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Navigating Independent Contractors, Intricate Employment Laws, & Intermodal Markets:

A Goal Without a Plan is Just a Wish!

April 6th, 2021, 2:00 PM ET

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Developments in Four Primary Areas

- Biden Administration's Recent Actions Related to Independent Contractor Use and Proper Classification
- Federal Legislation and Recently Proposed Legislation
- State Labor & Employment Law Updates
- Litigation and Case Law

Biden Administration's Recent Actions Related to Independent Contractor Use, Proper Contractor Classification, and Related Employment Matters

DOL Withdrawal of Gig Economy Opinion Letter

- On February 19, 2021, the Department of Labor's Wage and Hour Division withdrew its opinion letter that indicated gig economy workers who offer services in a virtual marketplace are independent contractors.
- The withdrawal is an "official ruling" of the Wage and Hour Division
- Parties may no longer rely on opinion letter FLSA2019-6 as a statement of agency policy as of February 19, 2021.

DOL Withdrawal of Gig Economy Opinion Letter

- The withdrawn opinion letter opined that the workers offering services in the virtual marketplace platform "are independent contractors, not employees of [the virtual marketplace platform]" based on the Department of Labor's long-standing six-factor "economic realities" test.
- The six factors are: 1. The nature and degree of the potential employer's control; 2. The permanency of the worker's relationship with the potential employer; 3. The amount of the worker's investment in facilities, equipment or helpers; 4. The amount of skill, initiative, judgment or foresight required for the worker's services; 5. The worker's opportunities for profit or loss; and 6. The extent of integration of the worker's services into the potential employer's business.

DOL Withdrawal of Gig Economy Opinion Letter

- Businesses should note that opinion letters are not legally binding, but parties can present opinion letters in court as persuasive guidance to boost claims or defenses in cases involving similar issues.
- For the time being, there is no definitive, revised stance from the Wage and Hour Division until it publishes a new opinion letter on the question of classification of gig economy independent contractors.
- In its withdrawal notice posted to opinion letter FLSA2019-6, the Wage and Hour Division noted as follows: "This letter addressed the same issue under consideration by the Department—independent contractor status under the FLSA. Thus, consistent with its proposed delay of the final rule, WHD is withdrawing this opinion letter."

Delay of Trump-era Independent Contractor Rule

- Department of Labor delayed of the effective date of the Trump-era final rule entitled "Independent Contractor Status Under the Fair Labor Standards Act" that was set to take effect on March 8, 2021.
- The effective date has been delayed until May 7, 2021.

Delay of Trump-era Independent Contractor Rule

- This business-friendly rule would have provided additional guidance to employers regarding the standards for contractor classification.
- The Trump-era rule, which was previously slated to become effective on March 8, 2021, focuses on the "economic realities" of the work arrangement and, in particular, whether the putative employer has actual control over the worker.
- The DOL stated the delay will allow the agency additional time to review the multiple issues of law, policy and fact before it goes into effect.

Delay of Trump-era Independent Contractor Rule

- It is likely the Biden administration will come back with a new rule or a rule with modified contents.
- Note: On March 26, 2021, business groups filed a complaint challenging the delay of the final rule.
- The business groups argue that the DOL, in violation of the Administrative Procedure Act's notice and comment rulemaking requirements, failed to provide a meaningful comment period before enacting the March 4, 2021 final rule to delay the rule's effective date.
- It is unclear whether such challenge will be successful.

DOL Withdrawal of Opinion Letter regarding classification of truck drivers

- On January 26, 2021, the DOL withdrew Opinion Letter FLSA2021-9 that was issued just one week earlier near the conclusion of former President Trump's lame duck period.
- The Opinion Letter addressed whether requiring tractor-trailer truck drivers to implement safety measures required by law constitutes control by the motor carrier for purposes of their status as employees or independent contractors under the FLSA.
- The Opinion Letter also addressed whether certain owner-operators are properly classified as independent contractors.

DOL Withdrawal of Opinion Letter regarding classification of truck drivers

- The DOL stated the reason for the withdrawal was that the Opinion Letter 2021-9 was issued "prematurely … based on rules that have not gone into effect."
- The withdrawal goes hand-in-hand with the later delay of the effective date of the Trump-era final rule on independent contractor classification under the FLSA.

Nomination of New NLRB Counsel

- President Joe Biden has nominated Jennifer Abruzzo, a lawyer for the Communication Workers of America union, to be general counsel of the National Labor Relations Board.
- It is expected, if confirmed, Abruzzo will implement a pro-union platform.
- This has significant implications for companies that have unionized employees, and especially those that utilize both employee drivers and contractor drivers.

DOL Withdrawal of Sleeper Berth Opinion Letter

- The DOL recently withdrew Opinion Letter FLSA2019-10, which addressed the compensability of time spent in a truck's sleeper berth.
- The DOL has now readopted its former position, that only up to 8 hours of sleeping time may be excluded in a trip 24 hours or longer, and no sleeping time may be excluded for trips under 24 hours.
- Employers that employ truckers whose sleep is included in the job should ensure their practices align with law.

Federal Legislation and Recently Proposed Legislation

Proposed Legislation: Protecting the Right to Organize Act: ("PRO Act")

- The House recently passed the PRO Act, which if enacted would represent the most significant change to the National Labor Relations Act ("NLRA") since its enactment in 1935.
- In part, the PRO Act takes aim at the country's growing use of contractors by revising the definitions of employee, supervisor, and employer to broaden the scope of individuals covered by the NLRA, which currently does not cover independent contractors.
- Among other items, the PRO Act would streamline the union election process, expand the scope of unfair labor practices to outlaw retaliation against striking workers, and override state "right to work" laws that allow employees to opt out of paying dues in unionized workplaces.

PRO Act, continued

- The PRO Act would also amend the Federal Arbitration Act so an employer could not require employees to enter into agreements in which they waive the right to pursue or a join collective or class-action litigation. The use of such collective or class waivers would constitute an unfair labor practice.
- The PRO Act is expected to be opposed by virtually all Republicans; therefore, whether it has any chance of passing will hinge on certain Democratic senators' support and whether the Senate retains the filibuster.

Reintroduction of proposed Forced Arbitration Injustice Repeal ("FAIR") Act

- Representative Hank Johnson (D-GA) recently reintroduced the FAIR Act on February 11, 2021.
- If passed, the FAIR Act would preclude mandatory arbitration agreements for disputes involving civil rights and employment matters, among other matters. It would also prohibit all class and collective action waivers
- It is expected that the FAIR Act will pass in the House again this year.
- It is unclear whether the FAIR Act will attain enough Republican support in the Senate to overcome a filibuster. However, commentators generally expect the FAIR Act will receive more bipartisan support than the PRO Act.

American Rescue Plan Act of 2021 ("ARP")

- The ARP provides funds for various items through September 30, 2021, including:
  - Extension of various unemployment benefits that Congress first passed under the CARES Act in March 2020.
  - Extension of the tax credits for qualifying "FFRCA" family leave and sick leave wages that an employer voluntarily pays between April 1, 2021 and September 30, 2021. Note there is no continuing *obligation* to provide FFCRA leave.
  - Expansion of the availability and value of employee retention tax credits.
  - Subsidies to individuals for COBRA premiums.

Covid-19 Vaccination and the Workplace

- Congress has not passed any law incentivizing employers to mandate their employees to obtain Covid-19 vaccination or to immunize employers from employee actions due to mandatory Covid-19 vaccination policies.
- However, the EEOC has issued guidance for employers related to Covid-19 vaccination, which includes the following points:
  - Administration of a vaccination alone does not constitute a medical examination under the ADA.
  - The determination of whether an unvaccinated employee is a direct threat in the workplace is a fact-specific question and may change depending on the working environment.
  - If vaccination is made mandatory, employers must also make reasonable accommodations for disabilities or sincerely-held religious beliefs.

State Employment Law Updates and State Government Activity

California Supreme Court affirms retroactive application of *Dynamex* ABC Test

- *Vasquez v. Jan-Pro Franchise International, Inc.* held that the three-part "ABC" test previously set forth in *Dynamex Operations West Inc. v. Superior Court* also applies retroactively to all non-final cases that predate the April 2018 *Dynamex* decision.
- *Vasquez* decision does not have any direct effect on AB 5.
- *Vasquez* decision also does not have any direct impact on the federal preliminary injunction that currently enjoins enforcement of AB 5 against motor carriers in California.

State Government Activity – Contractor Misclassification Enforcement

- State governments across a variety of states are becoming increasingly active in bringing enforcement actions related to the misclassification of workers as independent contractors.
- Some areas involving frequent enforcement based on misclassification allegations are in the context of unpaid unemployment taxes and unpaid workers' compensation premiums.
- No longer are such actions limited to the usual suspects. (e.g. California, Massachusetts, New Jersey, Washington). Many states are cracking down on misclassification and employers' related failure to remit taxes and payments required under law.

New legislation in West Virginia relating to contractor classification test

- On March 19, 2021, the West Virginia governor approved a bill that provides a bright-line test for determining whether a worker is an independent contractor or an employee. The law will take effect on June 9, 2021.
- The state senate had previously passed the bill, titled "Relating to West Virginia Employment Law Worker Classification Act," on March 11, 2021.
- Under the bill, a person shall be classified as an independent contractor if he or she signs a written contract with a principal stating the principal's intent to engage the services of the person as an independent contractor.

West Virginia legislation, continued

- Under the law, a person would be considered an independent contractor if he or she satisfies three or more components of list of nine pieces of criteria, including but not limited to the following:
  - Except for an agreement with the principal relating to final completion or final delivery time, the person has control over the amount of time personally spent providing services.
  - Except for services that can only be performed at certain locations, the person has control over where the services are performed.
  - The person is not required to work exclusively for one principal unless a law prohibits the person from providing services to more than one principal or a permit the person is required to maintain limits the person to working for only one principal at a time.
  - The person is free to hire employees or to contract with assistants to perform all or some of the work.

Litigation and Case Law

California Trucking Association, et al. v. Attorney General Xavier Becerra, et al., S.D. Cal. (December 31, 2019 / January 15, 2020)

- 2019: California passes AB5 governing worker classification, effective 1/1/20
- TEST: A person providing labor or services for remuneration shall be considered an employee rather than an independent contractor **unless** the hiring entity demonstrates that **all** of the following conditions are satisfied:

  (A) The person 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.

  (B) The person performs work **that is outside the usual course of the hiring entity's business** (key element).

  (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

California Trucking Association, et al. v. Attorney General Xavier Becerra, et al., S.D. Cal. (December 31, 2019 / January 15, 2020)

- Prong B specifically makes it difficult or impossible for drivers operating in California to be classified as ICs since their work can be difficult to distinguish from that of the 'hiring' motor carrier.
- Motor carriers are unlikely to be able to satisfy the 12-step business-to-business exception outlined in Section 2750.3(e) of AB-5
  - Even if a motor carrier could do so, multi-part *Borello* test then applies.
  - So, business-to-business exemption will not provide complete safe haven for motor carriers attempting to establish that drivers are IC's under AB-5.

California Trucking Association, et al. v. Attorney General Xavier Becerra, et al., S.D. Cal. (December 31, 2019 / January 16, 2020)

- December 24, 2019: CTA moves for a TRO in a pending case
- December 31, 2019: Court grants temporary restraining order – prohibits State of California from enforcing AB5 against any motor carriers operating in the State
  - Prong "B" of the ABC test is "likely preempted by the FAAAA"
  - AB5 "effectively mandates that motor carriers treat owner-operators as employees, rather than the independent contractors that they are."
  - Imminent, irreparable harm was present (criminal/civil enforcement actions) absent "significant and costly" compliance measures
- January 13, 2020: TRO extended
- January 16, 2020: Court enters preliminary injunction

California Trucking Association, et al. v. Attorney General Xavier Becerra, et al., S.D. Cal. (December 31, 2019 / January 15, 2020)

- 49 U.S.C. 14501(c)(1):

General rule.—*Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 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 (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.*

California Trucking Association, et al. v. Attorney General Xavier Becerra, et al., S.D. Cal. (December 31, 2019 / January 15, 2020)

Court's Holding:

- ". . . an all or nothing state law like AB5 that categorically prevents motor carriers from exercising their freedom to choose between using independent contractors or employees" is likely preempted by the FAAAA.
- Footnote: Judge "repeatedly invited" the California Attorney General and the Teamsters' counsel to explain during the hearing how the test in AB5 was not an "all or nothing" test. However, they were unable to provide any example.
- Focuses on the breadth of FAAAA preemption and avoiding patchwork of state laws, rules, and regulations
- BUT State of California / Teamsters Appealed
- September 1, 2020: Oral Arguments Held and Decision Pending

California Trucking Association, et al. v. Attorney General Xavier Becerra, et al., S.D. Cal. (December 31, 2019 / January 15, 2020)

Outlook

- Oral Argument
  - Ninth Circuit has mixed body of caselaw on FAAAA preemption
  - "The way in which this litigation has been sculpted makes it difficult [for us] to make those kinds of discrete determinations and what we're being asked to do is opine in a very broad way about things that perhaps should be presented in a much more discrete, developed fashion."
  - "In every case, we've said they're not preempted and so how is this law different and how is its effect so much more significant on the trucking industry so that we should say it's preempted?"
- Proposition 22 (road map / workaround?)

State of California v. Cal Cartage Transportation Express, LLC, et al., California Court of Appeals, Second District (November 2020)

- A California state appeals court ruled that the Federal Aviation Administration Authorization Act ("FAAAA") *does not* preempt application of "ABC" test set forth in California AB 5 as to truck drivers.
- In reaching this holding, the California Court of Appeals, Second District, stated that the "ABC test is a law of general application," and AB 5 "does not mandate the use of employees for any business or hiring entity."
- The state appeals court in *Cal Cartage* concluded that AB 5 does not amount to a ban of independent contractors in the trucking industry.

Cal Cartage, Continued

- The appeals court based this conclusion on ways in which companies can purportedly thread the needle such as the business-to-business exemption, despite the fact that, in practice, it is quite difficult for trucking companies to classify truckers as independent contractors and also comply with AB 5.
- In holding that the FAAAA does not preempt AB 5, this decision reversed the California state court's ruling from which a group of truckers appealed.
- Previously in January 2020, California state trial court Judge William Highberger issued an opinion holding that the FAAAA preempts use of California's version of the "ABC" test

Cal Cartage, Continued

- The parties to the federal appeal in *Becerra* have both submitted letters to the Ninth Circuit citing the recent *Cal Cartage* decision and urging different interpretations.
- Still, the *Cal Cartage* decision is not binding on the Ninth Circuit.

International Brotherhood of Teamsters, Local 2785, et al. v. Federal Motor Carrier Safety Administration, U.S. Court of Appeals for the Ninth Circuit (1/15/21)

- Motor Carrier Safety Act of 1984 grants FMCSA the express power to preempt State law
- FMCSA must follow a multi-step process in order to exercise this power
  - Compare State law/regulation to federal regulation (same effect; less/more stringent?)
  - If more stringent: apply three-part test focused on safety benefit, compatibility, burden
- 2008: FMCSA declines to preempt CA's MRB Rules for drivers subject to HOS
- 2018: FMCSA decides to preempt CA's MRB Rules for drivers subject to HOS

International Brotherhood of Teamsters, Local 2785, et al. v. Federal Motor Carrier Safety Administration, U.S. Court of Appeals for the Ninth Circuit (1/15/21)

FMCSA's Rationale

- Federal HOS:
  - A property carrying CMV driver working more than 8 hours must take one 30 minute break during those 8 hours (though has flexibility as to when break occurs and can be 'off duty' or in sleeper-berth)
- California Meal and Rest Break Rules are more stringent:
  - Wage Order 9-2001 applies to "all persons employed in the transportation industry"
  - A driver working more than 5 hours is entitled to a meal period of not less than 30 minutes
  - A driver is entitled to a second meal period of not less than 30 minutes if working over 10 hours
  - A driver is entitled to 10 minute rest breaks for every four hours worked through the day (and insofar as practical, should be in the middle of each work period)
  - Enforced through civil penalties and other remedies

International Brotherhood of Teamsters, Local 2785, et al. v. Federal Motor Carrier Safety Administration, U.S. Court of Appeals for the Ninth Circuit (1/15/21)

FMCSA's Rationale

- MRB Rules impose significant and substantial costs stemming from decreased productivity (decreases each driver's available duty hours)
  - Slow down, exit ramp, find safe/reliable parking, secure vehicle, exit vehicle, return to road
  - Exacerbated by volume of transportation in CA (3 ports carry 50% of container volume)
- The "flexibility" in the MRB Rules does not change the fact the rules impose additional burdens
- Paying fines is not a workaround to avoiding compliance

International Brotherhood of Teamsters, Local 2785, et al. v. Federal Motor Carrier Safety Administration, U.S. Court of Appeals for the Ninth Circuit (1/15/21)

- CA's Labor Commissioner and various labor organizations/persons petition for review of FMCSA's preemption decision under the Administrative Procedure Act
- Ninth Circuit: Upholds FMCSA's preemption
- Exercises *Chevron* deference in favor of FMCSA:
  - Change in policy from 2008 was reasoned
  - 2008 construction was "unnecessarily restrictive" in light of statutory language and legislative history
  - Changed circumstances because federal HOS regulations amended in 2011 to address breaks in particular

International Brotherhood of Teamsters, Local 2785, et al. v. Federal Motor Carrier Safety Administration, U.S. Court of Appeals for the Ninth Circuit (1/15/21)

Outlook/Takeaways

- Great decision for industry in a challenging CA environment
- Should be an analogical template for what should happen in Washington State
- BUT legitimate fear exists that Biden Administration will rescind its decision to preempt these burdensome state laws
  - An immediate sea change would be historically unprecedented at FMCSA.
  - Example: Trump Administration could have changed course on the electronic logging device mandate that was advanced during the Obama Administration, but did not do so.
- Low likelihood of FMCSA issuing comparably helpful preemption decisions soon

Q&A

Enter your questions using
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