

California Trucking Association  
2021 Annual Membership Conference  
*Bridging the Gap*

Education Program: Legal Update  
Friday, Jan. 22, 2021

Sponsored by CTA Winner Partner - J.J. Keller

Presented by Linda Allderdice, Chris McNatt, Bob Roginson

# California's ABC Test

- AB 5
  - 2018: CA Supreme Court adopts “ABC” test
  - 2019: AB 5 codifies “ABC” test, with several modifications
    - Expressly expands application to Labor Code and Unemployment Insurance Code
    - Several “carve outs” to ABC test
- AB 2257
  - No express exemption for owner-operators or motor-carriers.
  - Elimination of “individual worker” carve out in business-to-business exemption
  - Changes especially important for “last mile” delivery services

# California's ABC Test

- Prop 22
  - Applies to “app-based delivery drivers”
  - Unintended consequences – Albertson's/Von's fires all home delivery drivers; now contracting with app-based companies for gig drivers
  - SEIU and individual drivers filed petition for writ of mandate with California Supreme Court challenging Prop 22

# California's ABC Test

- *Vazquez v. Jan-Pro Franchising International, Inc.*  
California Supreme Court (S258191, January 14, 2021)
  - *Dynamex* applied retroactively
  - Employers “clearly on notice” that law was not settled
  - ABC test was “within the scope of what employers reasonably could have foreseen.”

# FAAAA Preemption Challenges

- *California Truck Ass'n v. Becerra* (S.D. Cal.)
  - Filed in Fall 2018. Plaintiffs are the CTA and two independent owner-operators. The complaint includes detailed factual allegations.
  - The lawsuit seeks a judicial determination that Prong B of the ABC test in *Dynamex* is preempted by the Federal Aviation Administration Authorization Act (“FAAAA”) and the Dormant Commerce Clause.
  - Teamsters intervene.
  - In November, 2019, CTA amends its lawsuit to add claims challenging AB 5 and files a motion for a preliminary injunction to block the State of California from enforcing AB 5 against motor carriers.

# FAAAA Preemption Challenges, cont'd

- *California Truck Ass'n v. Becerra* (S.D. Cal.)
  - On December 31, 2019, the United States District Judge grants CTA's request for a temporary restraining order. The restraining order temporarily prohibits enforcement of AB 5.
  - On January 16, 2020, the U.S. Southern District Court grants a preliminary injunction, which blocks the State of California from enforcing AB 5 against all motor carriers.
  - State and Teamsters file appeal of preliminary injunction order.
  - On September 1, 2020, Ninth Circuit hears oral argument.
  - Decision expected early 2021.

# FAAAA Preemption Challenges

- *People v. Cal Cartage Transportation Express*, (2020) 57 Cal.App.5th 619.
  - Trial court ruled that ABC test set forth in *Dynamex* and AB 5 preempted by FAAAA. California Superior Court, Case No. BC689320
  - California Court of Appeal reversed, holding that the FAAAA does not preempt generally applicable worker classification laws.
  - Relied upon the California Supreme Court decision in *People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772.
  - In dicta, court appellate court stated that motor carriers can satisfy AB-5's business-to-business exception including, notably, the requirement that owner-operator is "providing services directly to the [motor carrier] rather than to customers of the [motor carrier]." (Lab. Code, § 2776, subd. (a)(2).)

# *City of Los Angeles v. Cal Cartage*

- Trial Court – AB5 Preempted by FAAAA
- Appellate Court – Reversed Trial Court – Asserts Pac Anchor case regarding “laws of general applicability” saves AB5 (AB2257) from FAAAA preemption and regardless B-to-B exemption allows use of independent contractors by motor carriers.
- California Supreme Court – Has been requested by defendants to review Appellate Court Decision
- Immediate Impact: No immediate impact; need to await Ninth Circuit decision on CTA v. Becerra



# FMCSA Meal & Rest Break Cases

- January 15, 2021 – Ninth Circuit Court of Appeals denies petitions to review FMCSA determination that federal law preempts California meal and rest break rules for “operators of property-carrying motor vehicles subject to the federal hours-of-service regulations.” (*International Brotherhood of Teamsters, etc. et al. v. Federal Motor Carrier Safety Administration*, Case No. 18-73488)
- Next Steps – Potential Further Review at Ninth Circuit or U.S. Supreme Court
- Immediate Impact
- Operations: Operational changes may not be warranted at this point due to possible further review.
- Litigation: Bolsters carriers’ ability to challenge meal and rest break claims in existing and new litigation.
- Impact of New Administration

# Independent Contractors – Key Takeaways

- Legal status of owner-operators remains in flux
- Likely split between California and federal courts, with California Supreme Court and perhaps United States Supreme Court needing to weigh in
- Business-to-Business Exception may provide a viable option
- Broker model?
- Stay tuned for further developments in 2021

# COVID-19 Related Leave Requirements

- California State COVID-19 Supplemental Paid Sick Leave (“C-19SPSL”), effective September 19, 2020, but expired December 31, 2020.
- The federal Coronavirus Response and Relief Supplemental Appropriations Act extended only *tax credits* for employers with fewer than 500 employees offering paid sick leave for COVID-19 related reasons. Because the federal requirement to provide supplemental paid sick leave (SPSL) was not extended, the state requirement to provide SPSL expired on December 31, 2020.
- Employees who are already out on C-19SPSL on December 31, 2020 are entitled to use the remainder of their leave.

# Employers Not Off the Hook for Payment of Paid Supplemental Sick Leave if Work Occurs in Several CA Municipalities

- City of Los Angeles Ordinance, Effective April 7, 2020
  - Up to 80 hours of C-19 SPSL
  - Part-time employees receive up to an amount equal to the number of hours worked in the four weeks between February 3, 2020 and March 4 2020 and dividing it by two
  - Ends: Two calendar weeks after Mayor of City of LA declares COVID-19 local emergency over
  - Detailed LA City Regulations Issued May 26, 2020:  
<https://wagesla.lacity.org/sites/g/files/wph471/f/COVID19-SPSL-RR-20200526.pdf>
- Need to Check Municipality Regulations where work occurs
- Still time for CA Legislature to take up state-mandated SPSL; Feb. 19, 2021 is the last day for bills to be introduced per the Legislative Calendar published by the Secretary of the Senate; relief could also be introduced as urgency legislation.

# Cal/OSHA Mandates COVID-19 Emergency Temporary Standards (ETS)

- On November 30, 2020, California approved Emergency Temporary Standards (ETS) on COVID-19 infection prevention (8 CCR section 3205, *et seq.* – COVID-19 Prevention), effective Dec. 1, 2020; set to expire 120 days unless made permanent
- Three exceptions to broad coverage of ETS:
  - Workplaces where there is only one employee who does not have contact with other people
  - Employees who are working from home (Telework)
  - Employees who are covered by the Aerosol Transmissible Diseases regulation

# Enforcement Guidance

- Cal/OSHA enforcement personnel will consider an employer's good faith efforts in working towards compliance, but some aspects, such as eliminating hazards and implementing testing requirements during an outbreak, are essential
- Monetary penalties suspended until 2.1.2021, as long as no violation of existing Injury and Illness Prevention Plan
- No restrictions on issuance of citations

# Key Requirements for Employers

- Creation of site-specific written COVID-19 Prevention Program (8 CCR s. 3205)
  - Model Program at: [www.dir.ca.gov/dosh/coronavirus/](http://www.dir.ca.gov/dosh/coronavirus/)
  - Can be integrated with existing Injury and Illness Prevention Program
- Employee and Contractor Testing, if worksite has been identified by a local health department as the location of a COVID-19 outbreak **or** when there are 3 or more COVID-19 cases in an exposed workplace within a 14-day period. (s. 3205.1)
- Specific testing, correction and reporting requirements if outbreak, 20 or more COVID-19 cases in an exposed workplace within a 30-day period (s. 3205.2); after Jan. 1, 2021, reporting to local health care authorities mandated
- Investigate and respond to a COVID-19 case in the workplace
- Employer Responsibilities to Provide Notice to Employees in Non-Outbreak and Outbreak circumstances
- DIR Resources: FAQs at <https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html>

# Contents of COVID-19 Prevention Program

- 11 Mandatory Requirements for COVID-19 Prevention Program:
  - Communicating with employees about COVID-19 prevention procedures
  - Identify and evaluate COVID-19 hazards
  - Correction of COVID-19 hazards
  - Investigate and respond to COVID-19 cases in the workplace
  - Training and Instruction
  - Physical distancing of at least six feet unless it is not possible; need to justify why not possible and what protections are in place
  - Use of face coverings
  - Implement engineering controls, administrative controls and personal protective equipment as required to reduce transmission risk
  - Reporting, recordkeeping and access to records of steps taken to implement COVID-19 prevention; Maintain records of COVID-19 cases and report serious illnesses and multiple cases to Cal/OSHA and the local health department, as required
  - Exclusion of COVID-19 cases and exposed employees from the workplace until they are no longer an infection risk
  - Return to work criteria



Thank You