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"The Legal Environment for California Trucking"

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California has become a Nanny State…

- Labor laws were intended to provide safe work environments and predictable compensation for workers. Independent contractors were exempt from such laws.
- In recent years, California has apparently decided that all workers must be employees and is trying to eliminate independent contractor small businesses.
- By expanding the scope and content of labor laws it seeks to destroy small businesses that work for larger businesses.
- By adding private enforcement and authorizing attorney fees to plaintiff lawyers it vastly expands the risks that motor carriers using owner-operators face and the number of antagonists we face.

California has become a Nanny State…

- Contracts are no longer a safe way to establish relationships as California courts often ignore contracts as unconscionable (a public policy, not legal basis for upending contracts).
- California courts are not reluctant to overturn Interstate Lease Agreements (49 CFR 376.12) with little regard for the bilateral consent that they represent.
- California is dramatically expanding "joint employer" liability in logistics making the BCO jointly liable with its facility operator for labor law violations (Labor Code 2810.3).
- In LC 588.1 California ignores corporate or LLC status and makes owners, directors, officers and other “responsible parties” PERSONALLY LIABLE for corporate labor code violations. Thanks to this law, plaintiffs no longer have the burden of factually “piercing the corporate veil” to make owners and officers personally liable.

California Legislative Scene…

- Progressive Democrats control all Legislation:
  - 2/3 of all legislators follow progressive (nanny state) views. This results in an anti-business, anti-employer bias.
  - In 2017, organized labor contributed $21,000,000 to Democratic legislators and only $1,000,000 to Republicans.
  - These contributions equaled 20% of all legislator contributions.
- Unions abhor contractors because they can't organize them (anti-trust issues). Plaintiff lawyers support misclassification and more private action labor laws because there is greater opportunity to sue "deep pocket" companies and our labor laws make defense very difficult and the process very expensive. Class action rules make the suits far more complex, expensive and unreasonable prompting settlements to reduce defense costs rather than standing on principle.
- Legislators and unions support expansion of Private Right of Action to put more pressure on trucking businesses to convert from contractors to employees (organizable) by encouraging plaintiff attorneys to commence Class action misclassification suits.

Federal Protections…

- As a general rule, federal Constitutional and statutory law trumps state law with respect to interstate commerce. In 1994, Congress deregulated freight transportation and abolished state regulation except for safety and traffic regulation.

- The Federal Aviation Administration Authorization Act of 1994, 49 U.S.C.S. § 14501 (FAAAA) preempts state laws that relate to prices routes and services provided by motor carriers.

- The 2010, litigation brought by American Trucking Associations against the Los Angeles port concession requirement of "employee only" port truck drivers was found to be preempted by FAAAA.

Federal Protections…

- FMCSA Hours of Service: On December 20, 2018, the FMSCA ruled that federal HOS regulations preempted California's labor code meal and rest break provisions. That decision is now on appeal in the Ninth Circuit by the California Labor Commissioner and the Teamsters.

- Following its initial ruling the FMCSA determined that its preemption order was retroactive thus giving full effect to cases decided prior to the order as well as cases still in litigation.

- FMCSA Leasing Regulations: These regulations (49 CFR 376.12) require motor carriers and contractors to enter into contracts defining their relationship with particularity. Some courts have found that some provisions of these regulations preempt state labor law regulation.

- In at least one district court case (Miller v. CH Robinson Worldwide (Case No. 3:17-cv-00408-MMD-WGC.) the FAAAA was found to apply to freight brokers as well.

Teamster Activity…

- Significant steps taken by organized labor since 2011 to force contractors to become organizable employees include:

  I. Convincing their legislators to enact misclassification statutes making employers liable for civil penalties where workers are determined to be misclassified as contractors and opening judicial enforcement to private attorneys.

  II. At labor's request, legislators have also expanded the statutory powers of the Labor Commissioner to make misclassification decisions and to increase the level and number of employer penalties.

  III. They convinced the Ports of Long Beach and Los Angeles to ban the use of contractor drivers accessing port terminals. That was defeated in ATA v. City of Los Angeles in 2010.

  IV. They convinced the Labor Commissioner to exercise the expanded powers and greater penalties she gained in the new legislation to undertake Berman hearings focused on port motor carriers using contractors.

- She did in a BIG way.

The Berman Hearings…

- Berman hearings were initially intended to resolve minor unpaid wage claims in an informal process and to give the worker quick relief through a court enforceable judgment.
- Up until 2013, there were occasional misclassification claims against truckers but very few. Of those a very small number were found to have misclassified drivers.
- Then came the effect of the new legislation vesting greater powers in the Labor Commissioner.

I. Between 2013 and 2017 the Labor Commissioner issued 244 decisions in port carrier cases. In EACH CASE the drivers were found to have been misclassified and penalties and other compensation in six figure levels were consistently awarded against motor carriers.

The Berman Hearings…

- This abrupt 100% change in findings was not based on a change in the factor analysis that had been the legal standard in California since 1989. Borello & Sons v. Dept. of Industrial Relations 48 Cal. 3d 342.

- Rather, it demonstrates the change in public policy at the legislative level masquerading as new and expanded Labor laws at the behest of organized labor.

CTA v. Su (Berman) State Court…

- Julie Su was Labor Commissioner during the Brown administration. She has been promoted by now Governor Newsom to cabinet level as the Secretary of the Labor and Workforce Development Agency.

- In response to the dramatic change in Labor Commissioner policy on Berman hearings and the seeming "rigged" decision making process, the California Trucking Association, on behalf of its members, sued to force changes in the Berman hearing processes to guarantee that due process of law was followed.

- That suit (filed in 2016) is currently pending in Orange County Superior Court. Much has been done and there is more to do to get justice.

- CTA is also seeking, under the public records act, to obtain copies of communications that will demonstrate that the Labor Commissioner was "putting her thumb on the scale" at the request of organized labor and that the decision in each case was determined prior to the hearings.

California Supreme Court (Dynamex)…

- In Dynamex Operations West v. Superior Court of Los Angeles County, (April 2018) the California Supreme Court created a new test for independent contractor status that is modeled after the so-called “ABC” test used in Massachusetts, which was, prior to preemption under FAAAA, widely viewed as the toughest test in the country for establishing independent contractor status.

- A finer example of courts making public policy can't be found. Legislatures make public policy. Courts interpret legislation and apply them to facts.

California Supreme Court (Dynamex)…

- In Dynamex, that process was ignored and seven appointed justices decided public policy and created a radical departure from established California law for no better reason then they apparently believed it to be better social policy. No public debate, no planning, no evaluation of the effects on commerce!
- This one case has thrown the entire business community into chaos. Now, if you perform the same services that your employer does, whether you like it or not, you are automatically an employee not a business person of your own. This applies at present to nearly all contractors in all industries including physicians, insurance and real estate professionals, contractors, and virtually all Gig economy entities (UBER, Lyft, Instacart, and the like).

California Supreme Court (Dynamex)…

This newly adopted ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors *only if the hiring business demonstrates* that the worker in question *satisfies EACH of three conditions*:

- (A) that the worker is free from its control and direction in performing the service, both under a contract and in fact;
- (B) that the service provided by the worker is outside the employer's usual course of business; and
- (C) that the worker is customarily engaged in an independent trade, occupation, profession or business of the same type.

- The failure to meet any ONE on these "prongs" means the worker is an employee entitled to California's labor law benefits.

- A motor carrier and an owner-operator are in the SAME business. Hence, defeating Prong B is mandatory to preserving our business model and the livelihood of thousands of owner-operator small businesses.

CTA V. Su Federal Court…

- FAAAA Facial Challenge (Borello): Essentially this case argued that allowing California laws and regulations to reclassify relationships established under the Leasing Regulations (49 CFR 376.12) violated the intent of Congress that the marketplace, rather than regulation, should govern how the business should operate. Lost in District Court. Lost in Ninth Circuit. SCOTUS denied certiorari.

- However, this case attacked Borello not Dynamex. Even though it was a loss, the Ninth Circuit opined that while Dynamex was not before it in this case, Prong B would likely be found to be preempted under the holding in ATA v. City of Los Angeles.

- The judge who wrote this opinion - Wallace Tashima – is widely respected by fellow judges and his *dicta* has been noticed and applied by district judges in currently pending cases (B&O Logistics; Alvarez v. XPO).

- The industry should be appreciative that the Scopelitis law firm handled this case *pro bono* as a service to the industry.

CTA v. Becerra…

- CTA in its 2018 lawsuit seeks to invalidate Prong B of Dynamex as preempted by FAAAA. It also seeks injunctions against attempted state enforcement of its meal and rest break laws based on The 2018 FMCSA preemption decision.
- In addition to the CTA two Owner-Operators are included as plaintiffs.
- CTA sued California's Attorney General and the Teamsters intervened. Both Becerra and the teamsters filed Motions to Dismiss which are fully briefed and pending a decision by District Judge Roger Benitez in the Southern District of California.
- CTA is quite hopeful that the motions will be denied and that our trial court will apply Judge Tashima's *dicta* in CTA v. Su finding that FAAAA preempts the application of Prong B.
- Judging by the recent opinion in Alaya v. US Xpress by District Judge George Wu that district courts MUST follow the FMCSA opinion we are likewise hopeful that our trial judge will follow suit.

Conclusion…

- California labor laws are exceedingly anti-business which is a crazy situation for the world's fifth largest economy.
- Interstate commerce must be free from the diverse effects of public policy among the states. Only the federal government can guarantee that.
- Courts must interpret laws and apply them to the facts not make public policy as was done in Dynamex.
- If we care about doing business, we must elect California legislators who will not be swayed by organized labor to balance out those who are.
- Please consider donating to the efforts of the California Trucking Association and help fund our efforts to defeat the destruction of owner-operator truckers.
- Email to Shawn Yadon (syadon@caltrux.org) your willingness to participate.

Conclusion…

- Trucking has been fighting classification battles with various California administrative agencies for decades. Even if we are successful in preempting Prong B of Dynamex and preempting meal & rest breaks required by California, we will fall back to Borello as the test of employee status.
- While a better standard, since it is still subjective, it permits agencies the discretion to make decisions favoring their interests. Thus, the DLSE, EDD and WCAB will still lean heavily toward employee status in making administrative decisions. That will compel truckers to seek trial court review in order to get an unbiased trier of fact. Unfair, costly, frustrating but a fact of life.
- These battles are far from over. Truckers must continually adapt by modifying their contractor relationships to adjust to the ever changing business and legal environment. Those expenses need to be a new budget line for all of us.
- Due to the BCO exposure to legal liability under the new "joint employer" and related laws, truckers will be judged by their BCO customers by how well they alter their practices to reduce risk. Thus, how well we adapt to these challenges will become a competitive advantage.
- It is certainly the time to be proactive! THANK YOU.