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Rare Win for Transportation Workers at Supreme Court over Mandatory Arbitration

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On January 15, 2019, the Supreme Court decided in *New Prime Inc. v. Oliveira* that a court cannot enforce a mandatory arbitration agreement against a long-haul truck driver under the Federal Arbitration Act (FAA), notwithstanding his classification as an independent contractor rather than an employee. No. 17-340, slip op. at 15 (U.S. Jan. 15, 2019). The ruling represents a rare win for workers in a generally pro-arbitration Court, although the inclusion of independent contractors extends to a relatively narrow subset of transportation workers.

Background

Arbitration is a form of alternative dispute resolution used to adjudicate disputes between parties to a contract in lieu of litigation. Employers generally favor this out of court proceeding for its increased privacy, predictability, and settlement potential, as well as reduced time and costs compared to litigation.

Employees and workers, however, tend to face an uphill battle to prevail in arbitration. Unlike public litigation, arbitrations are confidential and decisions by arbitrators do not carry precedential effect and are subject to very limited (if any) judicial review. Arbitration agreements are often a condition of new or continuing employment, presented on a take it or leave it basis that the employee cannot negotiate. Employer-drafted arbitration provisions can set procedural rules that disadvantage workers – e.g., limiting discovery, shortening statutes of limitations, and eliminating punitive damages or other remedies. Employers can also benefit from appearing before the same arbitrators, which increases their odds of receiving favorable findings or a lower damages assessments.[1] The Supreme Court's interpretations of the FAA typically have favored employers, including a recent ruling upholding waivers of class arbitrations. *See Epic Sys. Corp. v. Lewis,* 138 S. Ct. 1612 (2018). Pursuing an individual arbitration claim, rather than a class action, can be cost-prohibitive for many would be plaintiffs.

Before the passage of the FAA in 1925, courts typically disfavored arbitration agreements between parties, viewing them as taking away jurisdiction from the courts. In an effort to promote the enforcement of arbitration agreements, the Act required courts to enforce arbitration agreements the same as they would any other contract and required courts to stay litigation and compel arbitration where necessary. *See* FAA, 9 U.S.C. §§ 3-4. The FAA, however, excludes from coverage "contracts of employment of seamen, railroad employees, or any other class of worker engaged in foreign or interstate commerce." FAA, 9 U.S.C. § 1. In 2001, the Supreme Court ruled in *Circuit City v. Adams* that "any other class of worker engaged in foreign or interstate commerce" applied solely to transportation employees – that is, workers "actually engaged in the movement of goods in interstate commerce." 532 U.S. 105, 112 (2001). In *New Prime*, the Court further examined the scope of the § 1 exemption.

New Prime Inc. v. Oliveira

Respondent Dominic Oliveira, a driver for trucking company New Prime Inc., brought a class action suit alleging, inter alia, minimum wage violations under the Fair Labor Standards Act and state law. Although he and other drivers were classified as independent contractors, rather than employees, Oliveira argued that New Prime treated them like employees and was thus subject to minimum wage laws. Because Oliveira's operating agreement with the company contained a mandatory arbitration provision, however, New Prime moved the court to compel arbitration under the FAA. In response to Oliveira's argument that the contract was exempted from the FAA under the § 1 exemption, New Prime argued that the arbitrator – not the court – should decide whether § 1 applies. The district court denied the motion to compel, finding that a court decides § 1 applicability and ordering further discovery to determine whether Oliveira was an independent contractor or an employee, noting that courts generally agree the § 1 exemption does not extend to independent contractors. On appeal, the First Circuit upheld the district court's first finding, but on the second point, found that the § 1 exemption includes independent contractors. The Supreme Court decided 8-0 (Justice Kavanaugh did not take part in the consideration) to affirm the First Circuit's ruling.

Writing for the Court, Justice Gorsuch pointed to the significance of the FAA's sequencing to conclude that a court must first determine § 1 applicability before it can exercise its §§ 3-4 power to compel arbitration or stay litigation. If a contract falls outside of the FAA's scope, the court lacks power to compel arbitration, notwithstanding the parties' private agreement to arbitrate even threshold questions of arbitrability.

It should be noted that this holding turns on the statutory exception and is distinct from the Supreme Court's otherwise firm stance that courts can enforce "delegation clauses" – or provisions in arbitration contracts requiring an arbitrator, rather than a court, to decide threshold questions of arbitrability. *See, e.g.*, *Harry Schein Inc. v. Archer & White Sales Inc.,* No. 17-1272 (U.S. Jan. 8, 2019) (striking down the "wholly groundless" exception, which some lower courts had carved out, to the general rule that courts must enforce delegation clauses).

On the second question, the Court found that the FAA § 1 provision, which exempts from coverage "contracts of employment" of transportation workers, includes contracts reflecting an independent contractor relationship. *See* FAA, 9 U.S.C. § 1. The Court's finding turned on the usage of the word "employment" in 1925, when Congress passed the FAA, determining that the ordinary meaning of the word at that time encompassed "different kinds of work," including that of independent contractors. The Court supported this conclusion by pointing to Congress's use of the phrase "class of workers," rather than class of 'employees' in the statutory text.

Justice Ginsburg agreed with the Court's decision, but filed a separate concurrence to add that Congress may design statutes to adapt to changing times and circumstances and, as such, "sometimes words in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic." No. 17-340 at 2 (Ginsburg, J., concurring) (citing *West v. Gibson*, 527 U.S. 212, 218 (1999)).

Implications for the Trucking Industry and Employment Rights

The *New Prime* decision is a rare win for workers in FAA jurisprudence, and indeed the first claim for arbitration the Supreme Court has rejected in at least over a decade. For transportation workers like Oliveira, plaintiffs will be free to bring wage and other employment claims and class actions to court. The trucking industry relies heavily on an "owner-operator" model, in which carriers lease trucks and equipment to drivers, who are held out as independent contractors. Varying degrees of carrier oversight, suppressed wages, and other labor abuses, however, have caused the classification of

drivers as independent contractors to be a source of dispute.[2] As workers continue to raise these issues, the *New Prime* ruling will ensure carriers cannot force workers into arbitration. The expansion of the FAA § 1 exemption to include independent contractors will only affect workers "actually engaged in the movement of goods in interstate commerce" and thus likely will not benefit most gig economy drivers for app services such as Uber and Lyft.

Outside of the transportation industry, workers will remain largely unaffected by *New Prime*'s holding. However, some commentators caution that the Court's singular focus on reading the FAA terminology as it was understood in 1925 could spell trouble for worker's rights protected by the civil rights statutes. For example, if the Court interprets the term "sex" in Title VII of the Civil Rights Act of 1964 by limiting its analysis to the meaning of that word in 1964, it may conclude that "sex" does not include sexual orientation or gender identity.[3] With certiorari petitions pending at the Supreme Court on both of these questions, this approach could take on greater significance, which could be what Justice Ginsburg was signaling in her concurrence, and could also explain why the Court has not yet granted the petitions in those cases.

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[1] *See* Alexander Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68(5) Indus. & Lab. Rel. Rev. 1019-1042 (2015), available at https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2018&context=articles.

[2] *See, e.g.*, *Bedoya v. Am. Eagle Express Inc.*, 914 F.3d 812, 826 (3d Cir. 2019) (holding a federal statute governing interstate trucking did not preempt New Jersey's test for classifying independent contractors in a class action by truck drivers over misclassification); *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 40 (Cal. 2018) (announcing a 3-prong "ABC test" for classifying employees, including a prong that an independent contractor's work must be "outside the usual course of the hiring entity's business" in misclassification class action suit).

[3] *See, e.g.*, Benjamin Sachs & Adrienne Spiegel, *Is New Prime a Poison Pill for Title VII?*, On Labor (Jan. 22, 2019), https://onlabor.org/is-new-prime-a-poison-pill-for-title-vii/; Mark Joseph Stern, *The Supreme Court Just Handed a Big, Unanimous Victory to Workers. Wait, What?*, (Jan. 15, 2019), https://slate.com/news-and-politics/2019/01/gorsuch-arbitration-labor-new-prime-oliveira.html.