

# Independent Contractor Drivers in California: Five Questions Answered On Assembly Bill 5

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Debate and litigation over the applicability and scope of the *Dynamex* ABC Test and recently enacted Assembly Bill 5 (“AB 5”) continue to provide the California transportation industry with partial but potentially valuable clues to avoid class action liability under wage and hour and other state labor laws. While these recent decisions do not provide an easy roadmap, they do offer some guidance to employer’s questions about the use of independent contractor drivers in the state.

To provide context for these decisions, it should be noted that the California Supreme Court drastically changed the standard for determining whether a given worker was an employee or an independent contractor under California State Wage Orders with its 2018 *Dynamex* decision. Under the *Dynamex* ABC Test, a driver or worker was considered to be an employee unless the alleged employer could prove: (a) the worker was not under its direction and control and performance of the work in question; (b) the worker’s business was not in the hiring company’s usual course of business; and (c) the worker was customarily engaged in an independent trade or business. The ABC Test was a grave concern to the transportation industry as Prong B arguably made it impossible for the owner-operator business model to exist in California. The situation became more complicated when Assembly Bill 5 became law on January 1, 2020 and implemented the ABC Test across a broader range of law by imposing the new standard on California Wage Orders and the State’s Labor and Unemployment Insurance Codes.<sup>1</sup>

## 1. Does The *Dynamex* ABC Test And AB 5 Apply To California Trucking Companies?

Recent court decisions cast serious doubt about whether AB 5 will apply to the trucking industry. Although AB 5 is now the law of the land in California, the recent rulings demonstrate reluctance of the Courts to apply the *Dynamex* ABC Test to motor carriers. In *CTA v. Beccerra*, the US District Court for the Southern District of California granted a preliminary injunction in January of 2020 enjoining the State from enforcing AB 5 against motor carriers. The Court made reference to the intent of the U.S. Congress to allow for owner-operator/independent contractors to exist in the trucking industry. It is now up to the Ninth Circuit Court of Appeals to affirm the Order, reverse it or remand for further findings. And the issue may eventually be considered by the United States Supreme

Court as the State of California and the Teamsters have filed notices of interlocutory appeal to the Ninth Circuit.

In addition, a California Superior Court held that Prong B of the ABC Test was preempted by the Federal Aviation Administration Authorization Act (“FAAAA”) in *California v. Cal Cartage Transportation Express, LLC*. Judge Highberger wrote that owner-operator truck drivers should not be reclassified as employees under AB 5 and *Dynamex*. The Court reasoned that FAAAA had been adopted to limit state rules that act to restrict owner-operator entry into the industry. Interestingly, the Order in the *Beccerra* action references Judge Highberger’s analysis in the *Cal Cartage* case.

## 2. If AB 5/*Dynamex* Is Eventually Found To Be Applicable To Motor Carriers, Will It Be Applied Retroactively?

In May of 2019, the Ninth Circuit Court of Appeals ruled that *Dynamex* was retroactive which potentially exposed employers to years of wage and hour liability. The Ninth Circuit has since withdrawn that Order and will ask the California Supreme Court to decide the question of *Dynamex*’s retroactivity in *Vazquez v. Jan-Pro Franchise International, Inc.* While the Supreme Court has granted review as to the question of retroactivity, the plaintiff’s initial briefing in *Vazquez* have requested the Court to go beyond the scope of retroactivity and rule more expansively on the applicability of the ABC Test.

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<sup>1</sup> If California’s higher courts conclusively rule that AB 5/*Dynamex* does not apply to federally regulated motor carriers, the less stringent *Borello* test for independent contractor misclassification will apply. Under the *Borello* standard, the hiring entity need only to show that it does not exert control over the worker and the manner in which the work is performed.

### 3. Does California Law Like AB 5 Apply To Transportation Companies Outside The State?

An additional hurdle for those attempting to enforce the *Dynamex* ABC Test and AB 5 is the difficult analysis as to whether California law applies to the in state operations of companies based outside of California. The Ninth Circuit recently held that California minimum wage and overtime laws apply to non-California resident baseball players employed by non-California teams. In *Senne v. Kansas City Royals Baseball Corp.*, the Court applied California law because players worked entire days or weeks in California and California's choice of law rules favored application of California law. It is currently uncertain as to whether California courts will apply the *Senne* decision to interstate drivers who infrequently deliver loads to and from California.

Prior Court decisions involving airline employees led to speculation that AB 5 would only apply to California resident drivers who principally drive in the State. The *Senne* decision seems inconsistent with that belief and suggests that even non-resident drivers could be subjected to California wage laws beyond independent contractor misclassification such as expense reimbursement and wage statements.

### 4. Are Rideshare and Delivery Service Companies Impacted By AB 5?

Uber and Postmates recently moved for a preliminary injunction against the application of AB 5 arguing in part that it denied gig economy workers their rights to pursue their chosen occupation. US District Court Judge Dolly Gee ruled that AB 5 does not target gig drivers in a way that violates Equal Protection, does not prevent the drivers from pursuing their profession and does not impact the company's contracts with workers. The Court distinguished the gig workers from truck drivers noting that (unlike federally regulated motor carriers) there is no federal statutory scheme that prevents California from regulating gig drivers.

### 5. How Do These California Rulings Impact The Future Of Transportation Companies Doing Business In California?

These recent rulings provide optimism that at least federally regulated motor carriers may be able to avoid the rigid AB 5/ *Dynamex* standards for drivers in California. With the less stringent *Borello* standard seeming more likely to be applied, motor carriers can feel more comfortable about continuing independent contractor operations in the State. That said, the Plaintiff bar will continue to press is the Courts and legislature for broad application of the ABC Test including franchisor and joint-employment liability.

How California's Courts answer additional questions about expanding the reach of AB 5 is an open question. That said, the consistent efforts by the Plaintiff bar to increase employer liability bears monitoring by all transportation employers. And due to the very fluid and impactful nature of the debate and litigation surrounding the independent contractor misclassification battle, we will continue to monitor the decisions and advise as to their impact on California operations.

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