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Is This the "Last Mile" for the "Last-Mile Drivers"? Navigating the Federal Arbitration Act's Transportation Worker Exemption

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In This Issue

Litigation over mandatory arbitration of employment disputes has skyrocketed in recent years, and one of the most hotly contested issues has involved the scope of the transportation worker exemption of the Federal Arbitration Act ("FAA"). Following the U.S. Supreme Court's 2019 decision in *New Prime Inc. v. Oliveira*[1] that held for the first time that the transportation worker exemption applies to both employees and independent contractors, courts have increasingly been wrestling with the scope of the exemption, including the question of whether certain transportation workers are engaged in interstate commerce. Indeed, given the number of ridesharing, food delivery, and other gig economy workers classified as independent contractors, understanding the scope and reach of the transportation worker exemption is of critical importance to many employers.[2]

In this article, we analyze several recent decisions in which courts have addressed the question of whether the nature of work at issue qualifies under the transportation worker exemption, and provide some practical steps employers can take to enhance the enforceability of their arbitration agreements with respect to workers who potentially qualify as transportation workers.

Background and Recent Decisions

The FAA "establishes 'a liberal federal policy favoring arbitration agreements'"[3] and generally requires courts to enforce such agreements. However, Section 1 of the FAA expressly exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[4] In 2001, the Supreme Court held that the residual clause in Section 1—"any other class of workers engaged in foreign or interstate commerce"—is limited to "transportation workers."[5] More recently, several circuit courts have grappled with the specific issue of whether certain transportation workers, for example, delivery drivers, airport baggage handlers, and rideshare drivers, must themselves be engaged in moving goods across state borders, or if the transportation worker exemption also applies even if the workers are transporting goods solely intrastate, but the goods themselves have traveled interstate.

Recent litigation over the scope and applicability of this transportation worker exemption has resulted in several competing views that make this issue ripe for Supreme Court review. Two recent decisions applying the transportation worker exemption concerned Amazon's "last mile" delivery drivers, who are

contracted through Amazon's "AmFlex" program to deliver packages from Amazon warehouses to their final destination. Although these trips occasionally require the drivers to cross state lines, the majority of deliveries take place intrastate.[6] The Ninth Circuit held that Amazon's AmFlex drivers fall within the transportation worker exemption, "even if they do not cross state lines to make their deliveries,"[7] noting that the packages being delivered "have been distributed to Amazon warehouses, certainly across state lines."[8] The First Circuit similarly held that Amazon's last-mile delivery workers are "'engaged in interstate commerce,' regardless of whether the workers themselves physically cross state lines."[9]

By contrast, the Seventh Circuit, in a decision by current U.S. Supreme Court Justice Amy Coney Barrett, held that the transportation worker exemption did *not* apply to Grubhub's food delivery drivers.[10] In *Wallace v. Grubhub Holdings, Inc.*, the plaintiffs "stress[ed] that they carry goods that have moved across state and even national lines." However, the court held that, to fall within the residual clause exemption of Section 1, "a class of workers must themselves be 'engaged *in the channels* of foreign or interstate commerce.'"[11] Because the plaintiffs did not show that "the interstate movement of goods is a central part of the job description of the class of workers to which they belong," the court concluded that they do not fall within the exemption.[12]

In the context of airport workers, the Fifth Circuit likewise held in *Eastus v. ISS Facility Services, Inc.*, that a supervisor of ticketing and gate agents who "ticketed passengers, accepted or rejected baggage and goods, issued tags for all baggage and goods, and placed baggage and goods on conveyor belts to transport for additional security screening and loading" did *not* fall within the transportation worker exemption.[13] According to the court, the exemption covers only workers "actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are."[14] The Fifth Circuit specifically highlighted the plaintiff's concession that longshoremen and delivery-truck loaders are *not* transportation workers under the exemption. Because "Eastus' duties could at most be construed as loading and unloading airplanes," just as longshoremen and delivery-truck loaders load or unload boats or trucks with goods, the plaintiff was "not engaged in an aircraft's actual movement in interstate commerce."[15]

In *Saxon v. Southwest Airlines*,[16] the Seventh Circuit recently addressed a similar issue for an employee of Southwest Airlines at Chicago Midway International Airport. The plaintiff was a ramp supervisor for Southwest where she supervised, trained, and assisted ramp agents to load and unload cargo, and also frequently assisted in loading and unloading the planes. Although the plaintiff agreed to arbitrate any wage disputes, she filed a putative collective action against Southwest under the Fair Labor Standards Act, alleging failure to pay ramp supervisors for overtime work. Southwest moved to compel arbitration. In response, the plaintiff argued that she was part of a "class of workers engaged in foreign or interstate commerce," and thus exempt under Section 1 of the FAA. The U.S. District Court for the Northern District of Illinois held that the plaintiff was *not* exempt under Section 1 because the exemption requires "'actual transportation, not merely handling goods … at one end or the other' of a network."

The U.S. Court of Appeals for the Seventh Circuit reversed, holding that "airplane cargo loaders are a class of workers engaged in commerce," and thus such individuals are transportation workers whose contracts of employment are exempt from the FAA. In reaching this conclusion, the Seventh Circuit stated that "to be exempted under the residual clause of § 1, the ramp supervisors must themselves be engaged in interstate or foreign commerce," which depends on whether the workers "are actively occupied in 'the enterprise of moving goods across interstate lines.'" Acknowledging the fine line in distinguishing between workers who satisfy this requirement and those who do not, the court concluded that ramp supervisors and ramp agents "physically load[] baggage and cargo onto planes destined for, or returning from, other states and countries, and that cargo-loading work is interstate or foreign commerce."

The Seventh Circuit distinguished the case from the Fifth Circuit's *Eastus* decision by explaining that the

plaintiff in *Saxon* did not concede, as did the plaintiff in *Eastus*, that longshoremen, who load and upload ships at port, are *not* transportation workers under Section 1. Thus, the court did not find *Eastus* directly applicable, even if Saxon's work could also be characterized as loading and unloading airplanes. Because the plaintiff in *Eastus* did not load and unload cargo herself, the *Saxon* court also acknowledged that she "was at least one step removed from either longshoremen or ramp supervisors like Saxon." This distinction, however, was not significant to the *Eastus* court. The *Eastus* court instead focused on the fact that "though the passengers moved in interstate commerce, Eastus' role *preceded that movement*" and did not involve actually transporting the goods themselves.[17] In *Saxon*, in contrast to *Eastus*, in response to Southwest's argument that ramp supervisors are not engaged in "actual transportation," the Seventh Circuit noted that "'[a]ctual transportation is not limited to the precise moment either goods or the people accompanying them cross state lines," and that workers like Saxon are "an essential part of the enterprise of transporting goods between states and countries."[18]

Practice Pointers

While the scope and applicability of the transportation worker exemption continues to evolve and the issue may ultimately be subject to Supreme Court review, companies that engage workers subject to arbitration agreements and who arguably fall under the transportation worker exemption can take certain steps to enhance the enforceability of such agreements.

First, in response to Southwest's concern that it would not be able to enter into enforceable arbitration agreements with a certain subset of its workers, the *Saxon* court noted that arbitration may still be enforceable under applicable state law. Thus, employers may consider revising their arbitration agreements to include a provision that if a court holds that the FAA does not control, the arbitration laws of a chosen state that does not contain a similar exemption for transportation workers, such as Virginia, will govern the arbitration process.

The *Saxon* court further explained that a transportation worker could still face arbitration "through an agreement outside of her contract of employment." In the Supreme Court's decision holding that the transportation worker exemption may also apply to independent contractors, the Court concluded that "contract of employment" in Section 1 "capture[s] any contract for the performance of *work* by *workers*"—in that case, including independent contractors.[19] Thus, instead of including an agreement to arbitrate in an employment or independent contractor agreement that sets forth the work the individual will perform, employers may seek arbitration through a separate agreement, provided there is separate consideration. The Second Circuit, for example, acknowledged the possibility that such an agreement could fall outside the scope of Section 1 in a case involving a "Claim Arbitration Agreement" signed between the parties after the plaintiff suffered an injury while working.[20] In *Harrington*, the court noted the Supreme Court's "strong[] suggest[ion] that arbitration agreements such as the one at issue in this case do not constitute 'contracts of employment' where the arbitration agreement is 'not contained' in a broader employment agreement between the parties."[21] However, it may be more challenging to distinguish between a standalone arbitration agreement and a "contract of employment" under Section 1 if both agreements are executed at the commencement of employment.[22] Employers should consult with counsel when assessing the risk of a court finding a proposed arbitration agreement to be part of a "comprehensive 'contract of employment'" under Section 1.[23]

Finally, the *Saxon* court stated that its finding that Saxon, a ramp supervisor who personally loads and unloads cargo, is a transportation worker under Section 1 "does not necessarily mean that the work of a ticketing or gate agents (like in *Eastus*) or others even further removed from that moment qualify too." In the Seventh Circuit's view, to qualify for the exemption, the worker "must be connected not simply to the goods, but to the act of moving those goods across state or national borders."[24] Determining whether a worker satisfies this test is not simple.[25] In

addition, as the residual clause refers to a "class of workers," the Seventh Circuit focuses not on the individual worker, but on "whether a given class of workers is engaged in commerce and whether [the individual worker] is a member of that class."[26] Determining the appropriate class of workers, the job responsibilities of that class, and whether the individual worker at issue is a member of that class are all fact-intensive questions requiring an understanding of the key issues, particularly in the applicable jurisdiction. Employers should consider revising their job descriptions for these positions to reflect, where applicable, the intrastate nature of the work performed and the absence of activities involving or facilitating the movement of goods or services that extend beyond state borders. We further recommend that employers consult with counsel when engaging in this assessment and when determining the form and substance of arbitration agreements to propose to particular workers.

[1] *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538-44 (2019).

[2] In addition to grappling with whether their delivery and ride-share workers are subject to the transportation worker exemption, companies with such workers in New York may soon see increased union organizing activity from such groups if a bill expected to be introduced next week is passed. *See New York Gig Workers to Get Easy Unionizing Path in Draft Bill*, BLOOMBERG (May 21, 2021), https://news.bloomberglaw.com/daily-labor-report/new-york-gig-workers-to-get-easy-unionizing-path-in-draft-bill.

[3] *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

[4] 9 U.S.C. § 1.

[5] *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

[6] *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 907 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1374 (2021).

[7] *Id.* at 919.

[8] *Id.* at 915.

[9] *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 26 (1st Cir. 2020).

[10] *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 803 (7th Cir. 2020).

[11] *Id.* at 802.

[12] *Id.* at 802-03.

[13] *Eastus v. ISS Facility Services, Inc.*, 960 F.3d 207, 208, 212 (5th Cir. 2020).

[14] *Id.* at 210 (quoting *Rojas v. TK Commc'ns, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996)).

[15] *Id.*

[16] *Saxon v. Sw. Airlines Co.*, 993 F.3d 492 (7th Cir. 2021).

[17] *Eastus*, 960 F.3d at 211 (emphasis added).

[18] The First and Ninth Circuits have pending cases on whether the transportation worker exemption applies to drivers for Lyft and Uber. *See Capriole v. Uber Techs., Inc.*, 460 F.Supp.3d 919 (N.D. Cal. 2020) (holding that Uber drivers do not qualify as transportation workers), *appeal filed* May 28, 2020; *Cunningham v. Lyft, Inc.*, 450 F.Supp.3d 37 (D. Mass. 2020) (denying defendants' motion to compel arbitration, finding that the plaintiffs qualify as transportation workers), *appeal filed* Apr. 6, 2020.

[19] 139 S. Ct. at 539-41.

[20] *Harrington v. Atl. Sounding Co.*, 602 F.3d 113, 115 (2d Cir. 2010).

[21] *Id.* at 121 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)).

[22] *See Abram v. C.R. England, Inc.*, 2020 WL 5077365, at *3 (C.D. Cal. Apr. 15, 2020) (distinguishing *Gilmer* because "the arbitration clause … was part of a completely separate contract with a separate entity," and distinguishing *Harrington* because "Defendant presented both the Driver Contract and Arbitration Agreement to Plaintiff at the same time prior to her hiring").

[23] *See Abram*, 2020 WL 5077365, at 3.

[24] *Saxon*, 993 F.3d at 500.

[25] *See id.*

[26] *Id.* at 495-96.

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