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New Employment Challenges in Transportation and Logistics

Analyzing New Prime Inc. v. Oliveira, Worker Classification, Regulatory Compliance

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NEW EMPLOYMENT CHALLENGES IN TRANSPORTATION AND LOGISTICS

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Strafford Webinar

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DLA PIPER

INTRODUCTION

OVERVIEW OF TODAY'S PRESENTATION

- Increased activity by states – a "patchwork" of laws?
- More difficult to use independent contractors throughout United States.
- Increased challenges to arbitration agreements.
- Greater use of employees means more rules to follow.

WORKER CLASSIFICATION

EMPLOYEES OR INDEPENDENT CONTRACTORS?

- Benefits to Independent Contractors
  - Lower costs.
  - Greater flexibility for fluctuating business demands.
  - Specialized skills.
  - Specialized equipment.
- Benefits To Employee Model
  - Greater control.
  - Greater dependability.
  - Guaranteed ability to respond to customer needs.

CLASSIFYING WORKERS PROPERLY

- There are many different legal tests.
- "Right to control" tests, including the IRS 20-factor test.
- Department of Labor's economic realities test.
- National Labor Relations Board's common-law agency test.
- ABC test.
- Other tests.

IRS RIGHT-TO-CONTROL TEST

- "The general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done."
- Facts that provide evidence of the degree of control and independence fall into three categories:
  - **Behavioral**: Does the company control or have the right to control what the worker does and how the worker does his or her job?
  - **Financial**: Are the business aspects of the worker's job controlled by the payer? This includes things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.
  - **Type of Relationship**: Are there written contracts or employee type benefits (*i.e.*, pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

ECONOMIC REALITIES TEST

- The extent to which the services rendered are an integral part of the principal's business.
- The permanency of the relationship.
- The amount of the alleged contractor's investment in facilities and equipment.
- The nature and degree of control by the principal.
- The alleged contractor's opportunities for profit and loss.
- The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
- The degree of independent business organization and operation.

NLRB COMMON-LAW AGENCY TEST

- In 2014, the NLRB announced a more restrictive test in *FedEx Home Delivery*, 361 NLRB 610 (2014), which emphasized the economic realities.
- On January 25, 2019, the NLBR returned to the historic common-law agency test in *SuperShuttle DFW, Inc*.
- Restatement (Second) of Agency, § 220 (1958)
  - The extent of control which, by the agreement, the master may exercise over the details of the work;
  - Whether or not the one employed is engaged in a distinct occupation or business;
  - The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
  - The skill required in the particular occupation;

NLRB COMMON-LAW AGENCY TEST (CONT'D)

- Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- The length of time for which the person is employed;
- The method of payment, whether by the time or by the job;
- Whether or not the work is part of the regular business of the employer;
- Whether or not the parties believe they are creating the relation of master and servant, and
- Whether the principal is or is not in business.

ABC TEST – COMMON VERSION

- The worker has been and will continue to be free from control or direction over the performance of such service, both under the contract of service and in fact; *and*
- The service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; *and*
- The individual is customarily engaged in an independently established trade, occupation, profession or business.

ABC TEST – MORE RESTRICTIVE VERSION

- *Dynamex v. Superior Court*, 4 Cal.5th 903 (2018) – the California Supreme Court imports Massachusetts' version of the ABC test for purposes of the state's Wage Orders.
- California's test:
  - Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact; *and*
  - Does the worker perform work that is outside the usual course of business of the hiring entity; *and*
  - Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?
- **Big change** – no language under Prong B permitting contractor if "such service is performed outside of all the places of business of the enterprise for which such service is performed."

APPLICATION OF ABC TEST IN CALIFORNIA

- Case law
  - *Garcia v. Border Transp. Group, LLC*, 28 Cal. App. 5th 558 (2018).
  - *Lawson v. Grubhub, Inc.*, No. 3:15-cv-05128-JSC, 2018 WL 776354 (N.D. Cal. February 8, 2018), appeal filed, No. 18-15386 (9th Cir. March 8, 2018)
- AB5 – possible codification of *Dynamex* for Labor Code, unemployment, and workers' compensation purposes.
- Preemption challenges under the Federal Aviation Administration Authorization Act ("FAAAA") and other statutes.

FAAAA PREEMPTION

- 1978: Airline Deregulation Act preempts "any law, regulation, or other provision having the effect of law related to a price, route, or service of an air carrier . . . ."
- "The need for [preemption] has arisen from this patchwork of legislation" by the states.
- 1994: FAAAA (mirrors ADA and only addresses motor carriers) – "a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law ***related to a price, route, or service of any motor carrier*** (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property." 49 U.S.C. § 14501(c)(1).

CASES APPLYING FAAAA PREEMPTION TO ABC TESTS

- *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 439-440 (1st Cir. 2016) – finding that the use of independent contractors "would be largely foreclosed" by application of Prong B such that Massachusetts' ABC test "is thus preempted by § 14501(c)(1)."
- *Chambers v. RDI Logistics, Inc.*, 65 N.E.3d 1, 9 (Mass. 2016) – holding that Massachusetts' ABC test was preempted by FAAAA because Prong B is a "de facto ban" that creates "an impossible standard for motor carriers wishing to use independent contractors."
- *Bedoya v. American Eagle Express Inc.*, 914 F.3d 812, 822-825 (3d Cir. 2019) – finding that New Jersey's version of the ABC test (which was less restrictive than the California/Massachusetts versions) does not "requir[e] carriers to use employees rather than independent contractors" and is "unlike the preempted" version of Prong B.
- *Alvarez v. XPO Logistics Cartage LLC*, 2018 WL 6271965, at *5 (C.D. Cal. 2018) – concluding "the ABC test – as adopted by the California Supreme Court – 'relates' to a motor carrier's services in more than a 'tenuous' manner and is therefore preempted by the FAAAA."
- *Western States Trucking Ass'n v. Schoorl*, No. 2:18-cv-01989-MCE-KJN, 2019 WL 1426304, at *10 (E.D. Cal. March 29, 2019) – rejecting preemption argument because the "mere fact that increased costs may result does not trigger preemption."

STRATEGIES FOR MINIMIZING RISK

- Don't use independent contractors, particularly for logistics operations?
- Use staffing companies to obtain temporary workers, but risk of joint employer liability.
- Arbitration agreements, but issues regarding enforceability.
- Try to strengthen independent contractor defenses.

MINIMIZING RISKS FOR INDEPENDENT CONTRACTORS

- Written contract.
- No termination at-will language in the contract.
- Allow the contractor to negotiate contract terms.
- Require payment by the job or task completed.
- Pay by means other than time worked, including by task completed.
- Allow contractor to hire employees to assist or perform services without prior company approval.
- Ability for contractor to obtain an equity interest in the business that can be sold to others without company approval.
- Not having employees performing same work as contractors.
- Allow contractor to perform similar services for other companies.

MINIMIZING RISKS FOR INDEPENDENT CONTRACTORS *(CONT'D)*

- Allow the contractor, and not the hiring entity, to control the economic aspects of the job:
  - Contractor's investment in equipment necessary to perform the job.
  - Bearing operating expenses.
  - Using contractor's office, rather than use of a company office or office equipment.
  - Contractor having own business cards, rather than company business cards.
  - Avoiding company subsidies, privileges, goods, services.

MINIMIZING RISKS FOR INDEPENDENT CONTRACTORS *(CONT'D)*

- Avoid appearance of control over the "manner and means" in which the services are performed, including:
  - "Regular business hours";
  - Designated meal and rest breaks;
  - Required training programs;
  - Specific techniques;
  - Grooming standards;
  - Mandated dress codes or uniforms; or
  - Mandated use of the company's logo.
- Conventional discipline for contractors rather than use of breach of contractual obligations.
- Employee benefits or vacation.
- Attendance at employee meetings or employee training sessions.

MINIMIZING RISKS FOR INDEPENDENT CONTRACTORS *(CONT'D)*

- Companies should pay attention to how they define their usual course of business, including their website, position postings, public filings, etc.
- Preferable to contract with established businesses – incorporation, licensure, advertisements, routine offerings to provide services of the independent business to the public or to potential customers, etc.

ARBITRATION AGREEMENTS

FEDERAL ARBITRATION ACT ("FAA")

- 9 U.S.C. § 2 – "A written provision in any maritime transaction or a contract ***evidencing a transaction involving commerce*** to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, ***shall be valid, irrevocable, and enforceable***, save upon such grounds as exist at law or in equity for the revocation of any contract."
- *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) – upholding inclusion of class-action waivers in mandatory arbitration agreements.
- So, we're good, right?

EXCEPTION FOR TRANSPORTATION WORKERS

- 9 U.S.C. § 1 – "[N]othing herein contained [in the FAA] shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.
- *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019) – Supreme Court resolved two questions:
  - A judge – not an arbitrator – decides whether the FAA applies, including the related issue of the transportation worker exclusion.
  - The phrase "contracts of employment," as used in the FAA, includes contracts with independent contractors, as well as agreements between employers and employees.
- The *New Prime* decision did not address who does or does not fall within the transportation worker exclusion.

HOW BROAD IS THE TRANSPORTATION WORKER EXCLUSION

- *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).
- The plaintiff worked for the electronics retailer. After the district court ordered the case to arbitration, the Ninth Circuit reversed, concluding that Section 1 exempted all employment contracts from the FAA's reach.
- The Supreme Court concluded that Section 1 is confined to transportation workers:
  - "[T]he location of the phrase 'any other class of workers engaged in . . . commerce' in a residual provision, after specific categories of workers have been enumerated, undermines any attempt to give the provision a sweeping, open-ended construction. And the fact that the provision is contained in a statute that 'seeks broadly to overcome judicial hostility to arbitration agreements,' . . . gives no reason to abandon the precise reading of a provision that exempts contracts from the FAA's coverage." *Id*. at 118 (internal citation omitted).

EXAMPLES OF CASES ADOPTING NARROWER VIEW OF EXCLUSION

- *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1289 (11th Cir. 2005) – exclusion did not apply to account manager for a furniture rental company who occasionally made furniture deliveries to out-of-state customers. "The emphasis [in Section 1] was on a class of workers in the transportation industry, rather than on workers who incidentally transported goods interstate as part of their job in an industry that would otherwise be unregulated."
- *Bonner v. Mich. Logistics Inc.*, 250 F.Supp.3d 388, 397 (D. Ariz. 2017) – the district court held that the Section 1 exemption should be construed narrowly as to delivery drivers, "exclud[ing] the contracts of workers who are literally engaged in the process of moving goods across state and national boundaries—workers like seamen and railroad employees."
- *Veliz v. Cintas Corp.*, No. C 03-1180 SBA, 2004 WL 2452851 (N.D. Cal. Apr. 5, 2004) – the district court rejected an overly broad definition of "transportation worker" since otherwise "every employee from a trucker for a grocery store to a pizza deliveryman" could be engaged in interstate commerce.
- *Wallace v. Grubhub Holdings Inc.*, No. 18 C 4538, 2019 WL 1399986, at *4 (N.D. Ill. March 28, 2019) – "Grubhub drivers do not belong to a class of workers engaged in interstate commerce. Their day-to-day duties do not involve handling goods that remain in the stream of interstate commerce, traveling to and from other states."

EXAMPLES OF CASES ADOPTING BROADER VIEW OF EXCLUSION

- *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 823 F.2d 466, 473 (11th Cir. 1987) – postal workers were engaged in interstate commerce under the FAA's Section 1 exemption, because they were "responsible for dozens, if not hundreds, of items of mail moving in 'interstate commerce' on a daily basis."
- *Bacashihua v. United States Postal Serv.*, 859 F.2d 402, 405 (6th Cir. 1988) – "the concern [is] not whether the individual worker actually engaged in interstate commerce, but whether the class of workers to which the complaining worker belong[s] engaged in interstate commerce."
- *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 594 (3rd Cir. 2004) – exclusion applies to manager who oversaw 30-35 drivers moving packages to and from airport.
- *Int'l Broth. of Teamsters Local Union No. 50 v. Kienstra Precast*, 702 F.3d 954 (7th Cir. 2012) – Section 1 applied even where number of interstate deliveries "was a small proportion of their total workload, the remainder of which was intrastate." "[E]ach trucker who testified at the hearing estimated that he had made 1500 to 1750 deliveries each year, of which only a few dozen were to Missouri."

STRATEGIES IN LIGHT OF *NEW PRIME*

- Choose a state arbitration law to overcome the FAA exemption.
  - Neither the FAA nor *New Prime* prohibit private arbitration of disputes.
  - All 50 states have adopted some version of the Uniform Arbitration Act or the Revised Arbitration Act.
  - But, beware of preemption argument.
    - State arbitration laws that are broader than the FAA should be permissible.
    - FAA's exclusion of transportation workers should limit FAA's preemptive effect.
  - Also beware that some states like California may offer no greater protection.

STRATEGIES IN LIGHT OF *NEW PRIME* (*CONT'D*)

- Rethink forum selection clause.
  - For administrative ease, most companies choose a forum based on the location of their headquarters or their state of incorporation
    - But, *New Prime* creates downside: a single forum for disputes encourages nationwide employees to come together in that forum and sue via a collective action.
  - To avoid this, companies should consider requiring employees to adjudicate their disputes in their home states. This will preclude employees from opting in to a collective outside of their home state. This approach would work in California, where the Labor Code prohibits forum selection clauses that require CA residents to arbitrate/litigate outside of CA.
  - Consider inserting forum selection clause for jurisdiction with favorable state law enforcing arbitration agreements?

STRATEGIES IN LIGHT OF *NEW PRIME* (*CONT'D*)

- Stand-alone class and collective action waiver not contingent on arbitration?
  - Arbitration programs are generally implemented with class and collective action waivers in order to avoid the prospect of nationwide class and collective actions.
  - In the wake of *New Prime*, companies should consider whether to adopt a stand-alone class and collective action waiver that is not tied to arbitration. However, this approach may only work in certain jurisdictions.
    - *In Killion v. KeHE Distributors LLC*, 761 F.3d 574 (6th Cir. 2014), the Sixth Circuit held that "a plaintiff's right to participate in a collective action cannot normally be waived" absent an arbitration agreement.
    - However, in *Convergys Corporation v. NLRB*, 866 F3d 635 (5th Cir. 2017), the Fifth Circuit upheld the enforceability of a class action waiver outside of an arbitration agreement

STRATEGIES IN LIGHT OF *NEW PRIME* (*CONT'D*)

- Segregate intrastate and interstate workers (*practical?*)
  - If employees are performing nothing more than local deliveries or intrastate work, there is a legitimate argument that such workers are not "engaged in interstate commerce" and thus are not exempt under the FAA.
  - If practical (operationally and administratively), transportation employers should consider segregating transportation employees into two distinct groups: (i) interstate workers, and (ii) intrastate workers.
  - Doing so, should allow the latter group to avoid the FAA's interstate exemption.

REGULATORY COMPLIANCE ISSUES

DRUG TESTING

- In many industries, the legalization of marijuana in some states has complicated the drug testing process, but not for transportation workers.
  - Federal Controlled Substances Act still provides that marijuana is illegal.
  - DOT's Drug and Alcohol Testing Regulations (49 CFR Part 40) do not authorize medical marijuana under state law to be a valid medical explanation for a positive drug test.
  - So, when it comes to drivers, employers can neither accommodate medical marijuana nor tolerate recreational marijuana.
  - Another complicating factor is the use of opioids (*e.g.*, OxyContin, Vicodin, Norco, Percocet).
    - Unlike alcohol which has a defined system that defines "under the influence," there are no such limits for marijuana or opioids.
    - However, drivers must be "fit for duty."

DRUG TESTING *(CONT'D)*

- Best practice: use random drug testing protocol along with robust fitness-for-duty/return-to-duty analysis.

- But what about non-transportation employees, such as dispatchers and other ancillary roles?
  - Review drug testing policies to ensure they apply to both medical and recreational marijuana. This will likely require implementation of a separate drug testing policy for driver employees and for non-driver employees.
  - Consider whether you will follow state or federal law with regard to non-driver employees.

COMPENSATION – MOTOR CARRIER OVERTIME EXEMPTION

- Truck drivers, driver's helpers, loaders, and mechanics are considered exempt from overtime pay, if the following conditions are met:
  - Annual salary of at least $23,660 (but, could increase to $35,308 if newly-proposed rule becomes final).
  - Must be involved in interstate commerce or connect with an intrastate terminal to continue an interstate journey.
- **Note:** involvement in interstate commerce is needed to satisfy Motor Carrier Act, which may result in person falling within the FAA's transportation worker exclusion.
- You may be able to rely on an arbitration agreement or the Motor Carrier Act, but can both apply to the same worker?

COMPENSATION – MOTOR CARRIER OVERTIME EXEMPTION *(CONT'D)*

- **Note:** employees such as dispatchers and office personnel (*i.e.*, those that are not engaged in "safety affecting activities") are not included within this exemption. As such, they may only be exempt from overtime pay to the extent that they qualify for another exemption (*e.g.*, administrative).
  - To the extent it is not prohibited in a particular state (*e.g.*, Alaska, Pennsylvania, California), consider the use of the "fluctuating work week" approach for such employees in order to minimize the cost of overtime pay from 1.5x to .5x.
- If applicable, lease between independent truck driver and trucking company employer will specify the method of compensation to be used.

MEAL PERIODS AND REST BREAKS

- DOT's Hours-of-Service rules require long-haul truck drivers to take at least 30 minutes off duty no later than 8 hours after coming on duty.
- More stringent requirements imposed by some states, *e.g.*, California requires a 30-minute off-duty meal period beginning before the end of the fifth hour of work, a second 30-minute off-duty meal period on shifts over 10 hours, and paid rest breaks for every four hours worked or major fraction thereof.
- What happens when there is a conflict between the rules?
  - No preemption in most jurisdictions based on existing language in the FAAAA, and efforts to amend that statute were unsuccessful.

RECENT PREEMPTION DETERMINATIONS

- Pipeline and Hazardous Materials Safety Administration: Determination of Preemption (September 20, 2018) – "find[ing] that California's meal and rest break requirements create an unnecessary delay in the transportation of hazardous materials, and are therefore preempted with respect to all drivers of motor vehicles that are transporting hazardous materials."
- Federal Motor Carrier Safety Administration: Grant of Petition for Determination of Preemption (December 28, 2018) – finding that "California may no longer enforce the [meal and rest break rules] with respect to drivers of property-carrying [commercial motor vehicles] subject to FMCSA's HOS rules."
- Subsequent developments.
  - FMCSA order appealed in Ninth Circuit by State of California and Teamsters.
  - FMCSA Legal Opinion of the Office of the Chief Counsel (March 22, 2019) – finds that preemption determination applies retroactively.
  - Petition related to drivers of passenger-carrying vehicles.

TRUTH-IN-LEASING REGULATIONS

- DOT regulates leases between independent truck drivers and federally-regulated motor carriers through its "Truth-in-Leasing" regulations 49 C.F.R. Part 376.
  - Specific lease requirements are set forth at 49 C.F.R. 376.12, which includes, among others, the following specific requirements:
  - Specification of compensation: flat-rate/mile; variable rate depending on direction or type of commodity transported; or other mutually-agreed method. (Subsection (d)).
  - Specification of charge-back items: lease shall specify *all* items that are paid for by the company but that will be deducted from the driver's compensation, along with *how* the amount of each deduction was computed. (Subsection (h)).
  - No requirement to rent or purchase products, equipment or services from an authorized carrier: lease shall specific that there is no requirement to rent or purchase specific items as a condition of entering into the lease. (Subsection (i)).
- Additional opportunities for preemption arguments?

BEST PRACTICES FOR EMPLOYMENT COUNSEL IN DRAFTING WORK AGREEMENTS, SAFETY MANUALS AND EMPLOYEE HANDBOOKS

QUESTIONS?