AB5: A New Standard for Worker Classification

Practices

Trucking and Transportation Law

Workers' Compensation

Related Attorneys

Joseph D. Delfino

By Joseph D. Delfino on October 15, 2020

One issue that has come up numerous times in the setting of the trucking and transportation industries is the classification of workers as either employees or independent contractors. Concerned with workers who were being misclassified as independent contractors and who were not getting the benefits afforded to employees, the State of California passed a law, which went into effect on January 1, 2020, addressing the classification of workers. The law, commonly referred to as AB5, dramatically changed the rules employers must use to determine whether workers are employees or independent contractors. Of note, the law applies to all workers in California no matter where the employer is based.

Prior to AB5 being passed, the decision on whether a worker should be classified as an employee or an independent contractor in California was determined by a standard set forth in S.G. Borello & Sons vs. Department of Industrial Relations. Similar to the common law independent contractor standard, the Borello test has 11 factors, primarily focusing on whether a company has control over the means and manner of performing contracted work, and additional secondary factors, such as who provides work tools and the individual's opportunity for profit or loss, to determine contractor status.

Under the new AB5 law, all workers are presumed to be employees. However, a worker can still be classified as an independent contractor if they can satisfy the "ABC Test." Under this test, a worker is an independent contractor only if he or she:

- (A) is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact, and
- (B) performs work that is outside the usual course of the hiring entity's business, and
- (C) is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

All three prongs of the "ABC Test" must be satisfied for workers to be independent contractors.

Recently, the new AB5 law was applied to Uber and Lyft drivers, who were previously classified as independent contractors. Judge Ethan Schulman concluded that Uber and Lyft had failed to comply with the provisions of AB5 and ordered the companies to stop referring to drivers as independent contractors and comply with unemployment and wage floor provisions for the workers.

However, attempts to apply AB5 to the Trucking Industry have been stalled. In response to the passing of AB5, the California Trucking Association filed a lawsuit contending that AB5 was preempted by the supremacy and commerce clauses of the U.S. Constitution and is in direct conflict with the Federal Motor Carrier Safety Act and the Federal Aviation Administration Authorization Act of 1994.

©2026 Hedrick Gardner. All Rights Reserved

The California Truck Association was most concerned with prong "B" of the ABC Test, which states that for a worker to be an independent contractor, the worker must perform work that is outside the usual course of the hiring entity's business.

On January 16, 2020, Judge Roger Benitez of the US District Court issued a preliminary injunction prohibiting California from applying AB5 to motor carriers. Judge Benitez commented,

> "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 AB-5, California runs off the road and into the preemption ditch of the FAAAA."

With the injunction issued, the standard for determining whether drivers are employees or independent contractors reverts to the longstanding Borello test. In early September, 2020, the issue of whether the preliminary injection issued by Judge Benitez was appropriate was heard by a panel of the ninth Circuit Court of Appeals. Based on people who observed the hearing, the panel of Judges appeared split on the issue. A ruling from the Ninth Circuit Panel on the preliminary injection is expected in the near future.

If AB5 is eventually applied to the trucking industry, it would make it very difficult for motor carriers to classify any of its drivers who work in California as independent contractors. I also assume that if the Court concludes that AB5 is not preempted by Federal Law, other States will follow California's lead and adapt a test similar to the ABC Test. This would obviously have far reaching and significant effects on the trucking industry.

We will continue to monitor this pending litigation and provide updates as needed.

This publication is not intended to be all-encompassing and does not cover all situations and exceptions to general rules. To discuss the applicability or interpretation of any provision of the law to a specific situation, please contact an attorney at Hedrick Gardner Kincheloe & Garofalo, LLP.

©2026 Hedrick Gardner. All Rights Reserved