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THE STATUS OF INDEPENDENT TRUCK DRIVERS AMID THE SUPPLY CHAIN CRISIS

Joshua Becker

As the supply chain shortage continues, many truck drivers across the country find themselves disturbed with both their employers' administrative decisions in response to pressures from the federal government and their working conditions. In the 2019 case, *New Prime v. Oliveira*, the U.S. Supreme Court declined to compel arbitration of wage and hour class action lawsuits brought by an interstate trucker and independent contractor.¹ The Court unanimously ruled that the exemption language in the Federal Arbitration Act ("FAA"), which includes "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," also includes owner-operators (those who own their own trucking business).² The Court ruled that the phrase "contracts of employment" was to be interpreted as "agreement to perform," and found that independent contractors are to be covered by the FAA, similar to employees.³ As a result of this groundbreaking case, employers are not able to bind their truck driving employees or independent contractors to arbitration agreements, constituting the first opportunity for equivalent treatment among the two groups.⁴

In September 2019, California Governor Gavin Newsom signed Assembly Bill 5 ("AB5") into law. The bill establishes a three-part test to determine whether workers are employees or independent contractors.⁵ The test requires that, in order for a worker to be classified as an independent contractor, the worker must: "(A) Be free from the hiring company's control and direction in performing the work, both in fact and under contract; (B) Perform work outside the hiring firm's usual course of business and; (C) Be customarily engaged in an independent trade, occupation or business."⁶

The statute poses a problem for those in the trucking industry who seek to remain as independent contractors, and meeting the statute's (B) test is extremely difficult.⁷ One major appeal of being an independent contractor, for instance, is that independent contractors are able to choose when to work and must primarily follow the terms of their contract, which outlines where and when to deliver their cargo.⁸ The effects of AB5 concern many people because formerly recognized independent contractors will be considered employees. This means that employers will

¹ Steven P. Caplow, *New Prime v Oliveira: Statute Derails Arbitration of US Transportation Workers Claim*, 85(3) *ARB.: INT'L J. ARB., MEDIATION & DISP. MGMT.* 312, 312 (2019), <https://kluwerlawonline.com/journalarticle/Arbitration:+The+International+Journal+of+Arbitration,+Mediation+and+Dispute+Management/85.3/AMDM2019039> [<https://perma.cc/7XVP-ASG8>].

² William B. Cassidy, *US High Court Rules Against Forced Trucker Arbitration*, *JOC.COM* (Jan. 15, 2019, 3:08 PM), https://www.joc.com/regulation-policy/transportation-regulations/us-transportation-regulations/us-high-court-rules-against-forced-trucker-arbitration_20190115.html [<https://perma.cc/45ES-9SKD>].

³ Leigh Anne Schriever, *Transportation Workers Can Avoid Arbitration*, *REGUL. REV.* (Mar. 7, 2019), <https://www.theregreview.org/2019/03/07/schriever-transportation-workers-avoid-arbitration/> [<https://perma.cc/H6WV-NHWX>].

⁴ *Id.*

⁵ Dinah Wisenberg Brin, *Ruling Threatens Independent Trucker Business Model in California*, *SHRM* (June 3, 2021), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/ruling-threatens-independent-trucker-business-model-in-calif.aspx> [<https://perma.cc/KC7D-MQHT>].

⁶ *Id.*

⁷ Rebecca Lake, *California Assembly Bill 5 (AB5)*, *INVESTOPEDIA*, (Jan. 9, 2022), <https://www.investopedia.com/california-assembly-bill-5-ab5-4773201> [<https://perma.cc/S4N3-R5H6>].

⁸ *Id.*

be required to follow labor laws that relate to minimum wages, paid time off, health insurance, paid unemployment insurance, and workers' compensation benefits.⁹ Among those exempted from the statute are video photographers and editors, freelance writers, content contributors, editors, translators, fine artists, and musicians.¹⁰

In *California Trucking Association v. Bonta*, a federal appeals panel in April 2021 ruled 2-1 that California may continue to apply the test against motor carriers (employers).¹¹ This decision was given in spite of the plaintiff's argument that the Federal Aviation Administration Authorization Act of 1994 ("FAAAA")—"which pre-empts state laws related to motor carrier prices, routes or service involving transportation of property"—should bar enforcement of AB5 against carriers.¹² The U.S. District Court for the Southern District of California issued a preliminary injunction, blocking California's enforcement of AB5 against motor carriers, and held that the plaintiffs were likely correct in their argument and that the state law should be preempted by federal law.¹³ The District Court's ruling was reversed by the Ninth Circuit Court of Appeals in April 2021, but the Ninth Circuit granted a stay to the plaintiffs to keep an exemption of AB5 in place until the U.S. Supreme Court decides if it will grant certiorari.¹⁴ If the Supreme Court denies cert., AB5 will be enforced against motor carriers.¹⁵

While the supply chain heavily depends on the capabilities of the trucking industry, especially in California, many argue that enforcing AB5 will only further harm motor carriers by forcing them to provide employee benefits to those who would otherwise be considered independent contractors, driving up costs and reducing the number of employees.¹⁶ Others argue that this legislation is a necessary step in providing employee benefits and rights to independent contractors,¹⁷ simply continuing in the direction that the Court took in *New Prime v. Oliveira*. However, one may pose the question as the following: Why should the FAA preempt state law in regard to precluding arbitration, but the FAAAA should not preempt state law in regard to motor carrier prices, routes, or service?

⁹ *Id.*

¹⁰ *Id.*

¹¹ Wisenberg Brin, *supra* note 5.

¹² *Id.*

¹³ *Id.*

¹⁴ Matt Cole, *California Trucking Association's AB 5 Lawsuit Still Pending with Supreme Court*, CCJ (Oct. 8, 2021), <https://www.ccjdigital.com/regulations/article/15279478/truckings-ab-5-independent-contractor-suit-still-pending> [<https://perma.cc/BQ8B-VGJH>].

¹⁵ Mark Webb, *Keep on Trucking*, WORKERS' COMP EXEC. (Nov. 3, 2021), <https://www.wcexec.com/article/keep-on-trucking/> [<https://perma.cc/96UW-8YN7>].

¹⁶ Sage Datko, *How Does AB5 Affect Truck Drivers?*, TOP CLASS ACTIONS (June 24, 2021), <https://topclassactions.com/lawsuit-settlements/employment-labor/how-does-ab5-affect-truck-drivers/> [<https://perma.cc/VBA8-4N5W>]; *see also* Luke Kibby, *The Saga of California's AB5 Independent Contractor Law For The Trucking Industry*, COMPLIANCE NAVIGATION SPECIALISTS (May 11, 2021), <https://www.cnsprotects.com/news/the-saga-of-californias-ab5-independent-contractor-law-for-the-trucking-industry/> [<https://perma.cc/LX4J-9VYF>].

¹⁷ Datko, *supra* note 16.