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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

FLASH NO. 32
F4A IN PLAY ONCE AGAIN

The F4A preemption and arguments are again in play in the context of the application of state labor and/or wage statutes as they relate to the independent contractor classification disputes within the trucking industry: most recently in Massachusetts.

On March 28th Judge Woodlock, a Massachusetts Federal District Court Judge, declined to extend F4A preemption to Massachusetts' Independent Contractor Statute, M.G.L.149 Section 148B ("Section 148B") (the *"Martins Case"*). Then on April 3rd Federal District Court Judge Lee from Virginia applied F4A preemption to Section 148B in a lawsuit brought by a Virginia based motor carrier which transports goods in interstate commerce and has operations in Massachusetts (the *"Lasership Case"*). Additionally, Judge Casper, another Massachusetts Federal Court District Judge heard oral arguments on the F4A/ Section 148B issue on April 10th in the Massachusetts Delivery Association case (the *"MDA Case"*). Thus, we have the opportunity to see the extent to which the preemption argument will have applicability in defeating the application of Section 148B with respect to federally licensed motor carriers that operate with independent contractors in Massachusetts.

You may recall from prior *FLASH* publications that Section 148B provides an unusual element in the Massachusetts wage laws often called "Prong B" which became effective in 2004 as a result of an amendment to the statute. Prior to the amendment the statute required that a contractor's service be performed EITHER outside the usual course of business for which the service is performed OR be performed outside of all places of business of the enterprise (which is the typical Prong B of a normal ABC test). However, the 2004 amendment removed the "outside of place of the business" language and retained only the "usual course of business" text: thus, making it virtually impossible for a motor carrier to operate with independent contractors in Massachusetts.

You may also recall from prior *FLASH* publications that the Federal Aviation Administration Act of 1994 (commonly referred to as "F4A" or FAAAA") provides that a state may not enact or enforce a law related to a price, route, or service of any motor carrier. In a very thorough and well written decision Judge Lee determined that Section 148B "relates to" or has "connection with" motor carriers' prices, routes and services because it (1) dictates the employment relationship carriers must utilize in its operation, thereby effecting carriers' routes and services; (2) significantly increases carriers' cost such as to have a significant effect on carriers' prices, routes and services; and (3) materially alters the common law test for independent contractor status, leading to a patchwork or varying state laws and resulting liability under varying independent contractor regimes.

Lasership is a federally licensed motor carrier operating in the on-demand small package/courier segment of the industry where customers may regularly request scheduled routes while others have irregular deliveries on an emergency or "as-needed" basis. As is typical in that segment, deliveries include time sensitive materials, medical supplies, and financial materials, which may or may not be scheduled in advance, and correspondingly Lasership requires flexibility in maintaining a work force in order to meet the demands of its customer base. Thus, it uses independent contractor drivers. Lasership has operations in Massachusetts and surrounding New England states.

The Plaintiffs' central claim in the *Lasership Case* was worker misclassification under Section 148B and they sought class action certification of all individuals who performed delivery and/or courier services primarily in Massachusetts for Lasership at any time since 2009. Basically, Plaintiffs argued that Lasership could not satisfy Section 148B's independent contractor test thus the independent contractor drivers were misclassified as a matter of law.

Lasership's argument was that Section 148B fundamentally alters Massachusetts' independent contractor law in such a way that it is precluded from using independent contractors in its drivers work force, resulting in a substantial impact on its prices, routes and services. Plaintiffs counter this argument by saying that Section 148B is merely a prevailing wage law and thus was not intended by Congress to be preempted.

Judge Lee's analysis of preemption is certainly beyond the scope of this *FLASH* but is extremely sensitive and deferential to the Congressional intent with respect to the care and caution that should be used in applying federal preemption to state laws, particularly wage and independent contractor laws which are relevant to the case.

Judge Lee was not bashful, however, in many of his statements in this *Leadership Case* ruling, describing Section 148B as an

unprecedented and fundamental change in independent contractor law and stating that Prong B (the "usual course of business" portion) is unlike any statute in the country. This lead him to conclude that the logical effect of the law is a categorical ban on the use of independent contractors by motor carriers in Massachusetts which in turn deprived Lasership of its ability to choose with whom it decides to contract. Due to the nature of its line of service, every driver used to deliver packages will inherently fall within the "usual course of business" prong and therefore subjects the motor carrier to liability. Judge Lee was not persuaded by the competing case law raised by Plaintiffs but reiterated his mindfulness that wage and labor laws are generally left to states' police powers. Judge Lee relies on Congress' expressed concern that state regulations that interfere with motor carriers' operations in interstate commerce must be preempted by federal law so as to allow motor carriers to provide quality services by using a flexible business model, one with sufficient malleability to efficiently conduct a standard way of doing business.

Judge Lee also dealt with Judge Woodlock's decision in the *Martins Case* quite deferentially, but also quite matter of factly. The first basis for Judge Lee's difference of opinion with Judge Woodlock was the basic starting point of each case. In the *Martins Case*, the defendants argued that plaintiffs' common law claims were preempted, but in the *Lasership Case* the argument was that the law, Section 148B, was preempted. Secondly, Judge Lee indicated that the *Martins* court did not have the benefit of the substantial evidentiary record that he had before him. Thirdly, since the defendants in the *Martin Case* merely argued that Section 148B affected the rates paid to drivers rather than carriers' costs which in turn impact price, the court in the *Martins Case* was not in the position to analyze Section 148B's effect on carriers' pricing in the same way that he was able. Finally, Judge Lee indicated that the *Martins* court failed to consider Section 148B's distinct and restrictive independent contractor test, which if allowed to stand, would permit other states to adopt their own untraditional test for independent contractor status. This would create a patchwork of state laws nested in the guise of labor laws which would have the practical effect of dictating the types of employment relationships to be used in the marketplace, thus adversely effecting interstate commerce which is a result entirely inconsistent with F4A's objectives.

The status of the competing decision does not close the book on the F4A's arguments in the context of labor and wage related state statutes, and it will be certainly interesting to see how Judge Casper responds to the arguments in the *MDA Case*. Appeals coming from one or all of the decisions certainly can be expected. Perhaps then the Federal District Court of Appeals can provide a degree of certainty to the application of Massachusetts law as it impacts the use of independent contracts by motor carrier.

As we wait to see the ultimate result, our Transportation and Logistics Practice Group has not abandoned hope with respect to the operation with independent contractors in Massachusetts and have reconfigured, without significant disruption to motor carriers' operations, some "alternative approaches" to the traditional IC model that seem to be gaining momentum and allowing operations to move forward with a variable cost structure. If these alternatives would be of interest to you we would be happy to discuss.

Additional Information

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