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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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FLASH NO. 72
PREDICTING ABC OUTCOMES IS NOT THAT EASY: A TALE OF TWO STATES

In November, we documented a number of 2018 independent contractor-related developments in New Jersey since Democratic Governor Phil Murphy's inauguration in January, one of which was the filing by the NJDOL in August of an amicus brief in *Bedoya v. American Eagle Express*[1] vigorously arguing against FAAAA preemption of New Jersey's ABC test. Today we update you on the Third Circuit's decision last week in *Bedoya* and also briefly summarize a very recent state supreme court driver classification decision in a state that leans more conservative politically and judicially.

Bedoya v. American Eagle Express, Inc. d/b/a AEX Group

On January 29, the Third Circuit decided in *Bedoya* that New Jersey's ABC test for employee classification, as codified in the New Jersey Wage and Hour Law ("NJWHL") and New Jersey Wage Payment Law ("NJWPL"), is not preempted by the FAAAA. The court's analysis centered on the "B" prong of the New Jersey test, which refers to work that "is either outside the usual course of the business or is performed outside of all of the places of business of the enterprise," and distinguished the relative breadth of this prong from the Massachusetts "B" prong the First Circuit held to be preempted by FAAAA in its 2016 *Schwann* holding. As we have discussed in a number of previous *Flashes*,[2] the Massachusetts "B" prong provides that only workers who perform a service that is outside the employer's usual course of business may be classified as independent contractors. The Third Circuit instead found the NJWPL and NJWHL to be more analogous, in light of their applicability to all employers and their focus on "resource inputs" rather than "production outputs," to the wage and hour provisions the Seventh, Ninth, and Eleventh Circuits have held in the last few years are not preempted by FAAAA.[3]

The court gave little credit to AEX's argument that compliance with the New Jersey law will require it to switch its entire business model away from using independent contractors, which will increase its costs and, in turn, its prices, stating that it and other circuits have already rejected similar lists of "conclusory" impacts. The court went on to say that, "while we have no doubt that the disruption of a labor model—especially after services have been performed—could have negative financial and other consequences for an employer, this impact on the employer does not equate to a significant impact on Congress' goal of deregulation." Furthermore, "Congress sought to ensure market forces determined prices, routes and services," but did not mean "to exempt workers from receiving proper wages, even if the wage laws had an incidental impact on carrier prices, routes or services."

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The *Bedoya* decision surely makes arguments for FAAAA preemption of state ABC independent contractor tests less likely to succeed to some degree, but it also provides some additional support for the idea that particularly strict "B" prongs should cause those ABC tests to be preempted. It is also worth noting that the Third Circuit did not directly disagree with the First Circuit but sought to distinguish the New Jersey statutes at issue from the Massachusetts statutes interpreted in *Schwann*, making it less likely that the Supreme Court will resolve these types of preemption questions definitively any time soon.

Q.D.-A., Inc. v. Indiana Department of Workforce Development[4]

On January 23, 2019, the Indiana Supreme Court reached a very different result in its *Q.D-A* decision, holding that the drivers engaged by Q.D-A, which was described in the case as a business that "connects drivers with customers who need too-large-to-tow vehicles driven to them," are independent contractors, not employees, under the Indiana ABC test.[5] The "B" prong of the Indiana ABC test, like the Massachusetts test, presumes a worker is an employees unless the employer can show "the worker performs a service outside the usual course of the employer's business." This decision highlights the importance of the way the employer's and worker's services are characterized in a "B" prong analysis, and it may also highlight how differently courts can view these questions based on their philosophy and sensibilities.

Q.D-A considers the drivers it uses independent contractors in accordance with its agreements with them, and therefore does not pay unemployment taxes for the drivers. One of Q.D-A's former drivers filed a claim for unemployment benefits with the state Department of Workforce Development, and the Department ruled in favor the driver due to Q.D-A's failure to satisfy any of the 3 prongs of the ABC test. A Liability Administrative Law Judge then affirmed the Department's decision, stating that Q.D-A did not satisfy the "A" and "B" prongs due to (1) its provision of training on federal regulations and employer policies, and (2) the LALJ's conclusion that Q.D-A is "a provider of one-way transportation of commodities" and the drivers "provide those services to the clients on behalf of the employer."

Q.D-A again appealed, and the state appellate court reversed on the basis that Q.D-A's training did not demonstrate "the kind of ongoing control over work methods needed to show control and direction," and Q.D-A and the drivers offer complementary yet distinct services because Q.D-A functions as an intermediary, employing people to pair customers and drivers. Because the state appellate court had decided in a different case in 2017 that an LALJ's conclusion that a drive-away driver was an employee of a company was reasonable, the Indiana Supreme Court reviewed the case to resolve the conflict.

The Supreme Court first held that Q.D-A met the "A" prong standard due to the absence of any evaluation or monitoring by Q.D-A and the drivers' ability to work with other companies, negotiate per-trip pay, and refuse jobs. The Court then began its analysis of the "B" prong by noting that both parties agreed the drivers provided "drive-away services." While Q.D-A's DOT broker registration described its business as providing drive-away services, the Court noted that many independent contractors operate under the DOT registration of another company and concluded that Q.D-A did not "regularly or continually provide drive-away services," but instead arranged for the provision of drive-away services as a broker. As a result, the driver performed a service outside of Q.D-A's usual course of business.

Conclusion

The two decisions discussed above and the prior decisions to which they reference provide a measure of forward looking guidance. First, the application of an ABC test remains a "facts and circumstances" determination. Second, the manner in which the court in Bedoya distinguishes its decision from the First Circuit's *Schwann* decision regarding Massachusetts' ABC test makes it less likely that any appeal will be successful. Third, the *Bedoya* decision will no doubt be influential in the challenges to California's *Dynamex* ABC test that are currently pending. Thus, motor carriers operating with independent contractor relationships would be well served to review those relationships and take the requisite steps to elevate them to bona fide arms-length business-to-business relationships. The Benesch Transportation and Logistics Group is well positioned to assist motor carriers that may be interested in considering accomplishing such an objective.

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Richard is a partner with the firm's Litigation and Transportation & Logistics Practice Groups. He has been in the transportation and logistics industry, both as a businessman and an attorney, for over 45 years during which he has been heavily involved with the IC model within the trucking industry. His practice also includes advising and representing motor carriers, leasing companies, third party logistics providers, national shippers, large private fleets and water carriers in the domestic, non-contiguous trade lanes.

[1] *Bedoya* is a class action brought by drivers of American Eagle Express, Inc. d/b/a AEX Group, a delivery service provider to medical organizations, seeking a determination that they are employees of AEX entitling them to compensation under the New Jersey wage and hour and wage payment statutes. The District Court previously denied AEX's motion for judgment on the pleadings based on FAAAA preemption of the drivers' claims, reasoning that the connection between regulation of AEX's workforce and the "prices, routes, and services" provided to AEX's customers is too attenuated to justify preemption. *Bedoya v. Am. Eagle Express*, Civ. No. 14-2811, 2017 WL 4330351 (D.N.J. Sept. 29, 2017).

[2] See, for example, *Flash* No. 59, 54, or 53.

[3] See *Costello v. BeavEx, Inc.*, 810 F.3d 1045 (7th Cir. 2016), *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), and *Amerijet Int'l, Inc. v. Miami-Dade County, Fla.*, 627 F. App'x 744 (11th Cir. 2015). See also *Lupian v. Joseph Cory Holdings, LLC*, 905 F.3d 127 (3d Cir. 2018).

[4] Ind. Supreme Court Case No. 19S-EX-43 (January 23, 2019).

[5] See Ind. Code § 22-4-8-1(b).

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