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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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FLASH NO. 43
A FAVORABLE DECISION REGARDING THE MASSACHUSETTS "ABC" TEST

The saga surrounding the challenges to the Massachusetts "ABC" Test for independent contractors has taken a potentially positive turn for the transportation industry. A decision issued by the U.S. Court of Appeals for the First Circuit on September 30 reversed a Federal District Court's ruling regarding FAAAA preemption and sent the matter back to that court for further consideration as to whether the Massachusetts statute satisfies the broad federal preemption test consistent with the principles articulated by the Court of Appeals.

As background, the current law in Massachusetts creates a presumption that workers are employees, unless all three criteria of Section 148(B) of the Massachusetts General Laws are met, which is commonly referred to as the "ABC" Test. The three prongs of the "ABC Test" are: (A) the worker is free from control and direction in performing the work (under the contract and in fact); (B) services provided by the worker are *outside of the usual course of the business of the employer*; and (C) the worker is customarily engaged in an independent business performing such services. There was a revision to Prong B in 2004 that eliminated an exemption for workers who performed their work "outside of the company's places of business," which forced motor carriers that regularly utilize independent contractors within Massachusetts to change their business models to comply or run the risk of penalties.

The Massachusetts Delivery Association (MDA) brought suit in 2010 against the Massachusetts Attorney General in Federal Court, claiming that this state law, and specifically Prong B of the test, is preempted for motor carriers under the Federal Aviation and Administration Authorization Act of 1994 (FAAAA). Using its member company Xpressman Trucking & Courier, Inc. as the example, MDA argued that under Massachusetts law Xpressman must consider their drivers as employees because they could never pass Prong B of the test since the delivery services that the driver's perform are done in the usual course of business for delivery companies. Essentially, MDA argued that Xpressman and companies like it would have to severely alter their business models to comply with the law, including their prices charged, routes used, and services offered to customers, which is in direct contravention of FAAAA. The District Court determined that there was no FAAAA preemption and MDA appealed.

Generally, FAAAA says that states cannot enact or enforce laws that are related to a price, route, or service of any motor carrier with respect to the transportation of property. The first phrase, "related to price, route and service," is borrowed from the earlier Airline Deregulation Act ("ADA") and interpreted identically. However, the second phrase, "with respect to transportation of property," is unique to FAAAA. When evaluating the first phrase, "related to a price, route, or service of any motor carrier," a state law is preempted by FAAAA if it specifically references, or has a major impact on, a motor carrier's prices, routes, or services. Various courts have interpreted the phrase in a purposely expansive manner, encompassing laws that have a connection with, reference to, or a significant impact on the rates, services, or routes. But, it does have some limits, such as when the law's effect is only remote or peripheral. The Massachusetts Attorney General argued that

"background" labor laws that contain the "ABC" Test are of generally applicability and not aimed at a specific area of federal authority, and are thus sufficiently remote and not preempted. The Court of Appeals, however, soundly rejected this line of thinking, favoring a broader interpretation of the phrase. Specifically, the Court of Appeals found that the District Court incorrectly applied the first phrase and incorrectly interpreted the second phrase; it read the first phrase too narrowly and the second phrase too broadly; and a thorough review of state laws is required, even the generally applicable ones, to determine if there are actual but unallowable effects on the price, route, or services.

The District Court had rejected MDA's argument that the "ABC" Test effectively prohibits motor carriers from engaging their couriers as independent contractors and should be preempted due to (1) its direct regulation of the service itself and (2) its effect on prices, routes, and services, since Xpressman's required use of employees instead of independent contractors would significantly increase its costs and, in turn, its prices to its customers. The Court of Appeals, however, agreed with MDA relying on Supreme Court precedent which broadly interprets the "related to" language in FAAAA, and determined that a statute's "potential" impact on motor carriers' prices, routes and service can be sufficient even if it is significant, rather than tenuous, remote or peripheral, and that courts should look to the logical effect that a particular scheme has on the delivery of services or the setting of rates. This local effect can be sufficient even if indirect.

The second part of the FAAAA preemption phrase is "with respect to the transportation of property." The District Court interpreted this language independently and strictly, relying on the US Supreme Court's decision in *Dan's City Used Cars v. Pelkey*, which we reviewed in detail in our May 2013 Flash. The District Court's interpretation was that a state law must *regulate* the motor carrier's transportation of property, not simply *concern* the transportation of property. The Court of Appeals determined that such a strict interpretation of the second phase would nullify the expansive reading of the first phrase regarding the relation to a "price, route, or service," effectively guaranteeing that state laws that met such criteria, albeit in a significant but indirect way, would never be preempted.

The Appeals Court went on to clarify the FAAAA preemption's scope as being broader than *regulating* transportation of property but not actually encompass situations wholly unrelated to transportation. For instance, laws that affect transportation of passengers or that are related to motor carriers only after they have completed the transportation of property, such as the case in *Dan's City*, would not fall under the preemption. The Court of Appeals interpreted *Dan's City* to mean that the second phrase excludes from FAAAA preemption any state law that affects a motor carrier's prices, routes, or service outside the context of the transportation of property.

Because the Massachusetts's "ABC" Test could affect prices, services, or routes and obviously concerns a motor carrier's transportation of property, the Court of Appeals remanded the case back to the District Court to determine whether Section 148(B) satisfies the broad preemption test on a review of the full record consistent with the principals outlined by the Court of Appeals.

The Court of Appeals decision is certainly not a home run, but it is a solid double with no outs. We will be watching the District Court's analysis closely since the MDA presented no evidence as to Prong A or Prong C. Thus, even though the Court of Appeals found Prong B to be preempted, the couriers still could be classified as employees. That being said, the Court pointed out that a decision on Prong B would lift the bar to the couriers' classification as independent contractors even if it does not conclusively resolve their classification. In the meantime, should you have questions on this development or how it may impact your independent contractor operations, we would be happy to help.

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