Legal Update Article

Navigating the Federal Arbitration Act's Transportation Worker Exception After *New Prime*

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March 2, 2020

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As enforcing arbitration agreements with transportation workers under the Federal Arbitration Act (FAA) has become more difficult, employers should consider arbitration agreements with a potential alternative enforcement mechanism under state law.

FAA and Transportation Worker Exception

The FAA requires courts to enforce arbitration agreements, but it does not apply to "contracts of employment" with seamen, railroad employees, and other workers engaged in foreign or interstate commerce. 9 U.S.C. § 1. This is commonly referred to as the "transportation worker exception" or exemption of the FAA.

In *New Prime Inc. v. Oliveira,* 139 S. Ct. 532 (2019), the U.S. Supreme Court held for the first time that the transportation worker exception applies to both employees *and independent contractors.* Even though the plaintiff (an interstate truck driver) had signed an arbitration agreement and was an independent contractor, the Court held the FAA could not be used to compel arbitration. The Court, however, left open the possibility that a transportation worker who signed an arbitration agreement could be compelled to arbitrate pursuant to a court's inherent authority or state arbitration statutes. *See New Prime Inc.,* 139 S. Ct. at 543; *Byars v. Dart Transit Co.,* No. 3:19-cv-541, 2019 U.S. Dist. LEXIS 181698, at *6 (M.D. Tenn. Oct. 21, 2019). (For more on *New Prime,* see our article, Supreme Court: Interstate Transport Companies' Independent Contractor-Drivers are Exempt from FAA.)

Following *New Prime,* courts have struggled with the scope of the transportation worker exception, particularly whether certain transportation workers are engaged in interstate commerce. Most long-haul truck drivers whose jobs regularly require them to physically transport goods across state lines are engaged in interstate commerce. However, less certain is the status of transportation workers who generally work within a single state, such as last-mile delivery drivers, couriers, food delivery drivers, drivers of ride-sharing services, and other gig-economy transportation services.

Courts have applied vague, multi-factor tests that do not lend themselves to predictable results. Some courts have taken an expansive approach, finding the transportation worker exception applies even to workers who do not physically transport goods across state lines. *See, e.g., Waithaka v. Amazon.com, Inc.,* No. 18-40150, 2019 U.S. Dist. LEXIS 140605 (D. Mass. Aug. 20, 2019) (last-mile delivery drivers were subject to the transportation worker exception, even though they did not cross state lines); *Rittmann v. Amazon.com, Inc.,* 383 F. Supp. 3d 1196 (W.D. Wash. 2019) (same); *Ward v. Express Messenger Sys.,* No. 17-cv-2005, 2019 U.S. Dist. LEXIS 175674 (D. Colo. Jan. 28, 2019) (package delivery drivers were subject to the transportation worker exception, even though they did not cross state lines); *Muller v. Roy Miller Freight Lines, LLC,* 34 Cal. App. 5th 1056 (2019) (a trucker was subject to the transportation worker exception even though he did not personally transport goods across state lines).

Other courts have found the worker transportation exception does not apply to workers who merely transport goods within a single state and, therefore, arbitration may be compelled under the FAA. *See, e.g., Austin v. DoorDash, Inc.,* No. 1:17-cv-12498, 2019 U.S. Dist. LEXIS 169728 (D. Mass. Sep. 30, 2019) (food delivery drivers were not subject to the transportation worker exception); *Davis v. Cintas Corp.,* No. 2:18-cv-1200, 2019 U.S. Dist. LEXIS 87261 (W.D. Pa. May 23, 2019) (route sales drivers were not subject to the transportation worker exception); *Borgonia v. G2 Secure Staff, LLC,* No. 19-cv-914, 2019 U.S. Dist. LEXIS 70224, at *9 (N.D. Cal. Apr. 25, 2019) (airport employees providing passenger assistance and security services were not subject to transportation exemption).

These competing lines of cases are essentially impossible to reconcile, and the parameters of the FAA's transportation worker exception will continue to develop in the lower courts and may reach the U.S. Supreme Court. In our view, the exception was only intended to cover workers with truly interstate and international routes, and that position may be vindicated eventually. Meanwhile, state law may provide a useful alternative enforcement mechanism in arbitration agreements.

Using State Law to Compel Arbitration of Transportation Worker Disputes

For any company that contracts with or employs transportation workers, the risk that the arbitration agreements with those workers will not be enforceable under the FAA is real. However, even if the FAA does not apply, enforcement under state law may be feasible. *See, e.g., Byars,* 2019 U.S. Dist. LEXIS 181698, at *6-10, *25 (arbitration provision was enforceable against interstate truck drivers pursuant to Minnesota law, even though the drivers were subject to the transportation worker exception under the FAA); *Merrill v. Pathway Leasing LLC,* No. 16-cv-2242, 2019 U.S. Dist. LEXIS 72922 (D. Colo. Apr. 29, 2019) (same, pursuant to Missouri law). *But see Rittmann,* 383 F. Supp. 3d at 1203 (denying motion to compel arbitration where the FAA was inapplicable due to the transportation worker exception and because the contract indicated state law did not apply to the arbitration provision).

Companies with transportation workers should assess their current arbitration programs and consider whether they can improve the prospect of enforcing their agreements by including an alternative state law enforcement provision. Such a provision could provide that arbitration will be governed by an appropriate state arbitration statute in the event the FAA is determined to be inapplicable. It is important to draft the arbitration provision carefully so that it will meet any specific state law requirements. Further, selection of an appropriate state arbitration statute is itself a question that requires careful consideration and knowledge of state laws on arbitration.

Please contact a Jackson Lewis attorney with any questions or for assistance with your arbitration agreements.