

**COLUMBUS LOGISTICS
CONFERENCE
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***TRANSPORTATION LAW
UPDATE***

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U.S. Supreme Court is Currently Considering Whether to Review Two Key Transportation Cases

- Largely Discretionary Review
- Always Daunting Odds
- Key Factors
 - Resolution of Circuit Splits
 - Issues of Great Public Importance
- Timing of Decisions
 - Call for Views of Solicitor General (November 2021)
 - Term Runs from October to October
 - BUT Court usually recesses in late June / early July

***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.,
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- 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
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- 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.,
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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
- April 28, 2021: Ninth Circuit Court of Appeals REVERSES

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Court's Reasoning

- District Court abused its discretion
- AB5 is a “generally applicable labor law that . . . does not bind, compel, or otherwise freeze into a place a particular price, route or service of a motor carrier at the level of its customers.” Draws a line:
 - Preempted: Laws that are significantly related to rates, routes, or services
 - Not Preempted: Laws that have only a tenuous, remote, or peripheral connection to rates, routes, or services

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Policy Considerations

- Motor carriers wishing to continue offering the same services to their customers in CA must do so using only employee drivers - they must significantly restructure their business model (obtaining trucks, hiring and training employee drivers, and establishing administrative infrastructure)
- Motor carriers using IC's will be forced to stop their routes at the CA border so that the property being transported can be transferred to another MC that employs its own drivers (and vice versa)
- Many motor carriers that operate under the independent contractor model will simply cease accepting any loads that traverse the CA state line
- Given that CA ports are one of the primary points for importing goods into and exporting goods from the United States, a huge impact on these motor carriers' routes
- Certain motor carriers will exit market and others will convert and raise rates
- Small freight brokers may exit the market altogether (reliance on a broad pool of smaller MCs)

Miller v. C.H. Robinson Worldwide, Inc., **2020 U.S. App. LEXIS 30751 (9th Cir. 2020)**

- Costco retained CHR to arrange for the interstate transportation of goods
- CHR retains “Kuwar Singh dba RT Service” or Rheas Trans, Inc. to perform the actual transportation
- Ronel Singh was employed by one of these motor carriers as a driver
- Singh lost control of trailer while driving in icy conditions in Nevada
- Mr. Miller suffers extensive injuries – quadriplegic
- Mr. Miller sues all involved, including CHR, in federal court in Nevada
 - Breached “duty to select a competent contractor”
- Summary judgment granted in favor of CHR on basis of FAAAA preemption

Miller v. C.H. Robinson Worldwide, Inc., **2020 U.S. App. LEXIS 30751 (9th Cir. 2020)**

Trial Court's Reasoning:

- Plaintiff's claim "sets out to reshape the level of service a broker must provide in selecting a motor carrier to transport property."
 - a broker "would consistently need to inspect each motor carrier's background"
 - "such additional inspection would result in state law being used to, at least indirectly, regulate the provision of broker services by creating a standard of best practices."
- Rejects the exception for "safety regulatory of a State with respect to motor vehicles"
 - Exception does not provide for a private cause of action "allowing for Miller to essentially do the state's work and enforce the state's police power"
 - No mention of broker services in the exception

Miller v. C.H. Robinson Worldwide, Inc., **2020 U.S. App. LEXIS 30751 (9th Cir. 2020)**

Appellate Court's Holding:

- The Plaintiff's claim would be preempted but for the safety exception
- The claim is "related to" CHR's services
 - common law tort claims, which "demand[] that an individual or entity exercise ordinary care" are "related to" broker services, such that they are preempted by the FAAAA
- Safety exception governs because a "connection" exists with motor vehicles
 - "In enacting that exception, Congress intended to preserve the States' broad power over safety, a power that includes the ability to regulate conduct not only through legislative and administrative enactments, but also through common-law damages awards"
 - Miller's claim "has the requisite 'connection with' motor vehicles because it arises out of a motor vehicle accident"

Miller v. C.H. Robinson Worldwide, Inc., **2020 U.S. App. LEXIS 30751 (9th Cir. 2020)**

Appellate Court's Analysis:

- Legislative history shows focus is on preempting economic regulation and not safety
- No indication that the safety exception was limited to “positive enactments” and, if so, outcomes would be different in states that codify common law
- Statutory construction favors accepting alternative reading that disfavors preemption
- Federalism favors primacy of state regulation of health and safety
- Phrase “with respect to” motor vehicles should be read broadly as “relating to”

Miller v. C.H. Robinson Worldwide, Inc., **2020 U.S. App. LEXIS 30751 (9th Cir. 2020)**

What Might Persuade Court?:

- Common law standards applied in negligent selection cases dictate that a freight broker provide its services in a particular way
- Some state courts have dictated that brokers rely on FMCSA data that Congress and the industry consider unreliable
- Freight brokers are subject to varying, inconsistent common law standards in performing their carrier selection services
- The state of the law is confused

Miller v. C.H. Robinson Worldwide, Inc., **2020 U.S. App. LEXIS 30751 (9th Cir. 2020)**

Outlook / Takeaways:

- Other federal circuits will begin issuing decisions on the subject
- Eventually, U.S. Supreme Court must resolve
- Capitalize on the Ninth's Circuit favorable language as to the scope of FAAAA
 - For example: Miller should not undermine outcomes in certain cargo claim cases or other cases where safety exception is not implicated
- Operators should obtain insurance to protect themselves
 - Evaluate adequacy and practicality of carrier selection protocols
- In the meantime, continue to advance preemption in other jurisdictions

FMCSA Modified Emergency Declaration No. 2020-002

Original Declaration: March 13, 2020 (Extended May 31, 2022)

- Provide certain limited relief under the FMCSR's to those providing "direct assistance" in support of relief efforts related to COVID-19 – (now ONLY Maximum Driving Time NOT "on duty time or other HOS regulations)
- "Direct assistance" is limited to transportation of:
 - (1) livestock and livestock feed;
 - (2) medical supplies and equipment related to testing/diagnosis/treatment of COVID-19;
 - (3) vaccines, constituent products, medical supplies and equipment related to testing, diagnoses, treatment of prevention of COVID-19;
 - (4) supplies and equipment necessary for community safety/sanitation/prevention of community transmission of COVID-19 (masks, gloves, hand sanitizer, soap, etc.);
 - (5) food, paper products, other groceries for emergency stocking of distribution centers or stores;
 - (6) gasoline, diesel, jet fuel, ethyl alcohol; and
 - (7) supplies to assist individuals impacted by consequences of COVID-19 (building materials for displaced individuals).
- BUT NOT "non-emergency" transportation or "routine commercial deliveries" or "mixed loads" with a "nominal quantity" of qualifying relief added to obtain the benefits of the declaration

Canada – Electronic Logging Devices **(Effective: June 12, 2021)**

- **Biggest Difference:**
 - Canada Requires Third-Party Certification of your ELD
 - US Carriers operating in Canada must have ELD on list of third-party certifications
 - Problems: Only a few third-parties were on the list originally
 - February 2022: 16 vendors are certified
- March 2022: Extended a “soft enforcement” policy
 - If your driver is stopped, and ELD is not on third-party list, officer will explain but not likely hold you in violation
 - Proactive: Make Sure ELD Vendor getting certified in Canada

US – Electronic Logging Devices (3G Sunset)

Mobile carriers are sunsetting 3G soon. Will your ELD be affected?

Mobile carriers are shutting down their 3G networks to make room for more advanced network services, including 5G. As a result, many older cell phones and other mobile devices will be unable to use data services.

Once a 3G network is no longer supported, it is highly unlikely that any ELDs that rely on that network will be able to meet the minimum requirements established by the ELD Technical Specifications, including recording all required data elements and transferring ELD output files.

Therefore, **any ELD that requires 3G cellular connectivity to perform its functionality will no longer be in compliance with the technical specifications in the ELD rule after the 3G network it relies on is sunset.** When in an area that does not support 3G, a 3G device will register a malfunction. In accordance with 49 CFR 395.34, the carrier has 8 days to get the malfunction resolved, in this case by replacement, unless an extension is granted.

The announced sunset dates are below.* These are dates for completing the shutdowns. **Mobile carriers are planning to retire parts of their networks sooner.**

- AT&T 3G: February 22, 2022
- Sprint 3G (T-Mobile): March 31, 2022
- Sprint LTE (T-Mobile): June 30, 2022
- T-Mobile 3G: July 1, 2022
- Verizon 3G: December 31, 2022

Note: Many other carriers, such as Cricket, Boost, Straight Talk, and several Lifeline mobile service providers, utilize the AT&T, Verizon, and T-Mobile networks.

*Sunset dates are subject to change. Contact your mobile carrier for up-to-date information.

OTHER REGULATORY ISSUES

- **Hair Testing As An Alternative** (Industry Conflict)
- **Oral Fluids Rule**: Published 2/28/22; comments due 4/29/22
 - Compare to urinalysis (every collection is observed; tough to cheat)
- **Drug & Alcohol Clearinghouse**
 - 97,144 drug violations of 115,367 violations (Marijuana / Cocaine / Meth)
 - TX, CA, FL, GA, IL, NC, NY, OH, PA, MI
- **CDL/CLP Downgrade Final Rule**: 10/7/21 (comply by 11/17/24)
 - Requires states to query of Drug & Alcohol Clearinghouse when issuing, renewing, transferring, upgrading a CDP or CLP
- **Vision Standards** (Alternative Vision Standard): January 2022
 - Consult with physician to qualify if have certain vision deficiency
 - Replaces Waiver Program

OTHER REGULATORY ISSUES

- **Speed Limiters**: April 24, 2022: Notice of Intent to mandate speed limiting devices on CMVs
- **Record of Violations**: March 9, 2022 – Final Rule Published
 - Before: Annual review of driver's convictions and annual MVR
 - Now: No need to have driver to make list of violations
- **Entry Level Driver Training**: February 7, 2022 – Effective Date
 - For New Drivers or New Endorsements
 - Instruction Requirements (Theory/Behind the Wheel) – Proficiency Based
 - National Training Provider Registry – search function working
 - Verification – completion certificates
- **Younger Driver Apprenticeship Pilot Program** (18-21 yrs.): 11/15/21
 - Should be up and running this summer

OTHER REGULATORY ISSUES

- **Underride Protection**: 11/9/21 – Rear Impact Guards
 - Annual Inspection Required
- **CNG Tank Inspections**: 2/11/22 – NHTSA Visual Inspection
 - Annual Inspection
- **Windshield Safety Technology**: 3/7/22 – Specifies Mounting Areas
 - Cameras, GPS systems, etc.

On the Horizon

- Broker Records
- National Consumer Complaint Database
- Definition of “Dispatch Services”
- Safety Fitness Determinations
- Electronic ID of CMVs
- Heavy Vehicle Automatic Breaking
- Electronic Signatures for Drug and Alcohol Testing
- Safe Integration of Automated Driving Systems

OTHER REGULATORY ISSUES

- **FMC ANPR 22-04**: February 15, 2022: FMC issued request for comment as to detention and demurrage billing practices. Examples:
 - **What percentage of demurrage and detention bills contain inaccurate information, and which information is most often disputed?**
 - **How much does the type of information included on or with demurrage and detention billings vary among common carriers, among marine terminal operators, and between VOCCs and NVOCCs?**
 - **What information or timeframes should be required for VOCC and NVOCC demurrage and detention bills? Should the Commission require different types of information or timeframes?**
 - **How would a regulation on demurrage and detention billing requirements impact, conflict with, or preempt any other applicable laws, regulations, or arrangements (such as the UIIA)?**

OTHER REGULATORY ISSUES

What was NOT in the Infrastructure Bill

- Returning CSA scores to public viewing**
- Eliminating Preemption of CA Meal and Rest Break Rules**
- Side Underride Guard Mandate**
- HOS reform/rollbacks**
- Minimum Insurance Increase**
- Speed Limiter Mandates**

QUESTIONS?



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