

Employee-Driver Mandates

ISSUE TYPE	Regulatory (Federal/State); Legislative (Federal/State)
AGENCY	DOL/Congress/NLRB
STATUS	Active/Tracking
DIVISION IMPACT	MC, Marine, 3PL
INTERESTED PARTIES	ATA, CTA, OOIDA
KEY DATES	<p>Apr. 30, 2018 – California Supreme Court issues ruling in <i>Dynamex Operations West, Inc. v. Superior Court of Los Angeles</i> case establishing the ABC classification test in California</p> <p>Oct. 25, 2018 – CTA files suit challenging Dynamex decision and ABC test</p> <p>Sep. 18, 2019 – AB 5 codifying Dynamex decision into California law signed by Governor</p> <p>Jan. 16, 2020 – Preliminary injunction granted on enforcement of AB 5 in California</p> <p>Jan. 7, 2021 – DOL issues final rule revising FLSA interpretation of independent contractors</p> <p>June 30, 2022 – U.S. Supreme Court denies CTA petition for review; AB 5 now enforced</p> <p>Oct. 11, 2022 – DOL issues NPRM to rescind and replace 2021 independent contractor rule</p> <p>Jan. 11, 2023 – CTA files motion for new preliminary injunction on AB 5 enforcement</p> <p>Feb. 2, 2023 – GIG Act introduced in Congress to codify 2021 DOL final rule</p> <p>Feb. 28, 2023 – PRO Act reintroduced in Congress to establish ABC test in federal law</p>
MOST RECENT ACTION	June 13, 2023 – NLRB modifies IC standard

Statement of the Issue

Over 80 percent of truck drivers serving the intermodal industry are classified as independent contractors (ICs) and not as employees of a trucking company. However, there have been attempts to mandate that motor carriers use employee-drivers instead. In recent years, several high-profile court cases as well as legislative and regulatory proposals at both the state and federal level have sought to address worker classification.

Policy Position – Adopted by the Board (11/14/10)

IANA should oppose attempts at the local, State or Federal level, to instill employee-driver mandates on the intermodal drayage industry. In addition, IANA should continue to monitor and support the efforts of the California Trucking Association and the American Trucking Associations in its attempts to defeat the employee-driver requirement. This support should take the form of advocacy activities and, if appropriate, financial contributions to a fund specifically designated for this purpose.

Summary

Litigation

Several lawsuits have challenged worker classification tests established by states, which the plaintiffs argue should be preempted by federal laws such as the Federal Aviation Administration Authorization Act (FAAAA). The FAAAA prohibits states from imposing laws that impact motor carrier prices, routes, and services. In 2018, the

California Supreme Court ruling in *Dynamex Operations West v. Superior Court of Los Angeles* established new worker classification criteria, making it more difficult for carriers to classify their drivers as ICs in the state. Assembly Bill 5 (AB 5), which codified the Dynamex ruling into California state law, took effect in 2020.

Following the Dynamex decision, the California Trucking Association (CTA) initiated a lawsuit seeking to overturn the stringent new classification criteria known as the ABC test. In Jan. 2020, the U.S. Southern District Court of California issued a preliminary injunction temporarily blocking AB 5 enforcement for motor carriers in California.

After an appeals court ruled that AB 5 is not preempted by the FAAAA and reversed the lower courts preliminary injunction, CTA petitioned the U.S. Supreme Court for review. The petition was denied on June 30, 2022. Consequently, the injunction on AB 5 enforcement for motor carriers was lifted and the law retroactively took effect as of January 2020. However, the scope of this decision was limited to the injunction – CTA's underlying legal challenge against AB 5 remains ongoing.

In January 2023, CTA and the Owner-Operator Independent Drivers Association, an intervenor in the case, filed separate motions for a new preliminary injunction.

Regulation

In Jan. 2021, under the Trump Administration, the U.S. Department of Labor (DOL) issued a final rule on the

interpretation of independent contractors under the Fair Labor Standards Act (FLSA). The rule revised the “economic reality” test used to determine whether a worker is economically dependent on the potential employer by examining two core factors: (1) the nature and degree of the worker’s control over the work; and (2) the worker’s opportunity for profit or loss based on initiative and/or investment. Due to the primary factors considered under the test, the final rule provided more flexibility for IC classification.

The Biden Administration’s DOL, in October 2022, issued a notice of proposed rulemaking to rescind and replace the 2021 rule. The proposal would eliminate the use of core factors and, instead, consider the totality of six factors in the economic reality test without predetermining the weight of each consideration. Moreover, while the 2021 rule determined that the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible, the new proposal would also consider these theoretical aspects in its assessment.

Marking another reversal of Trump Administration policy and further limiting IC operations, the National Labor Relations Board issued a ruling in June 2023 modifying its standard for determining whether workers are employees or ICs under the National Labor Relations Act. The decision overruled the standard established in 2019, which elevated consideration of a worker’s “entrepreneurial opportunity” as a principle through which to evaluate all other factors. Instead, NLRB reinstated a more comprehensive Obama-era test adopted in 2014. Notably, the 2014 ruling was rejected by the US Court of Appeals for the District of Columbia. This standard uses a non-exhaustive list of factors that are each afforded equal weight in determining a worker’s status, which is expected to expand the definition of an employee under the NLRA, further threatening the IC business model.

Legislation

Legislation has also been introduced in Congress to codify the restrictive ABC test within federal law. Among such proposals is the Protecting the Right to Organize (PRO) Act, which passed the House of Representatives in March 2021, though it did not advance in the Senate. The PRO Act was reintroduced in both the House and Senate in the 118th Congress in February 2023.

IANA supports congressional efforts to preserve the IC model, such as the Guaranteeing Independent Growth

(GIG) Act, introduced by Rep. Ferguson in February 2023. The GIG Act would codify DOL’s 2021 IC final rule.

Potential Impact to Intermodal Freight Transportation

Impact 1:

An employee-driver requirement would change the predominant owner-operator drayage model in use throughout the U.S. Drayage rates and associated charges would likely reflect an increase to offset compliance costs of the requirement. Given the inherent nature and culture of ICs, the supply of intermodal drivers is expected to decrease under an employee model. Already, the implementation of AB 5 in California has resulted in motor carriers exiting the state, and increased costs.

Impact 2:

The switch from owner-operators to employee-drivers would initiate a movement to unionize the port drayage community, which in turn, could increase drayage costs beyond the expense of compliant power equipment.

Impact 3:

Broader implications would result from modifications to the FAAAA that would remove or temper the federal preemption of state and local regulations of interstate motor carriers’ prices, routes, or services. The statute specifically provides that:

“A State, political subdivision of a State, or political authority of two or more States may not enact or enforce a law, regulation or other provision having the force and effect of law related to a price, route, or service of any motor carrier. (49 U.S.C. Section 14501(c) (1)).”

In practice, the above preemption applies when such regulations are at odds with what the market dictates. In the case of intermodal drayage operations, the business model (i.e. the market) favors the use of ICs over employee-drivers.

Impact 4

Compliance with new labor regulations such as AB 5 requires drastic and costly changes to motor carriers’ business and operational models. Motor carriers must either adopt an employee-driver model, restructure to a freight brokerage model, or seek a (rarely granted) business-to-business exemption, among other approaches. Such changes stand to increase costs, reduce service efficiency and reliability, and exacerbate existing workforce shortages.