Georgia Legislative Alert – Does HB 389 Threaten the Independent Contractor Model for the Transportation Industry in Georgia?

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The Supreme Court's refusal to hear the challenge to California's AB 5 could have far-reaching effects across the country. As many people know, AB 5 is a California law that codifies a stringent "ABC" test that ultimately reclassifies many independent contractors as employees. This law has far-reaching effects on many labor forces, including the transportation industry and its independent contractor model. Many states are pursuing similar laws that will have an impact upon the transportation industry and its use of independent contractors and owner operators versus company drivers.

For instance, on May 2, 2022, Governor Brian Kemp signed a bill that purports to provide more clarity to employers on how to classify employees and independent contractors when it comes to unemployment contributions. Effective July 1, 2022, Georgia law presumes that an individual who provides a service for a wage is an employee unless the company can establish that the individual is free from control or direction over the performance of those services.

Much like the ABC test set forth by AB 5 in California, HB 389, codified in O.C.G.A. § 34-8-35, provides some level of clarity to the distinction between employees and independent contractors. Unlike AB 5, however, HB 389 does not place the burden on the employer to show that an independent contractor is not an employee. Under AB 5, the burden is on the employer to demonstrate that such a person is not an employee.

That burden is not the employer's to bear in Georgia. Rather, HB 389 provides that these independent contractors "have been and will continue to be free" from control over the performance of their services as demonstrated by whether the individual:

- Is not prohibited from working for other companies or holding other employment contemporaneously;
- Is free to accept or reject work assignments without consequence;
- Is not prescribed minimum hours to work or, in the case of sales, does not have a minimum number of orders to be obtained;
- Has the discretion to set his or her own work schedule;
- Receives only minimal instructions and no direct oversight or supervision regarding the services to be performed, such as the location where the services are to be performed and any requested deadlines;
- When applicable, has no territorial or geographic restrictions; and
- Is not required to perform, behave, or act, or, alternatively, is compelled to perform, behave, or act in a manner related to the performance of services at issue.

HB 389 provides that unless an exception outlined in Georgia law applies, these factors determine whether an individual qualifies as an employee or an independent contractor. HB 389 added two exceptions to those already codified in O.C.G.A. § 34-8-35, one of which excepts rideshare networks from the definition of "employment." Companies who incorrectly classify employees as independent contractors are subject to fines.

The big question now is whether this test changes the landscape for the transportation industry in Georgia. Specifically, does HB 389 magically transform independent owner operators who lease on with a motor carrier into the employees of that motor carrier? The good news is that, on its surface, HB

389 does not change the existing Georgia law with respect to independent contractor truck drivers in Georgia. Whether it will be challenged in the courts remains to be seen.

Specifically, O.C.G.A. § 34-8-35(n)(17) remains unchanged and states that employment does not include services performed for an employer who is a common carrier of persons or property. If the services include the pickup, transportation, and delivery of property, persons, or property and persons, provided that:

- The individual is free to accept or reject assignments from the common carrier;
- Remuneration for the individual is on the basis of commissions, trips, or deliveries accomplished;
- Such individual personally provides the vehicle used in the pickup, transportation, and delivery;
- Such individual has a written contract with the common carrier;
- The written contract expressly and prominently states that the individual knows;
    - Of the responsibility to pay certain estimated taxes;
    - That the social security tax the individual must pay is higher than the social security tax the individual would pay if they were an employee; and,
    - That the work is not covered by the unemployment compensation laws of Georgia; and,
- The written contract does not prohibit the individual from the pickup, transportation, and delivery of property or persons for more than one common carrier or entity.

Perhaps the most important consideration in this statutory framework is the importance of a written contract. Gone are the days of handshake agreements between motor carriers and drivers. Gone also are the days of simple one-page contracts between carriers and the drivers who wish to maintain their independent contractor status. The contract must expressly delineate each parties' rights and responsibilities in order to keep an independent contractor from being classified as an employee.

The independent contractor model is under attack in California with AB 5. Other states like New Jersey and New York have proposed similar proposed legislation. Even with the passage of HB 389, the independent contractor trucking model in Georgia appears safe. For now.