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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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FLASH NO. 53
2 STEPS BACK—FIRST CIRCUIT COULD HAVE DONE MORE FOR THE INDEPENDENT CONTRACTOR BUSINESS MODEL

Approximately one year ago in *FLASH No. 46*, we wrote about Massachusetts District Court Judge Robert G. Stearns' industry-positive decision in *Schwann, et al. v. FedEx Ground Package System, Inc.* In short, guided by the First Circuit Court of Appeals' ruling in *Massachusetts Delivery Ass'n v. Coakley*, 769 F.3d 11 (1st Cir. 2014), Judge Stearns granted summary judgment in favor FedEx Ground on the grounds that Prong 2 of the Massachusetts Independent Contractor Law, Mass. Gen. Laws ch. 149, §148B (the "Massachusetts "ABC" Test") was preempted for motor carriers under the Federal Aviation and Administration Authorization Act of 1994 ("FAAAA") because application of Prong 2 would "unquestionably have an impact on 'price, route[s], [and] services' by in effect proscribing the carrier's preferred business model." In addition, Judge Stearns ruled that Prong 2 could not be severed from the statute as a whole; enforcing either Prong 1 or Prong 3 would lead to the same result: a preempted impact on a motor carrier's choice of business model. As a result, the entire Massachusetts "ABC" Test must be treated as preempted.

The Massachusetts "ABC" Test provides that a worker is properly classified as an independent contractor if the employer can show that: (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and (2) the service is performed outside the usual course of the business of the employer, and (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

On February 22, 2016, the First Circuit issued an opinion affirming, in part, and reversing, in part, Judge Stearns' February 5, 2015 decision. The First Circuit also sent the case back to Judge Stearns for further proceedings consistent with its opinion.

In the opinion, the First Circuit affirmed Judge Stearns' decision that Prong 2 of the Massachusetts "ABC" Test was preempted by FAAAA. Disappointingly, the First Circuit declined to adopt an industry friendly bright-line that Prong 2 is preempted because it proscribes a carrier's preferred business model, and instead reeled back the breadth of the preemption proclaimed by Judge Stearns. The First Circuit stated that "there is a limit to the preemptive scope of [FAAAA]," and "one must move quite far afield to confidently reach that limit." Further, "[e]xactly where the boundary lies between permissible and impermissible state regulation *is not entirely clear*." (emphasis added). To that end, the Court limited its holding, stating that "we hold only that Prong 2 *as Plaintiffs propose to apply it* sufficiently 'relate[s] to' FedEx's service and routes and is thus preempted by [FAAAA]." (emphasis added). One step back.

Next, in what can only be described as legislative and judicial activism double-speak, the First Circuit reversed Judge Stearns' decision that Prong 1 and Prong 3 were also

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preempted because those prongs were not severable from Prong 2 of the Massachusetts "ABC" Test. The Court first noted a "judicial preference" for severability, as well as a Massachusetts legislative escape that "the provisions of any statute shall be deemed severable." Despite the plain fact that the Massachusetts "ABC" Test was enacted in the conjunctive (meaning that each prong had to be satisfied to classify a worker as an independent contractor; Prong 1 and Prong 2 each end with "and"), the First Circuit opined that "[t]he separated itemization of [the statute's] three factors easily allows for the straightforward deletion of one factor without touching the others," and "Prong 2 may easily be eliminated from the statute, leaving the remainder intact." "We therefore *think* that the legislature's plain aim in enacting this statute favors two-thirds of this loaf over no loaf at all as applied to motor carriers with respect to the transportation of property." (emphasis added). Two steps back.

Nonetheless, it appears that the First Circuit was most put-off by the fact that Judge Stearns apparently declared that Prong 1 and Prong 3 were likewise preempted under FAAAA on his own, without being prompted to do so by FedEx. Perhaps keen to the adage that "pigs get fed and hogs get slaughtered," FedEx never argued that Prong 1 and Prong 3 were non-severable. As such, the First Circuit elected to "hold FedEx to its decision not to argue to us that Prongs 1 and 3 are preempted, and for that reason alone vacate and reverse the district court's ruling that Prongs 1 and 3 are preempted."

In our view, the First Circuit's ruling is not particularly favorable to the industry, but satisfying the newly modified Massachusetts "A – C" Test remains possible, though more challenging than after Judge Stearns' decision last year. We will, of course, continue to monitor this case and further developments. In the meantime, should you have any questions regarding these developments or how they may impact your independent contractor operations, we would be very happy to help.

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Allen is a partner with Benesch's Transportation & Logistics Practice Group. He focuses his practice on the representation of companies located throughout the country in virtually all segments of the transportation industry, including, among others, truckload carriers, overweight/over-dimensional carriers, bulk and tank carriers, dray carriers, and third-party logistics providers in matters involving, among other things, independent contractor/owner-operator issues, lost, damaged or stolen freight, freight charge collection, and transportation related service agreements.

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