



Smith



Walsh

DOT/FMCSA Noteworthy Updates

Allen C. Smith, acsmith@hedrickgardner.com;

Austin R. Walsh, awalsh@hedrickgardner.com

On 11/12/21, the U.S. Court of Appeals for the D.C. Circuit threw out portions of the 2016 Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles – Phase 2 (“Phase 2”) as it relates to trailers, tanks, car carriers, logging trailers, and platforms. The Rule, which was set to take effect 1/1/21, but was stayed pending the outcome of litigation, would have required trailer manufacturers to adopt fuel-saving technology such as side-skirts and tire-pressure warning systems. The Court held that the trailers are not engines, do not utilize fuel and, therefore, are not motor vehicles and are not governed by rules of fuel economy.

On 11/4/21, U.S. Labor Secretary Marty Walsh told Philadelphia television station WPVI that truck drivers driving alone in their cabs are exempt from the Biden Administration’s COVID-19 vaccine mandate. On 11/12/21, the Owner-Operator Independent Drivers Association (OOIDA) petitioned OSHA to extend the exemption to team drivers, who would otherwise be subject to weekly testing at the drivers’ expense. The Occupational Safety and Health Administration (OSHA) estimates that the mandate would impact over 700,000 transportation employees. The mandate is currently stayed by the 5th U.S. Circuit Court of Appeals.

On 10/7/21, the Federal Motor Carrier Safety Administration (FMCSA) published a final rule requiring state driver’s license agencies to access and use the Drug and Alcohol Clearinghouse and initiate proceedings to downgrade a driver’s commercial license privileges within 60 days after notification of a drug or alcohol test failure. The FMCSA clarified that state agencies have until 11/18/2024 to comply with the rule, which provides time for agencies to ensure processes are in place to notify drivers of the licensure downgrade and provide sufficient periods for due process under state law.

On 11/3/21, the FMCSA published a bulletin warning drivers that with carriers upgrading to 5G networks, older 3G cellular network gaps may result in faulty hours of service (HOS) logs. The FMCSA encouraged drivers and carriers to investigate their electronic logging device (ELD) to ensure that it will continue to operate once the aging 3G infrastructure sunsets.

On 4/30/21, the Texas House of Representatives passed HB19 that, among other things, allows authentication of motor carrier dash camera footage of an accident and bifurcation of trial to only allow a carrier’s unsafe safety practices during the second phase of the trial, after a jury determined who was at fault for the accident. The Texas Senate passed the bill on 5/19/21 with an amendment that would extend the time for carriers to keep records of driver employment, drug and alcohol testing, and the employer’s duty to investigate an employment application. The amended bill was passed on 5/28/21, signed by Governor Abbott on 6/16/21 and took effect 9/1/21.

On 4/28/21, a three-judge panel of the 9th U.S. Circuit Court of Appeals lifted the stay of California Assembly Bill 5, holding that the California law was not preempted by federal regulations. The controversial provision codifies a three-pronged “ABC test” that requires carriers to classify workers as employees unless the employer shows that the workers are (1) free from the control of the hiring entity; (2) the worker performs work outside the usual course of the hiring entity’s business; and (3) the workers are customarily engaged in an independent trade or occupation.

On 3/26/2021, H.R. 2187, the Truck Parking Safety Improvement Act, was introduced by Representatives Mike Bost (R – Ill.) and Angie Craig (D – Minn.) in the House of Representatives. The bill dedicates federal funding to state facilities that provide parking to commercial motor vehicles. Beginning in 2022, the bill authorizes \$125 million, which is increased annually through 2026. The bill was referred to the Subcommittee on Highways and Transit with no further action taken during the 117th Congress.



AB5: A New Standard for Worker Classification - Part 3

Joe D. Delfino, jdelfino@hedrickgardner.com

In several recent articles, we discussed the potential impact of AB5 (now referred to as California Labor Code § 2775). The law went into effect on January 1, 2020, addressing the classification of workers as employees or independent contractors.

Several lawsuits were filed challenging AB5. In one the California Trucking Association filed a lawsuit contending that AB5 was preempted by the supremacy and commerce clauses of the U.S. Constitution and was in direct conflict with the Federal Motor Carrier Safety Act and the Federal Aviation Administration Authorization Act of 1994.

On January 16, 2020, Judge Roger Benitez of the US District Court issued a preliminary injunction prohibiting California from applying AB5 to motor carriers. On September 1, 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.

Most recently, the Ninth Circuit Court of Appeals, in a 2-1 panel ruling, overturned the District Court's preliminary injunction against AB5. In reversing the preliminary injection staying enforcement of AB5, the Court found that the California Trucking Association was unlikely to succeed on the merits of its claim in District Court.

The Ninth Circuit Court of Appeals held that AB5 was applicable to motor carriers. By way of review, pursuant to AB5, 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. The California Trucking Association was most concerned with prong "B" of the ABC Test.

Following the decision from the 3-Judge Panel, the Ninth Circuit denied a petition for an appeal of the decision to an en banc sitting of the Court.

On June 23, 2021, the Ninth Circuit granted the California Trucking Association's request to keep the preliminary injection in effect while the Association petitioned the United States Supreme Court for review of the issue. The California Trucking Association has now sought review by the U.S. Supreme Court and we await a decision from the Court on whether they will hear the case.

We will provide an update when a decision is reached by the US Supreme Court. Currently, AB5 is not applicable to motor carriers in California due to the continued preliminary injection. However, if the U.S. Supreme Court refuses to hear the case, it is anticipated that AB5 will immediately apply to motor carriers in California.

Current and prior issues of this newsletter can be found at:

www.hedrickgardner.com/practices/trucking-and-transportation-law



What are the Potential Legal Implications of Fully Autonomous Vehicles?

Williams B. Britt wbritt@hedrickgardner.com

Autonomous vehicles are the future as evidenced by a September software release that allows every new Tesla to become a fully self-driving vehicle.

How will motor vehicle laws adapt to the rise in this technology? In North Carolina, “the operator of a fully autonomous vehicle with automated driving system engaged is not required to be licensed to operate a motor vehicle.” N.C. Gen. Stat. § 20-401(a). Additionally, “The person in whose name the fully autonomous vehicle is registered is responsible for a violation of this Chapter that is considered a moving violation, if the violation involves a fully autonomous vehicle.” N.C. Gen. Stat. § 20-401(e).

The current law for autonomous vehicles places more responsibility on the owner of the vehicle and less on the “operator” (individual occupying the “driver’s seat”). Based on the current laws, North Carolina is silent regarding whether the “operator” is liable if the autonomous vehicle is involved in an accident while operating autonomously. Because the owner is responsible for moving violations, it is reasonable to believe the registered owner would be responsible for an accident while the vehicle operates autonomously.

This is similar to current laws for traditional motor vehicles where the vehicle owner, even if not involved in an accident, can be liable for damages caused by his/her vehicle. See N.C. Gen. Stat. § 20-71.1(a). The difference with autonomous vehicles is whether the “operator” can be liable when the vehicle is operating autonomously and the “operator” is not controlling the vehicle.

Another potential issue is what duties will be placed on the owner and/or “operator” of the vehicle when it operates autonomously. Currently, the “operator” does not even need to have a driver’s license if the vehicle is operating autonomously. However, what if the “operator” had the time and ability to turn off the autonomous feature to avoid a potential collision? Alternatively, is the “operator” allowed to assume that the autonomous software will function correctly?

Even though autonomous software is more prevalent in non-commercial motor vehicles, it is also implemented in commercial motor vehicles. The potential for the software in commercial vehicles is ultimately for the vehicle to be driverless. However, in the interim, it is unknown how autonomous software will change the requirements for commercial vehicle operators. If the commercial vehicle engages its autonomous software, will the “operator” need a valid commercial driver’s license? Will the operator even need a driver’s license? Considering that North Carolina does not currently require an “operator” to have a driver’s license for an autonomous vehicle, it is not out of the question that a CDL may no longer be required. Will the FMCSA guidelines and requirements change for autonomous commercial motor vehicles? At first glance, it appears that they will, but how drastically? The potential impact on commercial drivers and carriers will be addressed in future articles.