinced that the business-to-business exemption carved out in AB5 would provide reprieve to trucking companies utilizing the owner-operator business model. Nevertheless, because the Appellate Court seemingly overturned the lower court's ruling based on a lack of factual showing, we are all left to wonder why the Court did not simply remand the case back to the trial court for an evidentiary hearing to determine the applicable facts.

In all likelihood, it is a matter of when, and not if, a court will be presented with an argument supported by facts as to how and why the ABC is preempted by the FAAAA. Unsurprisingly, at least one Defendant has already filed a request that the California Supreme Court undertake such a review in its case. To date, the California Supreme Court has not indicated whether or not it will review the Order. (*See The People of the State of California v. Cal Cartage Transportation Express, LLC et al.*)

What Now?

Trucking companies should feel empowered by the Ninth Circuit's recent ruling preempting California meal and rest break laws. Practically speaking in the context of litigation, available damages and penalties in

these types of lawsuits have been significantly limited by this recent win.

Related to the ABC test, the future remains unknown. As most employers already know, California courts routinely side with employees on employment issues. However, even though the Appellate decision reversed the lower court's ruling, the Southern District's injunction prohibiting enforcement of the ABC test in the trucking industry due to FAAAA preemption remains intact pending appeal. While we await clarification of the application of the ABC test to trucking companies, we recommend ensuring satisfaction of both the business-to-business exemption in the event that the outcome leaves trucking companies with the ABC test as well as *Borello*. This is even more important in the face of the recent ruling from the California Supreme Court holding that *Dynamex* is retroactive.

Please reach out to Partner Jamie L. Gross and Partner Lindsay David with any questions.