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Management Alert

Keep On Truckin': Strategies for Managing Wage and Hour Risks with Transportation Contractors After *New Prime, Inc. v. Oliveira*

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Seyfarth Synopsis: *In January, the Supreme Court unanimously ruled in New Prime Inc. v. Oliveira that the Federal Arbitration Act's ("FAA" or the "Act") exclusion for transportation workers engaged in interstate commerce applied not just to employees, but also to independent contractors. This ruling got the attention of those within the transportation and logistics industry, many of whom have longstanding mandatory arbitration programs with their independent contractors. While the FAA no longer provides a mechanism for enforcing mandatory arbitration agreements with transportation contractors, there are a number of strategies that can be implemented to ensure the enforceability of arbitration programs and minimize the risk of nationwide class or collective actions.*

The *New Prime* Decision

The Supreme Court has repeatedly held that the FAA reflects a liberal federal policy favoring arbitration agreements. Section 1 of the FAA, however, provides a narrow exception for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." In recent years, much debate has turned on whether the phrase "contracts of employment" extends to independent contractor agreements or if the Section 1 exclusion only applies to transportation employees engaged in interstate commerce. In January 2019, the Supreme Court decisively resolved the debate with an 8-0 decision (Justice Kavanaugh recused) in *New Prime Inc. v. Oliveira*.

Before examining the meaning of the word "employment," the Supreme Court first considered whether the applicability of the Section 1 exclusion was a question for the court or arbitrator. The Supreme Court concluded that the question of whether the contract triggers FAA's coverage was an "antecedent determination" for the Court to make and was not delegable to an arbitrator.

The Court then turned to whether "contracts of employment" applies to independent contractors as well as traditional employees. After much discussion about the meaning and usage of the term "employment" in 1925 when the FAA was enacted, the Supreme Court concluded that employment was essentially a synonym for work at that time. Although the Court acknowledged the evolution of the terminology over time, it ultimately concluded that Congress's use of the term "workers" as opposed to "employees" or "servants" meant a broader interpretation was intended and Section 1 extended to independent contractors.

What Should Transportation and Logistics Companies Do Now

The *New Prime* decision presents a bump in the road for transportation and logistics companies who want to include arbitration and class action waivers in their services contracts. But with proper navigation, *New Prime* should not serve as an absolute bar to enforcing mandatory arbitration agreements with transportation workers. Below we offer strategies for logistics and transportation industry companies to preserve their arbitration agreements and otherwise protect against crippling nationwide class and collective actions.

Rely on State Arbitration Laws—But Choose the Right Ones

To be sure, *New Prime* prevents a court from relying on the FAA as a mechanism for enforcing an arbitration agreement involving transportation workers. Critically, however, neither *New Prime* nor the FAA actually prohibits private arbitration of disputes involving transportation workers. Courts should still enforce agreements to arbitrate under state arbitration laws. It is good news then that all 50 states have arbitration laws empowering courts to stay a judicial proceeding and enforce an agreement to arbitrate. The majority of states have adopted some version of the Uniform Arbitration Act or the Revised Uniform Arbitration Act, neither of which includes an exemption for transportation workers. These state arbitration laws therefore provide a basis for enforcing arbitration agreements that is independent of the FAA.

The plaintiffs' bar may try to thwart reliance on state arbitration laws by arguing they are preempted by the FAA. The FAA, however, only preempts state arbitration laws that put arbitration agreements on unequal footing with other contracts and impose special restrictions on them or that apply a general doctrine (such as duress and unconscionability) in a way that disfavors arbitration. State arbitration laws that are broader than the FAA are permissible in the same way that state overtime laws that are more protective are not preempted by the FLSA.

When selecting the applicable state arbitration law for an arbitration agreement involving transportation workers, beware of potential choice-of-law principles that could impact a court's decision. Moreover, as we have seen in the wake of *Epic Systems v. Lewis,* expect challenges to enforcement on public policy and unconscionability grounds. It is also worth noting that many state laws (for example, Kansas, Kentucky, Louisiana, and New Hampshire) explicitly exempt contracts between employers and employees. While such exclusions would normally be preempted by the FAA, the FAA's exclusion of transportation workers will limit the FAA's preemptive effect, at least as to employees. However, because these state arbitration laws do not have similar exclusions for independent contractors, the *New Prime* decision should not prevent companies from entering into arbitration agreements with contractors for transportation services pursuant to state law in those jurisdictions.

Rethink The Forum Selection Clause

Most dispute resolution agreements contain a forum selection provision establishing the locale in which the parties agree to adjudicate their disputes. Traditionally, companies select a forum that is tied to their corporate headquarters or state of incorporation. This means that no matter where the workers are located across the country, they must come to the company's backyard to arbitrate (or litigate). While there are obvious advantages to this approach, *New Prime* highlights a significant downside: choosing the company's locale provides a single forum in which all workers across the country can come together and sue the company on a collective basis. Companies should therefore give serious consideration to reversing course and requiring transportation workers to adjudicate their disputes in the worker's own home state. Doing so would preclude workers from opting in to a collective outside of their chosen forum and therefore provides a significant defense to nationwide collective actions in the event their disputes are litigated in court. This is an arrow that can even be in the quiver of companies with transportation workers in California. The California Labor Code prohibits forum selection provisions that require employees who primarily reside and work in California to litigate or arbitrate outside of California. *See* Labor Code 925. Requiring they arbitrate or litigate in their home state of California is entirely consistent with the Code.

Include a Standalone Class and Collective Action Waiver

Historically, class and collective action waivers have been included in arbitration agreements. Indeed, getting a case into

bilateral arbitration in order to avoid the possibility of a nationwide class or collective is a driving force behind implementation of arbitration programs. A less common and admittedly less universally accepted approach is a standalone class and collective action waiver not contingent on arbitration. Few courts have addressed the issue and those that have are in conflict. The Sixth Circuit, for example, ruled in *Killion v. KeHE Distributors LLC*, 761 F.3d 574 (6th Cir. 2014), that "a plaintiff's right to participate in a collective action cannot normally be waived" unless an "arbitration clause is involved," whereas the Fifth Circuit came out the other way and found a class action waiver outside of an arbitration agreement to be enforceable in *Convergys Corporation v. NLRB*, 866 F.3d 635 (5th Cir. 2017). For workers outside of the Sixth Circuit (and most likely outside of California), standalone class and collective action waivers may provide another layer of protection in the event their arbitration agreements are not enforceable under *New Prime*.

Ensure Arbitration Agreements Contain a Severability Clause

In addition to shoring up arbitration agreements with language that it is subject to a particular state arbitration statute, choosing the appropriate forum, and requiring a class and collective action waiver, transportation companies should be sure to include a severability clause. A severability clause allows a court to carve out invalid, illegal or unenforceable contract terms while preserving the other provisions. To the extent that any of the above safeguards are rejected by a court, a broad severability clause should allow for enforcement of other key provisions.

Segregate Intrastate and Interstate Work

Plaintiffs' attorneys are likely to read the *New Prime* decision as opening up the door to lawsuits by gig economy workers who perform some transportation-related duties pursuant to independent contractor agreements, even if they are not directly involved in the interstate transportation of goods. Indeed, federal courts have held that even occasional interstate transportation can trigger the FAA Section 1 exemption, so long as the worker is actually engaged in moving goods in interstate commerce. Additionally, courts have found the FAA Section 1 exemption applies to supervisors and managers who do not by themselves transport goods, but are critical to the operations of the company that provides transportation services. But if the work performed is related to nothing more than local deliveries, they are not within the category of workers "engaged in interstate commerce" that are exempt from the FAA.

If a transportation and logistics company provides both intrastate and interstate services, segregating the workers who perform only intrastate services from those performing interstate services will at least shield the intrastate workers who only make local deliveries from being swept into the FAA Section 1 exemption.

Conclusion

Although *New Prime* took a little air out of the tires of companies who have elected arbitration as the preferred method of alternative dispute resolution with transportation contractors, all is not lost. As detailed above, state arbitration statutes provide an alternative avenue for implementing an enforceable arbitration program. In addition, forum selection, severability, and class/collective waivers are important provisions that can be inserted into contractor agreements to minimize the threat of a class or collective action in the event that claims must be litigated in court. As companies invoke state arbitration laws to enforce arbitration agreements, we may see legal challenges from a creative plaintiff's bar, making the inclusion of severability clauses, reverse forum selection clauses, and standalone class and collective action waivers all the more important.

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