

Statement for the Record

National Association of Small Trucking Companies

*U.S. House Committee on Education and the Workforce
Subcommittee on Workforce Protections*

“EXAMINING BIDEN’S WAR ON INDEPENDENT CONTRACTORS”

April 19, 2023

The Independent Contractor Model in Interstate Trucking and AB5

The National Association of Small Trucking Companies (NASTC) commends the subcommittee, particularly Chairman Kevin Kiley, for leadership addressing the threat and harm to independent contractors posed by policy proposals that would incorporate many elements of California’s AB5 law at the federal level.

NASTC is a member-based organization whose 15,000 member companies range from a significant segment that operates on the single-power-unit, owner-operator model to those carriers having more than 100 power units; NASTC members average 12 power units. These companies for the most part operate in the long-haul, over-the-road, full-truckload, for-hire, irregular-route sector of interstate trucking. NASTC’s members come from the largest segment of America’s long-haul trucking—they all are small motor carrier businesses. They are representative of the vast majority of our nation’s commercial motor carriers, those having fewer than 100 power units.

Trucking’s independent owner-operator model has been recognized, protected, and respected since trucking came under the jurisdiction of the Interstate Commerce Commission (ICC) in the Motor Carrier Act of 1935. The U.S. Supreme Court upheld the regulation of the owner-operator-truck-driver-as-independent-contractor model in *American Trucking Ass’n, Inc. v. United States*, 344 U.S. 298 (1953). In January 1979, the Carter administration’s “truth-in-leasing” ICC regulations took effect, and in 1992 the rule was clarified to ensure that motor carriers’ “exclusive” control and responsibility for safe operation of leased vehicles does not preclude truck owner-operators’ independent-contractor status.

Today, this positive evolution of independent contracting in the interstate trucking sector faces serious threat. The AB5 law in California is evidentiary exhibit number one of the great potential for disruption of independent contracting in trucking by AB5’s reclassifying independent owner-operators as “employees.” As Land Line has reported, “California has made an adversary out of many in the trucking industry . . . [and is] driving truckers out of the state.”¹

The U.S. Department of Labor under the Biden administration has pursued policies that would essentially federalize the California AB5 law and its “ABC test” for worker reclassification.

¹ Mark Schremmer, “AB5 creates ‘hurdle’ for truckers, California Trucking Association leader says,” Land Line (April 13, 2023)(<https://landline.media/ab5-creates-hurdle-for-truckers-california-trucking-association-leader-says/>).

Such a policy would redefine “employee” as an individual performing any service—and no longer as an independent contractor—unless:

- The individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;
- The service is performed outside the usual course of the business of the “employer;” and
- The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

This unreasonably encompassing test, especially its B prong, is utterly impossible for most to meet and continue as an independent operator. This expansive redefinition is shuttering small businesses. Plainly, the ABC test and the B prong do not work in trucking. Freight volumes constantly change; a motor carrier contracted to haul certain freight for a certain shipper is likely to experience an urgent need to expand capacity to fulfill the contract; obviously, independent contractors available for hire for freight hauling and a motor carrier in need of additional capacity at a given time perform services in the same line of business—otherwise, the for-hire independent contractor’s services would be of no use to the carrier trying to meet its contractual obligations to the shipper—; and just as obviously, the independent contractor is not, does not seek to be, and should not be misclassified as an “employee” of the carrier because once the load in question is hauled and delivered, the need for that truck driver’s services ends. Moreover, a large share of interstate truck drivers is independent contractors.

If the Biden Labor Department succeeds at imposing such an anti-independent contractor policy at the national level, the effect could cripple the U.S. economy. Today, independent contractors can decamp from California to free states, as has been happening. Federal policy of the AB5 sort would force almost every independent-contractor business person in America into “employee” status against his or her will, best wishes, and best judgment.

California’s broad redefinition of those who are clearly independent contractors as “employees” has threatened many “gig economy” workers. Only a California ballot initiative, Proposition 22, which passed in 2020 with 58 percent of the vote, carved out certain app-based gig work from AB5’s ABC test. Otherwise, California’s harm would have been even greater. If nationalized, such policy would spare few independent contractors from being miscategorized as “employees.”

Without an interstate trucking carveout, AB5, its B prong most especially, is unworkable and highly destructive for trucking and other businesses. In the Trump administration, the Federal Motor Carrier Safety Administration (FMCSA) exercised federal preemption of AB5 in order to ensure uniform safety regulation of interstate motor carriers, including owner-operators. FMCSA preempted AB5 pursuant to the Federal Aviation Administration Authorization Act of 1994 (F4A). However, AB5 litigation has unsettled matters. U.S. Labor Department imposition of any form of AB5 would likely settle the matter in a most disruptive, antiworker manner.

One of California’s strongest proponents of AB5 is Julie Su, former California labor commissioner. In that role, Ms. Su demonstrated a decided devotion to misclassification of independent contractors and thereby seeking to cement AB5’s tentacles deep into the state’s legal and public policy regime. Her commitment to categorize independent contractors as “employees” nationally is boosted by President Biden’s recent nomination of her to U.S. Secretary of Labor. She has shown herself a friend of Big Labor, which backs AB5 and its ilk, and a foe of “gig workers,” from ride-sharing service drivers seeking to make some extra money to independent owner-operators in long-haul trucking seeking to make a living and work for themselves.

NASTC's 34 years of experience serving small-business trucking has led us to consider leased-on capacity owners and independent owner-operators as perhaps the safest truck drivers and small trucking companies on the highway. This avenue of blue-collar entrepreneurship offers a win-win, not just for drivers who opt to be self-employed independent contractors or small trucking business owners, but for shippers, brokers, stores that stock the goods they haul, consumers who buy the products these drivers deliver, and the driving public whose safety these independent contractors enhance.

Conventionally defined employment as truck drivers for a motor carrier is readily available to qualified commercial drivers who want it. Notably, many thousands of truckers prefer running their own business as independent contractors. There is plenty of demand for qualified commercial truck drivers, whether an individual driver chooses employment or contractual work. One-driver, one-truck operators may lease onto a motor carrier, secure loads through brokers, or contract with shippers directly.

Comments NASTC joined to the U.S. Labor Department said, "The owner-operator independent-contractor model allows professional truck drivers the opportunity to purchase and maintain power equipment, gain management experience[,] and become small carriers with their own authority."² The independent contractor option affords the opportunity for many, including many women, immigrants, and minority groups, to become entrepreneur truckers. This option must be preserved.

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² Comments filed February 24, 2021, by Henry E. Seaton, Esq., on behalf of NASTC and allied transportation organizations with the U.S. Department of Labor regarding DOL's regulatory "freeze" and review of independent contractor rule (Regulatory Information Number (RIN) 1235-AA34), p. 3.