Legal Opinion Letter

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Courts Deliver Mixed Bag on Federal Law's Preemption of State Independent Contractor Standards

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A number of recent cases have challenged whether federal law preempts state independent contractor laws, as they apply to drivers for motor carriers and other delivery companies. This Legal Opinion Letter will review preemption cases for independent contractor laws in Massachusetts, Illinois, California, and New Jersey, and will try to make sense of their divergent and sometimes conflicting results.

Backdrop. Many industries, including the motor carrier and delivery industries, have long used independent contractors to provide services to their customers. The independent contractor relationship offers both individuals and businesses freedom, flexibility, and financial advantages—benefits that are not available from the traditional employer-employee model. Many states, and many plaintiffs' lawyers, have sought to limit companies' ability to engage in independent contractor relationships. In the past few years, however, these companies have been pushing back, using a once-obscure federal law called the Federal Aviation Administration Authorization Act of 1994 (FAAAA) to obtain rulings that these independent contractor laws are preempted—with mixed results.

The Law. Congress enacted the FAAAA as part of a wave of deregulation in the 1980s and 1990s. Despite its aeronautical name, the FAAAA was intended to sweep aside most regulations governing the motor carrier and delivery industries. It preempts any state law that "relate[s] to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1). "Motor carrier" is defined to include anyone who transports goods for compensation—essentially most delivery companies and their drivers, even those operating entirely within state borders.

The Massachusetts Independent Contractor Law: Preempted (In Part). The first application of the FAAAA to an independent contractor law came in Massachusetts. The Massachusetts independent contractor law was (at the time) unique. It uses a three-part test, often known as the "ABC" test, which itself is not uncommon. However, this law was unusual because one portion (the "B" prong) required that a person work "outside the usual course of the business" of the company to be an independent contractor. M.G.L. c. 149, § 148B. This worked as a de facto ban on independent contractor drivers in the motor carrier and delivery industries.

Beginning in 2010, delivery-business companies argued in a number of suits that the FAAAA preempted the Massachusetts law. The First Circuit agreed in *Schwann v. FedEx Ground Package System, Inc.*, 813 F.3d 429 (1st Cir. 2016). The court found that the "B" prong compelled the use of employees instead of independent contractors, which meant that "a court, rather than the market participant, would ultimately determine what services that company provides and how it chooses to provide them." 813 F.3d at 438. The court found the business's inability to choose independent contractors impermissibly affected the delivery company's routes and services and therefore the "B" prong was preempted. *Id*.

The Illinois Wage Deduction Law: Not Preempted. The Seventh Circuit also considered FAAAA preemption in *Costello v. BeavEx, Inc.,* 810 F.3d 1045 (7th Cir. 2016). Couriers sued a delivery company, alleging that they were misclassified as independent contractors and that deductions taken from their pay violated Illinois law. The

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defendant argued that the FAAAA preempted the claim. The Seventh Circuit disagreed, noting that the Illinois law only governed wage deductions and a worker could waive the Illinois law by express contract. This was unlike the Massachusetts law, which was mandatory and triggered a range of other employment statutes.

The California Multi-Factor Test: Not Preempted. A number of FAAAA cases have emerged from the hotbed of independent contractor litigation, California. In *People ex rel. Harris v. Pac Anchor Transportation, Inc.,* 59 Cal.4th 772 (2014), the state of California sued a trucking company under the unfair competition law (UCL), based on the company alleged misclassification of drivers as independent contractors. The California Supreme Court rejected the company's challenge of the UCL under the FAAAA. It held that "the FAAAA does not preempt generally applicable employment laws that affect prices, routes, and services," and that while the state's lawsuit "may have some indirect effect on defendants' prices or services, that effect is too tenuous, remote, and peripheral to have pre-emptive effect." *Id.* at 780 (internal alterations omitted).

Not long after *Harris*, the California Trucking Association (CTA) sued the California Labor Commissioner, arguing that the agency's use of an independent contractor test known as the "*Borello* standard" was FAAAA preempted. *Calif. Trucking Ass'n v. Su*, 903 F.3d 953 (9th Cir. 2018). The *Borello* standard is a multi-factor test based on "the right to control the manner and means" individuals perform their work. *See S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal.3d 341 (1989). The Ninth Circuit ruled that the *Borello* standard "does not compel the use of employees or independent contractors," and instead affects the CTA's members in ways that "are not significant," and therefore not preempted under the FAAAA. *Su*, 903 F.3d at 964.

The New California Test: Preempted—Or Is It? While the *CTA* lawsuit was pending, the California Supreme Court issued a new independent contractor test for many of the state's wage-and-hour laws in *Dynamex Operations West, Inc. v. Superior Court*. 4 Cal.5th 903 (2018). *Dynamex* adopted the same independent contractor test that was used in Massachusetts—that is, an "ABC" test, where the "B" prong requires that the person work outside the usual course of the hiring entity's business. *Id.* at 957.

Carriers were swift to challenge the new *Dynamex* test on FAAAA grounds. The first case to decide the issue was *Alvarez v. XPO Logistics Cartage LLC*. 2018 U.S. Dist. LEXIS 208110 (C.D. Cal. Nov. 15, 2018). There, the defendant motor carrier argued that the FAAAA preempted application of the *Dynamex* ABC test to the plaintiffs' misclassification claims. The district court chose to follow the First Circuit's lead in *Schwann*, because the *Dynamex* test was essentially identical to the Massachusetts statute challenged in that case, and held the FAAAA preempted the *Dynamex* test. *Id.* at *13. Two weeks after *Alvarez*, a federal district court in Oklahoma addressed this same issue—and reached the opposite conclusion. The plaintiffs in *Huddleston v. John Christner Trucking, LLC*, were pursuing California state-law claims against the defendant. 2018 U.S. Dist. LEXIS 203304 (N.D. Okla. Nov. 30, 2018). The court rejected an FAAAA challenge, holding (without significant analysis) that the defendant did not "specifically explain how the ABC test under *Dynamex* affects its prices, routes, or services." *Id.* at *23.

New Jersey ABC Test: Not Preempted. The Third Circuit waded into this issue in *Bedoya v. American Eagle Express Inc.*, 2019 U.S. App. LEXIS 3155 (3d Cir. 2019). *Bedoya* held the FAAAA did not preempt New Jersey's "ABC" independent contractor test. Unlike Massachusetts' test—which requires that an individual work outside the usual course of employment of the company—New Jersey's test also allows an individual to work "outside of the putative employer's places of business," and therefore, unlike Massachusetts, does not "categorically prevent[] carriers from using independent contractors." *Id.* at *20-21.

Conclusion. What lessons can be drawn from these cases? It appears that independent contractor laws that are not *impossible* to comply with (such as the *Borello* standard in *CTA* or the ABC test in *Bedoya*), or laws that a party can contract around (such as the Illinois wage deduction law in *Costello*), will not be FAAAA-preempted. On the other hand, based on *Schwann* and *Alvarez*, laws that work as a *per se* ban on the use of independent contractors may not survive FAAAA scrutiny. Still, *Alvarez* is only a district court decision, and *Huddleston* reached the opposite conclusion, so it is likely too soon to declare this a settled area of law.

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