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April 1, 2019

The Honorable Lorena Gonzalez
California State Assembly
State Capitol, Room 2114
Sacramento, CA 95814
Fax: (916) 319-2180

RE: AB 5 (Gonzalez) – SUPPORT IF AMENDED TO PROVIDE A REASONABLE PATHWAY FOR OWNER-OPERATOR TRUCK DRIVERS TO MAINTAIN INDEPENDENCE

Dear Assembly Member Gonzalez,

The Western States Trucking Association (WSTA) has adopted a **SUPPORT IF AMENDED** position on your bill AB 5, which would codify the ABC test for employment classification established by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court* (4 Cal.5th 903 (2018)) into the California Labor Code, as well as return certain industries to the previous *Borello* standard. We appreciate your recognition that for certain industries and professions, the *Dynamex* decision is unworkable, unwarranted, and unnecessarily stifling for businesses and their consumers. Because the *Dynamex* ABC test also makes it virtually impossible for owner-operator truck drivers to continue to contract with other trucking businesses in this state, WSTA urges you to also consider a similar, reasonable pathway for legitimate owner-operators to maintain their independence. With such an amendment, WSTA would proudly support AB 5.

As background, WSTA (formerly the California Construction Trucking Association) is a 501(c)(6) nonprofit trade association incorporated in 1941. WSTA's over 1,000 member companies and another 5,000 affiliated member motor carriers engage in multiple modes of trucking operations from construction related to general freight operations. Our diversified group of member motor carriers operates in intrastate, interstate, and foreign commerce. Our members operate many different types and classes of commercial motor vehicles, including dump trucks, concrete pumpers and mixers, water trucks, port and border dray trucks, heavy-haul trucks, and class 8 over-the-road tractors. While member companies range in size from one-truck owner-operators to fleets with over 350 trucks, over 45% of WSTA's membership is composed of independent contractor owner-operators. California defines an "owner-operator" in Vehicle Code section 34624 as a person who: (1) holds a class A or class B driver's license or a class C license with a hazardous materials endorsement; (2) owns, leases, or otherwise operates not more than one power unit and not more than three towed vehicles; and (3) is required to obtain a Motor Carrier Permit issued by the DMV.

These independent contractor owner-operators have been the backbone of the trucking industry for more than 75 years and have dutifully served a critical role in the transportation of goods that Californians continue to utilize on a daily basis throughout the state. WSTA's owner-operators are fiercely protective of their independent contractor status, as the independent contractor model provides many unique advantages to Californians in the workforce, including:

- **Being Your Own Boss** – Contract work provides greater independence and, for many people, a greater perceived level of job security and satisfaction than traditional employment as contract work involves responsibility, drive, the ability to act on your own, commitment, and initiative.
- **Earning More Money** – A 2015 study by Southern California economist John Husing found that the median net earnings of independent owner-operator truck drivers were substantially higher than for company drivers who work as employees of licensed motor carriers. Specifically, the study found that the

median net income for the owner-operators in 2013 was \$59,478, or \$17,400 more than the \$42,078 for employee drivers in the state.

- **Maintaining a Flexible Schedule** – The Husing study also found that one of the additional advantages of being an independent contractor is that the driver can work as many hours as he or she wants and can leverage the truck, as its owner, to work where potential earnings are the highest. This means that drivers can work the hours and locations that suit his or her lifestyle best.

For a hiring entity, the ability to hire an owner-operator to fulfill a demand on a short-term or temporary project, or on an unexpected or urgent job that simply exceeds the abilities of its employee workforce, is critical. An example of this unexpected, immediate demand for help can be found in the response to the devastating wildfires that recently ravaged California. There was an immediate need for additional trucks that could assist in hauling out debris as well as transporting tools and supplies, and many WSTA owner-operators dutifully took on this arduous and vital task to assist with the relief efforts. The flexibility to manage these unexpected increases in demand is appropriately addressed through the use of owner-operators.

Unfortunately, the recent *Dynamex* decision significantly increases uncertainty and liability for owner-operator independent contractors, and those that hire them, in California. For the past three decades prior to *Dynamex*, California courts and state agencies had applied the *Borello* test for determining whether a worker was an independent contractor for labor and employment purposes. Utilizing a flexible, multi-factor approach, the *Borello* test looked primarily at whether the hiring entity had a “right to control” the manner in which the worker performed the contracted service.

Unexpectedly, in April 2018 the California Supreme Court in *Dynamex* overturned nearly 30 years of California employment law by enacting a new, stricter ABC test in *Dynamex* that will now make it significantly easier for a company to be found to have misclassified its independent contractors. Under this new ABC test, a person will be considered an independent contractor only if the hiring entity can prove all three of the following:

- (A) that the worker 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) that the worker performs work that is outside the usual course of the hiring entity’s business; and,
- (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

This rigid test is ill-fitting for today’s workforce and places in doubt the sustainability of a significant portion of independent contractor relationships in California and has the potential to cause substantial economic harm to millions of California citizens.

Specifically for owner-operator truck drivers, the B prong of the *Dynamex* test is particularly unworkable and problematic. The B prong prohibits an independent contractor from performing work that is within the “usual course of the hiring entity’s business.” Even if an owner-operator is able to demonstrate their true independence and satisfy the A and C prongs, as most owner-operators contract their work with other trucking companies (be it through a truck broker or another motor carrier), it is virtually impossible to pass the B prong as both are in the business of trucking. And because an independent contractor cannot fail any of the prongs under *Dynamex*, these owner-operators would thus be classified as an employee of the hiring entity.

Under this scenario, the owner-operator would therefore lose the benefits of their independence, and the hiring entity would be held liable for compliance costs and penalties for failing to have properly classified the owner-operator as its employee for **up to four years in retroactive liability**, for violating an ABC test that was not even the law during the contracted period. This retroactive liability is fundamentally unfair and will unnecessarily destroy businesses.

WSTA members are already experiencing the real world ramifications of this overreaching *Dynamex* decision. Due to the potential liability, some entities are flatly refusing to work with owner-operators. Thus these small, emerging businesses are already suffering the financial consequences of the *Dynamex* decision. Annihilation of the owner-operator business model is likely inevitable if further modifications are not made to the ABC test.

As such, WSTA is dedicated to working with you, as the author, and other labor and trucking stakeholders to find a reasonable pathway for legitimate owner-operators to maintain their continued independence, while ensuring that there are significant protections in place to curb abusive misclassification practices.

Thank you for your dedication to this important issue and we look forward to continued discussions. Please contact WSTA's lobbyist, Brooks Ellison of Ellison Wilson Advocacy, LLC, at (916) 448-2187 or lobby@ellisonwilson.com with any questions or feedback.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lee Brown". The signature is written in dark ink and is positioned above the typed name.

Lee Brown, Executive Director, WSTA

cc: Members, the Assembly Labor & Employment Committee