The Supreme Court recently refused to grant two separate writs of certiorari seeking judicial review of California’s controversial state statute, Assembly Bill 5 (AB5). As we have explained previously (see here, here, and here), AB5 codifies the so-called ABC Test for determining whether a worker is an employee or an independent contractor. Under the ABC Test, a worker is an employee unless the alleged employer can satisfy all three of the following:

1. The worker is free from the control and direction of the hiring entity in connection with the work performed, both under the relevant contract for the work at issue and in fact;
2. The worker performs work that is outside the usual course of the hiring entity’s business; and

3. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that of the work performed.

Massachusetts and New Jersey have passed their own versions of AB5 and adopted the ABC Test. Predictably, business groups have criticized the measures on the grounds they make it difficult to use labor in the form of independent contractors, as opposed to employees.

On Monday June 27, 2022, the Supreme Court denied a challenge to AB5 from the American Society of Journalists and Authors (ASJA) and the National Press Photographers Association (NPPA). The lawsuit started in 2019 against the California Attorney General as an effort to block enforcement of the statute against journalists, freelance writers, and photographers. The ASJA and NPPA challenged the statute as an unconstitutional violation of free speech and the Equal Protection Clause. The court denied an application for an injunction, and the groups appealed to the Ninth Circuit. In October 2021, the Ninth Circuit Court of Appeals upheld the trial court’s ruling and held AB5 regulates economic activity and not speech. The ASJA and NPPA then appealed to the Supreme Court.

In a similar case, the California Trucking Association sued the state of California in 2019 to stop enforcement of AB5; in that case the CTA argued the Federal Aviation Administration Authorization Act (FAAAA) preempted AB5. On December 31, 2019, a federal district judge enjoined the state from enforcing AB5, ruling that the FAAAA likely preempted the “B” prong of the ABC Test.

In April 2021, the Ninth Circuit reversed the district court’s decision, holding the FAAAA did not preempt AB5. On June 30, 2022, the Supreme Court declined to hear the CTA’s challenge to the Ninth Circuit’s ruling. The case now reverts back to the district court, to hear the CTA’s challenge to the statute as a violation of the Commerce Clause.

Despite the U.S. Supreme Court’s decision not to weigh in, there remain questions concerning the scope of the statute and to whom it may apply. For instance, how the law impacts truckers passing through — but not domiciled in — California remains an open issue. Further, other states may adopt “copycat” legislation in reliance on the Supreme Court’s unwillingness to review the law. With already-stressed supply chains, the trucking industry and those that rely on it must now grapple with another regulatory scheme. Switching to an employee-driver model or seeking to exploit an exemption under AB5 are possibilities.

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