**Regulatory and Legislative Update**

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**Courts**

**Trucking wins more court victories on California’s AB 5**

The federal judge who had issued a temporary restraining order (TRO) on December 31 barring California from enforcing the controversial AB 5 law against any motor carrier operating in the state extended the prohibition on January 16 by issuing the preliminary injunction that had been requested by the California Trucking Association. In late January, the State of California and the Teamsters union separately filed appeals of the preliminary injunction to the U.S. Court of Appeals for the Ninth Circuit.

In a separate case, a Los Angeles Superior Court judge on January 8 also ruled that state regulation on carriers’ use of independent contractors was preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA), which bars states from regulating freight carriers’ prices, routes, or services. The Superior Court ruling from Judge William Highberger was the court’s final decision in a case that began before enactment of AB 5 and stemmed from the April 2018 Dynamex decision, which basically was codified into state law by AB 5.

In issuing the preliminary injunction on AB 5’s application to motor carriers, U.S. District Judge Roger Benitez said a major flaw in AB 5 is that it does not provide for any alternative to the strict ABC test for establishing an independent contractor relationship. The case law shows that "the FAAAA likely preempts 'an all or nothing' state law like AB5 that categorically prevents motor carriers from exercising their freedom to choose between using independent contractors or employees,” Benitez ruled. Judge Benitez also noted Judge Highberger’s January 8 ruling, saying that the only other court so far to rule on AB 5 as it applied to motor carriers agreed that the state law was preempted by FAAAA. He also noted that other courts considering the California ABC test under Dynamex but before AB 5 likewise concluded that FAAAA preempts the B prong of the state’s ABC test.

Judge Benitez acknowledged that FAAAA preemption is “not so broad that the sky is the limit.” For example, states can execute their police power with laws that do not significantly impact rates, routes, or services, he said. “Here, however, there is little question that the State of California has encroached on Congress’ territory by eliminating motor carriers’ choice to use independent contractor drivers, a choice at the very heart of interstate trucking. In so doing, California disregards Congress’ intent to deregulate interstate trucking, instead adopting a law that produces the patchwork of state regulations Congress sought to prevent. With AB5, California runs off the road and into the preemption ditch of the FAAAA.”

For U.S. District Judge Benitez’s order and related information, visit <https://www.caltrux.org/ab-5-faq>.

**Legislation**

**One New Jersey independent contractor bill dies; five others become law**

Legislation (S4204) similar to California’s AB 5 that had been pending in the New Jersey legislature died at the end of the legislative session, but five other bills that could make it tougher in practice to use independent contractors passed the legislature and were signed into law on January 20 by Gov. Phil Murphy. The five bills enacted are:

* **A5838** – Allows the Commissioner of Labor and Workforce Development (“commissioner”) to issue a stop-work order against any employer that the commissioner deems to be in violation of any state wage, benefit and tax law. The commissioner would have to provide at least seven days' notice, but the employer would have to appeal the notification administratively within 72 hours.
* **A5839** – Allows the commissioner to impose penalties in the case of a violation of a state wage, benefit and tax law in connection with failing to properly classify employees. Possible penalties include a "misclassification penalty" up to $250 for a first violation and up to $1,000 per misclassified employee for each subsequent violation. In addition, the employer could have to pay each misclassified worker up to 5% of the worker's gross earnings over the previous 12 months.
* **A5840** – Makes any client employer and any labor contractor providing workers to the client employer subject to joint and several liability and shared civil legal responsibility for any violations of the provisions of state employer tax laws, including provisions of those laws concerning the misclassification of workers.
* **A5843** -Requires employers to post notices regarding employee misclassification, explaining (1) the prohibition against employers misclassifying employees; (2) the standard that is applied to determine whether one is an employee or an independent contractor; (2) the benefits and protections to which an employee is entitled under state wage, benefit and tax laws; (4) the remedies under New Jersey law to which workers affected by misclassification may be entitled; and (5) how a worker or a worker’s authorized representative may contact a representative of the commissioner to provide information to, or file a complaint with, the representative regarding possible worker misclassification. Employers also are explicitly prohibited from discharging or discriminating against an employee because the employee has made an inquiry or complaint regarding possible misclassification.
* **S4228** – Authorizes the Division of Taxation within the Department of the Treasury to share with the Department of Labor and Workforce Development any information, including, but not limited to, tax information statements, reports, audit files,returns, or reports of any investigation. Having access to that type of information will make it easier for the commissioner to target employers for state law violations, including misclassification.

For more information on each bill, visit <https://www.njleg.state.nj.us>, select “2018-2019” under “LegislativeSession,” and search the bill number under “Bill Search.”

**U.S. House to consider federal ABC test in pro-unionbill**

The U.S. House of Representatives during the week of February 3 is expected to considerlegislation (H.R. 2474) to support unionization efforts. The bill includes typical pro-union measures, such as a prohibition against permanent replacements of workers who participate in strikes and a revision of the definitions of “employee” and “supervisor” to prevent employers from classifying employees as exempt.

Of particular interest to the trucking industry is a definition of an employee as opposed to an independent contractor under the National Labor Relations Act. Sec. 2(a)(2) of the bill would impose a federal ABC test with the B prong stating that a worker is to be considered an employee unless“the service is performed outside the usual course of the business of the employer.” As is the case with the California version of the ABC test, the legislation is drafted so as to require that all three prongs of the test be satisfied for a worker to be considered an independent contractor.

Given Republican control of the Senate, H.R. 2474 essentially has no chance to become law in the current Congress. For more information on the bill, visit<https://www.congress.gov/bill/116th-congress/house-bill/2474>.

**USMCA implementation bill signed into law**

President Trump on January 29 signed into law legislation (H.R. 5430, now Public Law 116-113) to implement the United States-Mexico-Canada Agreement (USMCA) as a replacement for the existing North American Free Trade Agreement (NAFTA). One section of the law deals with access of Mexican trucking companies to the U.S. market. Under the law, the U.S. International Trade Commission would investigate whether current or future grants of authority to operate cross-border trucking services cause or are threatening to cause material harm to the U.S. long-haul trucking industry. Factors to be considered include, among other things, thevolume and tonnage of merchandise transported and the employment, wages, hours or service, and working conditions in the industry.For the text of Public Law 116-113, visit <https://www.congress.gov/bill/116th-congress/house-bill/5430>. For the House Ways and Means Committee report on the bill, which provides a plain language summary, visit <https://www.congress.gov/congressional-report/116th-congress/house-report/358>.

**House bill would provide HOS relief on perishable agricultural products**

Rep. W. Gregory Steube (R-Florida) introduced legislation (H.R. 5584) that would require the Federal Motor Carrier Safety Administration (FMCSA) to exempt from certain provisions of the hours-of-service (HOS) rules drivers and carriers “transporting any agricultural, horticultural, or floricultural commodity.” The bill further defines the category as including “both fresh and processed products, as well as sod and other agricultural products sensitive to temperature and climate and at the risk of perishing in transit.” Under the bill, in those situations (1) loading and unloading of commercial motor vehicles would be excluded from on-duty time requirements; (2) the 30-minute rest break would not be mandatory; and (3) carriers and drivers would not be limited by the maximum on-duty time if they are within 150 miles of their scheduled delivery point. For more information on the bill, visit<https://www.congress.gov/bill/116th-congress/house-bill/5584>.

**Regulation and Enforcement**

**Driver training rule postponed for two years**

In a move that had been anticipated for several months, FMCSA has delayed through an interim final rule the compliance date on minimum training requirements for entry-level commercial motor vehicle (CMV) drivers for two years until February 7, 2022. The agency said the action will give it more time to complete development of theTraining Provider Registry (TPR). The TPR will allow training providers to self-certifythat they meet the training requirements. The system also will provide the electronic interface that willreceive and store entry-level driver training (ELDT) certification information fromtraining providers and transmit that information to state driver licensing agencies(SDLAs).

“Despite the agency’s best efforts, due to IT development issues largely beyond its control FMCSA cannot complete any portion of the TPR in time for the February 7, 2020, compliance date” established by the final rule, FMCSA said in a Federal Register notice. “These issues include changes inDepartment of Transportation (DOT) internal requirements for cloud-based IT systems,which added time to the development process, which in turn made it impossible forFMCSA to implement a TPR that would be able to accept training provider registrationsby February 7, 2020.” For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-01548>.

**FMCSA extendsCalifornia MRB preemption ruling to passenger carriers**

FMCSA has agreed to a request by the American Bus Association (ABA) for a determination that California’s meal and rest break rules (MRB rules) are preempted under 49 U.S.C. 31141 as applied to passenger-carrying CMV drivers subject to FMCSA’s HOS regulations. ABA had requested the determination more than a year ago, shortly after the agency had reached the same decision as it applies to motor carriers of property.

In its Federal Register notice, FMCSA said that state laws on CMV safety that are additional to, or more stringent than, federal regulations are preempted if they (1) have no safety benefit; (2) are incompatible with federal regulations; or (3) would cause an unreasonable burden on interstate commerce. FMCSA determined that California’s MRB rules:

* Are laws on CMV safety;
* Are more stringent than the agency’s HOS regulations;
* Have no safety benefits that extend beyond those already provided by the Federal Motor Carrier Safety Regulations (FMCSRs);
* Are incompatible with the federal HOS regulations, and;
* Cause an unreasonable burden on interstate commerce.

For the preemption determination, visit <https://www.federalregister.gov/d/2020-00835>.

**FMCSA seeks feedback on a new study of large truck crashes**

FMCSA is requesting comments by March 16 on how best to design and conduct a study to identify factors contributing to FMCSA reportable large truck crashes. The agency specifically seeks information on how best to balance sample representativeness, comprehensive data sources, ranges of crash types, and cost efficiency. FMCSA plans to use on-board electronic systems to obtain information aboutspeeding, lane departure, and hard braking. The agency plans to conduct a study that ranks the significance of various activities and the reductions in crash frequency and severity that would result from reducing each activity. For more information, see the Federal Register notice at <https://www.federalregister.gov/d/2020-00557>.

**Vision Systems gets exemption for cameras to replace rear-view mirrors**

FMCSA has granted Vision Systems North America a limited five-year exemption to allow motor carriers to operate CMVs with the company’s Smart-Vision high definition camera monitoring system installed as an alternative to the two rear-vision mirrors required by the FMCSRs. The agency determined that granting the exemption to allow use of the Smart-Vision system in lieu of mirrors would likely achieve a level of safety equivalent to or greater than the level of safety provided by the regulation. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-00556>.

**Firms seek exemption for mirror-replacement camera system**

FMCSA is requesting comments by March 2 on an application from Robert Bosch LLC and Mekra Lang North America LLC for an exemption to allow motor carriers to operate CMVs equipped with the company’s CV [Commercial Vehicle] Digital Mirror System installed as an alternative to the two rear-vision mirrors required by the FMCSRs.For the Federal Register notice, visit<https://www.federalregister.gov/d/2020-01763>.

**Bus operations seek exemption from CMV interchange marking rules**

FMCSA is requesting comments by February 13 on an application from commonly owned motorcoach operators Adirondack Transit Lines, Pine Hill-Kingston Bus Corp., and Passenger Bus Corp. for an exemption from the CMV marking rules under certain circumstances involving the exchange of equipment and/or drivers. The carriers said that the frequency with which they are involved in interchange arrangements with one another and with Greyhound Lines and other carriers make it difficult to comply with the placarding required under 49 CFR 390.21. Interchanges often occur on short notice and in remote locations, they said. For the Federal Register notice, visit <https://www.federalregister.gov/d/2020-00403>.

**McKee Foods seeks renewal of split sleeper berth exemption**

FMCSA is requesting comments until March 2 on an application from McKee Foods Transportation, LLC (MFT) to renew an existing exemption from the HOS regulation pertaining to the use of a sleeper berth. Under the exemption, MFT team drivers can take the equivalent of 10 consecutive hours off duty by splitting sleeper berth time into two periods totaling 10 hours, provided neither of the two periods is less than 3 hours. The current exemption expires March 27. For the Federal Register notice, visit<https://www.federalregister.gov/d/2020-01762>.

**Advocacy and Comment**

**Spotlight on the attack on the IC model and on the new large truck crash study**

We wanted to highlight two issues addressed in this month’s update:

(1) The independent contractor model under attack. The first three articles involve federal and state legislative action and a court appeal involving the future of the independent contractor or owner-operator model. The good news is the California AB5 legislation and the *Dynamex* case has been stayed. Hence enforcement of California’s ABC test and misclassification regulations will be postponed pending federal Court review of whether California’s state law violates federal preemption and adversely affects “routes, rates and services.” Unfortunately, there is a split in the circuits over this issue. Absent a Supreme Court ruling, decisions on the issue will be fact specific.

Other bad news is that even though New Jersey S4204, which is similar to California AB5, died at the end of the session, it will most likely be reintroduced and five pro-labor bills were passed which give New Jersey bureaucrats greater authority to proclaim misclassification and enforcement of draconian procedures. (See descriptions of bills above.)

The last article this month on the ABC test involves H.R. 2474, which for federal labor purposes would impose the same ABC test, the second prong of which would require employee treatment of owner-operators because “their services are not performed outside the usual course of business” of the carrier. This legislation, which has no chance of passage in a Republican-controlled Senate, is nonetheless indicative of the conundrum resulting from relying on federal preemption alone.

The industry must be careful what it asks for. Federal preemption in the hands of a different administration and a different Congress could vitiate the owner-operator model. The independent contractor model has been mischaracterized as a “sweatshop on wheels” in the press. It is seldom recognized as an entrepreneurial choice, a business-to-business partnership or as an important blue-collar entrepreneurial opportunity.

The current pro-business administration has been tepid in weighing in on the issue. Little or no attention has been paid to the extensive use of the independent contractor model in truck transportation. This case is best made by the approximately 800,000 independent businesspeople who own and operate their own vehicles and the more than 500,000 small motor carriers, many of whom rely on owner-operators and could not afford to grow if forced to finance their own equipment.

(2) The agency seeks feedback on new study of large truck crashes. As noted above, FMCSA has requested comments on a new study of large truck crashes. The Federal Register publication suggests the Agency has already decided to conduct a new large crash causation study that ranks various activities with a reduction in crash frequency and severity. The last large truck crash study was conducted approximately 15 years ago and was of no help to the agency in prioritizing carriers for safety ratings. Yet, neither the purpose of the new study nor its benefits or costs are addressed in the notice. Also unaddressed is how the study could possibly assess the assigning of safety ratings to the vast majority of carriers that have no crash history.

Before the agency continues with this unfunded mandate an advance notice of proposed rulemaking would be appropriate to first consider the plethora of rulemaking issues the agency must ultimately address.The agency’s track record with CSA/SMS methodology suggests that further development of crash data, roadside data and algorithms cannot effectively enhance the agency’s ability to audit carriers. Any further development of a big data model falls within the strictures of rulemaking and requires more than a controlled narrative and a limited notice and request for comment.