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Massachusetts Independent Contractor Law Survives Trade Association's Challenge

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By Patrick M. Curran, Jr.

The Massachusetts Independent Contractor statute, Mass. G.L. c. 149, § 148B, establishes a rigorous three-part test for determining whether a worker performing services for an employer may be considered an independent contractor, rather than an employee. The U.S. District Court for the District of Massachusetts recently dismissed facial and as-applied.....

The Massachusetts Independent Contractor statute, Mass. G.L. c. 149, § 148B, establishes a rigorous three-part test for determining whether a worker performing services for an employer may be considered an independent contractor, rather than an employee. The U.S. District Court for the District of Massachusetts recently dismissed facial and as-applied challenges to the second prong of this test brought by a nonprofit trade association of delivery service providers. In *Massachusetts Delivery Association v. Coakley*, No. 10-11521 (September 26, 2013), the Massachusetts Delivery Association (MDA) had argued that the second prong of the test was preempted by the Federal Aviation Administration Authorization Act (FAAAA) because of its effect on labor costs and, therefore, prices. The district court held, however, that because the challenged prong of the test does not relate to the transportation of property and has only a potential effect on prices the FAAAA does not preempt it.

The Massachusetts Independent Contractor statute's three-part test asks whether:

(A) the worker is free from the employer's control and direction in connection with the performance of the service;

(B) the service is performed outside the usual course of business of the employer; and

(C) the worker is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

The MDA argued that the FAAAA preempted the second prong of this test, which is referred to as the "B prong," because the application of that prong effectively requires its members to engage all of their workers as employees, rather than as independent contractors, thus increasing their labor costs and forcing them to increase their prices to consumers.

The district court began its analysis by observing that the FAAAA does not preempt a state law unless the law both (1) relates to the prices, routes, or services of a motor carrier and (2) relates to the transportation of property. With respect to the second part of the preemption test, the court noted that, prior to the United States Supreme Court's 2013 decision in *Dan's City Used Cars, Inc. v. Pelkey*, "one plausible interpretation of the operative phrase was that the FAAAA would preempt state statutes where they had a significant effect on the prices, routes or service of those entities that transport property." In the *Dan's City* ruling, however, the Supreme Court "foreclosed that line of reasoning" and made clear that unless the statute in question "relate[s] to the movement of property, the FAAAA cannot preempt it." Thus, the district court held, since the B prong does not apply only to the trucking industry and does not address "how MDA's *members make deliveries . . . nor the way their services are performed," it has "nothing to do* with the regulation of the carriage of property" and therefore cannot be preempted by the FAAAA.

The district court also found that even if the B prong did relate to the transportation of property, MDA had failed to establish the first requirement of the FAAAA preemption test—i.e., that the challenged law relates to the prices, routes, or services of a motor carrier. Relying on decisions by the First Circuit Court of Appeals, the court held that while the FAAAA may preempt state laws when their effect on prices, routes, or services is only indirect, there is no preemption when the effect is "tenuous, remote, or peripheral." Further, the court reasoned, while it is true that the B prong has the potential to affect costs and therefore prices, the same is true of any wage law. Indeed, the court observed, MDA's "categorical approach" would effectively "immunize" the entire industry from all economic regulation by the state. Since, in the court's view, Congress did not intend the FAAAA to provide "a blank check to the trucking industry protecting it from any state regulation that increases the cost of doing business," it rejected MDA's approach and held that where a law of general applicability merely has the potential to affect prices, routes, or services, the FAAAA does not preempt the law. Applying that rule to the B prong, the court noted that MDA's members could absorb the increased costs of treating their workers as employees rather than as independent contractors in ways other than increasing their prices. Accordingly, the court held, the B prong's effect on prices, routes, or services was merely "potential," and the FAAAA does not preempt it.

Having rejected the MDA's facial challenge to the B prong, the district court turned to the argument that the FAAAA preempts the law as applied to Xpressman Trucking & Courier, Inc., one of MDA's members. The court rejected that argument also, holding that even if the B prong's effect on Xpressman's labor costs was "significant," the statute does not "relate to the movement of property," as the Supreme Court defined that phrase in *Dan's City*, and thus cannot be preempted by the FAAAA.

The Massachusetts Independent Contractor law presents a formidable challenge to employers seeking to engage workers as independent contractors in Massachusetts. The court's decision in *Massachusetts Delivery Association v. Coakley* leaves that challenge in place for all Massachusetts employers, including those in the trucking and delivery industries.

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