Battle Lines Drawn: Another Appeals Court Rules That Drivers Can Escape Arbitration, Furthering National Split For Gig Economy Companies

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Gig economy companies received bad news yesterday when yet another federal appeals court ruled that delivery drivers – even independent contractors – can escape otherwise valid arbitration agreements. This is now the third federal appeals court to conclude that the "transportation worker" exemption in the Federal Arbitration Act should be read broadly enough to exempt typical gig economy workers, setting up a split in the circuits that has businesses operating across the country scratching their heads on how to proceed. What do gig economy companies need to know about the 9th Circuit's ruling against Amazon.com?

Quick Background
Last year, the Supreme Court ruled in *New Prime v. Oliveira* that the Federal Arbitration Act's (FAA's) exemption that excludes those with "contracts of employment of workers engaged in interstate commerce" from arbitration includes workers with independent contractor agreements. We immediately raised a red flag and discussed whether gig delivery and ride-sharing drivers would be considered to be operating in interstate commerce, and if so, whether courts would soon block arbitration agreements from being enforced.

Circuits Have Been Split, Leading To Patchwork Of Legal Standards
Our fears were first realized when the 3rd Circuit Court of Appeals ruled in September 2019 that ride-share drivers performing work for Uber should not be subject to the company's arbitration agreement because of that Supreme Court ruling. That decision covers businesses in New Jersey, Pennsylvania, and Delaware. Then, just last month, the 1st Circuit Court of Appeals – covering Massachusetts, Rhode Island, Maine, New Hampshire, and Puerto Rico – rejected Amazon.com's effort to force arbitration in a case involving one its gig-economy-like drivers.

Gig economy businesses received some good news just a few weeks ago when the 7th Circuit Court of Appeals read the FAA exception narrowly and concluded that gig workers cannot avoid arbitration provisions by claiming they are exempt transportation workers. While businesses in Illinois, Indiana, and Wisconsin had cause for celebration, the good news did not lead to the positive momentum that some may have hoped for. Instead, just yesterday, the 9th Circuit Court of Appeals – the largest appellate court in the nation covering California, Washington, Oregon, Arizona, Nevada, Montana, Idaho, Alaska, Hawaii – handed yet another loss to the gig economy by broadly interpreting the FAA exemption.

Amazon.com's Gig Economy Program

The business at issue is Amazon's AmFlex program. The company retains workers through this program so they can make "last mile" deliveries of products from its warehouses to the final destinations. Workers use a smart phone application to sign up for shifts and then use their personal vehicle or bicycle to deliver the products. In other words, this appears to be a very typical gig economy arrangement. While some AmFlex delivery providers occasionally cross state lines to make deliveries, most deliveries take place intrastate.

What Did The Court Say About These Workers?

After a group of workers brought state and federal wage and hour claims in court (alleging, of course, they were misclassified as independent contractors and should have been treated as employees), Amazon pointed to the arbitration agreements the drivers had signed and asked the court to send the dispute to be resolved in a private arbitration setting.

But the 9th Circuit rejected this request and concluded that AmFlex delivery drivers should be considered "transportation workers" engaged in interstate commerce, thereby exempting them from arbitration under the FAA – even if they only make deliveries in one state. The court's reasoning? Because the drivers "delivered packaged goods that are shipped from around the country and which are delivered to consumers untransformed."

The court focused on the products' chain of commerce, examining where they start and where they end. It concluded that the drivers were an indispensable part of that chain by delivering the packages to their final destinations. "The interstate transactions between Amazon and the customer do not conclude until the packages reach their intended destinations," the court said, "and thus AmFlex drivers are engaged in the movement of interstate commerce."

This reasoning runs directly counter to the stance taken by the 7th Circuit in its Grubhub ruling from a few weeks ago. In that case, the court said that the question should focus more on what the worker *does* instead of where the goods have *been*. "The workers must be connected not simply to the goods, but to the act of moving those goods across state or national borders" in order to qualify for the arbitration exemption. "Put differently," the court said, "a class of workers must themselves be engaged in the channels of foreign or interstate commerce." To win an exemption from arbitration, the 7th Circuit said, the workers would have had to demonstrate that the interstate movement of goods is a central part of the job description of the class of workers to which they belong.

What Should You Do?

As a result of yesterday's ruling, you should be prepared to deal with the rejection of arbitration agreements – even for independent contractors – in a multitude of states. The full list of jurisdictions in which the FAA exemption is read broadly enough to permit workers to escape arbitration now includes New Jersey, Pennsylvania, Delaware, Massachusetts, Rhode Island, Maine, New Hampshire, Puerto Rico, California, Washington, Oregon, Arizona, Nevada, Montana, Idaho, Alaska, and Hawaii. If you operate in any of these states, you should assume that any arbitration

Alaska, and Hawaii. If you operate in any of these states, you should assume that any arbitration agreements you have (or had) your gig economy workers sign will not be held valid by a federal court.

You may have some solace if you are in Illinois, Indiana, and Wisconsin, which is currently the only federal appellate court to conclude that the typical gig economy worker arrangement does not trigger the FAA exemption. And if you operate in any area not yet included on this list? You need to proceed cautiously, perhaps with the guidance of your employment attorney, understanding the risks of relying on arbitration provisions given the current state of affairs.

What hope do you have for a reprieve? Amazon has already asked the 1st Circuit Court of Appeals for a rehearing before a full panel of judges, and will probably make a similar request at the 9th Circuit (especially given that yesterday's ruling was 2-1 with a very strong dissent authored by a judge who wanted to rule in Amazon's favor). There is always hope that an *en banc* panel will reverse course – but it is risky to wait for such a day, as it may be far in the future, or may never come.

The last-ditch resort: Supreme Court intervention. Now that four circuit courts have weighed in and created a definitive split across the country, there is an increasing chance that the Supreme Court justices would accept one of these challenges and settle the matter once and for all. We'll keep our eye out for further developments in this area and will report back with further insights when events warrant.

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