



AB 5: What You Need to Know

October 2, 2019



Housekeeping Items

- All lines are on mute.
- Please feel free to use the CHAT feature to ask questions at any time. We will address questions at the end of the presentation.
- **The information presented today is for educational purposes only and does not constitute legal advice. We strongly urge you to speak with legal counsel.**
- Please send any follow-up questions to Chris Shimoda at cshimoda@caltrux.org



- **Linda Allderdice, Partner**
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- **Bob Roginson, Managing Shareholder**
Ogletree Deakins

Assembly Bill 5

- Assembly Bill 5 (Gonzalez)
 - Codifies *Dynamex* “ABC Test” for purposes of all claims under Labor and Unemployment Insurance Codes
 - Signed into law by Governor Newsom on September 18, 2019
 - Effective January 1, 2020



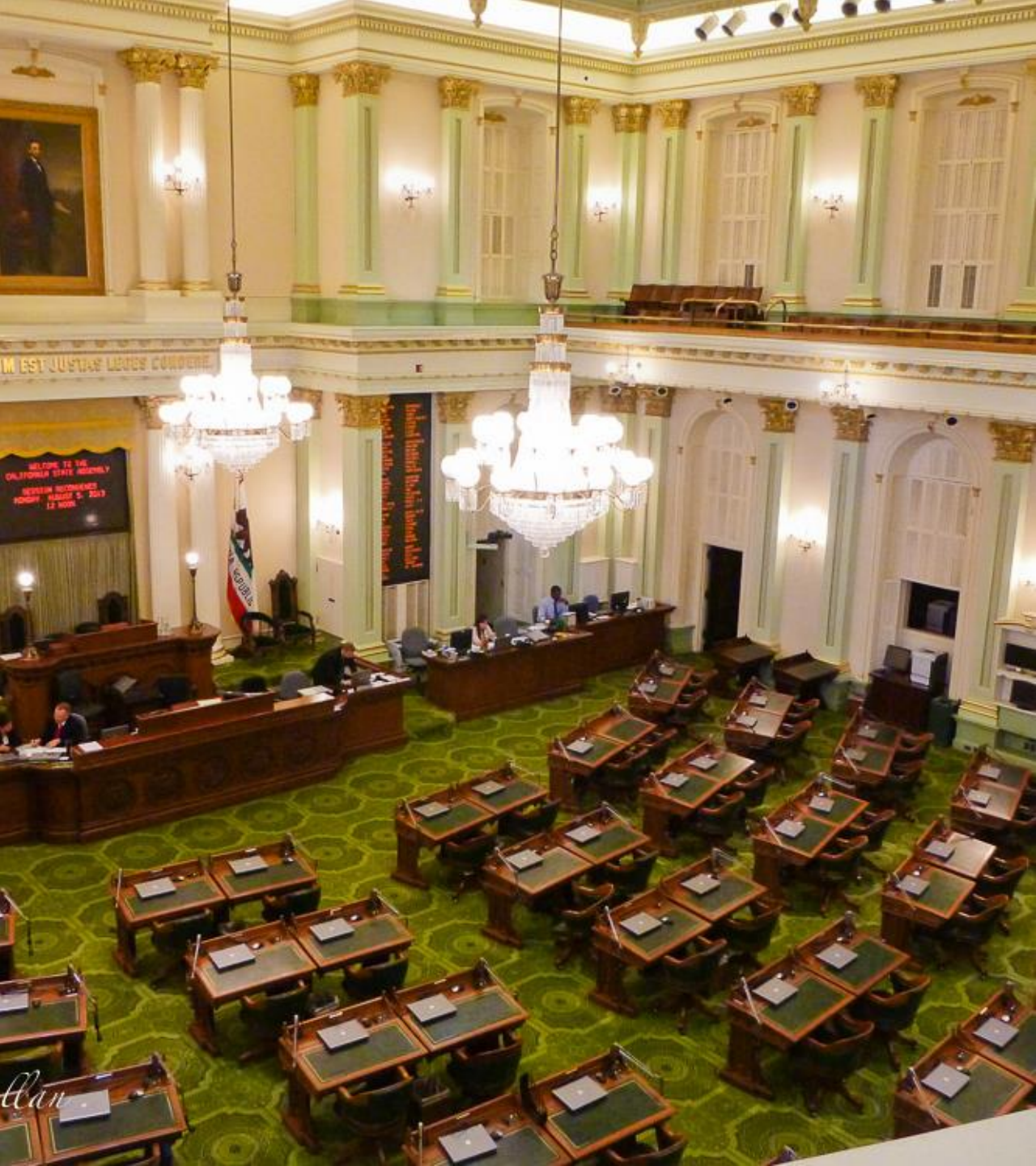
“ABC” Test

For purposes of the provisions of this code and the Unemployment Insurance Code, and for the wage orders of the Industrial Welfare Commission, 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.

(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.



What Might Happen in California Legislature in 2020?

- Clean-Up Bill?
- Tech Ballot Measure
- California Labor Relations Act?



What Might Happen in the Courts?

- **Bob Roginson, Managing Shareholder**
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Prong C

***Garcia v. Border Transp. Group, LLC*, 28 Cal. App. 5th 558 (2018)**

- Prong C of the ABC test:
 - Not merely prohibited or prevented from engaging in an independently established business.
 - Not merely capable of an independent business.
 - Must in fact provide services for their entities or otherwise have an established business independent of the relationship.

Are AB 5 and Dynamex Preempted?

- ***California Truck Ass'n v. Becerra*** (S.D. Cal.)
 - Filed in Fall 2018. Plaintiffs are the CTA and two independent owner-operators. The complaint includes detailed factual allegations.
 - The lawsuit seeks a judicial determination that Prong B of the ABC test in *Dynamex* is preempted by the Federal Aviation Administration Authorization Act (“FAAAA”) and the Dormant Commerce Clause.
 - State defendants and the Teamsters (who intervened) moved to dismiss.
 - Based upon the pending enactment of AB 5, which may supersede *Dynamex*, the court dismissed the complaint on standing and mootness grounds and provided permission to CTA to file an amended complaint challenging AB5.
 - The court has not made no substantive ruling on the claims or State’s defenses.

Are AB 5 and Dynamex Preempted?

- California rulings to date:
 - *Alvarez v. XPO Logistics Cartage LLC*, 2018 WL 6271965 (C.D. Cal. Nov. 15, 2018) – concluding the ABC test is preempted by the FAAAA.
 - *Western States Trucking Ass'n v. Schoorl*, 377 F. Supp. 3d 1056 (E.D. Cal. 2019) – rejecting preemption argument.
 - *Valadez v. CSX Intermodal Terminals, Inc.*, 2019 WL 1975460 (N.D. Cal. Mar. 15, 2019) – finding Prong B is impermissible because it “would require carriers to classify all workers who performed trucking work as employees, rather than independent contractors.”
 - *B&O Logistics, Inc. v. Michael J. Cho*, 2019 WL 2879876 (C.D. Cal. Apr. 15, 2019) – allowing preemption challenge to proceed since “the FAAAA preempts a state law that categorically requires a motor carrier to hire employees—and not independent contractors—as drivers.”
 - *Henry v. Central Freight Lines, Inc.*, 2019 WL 2465330 (E.D. Cal. June 13, 2019) – rejecting preemption argument.



How Do I Comply?

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What Changes Immediately?

- Is it possible to satisfy the ABC test?
- Are all of my workers now employees?
- Can I still use ICs in California?
- Are my ICOAs now void?
- What about Occ/Acc?

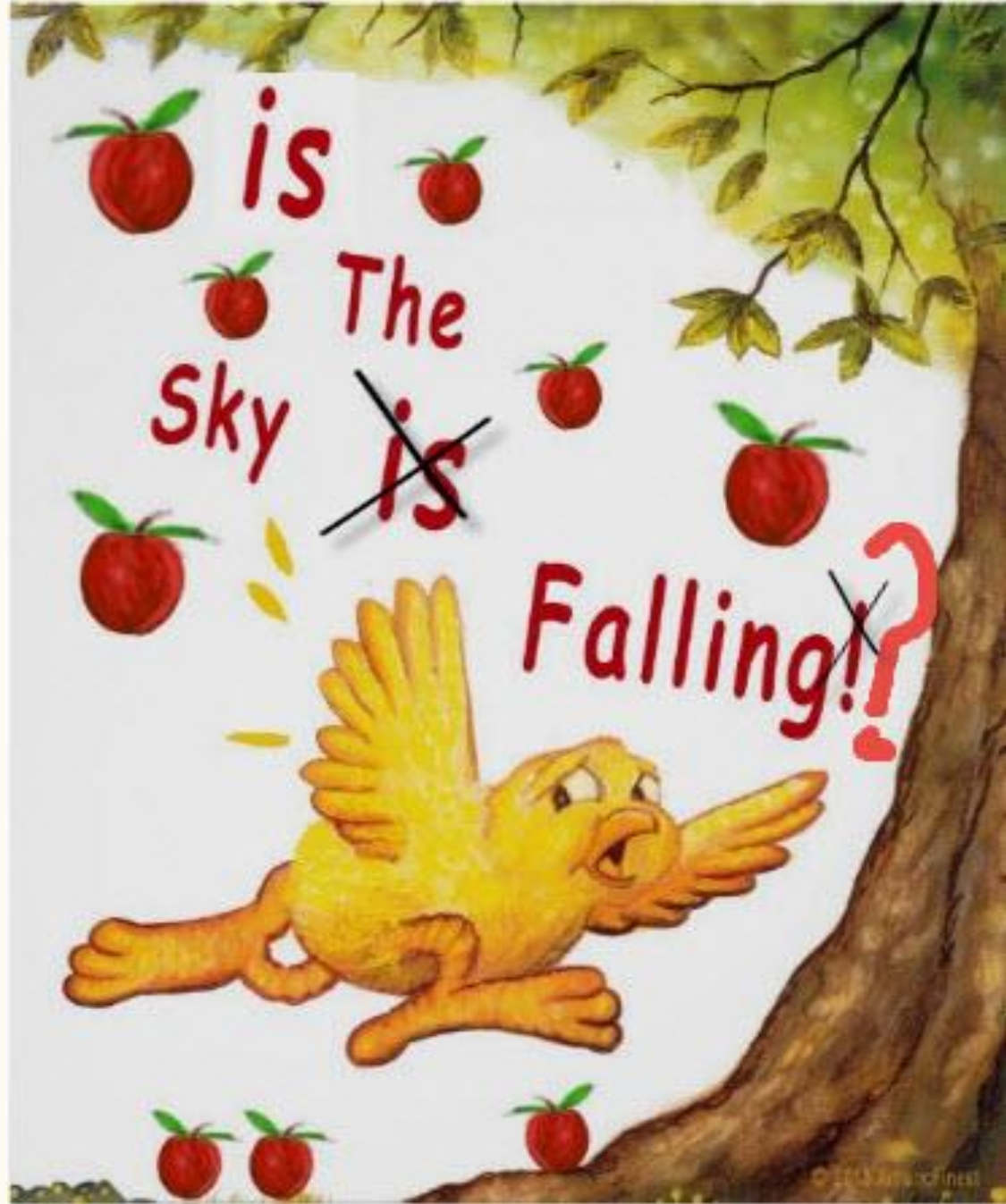
Are there any Applicable Exemptions?

- Some industries (e.g., real estate, construction, professional services) have successfully lobbied for exemptions from the application of the *Dynamex* ABC Test
 - *Borello* test applies to IC status determination in exempt industries
- Business to Business Exemption
- Construction Transportation Exemption

Practical Responses

- Minimize potential damages
- Operational changes
 - Fleet structure
 - Use of employees
 - Use of PEOs
 - TMC/TMP model
- Jurisdictional adjustments
 - Strategic dispatch
 - Exit the market
- Stand pat





COMPLIANCE: DYNAMICS OF AB 5

Employee-business model requires compliance with patchwork of California state and local laws and regulations

- Economic considerations in setting wage and benefits
- Ability to separate out payment of wages for labor of Driver from reimbursement of truck expenses is an open question
 - Labor Code section 2802 requires reimbursement:
 - of all “necessary expenditures or losses”
 - incurred by the employee “in direct consequence of discharge of his or her duties,
 - or in the employee’s “obedience to the directions of the employer”

COMPLIANCE: DYNAMICS OF AB 5

- California case law recognizes ability of employer to approximate reimbursement, provided that employee has ability to demonstrated specific costs that exceed the reimbursement (*Gattuso v. Harte-Hanks Shoppers, Inc.*)
- Unclear if rule applies to trucks owned/leased by Driver, but it should apply
- Expense Reimbursement to employee vs. 1099 payment: IRS scrutiny
- Private ruling option

COMPLIANCE: DYNAMICS OF AB 5

- **SPECIAL CONSIDERATIONS: MEAL AND REST BREAKS**
 - FMCSA issued rule that “California may no longer enforce the MRB Rules with respect to drivers of property-carrying CMV’s subject to FMCSA’s HOS rules.” FMCSA rule under attack by Teamsters and California in Ninth Circuit Court of Appeals
 - On December 21, 2018, the United States Department of Transportation’s Federal Motor Carrier Safety Administration (“FMCSA”) issued a determination that California’s Meal and Rest Break rules (“MRB Rules”) are preempted under 49 U.S.C. 31141 as applied to property-carrying commercial motor vehicle drivers (“CMVs”) covered by the FMCSA’s hours of service (“HOS”) regulations.

COMPLIANCE: DYNAMICS OF AB 5

- FMCSA concluded that “(1) the MRB Rules are State laws or regulations ‘on commercial motor vehicle safety,’ to the extent they apply to drivers of property-carrying CMVs subject to the FMCSA’s HOS rules; (2) the MRB Rules are additional to or more stringent than the FMCSA’s HOS rules; (3) the MRB Rules have no safety benefit; (4) the MRB Rules are incompatible with the FMCSA’s HOS rules; and (5) enforcement of the MRB Rules would cause an unreasonable burden on interstate commerce.”
- This decision has been followed by federal district courts. *See, e.g., Ayala v. U.S Xpress Enterprises, Inc.*, 2019 WL 1986760, at *3 (C.D. Cal., May 2, 2019) (granting motion for partial summary judgment on meal and rest breaks, finding that the “FMCSA has promulgated an order which specifically bars enforcement of the relevant provisions of the California Labor Code as applied to property-carrying commercial vehicle drivers.”); *Henry v. Central Freight Lines, Inc.*, 2019 WL 2465330, at *4 (E.D. Cal., June 13, 2019) (granting summary judgment on meal and rest break claims, concluding that the court “will follow the FMCSA Preemption Order and will not enforce the preempted provisions.”).

COMPLIANCE: DYNAMICS OF AB 5

- **SPECIAL CONSIDERATIONS: OVERTIME**
 - California overtime requirements for employees in the transportation industry are set forth in Industrial Welfare Commissioner Wage Order 9-2001, section 3.
 - Wage Order No. 9, section 3, like Section 13(b)(1) of the Fair Labor Standards Act (“FLSA”), provides for a so-called “motor carrier exemption.”
 - .

COMPLIANCE: DYNAMICS OF AB 5

- Employees whose hours of service are regulated either by the federal “Hours of Service” Regulations, Title 49, Code of Federal Regulations, sections 395.1 to 395.13, or by the parallel California provisions regulated by the California Highway Patrol, Title 13 of the California Code of Regulations (CCR), subchapter 6.5, Section 1200, are not covered under the Wage Order, at least with regard to “hours and days of work.” See Wage Order 9-2001, Sec. (L).
- This exemption applies to employees who drive a truck with a minimum **Gross Vehicle Weight Rating (“GVWR”) of 10,001 lbs.**
- This exemption has been broadly interpreted and has been specifically applied to California state overtime requirements and to overtime under the FLSA.

COMPLIANCE: DYNAMICS OF AB 5

- Compliance with the myriad of state, federal and local laws governing the workplace
 - For example:
 - Wage and Hour record-keeping – HOS
 - EEO
 - Protected Leaves of Absence
 - Workers' Compensation
 - Unemployment Insurance
- Unionization Issues



Panel Discussion and Q&A

- Please use CHAT feature to ask questions of panelists
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