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FLASH NO. 48 DISTRICT COURT CONFIRMS FEDERAL PREEMPTION IN MASSACHUSETTS “ABC TEST” LITIGATION

Yesterday, Judge Denise Casper of the District of Massachusetts issued an industry-friendly ruling in *Massachusetts Delivery Association v. Healy*, awarding summary judgment to the Massachusetts Delivery Association (“MDA”) and declaring that a portion of the Massachusetts Independent Contractor Law, Mass. Gen. Laws ch. 149, §148B (the “Massachusetts “ABC” Test”) is preempted by the Federal Aviation and Administration Authorization Act of 1994 (“FAAAA”). Previously, Judge Casper denied a motion by MDA, and allowed a motion by the Massachusetts Attorney General, ruling that Prong B of the Massachusetts “ABC” Test was not preempted for motor carriers under the FAAAA. MDA appealed that decision to the First Circuit Court of Appeals. In October of last year, the First Circuit reversed Judge Casper’s decision, ruling that the statute could affect a motor carrier’s prices, routes, or services, and sent the case back to Judge Casper for further consideration as to whether the Massachusetts statute satisfied the broad federal preemption test consistent with the First Circuit’s ruling.

The Massachusetts “ABC” Test provides that a worker is properly classified as an independent contractor if the employer can show that: (A) 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 (B) the service is performed outside the usual course of the business of the employer, and (C) 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. Judge Casper’s opinion focused on the effect of Prong B of the “ABC” Test on the prices, routes, and services of X Pressman Trucking & Courier, Inc. (“XPressman”), the member entity offered by MDA as an exemplar for purposes of the case.

Judge Casper first concluded that the application of Prong B would require XPressman to modify the delivery routes it served if forced to reclassify its independent contractors as employees. MDA argued that while independent contractors typically provide their own vehicles for use in the performance of services, the industry standard is for employees to drive company-owned vehicles. Judge Casper noted that the use of company-owned vehicles has “the potential to require XPressman to change its routes,” because XPressman might have to bear the expense of purchasing and maintaining a fleet of company-owned vehicles and compensate drivers for “stem miles,” increasing miles driven “by approximately 28 percent and hours worked and paid by 15 percent.” The logical effect on XPressman’s routes, according to Judge Casper, “would at least force a delivery company to charge higher prices that allow it to recoup these costs and to alter routes that formerly would begin and end at the courier’s own residence.”

In addition, the Court determined that since the application of Prong B could require XPressman, under applicable Massachusetts law, to provide unpaid meal breaks to driver's working more than six hours per day, and provide a day off for any driver working on Sunday, XPressman's routes could be affected by the statute. Thus, "[i]f compliance with [Prong B] hinders the opportunity to provide daily delivery service without the contingency of adding drivers to a route or constricts a route to fewer than six hours of driving, now or in the future," it "impermissibly affects a delivery company's routes in a significant way."

Next, Judge Casper focused on the logical effect of Prong B on XPressman's services. MDA argued that Prong B would force XPressman to cease providing on-demand service if required to classify delivery drivers as employees, because Massachusetts law requires employees to be compensated for time spent on-call, while XPressman's business model depends on a flexible workforce that is not paid while waiting on the next delivery job. If employee drivers merely took second jobs, as the Attorney General suggested, those drivers would likely be unavailable to XPressman during certain times of day. In any event, as the Court noted, as employees, the on-demand drivers could no longer decline a delivery job, effectively precluding them from taking a second job. Thus, to maintain its on-demand service under those circumstances, XPressman would be compelled to retain an on-call workforce, resulting in increased costs and higher prices. In other words, the law compels an impermissible Hobson's choice for XPressman with respect to its on-demand delivery service. Judge Casper wrote that "here, Massachusetts seeks to enforce a policy of hiring employees when market forces have prompted delivery companies to adopt an independent contractor model. The law would have the effect of limiting a courier company to the provision of scheduled service at the expense of on-demand deliveries."

Moreover, the Court determined that to avoid increased costs, delivery companies like XPressman would be forced to constantly modify routes, thereby affecting the services offered to its customers. Judge Casper held that FAAAAA preemption was intended to prevent such regulatory interference.

Last, the Court concluded that Prong B would have a logical, "if indirect," effect on XPressman's prices due to increases in operating costs. For example, XPressman would be required to pay payroll taxes for additional employees. As explained above, XPressman would likely have to acquire and maintain a fleet of delivery vehicles, and pay employees for "stem miles." Further, under Massachusetts law, XPressman employees would be entitled to a minimum wage and overtime pay, potentially requiring XPressman to incur additional labor costs associated with expense tracking and additional employees. As a result, Judge Casper determined that by implication, XPressman's prices would increase due to overtime, or its routes would have to be changed to "accommodate the assignment of multiple couriers." In short, "the practical and significant, if indirect, effect of an employee classification under the law is to require an adherence to a host of other laws," resulting in higher prices to XPressman's customers.

Accordingly, the Court decided that Prong B of the Massachusetts "ABC" Test is preempted since it affects XPressman's services, routes, and prices. "Such preemption is as a matter of law where . . . [Prong B] operates as a bar on the business model of same-day delivery service using independent contractors . . . where the service performed by the courier is not outside of the usual course of business of the employer."

Judge Casper's ruling is another industry-favorable decision regarding the Massachusetts "ABC" Test and is significant in its application of market factors and

forces to the logical effect of the law on a business's operational model. We will continue to monitor this case closely as another appeal in this continuing saga is certainly a possibility. In the meantime, if you have any questions regarding this new development or how it may impact your independent contractor operations, the Benesch Transportation & Logistics team would be happy to help.

For more information

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