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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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FLASH NO. 40
SUPREME COURT DECLINES SWIFT REVIEW—BUT IT IS NOT THE END OF THE STORY

The U.S. Supreme Court recently declined to review the Swift worker misclassification case, which has been working its way through the courts for several years. That decision has brought up a lot of questions on the viability of arbitration provisions in independent contractor agreements, but it is a far cry from the end of the story.

The case has went through several iterations to even get to possible consideration at the Supreme Court. The plaintiff drivers, all of whom entered independent contractor operating agreements with Swift, brought their initial class action complaint in 2009, alleging violations of the Fair Labor Standards Act and state labor laws, among other claims. The drivers claimed that they were really employees and offered various terms in the independent contractor agreement as their proof. Swift asked the District Court to require that the case be moved to arbitration, citing an arbitration clause that both parties has agreed to in the independent contractor agreement. The drivers argued that arbitration was no longer appropriate because the contract was really an *employment contract* between an employer and employee for work in interstate commerce and not an independent contractor agreement at all, and such contracts for employment in interstate commerce were exempt from arbitration under the Federal Arbitration Act (FAA).

The District Court declined to rule on the driver's argument on the FAA exemption on arbitration, instead saying that the terms of the parties' independent contractor agreement delegated to an arbitrator any disputes concerning the parties' relationship or even whether a specific dispute was arbitrable. Therefore, the District Court reasoned, this was not a question to be decided by the court itself, but rather the independent contractor agreement left to an arbitrator the question of whether an employer/employee relationship existed and whether the FAA exemption would apply. The drivers appealed this decision by the District Court.

The central question really revolved around one issue: in a complaint alleging *worker misclassification* where an agreement with an arbitration clause exists between the parties, should the court itself determine whether or not the workers were employees or independent contractors, and thus whether the contract is exempt from arbitration, or is this an arbitrable issue to be delegated to and determined by the arbitrator. Ultimately, the Appeals Court noted that established law makes the question of arbitrability an issue for the court itself unless the parties can prove otherwise. As an initial matter, a district court must first determine if an agreement is exempt from arbitration under the FAA before it can compel the parties to arbitration.

What does this mean for motor carriers who operate on an independent contractor model similar to Swift? On its face, you may think that the conclusion is that arbitration clauses do not matter anymore in independent contractor agreements since the court itself must decide the issue of worker misclassification and employment contracts. But no, we believe this is way too simplistic of a view. The Swift case was really first and foremost a *worker misclassification* dispute, and while the case may offer us guidance, it is really only binding in the 9th Circuit. And, arbitration clauses are like the jack of all trades of the contract world—they can do many, many things and serve many purposes. There are a whole host of other potential issues that may pop up in an independent contractor agreement besides the question of "employee or independent contractor" that would be well served by an arbitration clause. Issues such as violations of federal leasing regulations (such as those in which OOIDA has been active in the past few years), breach of contract, damages, and non-compete clauses all would still be effectively handled in arbitration. Further, a well-crafted independent contractor agreement arbitration clause should include the element of applicability on an individual case basis only and not as part of a class action.

While the Swift case was certainly not as positive of an outcome as the industry would have liked to have seen, there are still many reasons why an arbitration clause makes a lot of sense in today's independent contractor agreements. We here at Benesch are available to assist you with a review of your independent contractor model or to answer further questions should the need arise.

Additional Information

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