Important Update – Supreme Court Refuses to Hear AB 5 Challenge

BY C. FREDRIC MARCINAK

Just about everyone in the trucking industry has heard of—and shuddered at—the term "AB5." AB5 is the California law, passed in 2020 that essentially ended the owner-operator/ independent contractor model for trucking in California. Rather than using the traditional test to determine whether a worker is an employee or independent contractor, AB5 provides that, to classify a worker as an independent contractor, a hirer must show the worker: (1) is free from control; (2) performs work outside the company's usual business; and (3) independently performs work of the same nature as the work for the company. Motor carriers cannot meet the second prong with respect to owner-operators because independent contractors hauling goods for motor carriers by their very nature are only performing work for the carriers' business. Thus, under AB5 drivers must now be classified as employees in California, which leads to a host of new driver entitlements: the right to unionize, workers compensation, unemployment benefits, etc. Drivers, too, often prefer independent contractor classification so they can operate as independent business people, building their own equity and business while benefiting from favorable tax treatment for self-employed persons.

Federal law appeared to provide relief. Congress provided that states cannot enforce any law that affects a motor carrier's routes, prices, or services. What could more effect a carrier's routes, prices, or services than a new law imposing significant additional costs on carriers while destroying a longstanding driver model used in the trucking industry (and recognized by federal laws such as Truth in Leasing and equipment leasing regulations)? A federal trial court in California agreed, granting the California Trucking Association's ("CTA") request to stop enforcement of the law. But the Ninth Circuit appellate court reversed, and the CTA asked the Supreme Court to hear the case. On June 30, the Supreme Court—after the Biden administration recommended it decline the case--denied that request, meaning the Ninth Circuit's decision allowing the law to be enforced stands.

There might be a glimmer of hope that CTA can make headway in further proceedings before the lower courts using some of AB5's exceptions. But the big opportunity to end AB5 for trucking has past. Not only will this hurt carriers who benefit from the efficiencies of the contractor model, but it will also hurt drivers and, ultimately, consumers as higher carrier costs are passed on to shippers and their customers.

Carriers who hire drivers in California should take note that AB5 is now being enforced. There are ways to restructure to avoid the effects of AB5. These workarounds are not always easy, but carriers should review their existing corporate and regulatory structure and contracts as a first step to either complying with AB5 or modifying their operations to fall outside its terms.