

**Why Energy Transport Logistics chose to move away from the Independent Contractor Model in California, thereby resulting in a California surcharge. To Protect the viability and longevity of our company and to protect our customers from any potential liability from the state of CA.**

1. **If the Ninth Circuit reverses the district court and concludes AB5 is NOT preempted, motor carriers *may* be deemed liable for violations that occurred while the injunction was in place.**
  - a. The district court has only *preliminarily* enjoined the state from applying AB 5's ABC test to motor carriers in California. The injunction may be lifted if the Ninth Circuit reverses the district court's 01/16/2020 preliminary injunction order or the district court's final order at the end of the case. (The district court itself may also enter a final order in favor of the State.)
  - b. Guidance from the Ninth Circuit in a somewhat similar situation suggests motor carriers would be liable for violations that occur while the injunction is in place. Specifically, the Ninth Circuit found a federal Department of Labor Rule governing overtime for homecare workers applied from its effective date, and **not** from the date the Ninth Circuit reversed a federal district court's order vacating the regulation. As such, the Ninth Circuit allowed the homecare workers at issue to pursue claims for unpaid overtime during period preceding Ninth Circuit's reversal. *Ray v. Cty. of Los Angeles*, 935 F.3d 703 (9th Cir. 2019). In making this determination, the Ninth Circuit concluded the defendant knowingly took on the risk that the district court's order would be vacated, and that it would be unfair "for the homecare providers to bear the financial consequences of the [defendant's] calculated risk." *Id.* at 714-15.
2. **Section 2810.4 of the California Labor Code already places a burden directly on shippers to ensure the motor carriers they deal with have no unsatisfied wage and hour claims. The interplay between that law and AB 5 would indicate that if a motor carrier can be liable back to 1/1/2020, then so can a shipper!**
  - a. The DLSE website is updated at least monthly to identify motor carriers with unsatisfied judgements after all appeals are exhausted.
3. **Even if the State remains enjoined from applying AB 5's ABC test to motor carriers in California, motor carriers have found it difficult, if not impossible, to overcome the alternative test (called the *Borello* test) in California since at least 2014.**
  - a. You might recall the California Court of Appeals' landmark finding of employment status under the *Borello* test in *Estrada v. FedEx Ground* in 2007. But, prior to *and following Estrada*, several courts nevertheless deemed owner-operators independent contractors under the *Borello* test prior to 2014.
  - b. In 2014, however, the Ninth Circuit spun out of orbit and deemed owner-operators employees under the *Borello* test in back-to-back decisions (*Alexander v. FedEx Ground Package System* and *Ruiz v. Affinity Logistics*). Those Ninth Circuit decisions have proven to be powerful ammunition for adversaries, as California courts already tend to view independent contractor relationships (particularly in transportation) with a jaundiced eye.