Strafford

Presenting a live 90-minute webinar with interactive Q&A

Employment Challenges in Transportation and Logistics: Arbitration Programs, Independent Contractors, and Federal and State Regulations in 2022

WEDNESDAY, APRIL 20, 2022

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Alexander M. (Zander) Chemers, Shareholder, **Ogletree Deakins Nash Smoak & Stewart**, Los Angeles

Michael W. Massiatte, Of Counsel, **DLA Piper**, Dallas

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1**.

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat** or e-mail **sound@straffordpub.com** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

Program Materials

FOR LIVE EVENT ONLY

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.

Recording our programs is not permitted. However, today's participants can order a recorded version of this event at a special attendee price. Please call Customer Service at 800-926-7926 ext.1 or visit Strafford's website at www.straffordpub.com.

EMPLOYMENT CHALLENGES IN TRANSPORTATION AND LOGISTICS

Alexander M. Chemers

alexander.chemers@ogletree.com

Michael W. Massiatte

michael.massiatte@dlapiper.com

Strafford Webinar

April 20, 2022

INTRODUCTION

OVERVIEW OF TODAY'S PRESENTATION

- Heightened demand for transportation services and increased competition from other industries.
- Greater interference by certain states, particularly California.
- The Biden administration, while open to relaxing certain driver requirements, favors greater regulation of workers.
- Continued attacks on the use of arbitration agreements.
- These challenges are both legal and practical.

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.
- In 2019, the NLBR returned to the historic common-law agency test in *SuperShuttle DFW, Inc*.
- In *The Atlanta Opera, Inc.*, 371 NLRB No. 45 (2021), the NLRB invited submissions regarding which test to use.

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."
- Now codified through AB-5 and then AB-2257.

ABC TEST – B-TO-B EXCEPTION

- **Business-to-Business Exception -** traditional right-to-control test applies if hiring entity can establish 12 elements, including:
  - The business service provider is providing services *directly to the contracting business* rather than to customers of the contracting business.
  - If the work is performed in a jurisdiction that requires the business service provider to have a business license or business tax registration, the business service provider has the required business license or business tax registration.
  - The business service provider can contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity.
  - The business service provider advertises and holds itself out to the public as available to provide the same or similar services.
  - The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.
  - The business service provider can negotiate its own rates.

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).

CTA V. BONTA

- *California Trucking Ass'n v. Bonta*, 433 F. Supp. 3d 1154 (S.D. Cal. 2020): "[T]here is little question that the State of California has encroached on Congress' territory by eliminating motor carriers' choice to use independent contractor drivers, a choice at the very heart of interstate trucking. In so doing, California disregards Congress' intent to deregulate interstate trucking, instead adopting a law that produces the patchwork of state regulations Congress sought to prevent. With AB-5, California runs off the road and into the preemption ditch of the FAAAA."
- *California Trucking Ass'n v. Bonta*, 996 F.3d 644 (9th Cir. 2021): "Because AB-5 is a generally applicable labor law that impacts the relationship between a motor carrier and its workforce, and does not bind, compel, or otherwise freeze into place a particular price, route, or service of a motor carrier at the level of its customers, it is not preempted by the F4A."
- Injunction remains in place while petition for certiorari pending before the U.S. Supreme Court.
- Next step: Supreme Court asked the Solicitor General to submit its view.

STRATEGIES FOR MINIMIZING RISK

- Use of "master" contractors that employ drivers.
- 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

- Avoid or minimize California and other high-risk states.
- 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 confirmed that judges resolve whether the transportation worker exclusion applies, but did not address who falls within it.
- Two questions:
  1. Which drivers are transportation workers?
  2. Which non-drivers also fall within the 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).

DRIVER CASES – NARROW VIEW

- *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."
- *In re Grice*, 974 F.3d 950 (9th Cir.) – FAA applies to Uber drivers even if they pick up and drop off passengers at airports.
- *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."

DRIVER CASES – BROAD VIEW

- *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."
- *Rittmann v. Amazon.com*, 971 F. 3d 904 (9th Cir. 2020) – finding that final-mile drivers fall within the transportation worker exclusion "even if they do not cross state lines to make their deliveries." Largely based on packages not coming to rest and instead moving continuously across state lines.
- *Carmona v. Domino's Pizza, LLC*, 21 F. 4th 627 (9th Cir. 2021) – drivers delivering goods intrastate between distribution center and restaurants were excluded from the FAA, even though some goods were modified in state and not earmarked for specific restaurants.
- *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."

WHAT ABOUT NON-DRIVERS?

- *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.
- *Southwest Airlines Co. v. Saxon*, (U.S. Supreme Court No. 21-309)- matter currently before U.S. Supreme Court on appeal from the Seventh Circuit. Argued March 28, 2022.
  - **Facts:** A Southwest Airlines ramp supervisor filed a putative class action alleging wage and hour violations. Southwest successfully moved to dismiss the complaint on the basis of an enforceable arbitration agreement. On appeal, the Seventh Circuit reversed, finding that the ramp supervisor was an interstate "transportation worker" and thus exempt under Section 1 of the FAA. The U.S. Supreme Court granted certiorari in December 2021.
  - **Issue**: Whether workers who load or unload goods from vehicles that travel in interstate commerce, but do not physically transport such goods themselves, are interstate "transportation workers" exempt from the FAA.

RISK MANAGEMENT STRATEGIES

- Choose a state arbitration law to overcome the FAA exemption.
  - 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.

RISK MANAGEMENT (*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, 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?

RISK MANAGEMENT (*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.
  - Some companies have attempted 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 F.3d 635 (5th Cir. 2017), the Fifth Circuit upheld the enforceability of a class action waiver outside of an arbitration agreement.

RISK MANAGEMENT (*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 may allow the latter group to avoid the FAA's interstate exemption.

REGULATORY COMPLIANCE ISSUES

REGULATORY INITIATIVES TO ADDRESS DRIVER RETENTION AND SUPPLY CHAIN ISSUES

- Administration's Driving Good Jobs Initiative
  - Expanding Registered Apprenticeship programs.
  - Creating the Women of Trucking Advisory Board mandated in the Bipartisan Infrastructure Law.
  - Creating a new task force, mandated by the Bipartisan Infrastructure Law, to investigate predatory truck leasing arrangements with DOL and the Consumer Financial Protection Bureau.
  - Studying the issues of truck driver pay and unpaid detention time.
  - Launching the Safe Driver Apprenticeship Pilot –an under-21 pilot program for truck drivers mandated in the Bipartisan Infrastructure Law.
  - Over $32 million in funding to states to improve CDL licensing process.

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

- Motor Carrier Exemption – drivers and certain other position may be exempt from overtime pay, if the following conditions are met:
  - (1) Perform safety-affecting duties that;
  - (2) Involve vehicles used in interstate commerce;
  - (3) which have a gross vehicle weight rating or gross combination weight of 10,001 pounds or more.
- **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

- 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.
  - *Int'l B'hood of Teamsters v. FMCSA*, 986 F. 3d 841 (9th Cir. 2021)(cert. denied October 2021) – affirms FMCSA's preemption determination.
  - FMCSA grants similar petition for drivers of passenger-carrying vehicles.
  - FMCSA grants similar petition as to Washington State's meal and rest break rules (November 17, 2020).
  - Continuing litigation as to whether the preemption rulings apply retroactively.

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?

QUESTIONS?