

## Third Circuit: Federal Law Does Not Preempt New Jersey's ABC Test for Independent Contractors

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The Third Circuit Court of Appeals ruled that a federal statute that governs interstate trucking does not preempt the application New Jersey's ABC test for distinguishing between employees and independent contractors.

In *Bedoya v. American Eagle Express Inc.*, New Jersey-based delivery drivers for AEX alleged that the company misclassified them as independent contractors rather than employees in violation of the New Jersey Wage and Hour Law and the New Jersey Wage Payment Law. AEX moved to dismiss the drivers' claims as preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), which regulates air carriers and motor carriers. The District Court for the District of New Jersey denied the motion, and the issue proceeded to the Third Circuit on interlocutory appeal.

The ABC test is New Jersey's method of determining whether a worker is an employee or an independent contractor for purposes of the Wage and Hour Law and the Wage Payment Law. Under that test, a company has the burden of proving independent contractor status by demonstrating that:

- A. the worker is free from control or direction over the performance of his or her services; and
- B. the services provided are either outside the usual course of the company's business, or the services are performed outside of the company's places of business; and
- C. the worker has an independently established business.

N.J. Stat. Ann. § 43:21-19(i)(6)(A)-(C) ("ABC test").

The Third Circuit explained that Congress enacted the FAAAA and the Airline Deregulation Act of 1978 to deregulate the air and motor carrier industry, "maxim[ize] reliance on competitive market forces," and "level the playing field" between air carriers and motor carriers. To prevent state laws from interfering with that goal, the FAAAA provides that (with limited exceptions) a state "may not enact or enforce a law, regulation, or other provision . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The Third Circuit further noted that there is a presumption against preemption because "the historic police powers of the States" are "not to be superseded . . . unless that was the clear and manifest purpose

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of Congress.”

In determining whether the FAAAA preempts a state law, courts consider whether the law’s effect on carrier prices, services, or routes is (a) direct or indirect and (b) significant or insignificant. The Third Circuit pointed out that “garden variety employment claims” often evade FAAAA preemption because they are “too remote and too attenuated” from carrier prices, services, or routes.

To assess the directness of a law’s effect on prices, routes, or services, courts examine factors such as whether the state law: (1) mentions a carrier’s prices, routes, or services; (2) specifically targets carriers as opposed to all businesses; and (3) addresses the carrier-customer relationship (rather than, for example, the relationship between the carrier and its workers). The Third Circuit concluded that New Jersey’s ABC test does not directly affect prices, routes, or services largely because the test does not mention carrier prices, routes, or services, does not single out carriers, and does not regulate carrier-customer interactions

To assess whether a law has a significant effect on a carrier’s prices, routes, or services, courts consider whether: (1) the law binds a carrier to provide or not provide a particular price, route, or service; (2) the carrier has various avenues to comply with the law; and (3) the law creates a patchwork of regulation that erects barriers to entry, imposes tariffs, or restricts the goods a carrier may transport. Courts also will consider whether the legislative history indicates that Congress believed that the state law did not regulate prices, routes, or services. The Third Circuit focused on the fact that New Jersey’s ABC test did not bind carriers to using employees to make deliveries, but rather allows carriers to continue to choose between independent contractors and employees. Therefore, the impact of the state law on the AEX’s operations was not significant.

The Third Circuit distinguished New Jersey’s ABC test from the Massachusetts ABC test at issue in *Schwann v. FedEx Ground Package System, Inc.*, 813 F.3d 429 (1st Cir. 2016). The second prong of the Massachusetts ABC test limited independent contractor status to individuals who performed work that is “outside the usual course of the business of the employer.” Under that criterion, carriers could never hire independent contractor drivers to make deliveries, because deliveries are within the carrier’s usual course of business and therefore defeat independent contractor status. For that reason, the First Circuit Court of Appeals ruled in *Schwann* that the second prong of the Massachusetts law was preempted by the FAAAA.

In contrast to the Massachusetts law, the second prong of the New Jersey law requires either that services be provided outside the usual course of the company’s business or that the services are performed outside of the company’s places of business. Therefore, it is possible under the New Jersey ABC test for a carrier’s drivers to be independent contractors.

Because the effect the New Jersey ABC test has on prices, routes, or services with respect to the transportation of property is “tenuous and insignificant,” the Third Circuit concluded that the FAAAA does not preempt the New Jersey statutory test.

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