

WSTA Legal Analysis of Ninth Circuit Decision on AB 5

On Wednesday, April 28, 2021, the Ninth Circuit issued their much-anticipated decision in the California Trucking Association case challenging AB 5 on federal preemption grounds. In a 2-1 decision, the panel rejected CTA's F4A preemption arguments, finding the law was a generally applicable labor law. CTA has vowed to appeal. The lower court had issued an injunction in January of 2020 prohibiting the enforcement of AB 5 on the motor carrier industry. As a result of that injunction, the trucking industry has been allowed to continue to operate under the traditional owner-operator model where truckers are allowed to be treated as independent contractors rather than employees. The Ninth Circuit found that the lower court erred in issuing the injunction.

What Does This Mean in The Short Term?

The district court will now have to lift the injunction, but that can't happen immediately. The district court will not get jurisdiction over the case again until the Ninth Circuit issues its mandate. Ninth Circuit rules provide that the default rule is that the mandate cannot issue from the Ninth Circuit back to the district court for at least 21 days. That period is 14 days to allow the parties to seek rehearing, plus an extra 7 days. However, either party could ask the court to move those deadlines. The prevailing party could ask the court to expedite the issuance of the mandate (sooner than the 21-day period), and CTA could ask the court to stay issuance of the mandate. Each of these requests are discretionary, meaning the court does not have to grant them. Typically, a party seeking rehearing or rehearing en banc will also ask for a stay of the mandate as part of the request. So, barring any requests from the parties, and action by the Ninth Circuit on any such requests, WSTA members effectively have 21 more days to operate under the injunction. However, as discussed more fully below, the entire period of the injunction (from 1/16/20 to today, or until May 19 counting the 21 days) creates a legal gray area.

CTA has vowed to "Appeal"

CTA has several options in light of the recent ruling.

1. Do Nothing

CTA could do nothing and let the ruling stand. This seems unlikely given that CTA has vowed to continue the fight.

2. Petition for Rehearing

As a second option, CTA could seek panel rehearing. This would be asking the same 3-judge panel to revisit the decision they just issued. This seems unlikely to be successful, given that the grounds for panel rehearing are generally limited to situations where 1) a material point of fact or law was overlooked in the decision; 2) a change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or 3) an apparent conflict with another decision of the Court was not addressed in the opinion. In fact, the court's rules expressly instruct parties "Do not file a petition for panel rehearing merely to reargue the case."

3. Petition for Rehearing en Banc

A third option would be to seek rehearing en banc, which is asking a new 11-judge panel (out of the existing 29 Ninth Circuit Judges) to hear the case. This course seems like it would have at least a reasonable chance of success given that the grounds for en banc review are more liberal, including for such reasons as resolving conflicts with other Courts of Appeals. Also, given that President Trump had the opportunity to appoint 10 judges to the Ninth Circuit, most court-watchers agree that the Ninth Circuit is now more conservative than it has been for many years. Some even claim that President Trump “flipped” the court. Regardless of the opinions on this issue, it is certainly true that because en banc judges are selected at random, CTA would have a better chance now than in the past of drawing a more conservative en banc panel. Presumably, a request for en banc review by CTA would also be accompanied by a request to stay the mandate. If granted, this would effectively keep the injunction in place during the pendency of the en banc review.

4. Petition for Certiorari Review in the U.S. Supreme Court

The fourth and final option for CTA would be to go directly to SCOTUS by filing a petition for certiorari. One problem with this approach is that the Supreme Court will be adjourning for the term at the end of June. Even if CTA were to get their petition in very quickly, the Court likely would not rule on the request until next term, which begins in early October. That would mean there would be a period of at least six months during which the Ninth Circuit ruling would be in effect, and AB 5 could be enforced. There is a possibility of asking SCOTUS for an emergency stay while they consider the petition, but those are rarely granted. It is worth noting that even if CTA pursues one of the other options for rehearing, and those are unsuccessful, they could always seek review in the Supreme Court after those other attempts.

What about the period when the injunction was in effect?

Given that AB 5 is expressly retroactive, there is an interesting legal question about whether, if AB 5 is not preempted, the state (or a class action plaintiff) could seek to impose liability on trucking companies for the period of time they operated under the injunction. On the one hand, trucking companies were following the law, i.e. not complying with AB 5 because a federal district court had enjoined the law. On the other hand, the Ninth Circuit has now found that the injunction should never have been issued, which raises the probability that pro-AB 5 litigants will argue that misclassification liability should attach for the entire time that AB 5 has been the law, notwithstanding the injunction. Resolution of this issue will likely not be resolved until individual cases work their way through the courts.