Case No. 13-2307

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MASSACHUSETTS DELIVERY ASSOCIATION,
Plaintiff/Appellant,

v.

MARTHA COAKLEY, in her official capacity as
Attorney General of the Commonwealth of Massachusetts,
Defendant/Appellee

Appeal from the
United States District Court for the District of Massachusetts,
The Honorable Denise J. Casper, Presiding
Civil Action No. 1:10-cv-11521-DJC

Redacted Brief of Plaintiff -- Appellant Massachusetts Delivery Association

David C. Casey (First Cir. No. 26733)
Christopher B. Kaczmarek (First Cir. No. 117537)
Stephen T. Melnick (First Cir. No. 1135908)
Littler Mendelson, P.C.
One International Place, Suite 2700
Boston, MA 02110
Tel: 617.378.6000
Fax: 617.737.0052

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant Massachusetts Delivery Association ("MDA" or "Plaintiff-Appellant") hereby states that the MDA is a Massachusetts non-profit corporation organized under Mass. Gen. Laws ch. 180. The members of the MDA are engaged in the messenger, courier and delivery business. No publicly-held company owns 10% or more of the MDA.

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I. JURISDICTIONAL STATEMENT

Plaintiff-Appellant Massachusetts Delivery Association (the "MDA") filed this action in the United States District Court for the District of Massachusetts on September 7, 2010. It arises under the Constitution and laws of the United States, including the Supremacy Clause of the Constitution, art. VI, cl. 2, and the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. § 14501(c) (the "FAAAA"). Accordingly, the District Court had jurisdiction over this matter under 28 U.S.C. § 1331.

The District Court denied the MDA's motion for summary judgment, and granted it for Defendant-Appellee, Martha Coakley, in her official capacity as Attorney General of the Commonwealth of Massachusetts (the "Attorney General"), on September 26, 2013, dismissing Counts I and III of the MDA's Amended Complaint. To expedite appeal, the MDA filed an assented-to motion to voluntarily dismiss Count II.[1] The District Court granted that motion and entered final judgment on October 18, 2013. The MDA timely filed its notice of appeal on October 21, 2013. The Court of Appeals for the First Circuit has jurisdiction over the MDA's appeal pursuant to 28 U.S.C. § 1291. *See Cashmere & Camel Hair*

[1] Counts I and III advanced FAAAA arguments. Count II was based on the dormant commerce clause. Count II was not raised at summary judgment, and is not at issue here.

Mfrs. Inst. v. Saks Fifth Ave., 284 F.3d 302, 308-09 (1st Cir. 2002); *John's Insulation, Inc. v. L. Addison & Assoc.*, 156 F.3d 101, 107 (1st Cir. 1998).

II. STATEMENT OF THE ISSUES

Whether the FAAAA preempts M.G.L. c. 149, § 148B(a)(2), because that State law impermissibly relates to motor carriers' prices, routes or services with respect to the transportation of property?

III. STATEMENT OF THE CASE

The MDA, a non-profit trade organization representing same-day delivery companies in Massachusetts, initiated this action for a declaration that the "B prong" of the Massachusetts Independent Contractor statute, M.G.L. c. 149, § 148B(a)(2) ("Section 148B"), is preempted by the FAAAA, and for an injunction barring the Attorney General from enforcing it against the MDA's members.

The FAAAA preempts any State law that "relates to" a motor carrier's prices, routes, or services with respect to the transportation of property. Congress passed this law "to facilitate interstate commerce … in the public interest." The State law at issue here, Section 148B, categorically prohibits motor carriers from utilizing independent contractors to provide delivery services. Using employee-drivers rather than independent contractor-couriers would drastically alter the business model of the MDA's members, and would inevitably affect the prices, routes and services these companies offer customers for deliveries. This result is

contrary to the FAAAA's clear dictates, rendering Section 148B preempted by the FAAAA under the Supremacy Clause.

The MDA filed its Complaint for Declaratory Judgment and Injunctive Relief on September 7, 2010. Appendix ("Appx.") at A 004. The Attorney General filed a Motion to Dismiss on the basis of *Younger* abstention on October 22, 2010. On December 7, 2010, the MDA filed its First Amended Complaint, the operative pleading in this action, to clarify that the MDA was challenging the B prong of the Independent Contractor law, M.G.L. c. 149, § 148B(a)(2) only. Appx. at A 020. Despite this amendment, the District Court granted the Attorney General's Motion to Dismiss on April 11, 2011. The MDA timely appealed that decision, and this Court reversed the District Court's dismissal of the case and remanded it for further proceedings. *Mass. Delivery Ass'n v. Coakley*, 671 F.3d 33 (1st Cir. 2012) ("*MDA I*").

Following discovery, the MDA moved for summary judgment on October 30, 2012, asking the District Court to declare Section 148B preempted by the FAAAA and to enjoin the Attorney General from enforcing that law. Appx. at A 046. The Attorney General submitted briefing in opposition, but did not contest the MDA's factual proffer. The District Court denied the MDA's motion and

instead entered judgment for the Attorney General on September 26, 2013,[2] and entered final judgment on October 18, 2013. Appx. at A 176-78. The MDA timely filed its notice of appeal on October 21, 2013. Appx. at A 179.

A. The Massachusetts Delivery Association

The MDA is a non-profit trade organization supporting businesses involved in the delivery service industry. Appx. at A 058. The MDA's members provide same-day delivery services both within Massachusetts and throughout New England. *Id*. Most of the MDA's members provide delivery services through independent contractors. Appx. at A 058-59.

The MDA filed this action on a representational standing basis. *See N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 71-73 (1st Cir. 2006) ("*NHMTA*") (*aff'd sub nom. Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008)); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). In an FAAAA case, an association can obtain injunctive and/or declaratory relief by proving that the State law at issue relates to the prices, routes or services of any one motor carrier member of the association. *See NHMTA*, 448 F.3d at 72-73. Here, the MDA selected X Pressman Trucking & Courier, Inc. ("Xpressman") as its exemplar member for this purpose.

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[2] The Attorney General cross-moved for summary judgment, arguing that the MDA was seeking an "advisory opinion" here. The District Court below rejected this argument and denied that cross-motion. The Attorney General did not appeal the denial of the cross-motion, and it is therefore not before this Court.

B. Xpressman's Present Business Model

Xpressman is a same-day delivery service company, and an MDA member.[3] Appx. at A 058-59. Founded in 1993, it has grown to serve hundreds of customers across New England. Appx. at A 059. Xpressman is a certified woman-owned small business, and has won numerous awards, including "Small Business of the Year" by the Metro South Chamber of Commerce. *Id*. Like most MDA members, Xpressman engages independent contractors to provide delivery services to its clients. *Id.* The Internal Revenue Service previously conducted an audit of Xpressman, and determined that the couriers providing services for its customers were appropriately classified as independent contractors. Appx. at A 061.

Xpressman offers clients "scheduled-route" and "on-demand" delivery services. Appx. at A 059. Scheduled-route service involves regular pick-ups and drop-offs of packages at times and locations dictated by the client.[4] *Id*. To provide scheduled route services, Xpressman locates a courier who can accommodate the client's pick-up / drop-off schedule, and then engages him as a contractor. *Id*. Couriers are normally found through online advertisements such as craigslist.org or courierboard.com. *Id*. Interested couriers bid on a posted route, and Xpressman

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[3] Xpressman is a for-profit business providing delivery services for compensation, and thus a "motor carrier" under the FAAAA. Appx. at A 059; 49 U.S.C. § 13102(14).

[4] For example, a bank may direct that a courier pick up documents from its New Bedford branch at 2:00 pm, from Orleans at 3:00, from Chatham at 4:00, and then make a drop off at its Falmouth branch by 5:00. Appx. at A 059.

awards the route based solely on whoever advances the most competitive bid. *Id*. In 2011 Xpressman had approximately [] scheduled routes that it ran on a regular basis, and 46 couriers who service[5] these routes. Appx. at Sealed A 193.[6]

On-demand delivery services are short-notice rush deliveries such as law firms delivering filings to court. Appx. at A 060. On-demand jobs are inherently variable and unpredictable: Xpressman may receive dozens of on-demand jobs in a day, or none at all. *Id*. Xpressman is able to provide this service by engaging various couriers on an as-needed basis. *Id*. Couriers voluntarily contact Xpressman to state their availability to provide deliveries (time and location). *Id*. If a client's on-demand delivery request coincides with a courier's availability, Xpressman will offer the delivery to him. *Id*. Couriers can, and do, reject on-demand job offers from Xpressman. *Id*. Although the numbers fluctuate, on average 7 couriers performed [] on-demand deliveries for Xpressman's clients in a given day in 2011. Appx. at Sealed A 193.

Roughly 58 couriers provided delivery services for Xpressman's clients, as independent contractors. Appx. at A 061. These independent contractor-couriers

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[5] Although the number of Xpressman couriers providing scheduled services has remained relatively static, through significant turnover, their identity changes frequently. Appx. at A 059.

[6] Various sensitive data regarding Xpressman's business and financials were filed under seal in the District Court, *see* Appx. at A 142, and can be found in the Sealed Appendix, submitted with this Court under seal per Rule 11.0 of the rules adopted by the First Circuit.

are paid for each delivery they complete, not by the hour or week. *Id*. Xpressman does not provide couriers with benefits such as health insurance or retirement, does not offer workers' compensation, and does not pay payroll or unemployment insurance taxes. *Id*.

Xpressman also has administrative and warehouse functions, for which it employs 6 full-time and 2 part-time employees. Appx. at A 060. Xpressman's employees are paid on an hourly or salary basis, and receive health insurance and 401(k) plan benefits, which includes a [] percent contribution match from Xpressman. Appx. at Sealed A 193. Xpressman provides workers' compensation insurance, pays payroll taxes, and makes unemployment insurance contributions for its employees. Appx. at A 061. Because it has so few employees, Xpressman does not employ a human resources professional to assist in managing them. Appx. at A 061. Any employment issues are handled on an *ad hoc* basis by Xpressman's Office Manager. *Id*.

In 2011, Xpressman's costs and expenses were $X,XXX,XXX, of which it disbursed $X,XXX,XXX to independent contractor-couriers (over sixty percent of its total expenses). Appx. at Sealed A 195. Xpressman's 2011 net profit was $XXX,XXX. *Id*.

C. Xpressman's Business Model With Employees Rather Than Independent Contractors

As explained more fully *infra*, Section 148B would require same-day delivery companies like Xpressman to hire couriers as employees rather than engage independent contractors, which would profoundly alter Xpressman's business model as well as the prices, routes and services it offers customers.[7] Recruiting and hiring employees is significantly more complicated and expensive than engaging independent contractors. Similarly, managing dozens of employees (rather than independent contractors) would force Xpressman to create and staff a human resources function, and to adopt time-consuming and costly employment policies and procedures. Employers must also provide their employees with hourly compensation, overtime, mileage reimbursement, insurance and other fringe benefits, and pay employment taxes.

1. Recruiting, Interviewing and Hiring

The marked difference between independent contractors and employees starts even before the person is brought on board. Employers must verify the

[7] In gauging the effect that such a conversion would have on Xpressman's business, the MDA presented testimony from Xpressman's President, CEO and founder, Michelle Cully, an expert in transportation logistics, Satish Jindel of SJ Consulting Group, Inc., and an expert in human resources management, Susan Meisinger, JD, SPHR. Appx. at A 058, A 071, A 090. The Attorney General did not proffer any witnesses or experts in response, or otherwise factually challenge any of these submissions. *See* Appx. at A 144-147.

immigration status for all new hires.[8] Further, a business is vicariously liable for the conduct of its employees, but not independent contractors.[9] If Xpressman used employee-drivers, it could therefore be liable for any torts caused by those drivers. As a result, companies with employee-drivers spend significant time and effort in evaluating and screening applicants, to avoid hiring individuals who may have a greater propensity to commit such torts; those with poor driving records, criminal backgrounds, drug use, and so on. There are also a range of requirements and limitations on recruitment and hire imposed by the law: the content of employee advertisements is regulated by statute,[10] as is the content of an employment application.[11]

Because of the complex process associated with hiring employees, the average cost-per-hire in the transportation industry is $3,000 per employee. Appx. at A 110. 84 new couriers worked with Xpressman in 2011;[12] having to hire this many individuals as employees would cost Xpressman $252,000 annually. *Id.* By contrast, as noted *supra*, engaging a new contractor-courier is a streamlined process for Xpressman: an advertisement is posted online, couriers bid on the

[8] M.G.L. c. 149, § 19C.
[9] *See Corsetti v. Stone Co*., 396 Mass. 1, 9-10 (1985).
[10] M.G.L. c. 149, § 21.
[11] M.G.L. c. 149, § 19B (required disclaimers for employment applications); c. 151B, § 4(9 ½) (restrictions on criminal inquiries in employment applications).
[12] Xpressman has significant turnover in the couriers that provide services for its customers. Appx. at A 059.

posting, and the best bid is awarded the route. Xpressman currently spends just $[] annually to advertise for and engage couriers. Appx. at Sealed A 192.

2. Human Resources Management

Managing a mid-sized business in Massachusetts is substantially different from running a company with only six full-time employees. A mid-sized company (one with 50-100 employees) is exposed to a range of State and Federal employment laws that do not affect a smaller business. Likewise, most employment laws simply do not apply to independent contractors. The complexity of managing a workforce thus increases exponentially as independent contractors are converted to employees.

First, employers have extensive recordkeeping obligations for their employees: they must assemble and maintain personnel files containing any document bearing upon each individual's employment. These records must be available to employees on demand, and employers must inform employees within 10 days of any "negative information" placed in that record.[13] Employers must also track and keep records of employees' hours worked each day and each week, along with all compensation paid, and maintain those records for at least two years.[14]

[13] M.G.L. c. 149, § 52C.
[14] M.G.L. c. 149, § 52; c. 151, § 15.

Employment discrimination laws also impose affirmative obligations, and thus effort and cost, on employers.[15] Allegations of harassment, discrimination or retaliation must be investigated and remedied, a process that can be time-consuming and complex.[16] Further, disabled employees may be eligible for reasonable accommodations for their health conditions.[17] Determining whether an individual qualifies under these laws and then engaging in the "interactive process" to find an accommodation is similarly complicated.[18] Accommodations must also be made for employees' religious practices.[19]

State law imposes complications on employee scheduling as well. In Massachusetts, employees must be allowed a thirty-minute break for every six hours worked in a day.[20] Companies must provide their employees at least one day off every seven, and if an employee works on a Sunday, the company must

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[15] *E.g.*, 42 U.S.C. § 2000e (Title VII); 29 U.S.C. § 621 (Age Discrimination in Employment Act); 42 U.S.C. § 12101 (Americans with Disabilities Act); M.G.L. c. 151B (Massachusetts Fair Employment Act); M.G.L. c. 149, §§ 24A-24J (state law against age discrimination); M.G.L. c. 149, § 52A (state law prohibiting discrimination against military reservists); M.G.L. c. 149, § 105A (state equal pay law).

[16] *See College-Town, Div. of Interco v. MCAD*, 400 Mass. 156, 167-68 (1987) (employer may be liable for inadequate investigation or response to allegations of discrimination or harassment).

[17] 42 U.S.C. § 12112(b)(5); M.G.L. c. 151B, § 4(16).

[18] *See Russell v. Cooley Dickinson Hosp., Inc.*, 437 Mass. 443, 457 (2002).

[19] *See MBTA v. MCAD*, 450 Mass. 327, 341 (2008).

[20] M.G.L. c. 149, § 100.

designate one day off within the next six.[21] Also, because employees who work more than forty hours in a week must be paid a time-and-a-half premium, employers have a strong incentive to schedule employees less than forty hours to avoid this additional expense.[22]

Employees are also eligible for a range of leaves of absence under State[23] and Federal law.[24] These laws are complex to administer and oversee: companies need to determine whether an employee is eligible for leave, track how leave is being taken, find replacements for employees on leave, and so on.

Moreover, while not directly mandated by statute, most if not all mid-sized employers adopt common personnel management practices, including regular employee performance reviews, discipline and conduct policies, attendance policies, and policies regarding hiring and termination. These practices and policies are usually codified and compiled in an employee handbook, which must be reviewed periodically for ongoing compliance with ever-evolving laws. Appx. at A 118-28, 131-34.

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[21] M.G.L. c. 149, §§ 47-51.

[22] M.G.L. c. 151, § 1A; *see Overnight Motor Transp. Co. v. Missel,* 316 U.S. 572, 578 (1942) (overtime laws intended to discourage employers from scheduling workweeks of more than forty hours).

[23] M.G.L. c. 149, § 105D (Maternity Leave Act: 8 weeks off for women to give birth or adopt a child); M.G.L. c. 149, § 52D (Small Necessities Leave Act: 24 hours off to care for one's children or elderly relatives); M.G.L. c. 149, § 178 (time off for voting).

[24] 29 U.S.C. § 2601 *et seq.* (Family and Medical Leave Act: 12 weeks of leave for certain family or medical-related issues)

These employment statutes, standards and requirements do not apply to independent contractors. Because Xpressman currently has only six full-time employees, it does not have a human resource employee; any personnel issues are handled by its Office Manager. Appx. at A 061. Due to the complexity of complying with these myriad employment laws, and managing such a workforce, transportation companies with 50-100 employees typically have one full-time-equivalent human resource employee supporting the organization. Appx. at A 116-17. The average cost to maintain a human resource function and employ someone to oversee it is $100,000 per year. *Id*.

3. Compensation, Fringe Benefits and Taxes

While independent contractor-couriers at Xpressman are paid by the route, employee-drivers are paid an hourly rate.[25] Employees must also be paid at least a minimum wage (currently $8.00 per hour in Massachusetts)[26] and time-and-a-half for all hours worked over forty in a week.[27] Furthermore, industry standard is that drivers are paid for mileage driven. Appx. at A 077. Paying hourly rates and mileage would increase the amount Xpressman disburses to couriers by 39 percent: $11,767 more per week, or $611,884 more per year. *Id.*

[25] M.G.L. c. 151, § 1A.
[26] M.G.L. c. 151, § 1.
[27] M.G.L. c. 151, § 1A.

Likewise, industry standard is for companies to provide the vehicles that its employees drive, whereas independent contractor-couriers use their own cars. Appx. at A 077, 081. These company-owned vehicles are stored on company premises. *Id*. While independent contractor-couriers using their own car start the day at their first pick-up and end it with their last delivery, employee-drivers must start and end their workday at the company's worksite, adding what is known as "stem miles" to the route. Appx. at A 077. For Xpressman, these additional stem miles to and from Xpressman's main facility would increase hours worked – and hours paid – by 15 percent. *Id*.

Both per industry standard and Massachusetts law, employee-drivers also receive health insurance benefits.[28] Appx. at A 075, 111-12. On average, health insurance costs transportation employers $6,592 per employee.[29] Appx. at A 112. By engaging 58 employee-drivers, Xpressman would incur $382,336 in additional health insurance costs. *Id*. Xpressman's employees also receive 401(k) benefits including a [] percent match.[30] Appx. at Sealed A 193. Collectively, Xpressman paid couriers $X,XXX,XXX in 2011, which would result in up to $XX,XXX in additional 401(k) contributions annually. Appx. at Sealed A 195.

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[28] M.G.L. c. 149, § 188.

[29] Employers are obligated to offer the same insurance coverage to all full-time employees. M.G.L. c. 176B, § 3B.

[30] All employees must be offered retirement benefits at the same terms. I.R.C. § 410(b)(1).

Employers must also pay payroll taxes for each employee: 6.2 percent of employee earnings to Social Security (up to $110,000); 1.45 percent of employee earning to Medicare; and at least 2.58 percent for Massachusetts unemployment insurance (up to $14,000). Appx. at A 113. With a payroll of $X,XXX,XXX and 58 drivers, social security taxes for Xpressman would equal $XXX,XXX; Medicare, $XX,XXX; and unemployment, $XX,XXX. Appx. at Sealed A 195. Employers must also provide employees with workers' compensation insurance, which averages $520 per person in the transportation industry, or $30,160 annually to cover 58 employees. Appx. at A 088.

Even the method of payment for employees is strictly regulated. Employees must be paid at least biweekly, and must be given detailed pay stubs.[31] State law further limits the deductions that may be taken from an employee's paycheck.[32]

4. Routes Offered by Xpressman

There would be significant changes to Xpressman's routes, if it were required to use employees rather than independent contractors. As noted, unlike independent contractors who drive their own cars, employee-drivers use company-owned vehicles stored on the company's property, necessitating that drivers start and end their workday at the worksite. Appx. at A 077, 081. For Xpressman,

[31] M.G.L. c. 149, § 148.
[32] M.G.L. c. 149, §§ 148, 150A.

these additional "stem miles" to and from Xpressman's main facility in Randolph would increase the distance driven by 28 percent. Appx. at A 077.

Independent contractors can also drive for multiple delivery companies, and therefore are able to accept short-distance routes on behalf of several different companies. Appx. at A 078. A significant proportion of Xpressman's routes take less than four hours to complete, with some as short as two hours. *Id*. Forty percent of the routes for one of Xpressman's customers take less than four hours to drive. *Id*. On the other hand, employee-drivers work for just one company. *Id*. Because they rely on one source of hourly wages, industry standard is that employee-drivers are given shifts of at least four hours. *Id*. With employee-drivers, then, Xpressman would have to go through the exercise of reworking its routes to provide employees with routes of at least four hours, or else it would be forced to abandon short-distance routes altogether. Appx. at A 078-079.

Employees also must be given a thirty-minute uninterrupted meal break every six hours of work.[33] Xpressman has a number of routes that need more than six hours of continuous driving. Appx. at A 062. With employees, Xpressman would either have to cease offering these routes, or else split them up between multiple drivers. *Id*.

[33] M.G.L. c. 149, § 100.

5. On-Demand Services

Time that an employee spends on-call must be paid, at the employee's hourly rate, if the employee is not "effectively free to use his or her time for his or her own purposes."[34] If an employee is scheduled to work for more than three hours, but is sent home before the end of his scheduled shift, the employee is due at least three hours' pay.[35] Independent contractors do not have such requirements. For Xpressman to provide on-demand services with employees, it would need to pay for time spent on-call (even if these employees were not actually making deliveries), and pay no less than three hours' wages if called in to work (regardless of how long they actually worked); payments it does not currently make. Appx. at A 062. These scheduling issues and cost increases, together with the many additional costs listed *supra*, mean that Xpressman would be unable to provide an on-demand service to its clients profitably, and would cease offering it altogether. *Id*.

IV. SUMMARY OF THE ARGUMENT

The District Court ignored substantial uncontroverted record evidence demonstrating that enforcement of Section 148B against the MDA's members would inevitably and adversely affect the prices, routes and services these motor carriers offer customers for the transportation of property. Likewise, the District

[34] 455 C.M.R. 2.03(2); see 29 C.F.R. 785.17 (same).
[35] 455 C.M.R. § 2.03(1).

Court misconstrued the broad scope, and reach, that both the Supreme Court and this Court have given to FAAAA preemption. These errors warrant reversal.

Congress enacted the FAAAA to preclude States from enforcing any regulation that relates to a motor carrier's prices, routes or services for transporting property. The phrase "relates to" is exceedingly expansive, encompassing any State regulation that has a connection with, or reference to, a motor carrier's prices, routes, or services for deliveries. Even laws that at first blush have only slight and indirect effects on prices, routes or services for transporting property, such as a requirement that motor carriers affix placards to their trucks, or check recipients' identification, have been held preempted.

Unlike every other State, Massachusetts (through Section 148B) mandates that individuals work wholly "outside the usual course of the business" of the company to be independent contractors. As a matter of law, couriers necessarily operate within "the usual course of the business" of a same-day delivery company; therefore these delivery companies cannot utilize independent contractors in Massachusetts, but instead must classify these individuals as employees. This classification in turn triggers a range of laws that systematically regulate the employment relationship and profoundly affect the prices, routes and services a same-day delivery company offers in Massachusetts.

The MDA demonstrated below without contradiction that compliance with the laws triggered by Section 148B would force one of its members, Xpressman, to modify its delivery routes and abandon an entire class of services: on-demand deliveries. The MDA likewise proved without contradiction that hiring couriers as employees would massively increase Xpressman's costs, leaving it with no choice but to increase its delivery prices. The District Court did not dispute these factual bases, but instead found against preemption from a misreading of FAAAA precedent.

The FAAAA also preempts Section 148B because of the logical effect that State law has on the same-day delivery industry. Faced with a functionally identical regulation, the Ninth Circuit held that a ban on the use of independent contractors will inevitably affect the prices, routes and services motor carriers offer for transporting property. Further, Section 148B interferes with interstate transportation and commerce by creating a barrier to entry for any out-of-state carrier who uses independent contractors, which in turn precludes national and regional carriers from conducting business in a standard, efficient way. Section 148B trammels Congress' purpose in allowing motor carriers to freely operate their businesses according to market forces without service-determining State regulation, and therefore is preempted by the FAAAA.

V. ARGUMENT

A. Standard of Review

Federal preemption is a question of statutory construction warranting *de novo* review. *Bower v. EgyptAir Airlines Co.*, 731 F.3d 85, 92 (1st Cir. 2013). Likewise, a District Court's grant of summary judgment is reviewed *de novo*. *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323, 330 (1st Cir. 2003). Where, as here, the appellee did not contest the appellant's summary judgment record below, the Court of Appeals must accept the facts proffered by the appellant as true. *Id.*

B. The FAAAA Broadly Preempts a Wide Range of State Laws

"In every preemption case, 'the purpose of Congress is the ultimate touchstone.'" *NHMTA*, 448 F.3d at 74 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). In enacting the FAAAA, Congress' purpose was to preempt comprehensively any State regulation relating to motor carriers' transportation of property, "in the public interest" and "to facilitate interstate commerce." H.R. Conf. Rep. 103-677 (1994), at 87.

Congress eliminated most Federal regulations on motor carriers with the Motor Carrier Act of 1980, 94 Stat. 793. Federal deregulation proved a resounding success, reducing shipping rates 25 percent and saving the economy between $38 and $56 billion per year. Thomas Gale Moore, *Trucking Deregulation*, THE

CONCISE ENCYCLOPEDIA OF ECONOMICS (1993), http://www.econlib.org/library/Enc1/TruckingDeregulation.html. Nonetheless, eliminating Federal regulations alone proved insufficient, because the vast majority of States still regulated motor carriers within their borders. The national transportation system is so intricately interconnected that even "regulation of intrastate transportation of property by the States has imposed an unreasonable burden on interstate commerce; impeded the free flow of trade, traffic, and transportation of interstate commerce; and placed an unreasonable cost on the American consumers." Pub. L. No. 103-305, § 601(a), 108 Stat. 1569, 1605 (1994) (emphasis supplied). These unreasonable State-imposed burdens caused "significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets," with a price tag to the public of "$5-12 billion" per year. H.R. Conf. Rep. 103-677, at 87.

Given the substantial negative effects of intrastate regulation on the national economy, Congress chose to preempt the entire field through the FAAAA, now codified at 49 U.S.C. § 14501(c). In this, Congress aimed to allow "transportation companies to freely compete more efficiently and provide quality service to their customers," so that motor carrier "[s]ervice options will be dictated by the marketplace; and not by an artificial regulatory structure." H.R. Conf. Rep. 103-677, at 87. The FAAAA thus holds that a State "may not enact or enforce a law …

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).

In using the phrase "related to," Congress consciously duplicated the language of the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. § 41713(a), to give the FAAAA the same "broad preemption interpretation adopted by the United States Supreme Court in *Morales v. TransWorld Airlines, Inc.* [504 U.S. 374 (1992)]."[36] H.R. Conf. Rep. 103-677, at 82-83; *see NHMTA*, 448 F.3d at 78 ("The Act's drafters chose to express the preemptive scope of the FAAAA in words that they understood to be exceedingly broad"). Following Congress' clear direction regarding the breadth of this law, the Supreme Court has interpreted the FAAAA to preempt any State law that has a connection with or reference to a motor carrier's prices, routes, or services. *Dan's City Used Cars, Inc. v. Pelkey,* 133 S. Ct. 1769, 1778 (2013) (citing *Rowe*, 552 U.S. at 370 and *Morales*, 504 U.S. at 384). Preemption occurs "even if a state law's effect on rates, routes or services is only indirect," provided that the effect is more than "tenuous, remote, or peripheral." *Rowe*, 552 U.S. at 370-71; *accord Dan's City*, 133 S. Ct. at 1778.

To be sure, the FAAAA's preemptive reach is not unlimited. As the Supreme Court recently held in *Dan's City*, the State law must be "'related to' the

[36] "Courts have construed the two statutes [the ADA and the FAAAA] *in pari materia* and have cited precedents concerning either act interchangeably." *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 86 n.4 (1st Cir. 2011).

[price, route or] service of a motor carrier 'with respect to the transportation of property.'" 133 S. Ct. at 1778 (quoting 49 U.S.C. § 14501(c)(1)). That said, *Dan's City* "in no way retreated from existing precedent but, rather, reiterated and cited with approval a representative sampling of [the Supreme Court's] earlier decisions." *Brown v. United Airlines, Inc.*, 720 F.3d 60, 71 (1st Cir. 2013) (citing *Morales* and *Rowe*). "Related to" still means "having a connection with or reference to … whether directly or indirectly." *Dan's City*, 133 S. Ct. at 1778 (quoting *Rowe*, 552 U.S. at 370).

Parsing the FAAAA in light of *Morales*, *Rowe* and *Dan's City*, the FAAAA preempts State laws that "relate to," that is, have a connection with or reference to, directly or indirectly, a motor carrier's "price … with respect to transporting property," "route … with respect to transporting property," or "service … with respect to transporting property." *Am. Trucking Ass'ns v. City of Los Angeles*, 133 S. Ct. 2096, 2102 (2013).

Given Congress' explicit intent to give the FAAAA a "broad preemption interpretation," courts have found that an equally broad range of State laws relate to motor carriers' prices, routes or services with respect to the transportation of property. For instance, the seemingly-trivial requirements that a motor carrier affix a placard on its truck and find off-street parking were deemed sufficiently to "relate to a motor carrier's price, route or service with respect to transporting

property" to be preempted. *Am. Trucking Ass'ns*, 133 S. Ct. at 2102. Similarly, a State law directed at shippers (not motor carriers) requiring that carriers merely check a recipient's identification likewise was found preempted. *Rowe*, 552 U.S. at 368. Even common-law claims for fraud and misrepresentation fall within the FAAAA's scope. *See Data Mfg., Inc. v. United Parcel Serv., Inc.*, 557 F.3d 849, 852-53 (8th Cir. 2009). And as discussed more fully *infra*, and close on point here, the Ninth Circuit held that a ban on the use of independent contractors could not survive FAAAA preemption. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1056 (9th Cir. 2009) ("*ATA I*"); *Am. Trucking Ass'ns v. City of Los Angeles*, 660 F.3d 384, 407-08 (9th Cir. 2011) ("*ATA II*").[37]

C. Massachusetts Forbids the Use of Independent Contractors by Motor Carriers

The State law at issue here, M.G.L. c. 149, § 148B(a)(2), effectively prohibits motor carriers from engaging their couriers as independent contractors. This forecloses the same-day delivery service industry's most common business

[37] The American Trucking Associations' FAAAA litigation against the City of Los Angeles followed a convoluted path. In relevant part: the ATA appealed a denial of a preliminary injunction (*ATA I*, 559 F.3d 1046); the district court entered that injunction on remand (*Am. Trucking Ass'ns, Inc. v. City of Los Angeles,* 2009 U.S. Dist. LEXIS 40656 (C.D. Cal. April 28, 2009)); the district court held a trial on the merits (*Am. Trucking Ass'ns, Inc. v. City of Los Angeles,* 2010 U.S. Dist. LEXIS 88134 (C.D. Cal. Aug. 26, 2010)); the ruling from that trial was appealed again to the Ninth Circuit (*ATA II*, 660 F.3d 384); and the case was ultimately appealed to the Supreme Court (*Am. Trucking Ass'ns*, 133 S. Ct. 2096).

model and interferes with delivery companies' prices, routes and services for transporting property.

From 1990 to 2004, Massachusetts defined "independent contractor" using a three-pronged, conjunctive test. To be an independent contractor, one needed to: (A) "be free from control and direction" in how one performed services for the principal; (B) perform services "either outside the usual course of the business for which the service is performed or . . . outside of all places of business of the enterprise;" and (C) be "customarily engaged in an independently established occupation, profession or business." *Agostinho v. ICLB, Inc.*, 2010 Mass. App. Div. 96, 2010 Mass. App. Div. LEXIS 25, *5-8 (2010) (discussing the evolution of Section 148B)). These elements are often called the A, B and C prongs respectively.

In 2004, the Commonwealth made "a minor, yet significant, change in G.L. c. 149, § 148B, whereby the Legislature made it easier for some individuals to be deemed employees." *Agostinho*, 2010 Mass. App. Div. LEXIS 25, at *7-8. This revision struck the "performed outside of all places of business of the enterprise" language from the B prong, Section 148B(a)(2), leaving only the "outside the usual course of the business" clause. St. 2004, c. 193, § 26; *see MDA I*, 671 F.3d at 36 n.1. The Attorney General interprets this clause stringently: one must "perform[] services that are part of an independent, separate, and distinct business from that of

the employer" to be an independent contractor. ADVISORY FROM THE ATTORNEY GENERAL'S FAIR LABOR DIVISION ON M.G.L. c. 149, s. 148B, 2008/1, at 3.

Under this interpretation, couriers are necessarily acting in the usual course of a same-day delivery business: without couriers "providing physical delivery … [the carrier's] business would not exist." *Oliveira v. Advanced Delivery Sys., Inc.*, 27 Mass. L. Rep. 402, 2010 Mass. Super. LEXIS 242, *16-17 (Mass. Super. Ct. 2010). Since the test is conjunctive, Section 148B operates as a ban on the use of independent contractors by motor carriers (such as the MDA's members). Even if a courier is completely free from the control of the company and operates his own independent enterprise, he is still acting in "the usual course of the [delivery company's] business." There is simply no way for a delivery company to comply with Section 148B(a)(2) with respect to its couriers.

If the B prong were struck from Section 148B, a courier could be deemed an independent contractor. For instance, in *Commissioner of the Division of Unemployment Assistance v. Town Taxi of Cape Cod*, drivers were found to be independent contractors under the unemployment statute (which still uses the phrase "outside of all places of business of the enterprise" in its independent contractor test). 68 Mass. App. Ct. 426, 430-31 (2007). Not only were the drivers free from the defendant's control and able to operate independent businesses, they also met the B prong because "[t]he service performed by the drivers occurred

outside the business premises of Town Taxi." *Id*. The opposite result would have obtained under Section 148B: despite compliance with the other two prongs, the drivers would be considered working in the usual course of the company's business, and therefore employees.

The B prong thus requires delivery companies to engage their couriers as employees. This mandate is unique; Section 148B "is unlike any other statute in the country, as it is the only statute that requires independent contractors to perform services outside an entity's 'usual course of business.'" *Sanchez v. Lasership, Inc*., 937 F. Supp. 2d 730, 741 (E.D. Va. 2013); *see* Appx. at A 167 (decision below noting "the singular manner in which the Massachusetts legislature has chosen to define 'employees'").

Classifying a worker as an employee rather than an independent contractor triggers a staggering array of State and Federal employment laws, and thus the litany of costs and management challenges identified *supra*. Section 148B directly "governs whether an individual is deemed an employee for purposes of various wage and employment laws, chapters 62B, 149, 151 and 152 of the Massachusetts General Laws." *MDA I*, 671 F.3d at 36-37. Respectively, these chapters are the Massachusetts income tax law, the Labor and Industries law (which contains 379 sections reaching most aspects of the employment relationship), the Minimum Fair Wages law (minimum wages and overtime), and the Workers' Compensation law.

Id. at 36 n.2. Employees are also entitled to unemployment benefits; fringe benefits such as health insurance; the protections of anti-discrimination laws; and leaves of absence.[38]

1. A Company Cannot Treat Its Workers Both As Employees and Independent Contractors

The Attorney General argued before the District Court that a motor carrier could comply with Section 148B by classifying drivers as employees for State-law purposes while simultaneously treating these workers as independent contractors under Federal law. The District Court appropriately paid this no heed. An employer cannot mix-and-match the classification of its workers, legally or practically.

While independent contractor tests vary in their details, the "right to control" concept is found in every one. In essence, controlling the manner and means with which an individual performs his work implies an employer-employee relationship. *See, e.g., Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992). As a matter of law, complying with the myriad State-law regulations triggered by Section 148B – setting daily and weekly schedules, paying hourly wages and overtime, maintaining personnel records, deducting payroll taxes and providing insurance benefits, to name a few – signify and effect a "right to control" and thus

[38] *See*, *e.g.*, M.G.L. c. 151A (unemployment); c. 149, § 188 (health insurance); c. 151B (anti-discrimination); c. 149, § 105D (maternity leave of absence).

employment status. *See Alexander v. Rush N. Shore Med. Ctr.*, 101 F.3d 487, 492 (7th Cir. 1996) (scheduling a worker's time denotes right to control); *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 119 (2d Cir. 2000) (payment based on time worked shows right to control); *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998) (scheduling time, paying hourly wages and keeping personnel records creates employee status); *Twin Rivers Farm, Inc. v. Comm'r*, T.C. Memo. 2012-184 (2012) (provision of workers' compensation insurance and fringe benefits shows employee status).

Even if it were somehow lawful to have hybrid employees/independent-contractors, no rational business would choose to do so, because it would create an administrative nightmare. There are dozens of State and Federal employment laws and regulations. It is unrealistic to expect a business to invest the time and resources, and accept the uncertainty, associated with constantly reassessing its workers' employee status for each of these laws. Such reassessment would prove daunting for a sophisticated company; for a small employer that does not even have a human resource or legal department (like a typical MDA member), it would be impossible. This approach "would create havoc for employers and commerce" and cause "unnecessary complexity in bookkeeping, payroll, etc." *Scovil v. FedEx Ground Package Sys., Inc.*, 2012 U.S. Dist. LEXIS 113558, *13-14 (D. Me.

Aug. 13, 2012). For all purposes, Section 148B bans the use of independent contractors by motor carriers in Massachusetts.

D. Section 148B Would Force Xpressman to Change Its Prices, Routes and Services for Deliveries

The MDA presented two challenges to Section 148B: that the FAAAA preempts it because of the State law's impermissible effect on the prices, routes and services for transporting property of one MDA member, Xpressman; and that the FAAAA preempts Section 148B from its logical effect on the same-day delivery industry as a whole. This Court may find preemption under either theory.

As to the former approach, an association may establish preemption under the FAAAA by showing that a State law relates to transportation prices, routes or services for any single motor carrier. *NHMTA*, 448 F.3d at 72-73. Here, the MDA presented evidence below – undisputed by the Attorney General – regarding Section 148B's deleterious effect on Xpressman's prices, routes and services for deliveries. This evidence definitively shows the FAAAA preempts Section 148B.

1. Section 148B Would Force Xpressman to Alter Its Routes and Services

The MDA engaged an expert in transportation logistics, Satish Jindel, who testified (without objection or rebuttal) that utilizing employees instead of independent contractors would alter the routes Xpressman offers its customers. Appx. at 077-81. Because employees use company-owned vehicles, they start and

end at the company's facilities, adding "stem miles" to the route. Appx. at A 077, 081. These stem miles would increase the length of Xpressman's delivery routes by 28 percent. *Id*. Likewise, the industry standard is for employees to drive four or more hours per shift. Appx. at A 078. A large fraction of Xpressman's routes take less than four hours; Xpressman would have to combine or eliminate these routes if it used employee-drivers. Appx. at A 078-79. Massachusetts law also obligates employers to provide employees with a thirty-minute uninterrupted meal break after six or more hours of work, meaning Xpressman would need to eliminate all routes that require more than six hours of consecutive driving. Appx. at A 062. Section 148B thus "impact[s] the types and lengths of routes that are feasible" for Xpressman, "bind[ing] motor carriers to a smaller set of possible routes." *Dilts v. Penske Logistics LLC*, 819 F. Supp. 2d 1109, 1118-19 (S.D. Cal. 2011). Because Section 148B forces Xpressman to alter its routes for transporting property, it is, without more, preempted by the FAAAA. *See id.*; *Esquivel v. Vistar Corp*., 19 Wage & Hour Cas. 2d 1531, 1535-36, 2012 U.S. Dist. LEXIS 26686 (C.D. Cal. Feb. 8, 2012) (same); *Sanchez*, 937 F. Supp. 2d at 746-47 ("Section 148B requires Lasership to alter its routes, thereby relating to and binding Lasership to particular routes") (internal punctuation omitted).

Section 148B would also preclude Xpressman from offering on-demand delivery services. To provide these short-notice, unpredictable and time-sensitive

services, a same-day delivery company needs a flexible workforce – one that does not need to be compensated while idly waiting for a job, or paid a minimum number of hours regardless of the amount of work (as required by Massachusetts law). Appx. at A 062. Simply put, with employees, Xpressman would not be able to offer on-demand services profitably, and would cease offering them altogether. *Id*. Xpressman would not be alone in this: at least one other Massachusetts delivery company compelled to change its business model by Section 148B also had to abandon offering on-demand services. *See Sanchez*, 937 F. Supp. 2d at 745 ("due to the lack of flexibility of using employee drivers, [Massachusetts delivery company] Derby is forced to avoid certain services such as on-demand work"). For law firms, medical providers and other customers that depend on rapid courier deliveries, Section 148B means fewer service options, less competition, higher prices and lower quality, all contrary to the FAAAA's dictates. *See id.* (Section 148B preempted because it would force motor carriers to discontinue on-demand services); *cf. Rowe*, 552 U.S. at 372 (finding preemption because State law "will require carriers to offer a system of services that the market does not now provide").

With respect to on-demand services, Section 148B has the further effect of "inhibiti[ing] innovation and technology and curtail[ing] the expansion of markets," contrary to Congress' intent. H.R. Conf. Rep. 103-677, at 87. Many

leading national retailers, including Amazon, Google, eBay and Walmart, are beginning to offer same-day delivery for online orders. Marcus Wohlsen, *Tech Giants Want to Win Same-Day Delivery – Even if It Never Makes Money*, WIRED, July 22, 2013, http://www.wired.com/business/2013/07/ebay-now-same-day-delivery. These retailers rely on third-party delivery companies (like Xpressman) to make these on-demand deliveries. *Id.* Yet Section 148B would substantially diminish the availability of on-demand services, increasing prices and undermining a cutting-edge retail model before it could even get off the ground.

Because Section 148B "limit[s] when, where and how" deliveries may be made by Xpressman, that statute is preempted by the FAAAA. *Cf. Dan's City*, 133 S. Ct. at 1779.

a. The District Court Did Not Address Section 148B's Effect on Xpressman's Routes and Services, But Instead Misapplied the FAAAA

The District Court offers no explanation why a State law that would indisputably compel a motor carrier to change its routes and cease offering a particular type of delivery service passes muster under the FAAAA.[39] The District Court's failure even to acknowledge uncontroverted record evidence on these dispositive points, alone, constitutes reversible error.

[39] The District Court states that Section 148B's "effect on Xpressman's labor costs is immaterial," Appx. at A 167, but nowhere addresses how that State law would directly affect Xpressman's routes and services.

The District Court does not deny that Section 148B would seriously alter Xpressman's routes and services, but instead rejects preemption here because that statute itself does not "relate[] directly to the transportation of property." Appx. at A 162. The District Court's theory is that the FAAAA preemption test has two distinct elements: a State law "must both (1) relate to prices, routes or services of a motor carrier; and (2) relate to the transportation of property." Appx. at A 159.

This analysis substantially misconstrues the FAAAA and its caselaw. The phrase "with respect to the transportation of property" does not create an element itself, but rather modifies the terms "price," "route" and "service." 49 U.S.C. § 14501(c)(1); *see Dan's City*, 133 S. Ct. at 1778. This is illustrated in the Supreme Court's most recent FAAAA decision, *American Trucking Associations*, 133 S. Ct. at 2102. The regulations at issue in that case were slight and indirect: only that a driver place a placard on his truck and find off-street parking. *Id.* at 2100. It is plain that neither regulation itself related to "the transportation of property." However, the regulations did "relate to a motor carrier's price, route or service with respect to transporting property," and therefore fell within the FAAAA's ambit. 133 S. Ct. at 2102 (emphasis supplied); *see also Ortega v. J. B. Hunt Transp., Inc*., 2013 U.S. Dist. LEXIS 160582, at *24-25 (C.D. Cal. Oct. 2, 2013) ("the Supreme Court did not indicate claims must explicitly relate to the transportation of property").

Congress included the phrase "with respect to the transportation of property" in the FAAAA to ensure that only State regulations that "constrain participation in interstate commerce" are preempted. *Dan's City*, 133 S. Ct. at 1780. Said differently, the FAAAA does not protect motor carriers' prices or services "in any capacity," when the motor carrier is engaging in activities other than transporting property. *Cf. Dan's City*, 133 S. Ct. at 1778-79. In *Dan's City*, for example, the plaintiff sued after the motor carrier disposed of his car, which the motor carrier had previously towed and been storing at its lot for months. *Id.* at 1176-77. Because the car had stopped moving long ago, it was no longer in "transportation." Further, the disposition of the car had nothing to do with the price of transporting property, the routes for transporting property, or the services for transporting property. Thus, the FAAAA did not apply in that case. *Id.* at 1778. Similarly, *Dan's City* held that zoning ordinances "fall[] outside the preemptive sweep of § 14501(c)(1)," since they do not relate to the prices, routes or services for the movement of property. *Id.* at 1780.

This case presents a stark contrast. The statute at issue here does far more than merely dictate how Xpressman may sell goods outside the stream of transportation (as with the State law in *Dan's City*), or direct where Xpressman can site its business (as would a zoning law). Section 148B inescapably forces Xpressman to modify the routes that it offers customers for transporting property,

combining some routes, shortening others, or else eliminating routes altogether. Section 148B also inescapably forces Xpressman to cease providing its on-demand services, time-sensitive services it offers to customers for transporting property.[40] Section 148B "hamper[s] the operations of [the MDA's members]" and is therefore "the kind of burdensome state economic regulation Congress sought to preempt." *Dan's City*, 133 S. Ct. at 1780.

2. Section 148B Would Drastically Increase Xpressman's Costs and Thus Its Prices

The MDA also proved without factual contradiction that complying with Section 148B would cause Xpressman to incur enormous additional costs, including $252,000 per year for recruiting, screening and interviewing employees (Appx. at A 059); $100,000 per year to staff a human resource function to manage a much larger workforce and comply with employment laws (Appx. at A 117); $611,884 more in compensation for paying hourly wages and mileage (Appx. at A 076-77); $382,336 in additional health insurance costs, $XX,XXX in retirement benefits (Appx. at A 061, 111-12; Appx. at Sealed A 193), and $XXX,XXX in

[40] Even if the district court's interpretation was correct, it is difficult to see how Section 148B does not "relate to," that is, "have a connection with or reference to" the transportation of property. Section 148B constrains the routes that Xpressman can offer, and forecloses on-demand services altogether, and thus "limit[s] when, where or how [Xpressman] may operate[]." *Dan's City*, 133 S. Ct. at 1779; *see Burnham v. Ruan Transp.*, 2013 U.S. Dist. LEXIS 118892, at *18 (C.D. Cal. Aug. 16, 2013) (State employment law claims against motor carrier "clearly relate to transportation of property because Plaintiffs are truck drivers who transport products").

payroll taxes and workers' compensation benefits (Appx. at A 061, 088, 113). All told, converting independent contractor-couriers to employees would nearly double Xpressman's labor costs, $X,XXX,XXX to $X,XXX,XXX annually. Appx. at Sealed A 195. This increase is several times greater than Xpressman's annual profit. Appx. at Sealed A 195. Such an immense increase in costs would compel Xpressman to increase its delivery prices or go out of business. Appx at A 062.

This Court has recognized that for FAAAA preemption purposes, costs and prices are inextricably intertwined. In *Flores-Galarza*, a State law required UPS to undergo a series of procedures before delivering a package, causing it to incur "more than $4.6 million per year in costs." 318 F.3d at 327. This Court held, "[t]erms of service determine cost. To regulate them is to affect the price." *Id.* at 336. Because "[t]he costs of this scheme necessarily have a negative effect on UPS's prices," the State law fell "within the scope of the FAA Authorization Act's preemption provision."[41] *Id.*

This comports with economic theory. Prices are set where the supply curve intersects the demand curve, and "[a]nything that changes production costs will shift the supply curve, and hence will result in a new equilibrium price." *Sanchez*,

[41] Notably, $4.6 million in additional costs were a drop in the bucket compared to UPS's 2002 operating expenses ($27 billion) or its net profit ($3.1 billion), yet still significant enough to affect its prices. *See* United Parcel Service, Inc., Annual Report (Form 10-K), at 17 (Mar. 6, 2003), http://www.sec.gov/Archives/edgar/data/1090727/000095014403002770/g80387e10vk.htm.

937 F. Supp. 2d at 748 (quoting Ben S. Bernanke & Robert H. Frank, PRINCIPLES OF MICROECONOMICS 57 (3d ed. 2007)). A sharp increase to a motor carrier's labor costs will therefore lead to higher prices. *See id.*

This also squares with economic reality. Compliance with the multitude of laws Section 148B triggers will double Xpressman's labor costs, "shifting its supply curve" upwards and thus leading to higher prices. Appx. at Sealed A 195. Or, from a more common-sense perspective, if Xpressman's costs exceed its annual profits (as they would with employees), it will have two undesirable choices: either increase its prices to cover these higher costs, or go out of business altogether. Appx. at A 062.

Faced with similar circumstances, the district court in *Sanchez* adopted this reasoning to hold that the FAAAA preempted Section 148B. 937 F. Supp. 2d at 747-48. The motor carrier there, Lasership, proved that compliance with Section 148B would increase its costs for health, workers' compensation and liability insurance by $689,200, several times more than Lasership's profits.[42] *Id.* Lasership also presented evidence from another motor carrier (Derby) that changed its independent contractors to employees. For that carrier, "exorbitant costs inevitably raised Derby's rates for services." *Id.* at 748. Given these facts, the

[42] The MDA established many other costs that Xpressman would incur beyond insurance, including costs associated with hiring, human resource management and compensating employees.

court held, "Section 148B … is preempted because it relates to Lasership's prices by significantly increasing its costs and prices due to its restrictive provisions." *Id.* at 750. Similarly, a district court in California was faced with a ban on the use of independent contractors by motor carriers in *American Trucking Ass'ns v. City of Los Angeles*, 2010 U.S. Dist. LEXIS 88134, at *56.[43] At trial, the court found that the independent contractor ban "would increase drayage[44] operational costs by 167%" and "add an estimated $500 million to the annual operating costs of Port drayage." *Id.* The court concluded that because of these increased costs, "drayage services prices thus would need to increase." *Id.* Since "at least some of the increased costs of drayage services caused by the employee driver provision will impact drayage pricing," the court found that the employee-driver requirement fell within the scope of the FAAAA.[45] *Id.*

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[43] The District Court's statement that the ATA "did not make an as-applied challenge to the [Port of Los Angeles'] independent contractor ban," Appx. at A 166, is entirely inaccurate; the ATA went to trial on this issue, and (as noted *infra*) the relevant portion of the decision was affirmed.

[44] Drayage is short-distance hauling of cargo to or from a ship at port.

[45] The district court went on to hold that the Port of Los Angeles was acting as a market participant rather than as a regulator, and therefore exempt from FAAAA. *Id.* at *87-89. The Ninth Circuit agreed the independent contractor phase-out "was preempted by the FAAA Act as related to rates, routes and services." *ATA II*, 660 F.3d at 407. It vacated the market participant holding and reversed, thus entering a final judgment that the FAAAA preempted the independent contractor phase-out. *Id.* at 407-08. Notably, while the Port appealed other portions of this ruling, it did not appeal the finding of preemption as to the independent contractor ban. 133 S. Ct. at 2101.

Sanchez and *ATA* are on all fours with this case. Both found the extreme increase in costs attendant with converting independent contractor-couriers to employees will increase motor carriers' prices for transporting property. As in *Sanchez* and *ATA*, Section 148B's ban on independent contractors affects prices and therefore falls within the FAAAA's preemptive scope. 937 F. Supp. 2d at 750; 2010 U.S. Dist. LEXIS 88134 at *56.

a. The District Court's Reasoning Regarding Xpressman's Prices is Faulty

The decision below does not dispute the MDA's factual proffer, and even acknowledges that reclassifying independent contractor-couriers as employees will lead to increased costs. *See* Appx. at A 165. Rather, the District Court rhetorically rejects the notion that Section 148B can affect prices because it has only an "indirect impact on a motor carrier's pricing decisions," and to find preemption thereon "amounts to an invitation to immunize [the MDA's members] from all state economic regulation." Appx. at A 164. Both these assertions miss the mark.

For the first point, it has been exhaustively established that indirect effects on prices for transporting property fall within the FAAAA's scope as readily as direct regulation. *Dan's City*, 133 S. Ct. at 1778; *Rowe*, 552 U.S. at 370; *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 87 (1st Cir. 2011). Section 148B may not explicitly or directly dictate the prices that Xpressman must offer, but given the tremendous shift in costs that it compels, the effect on Xpressman's prices is both

substantial and inevitable.[46] *See Sanchez*, 937 F. Supp. 2d at 750 (finding preemption due to Section 148B's effect on costs); *Am. Trucking Ass'ns*, 2010 U.S. Dist. LEXIS 88134, at *56 (same; independent contractor ban by Port of Los Angeles); *see also Bower*, 731 F.3d at 96 ("laws regulating the operations of [carriers] whether at high cost or low" are preempted, as are "non-economic laws that nonetheless have a significant regulatory effect on [carriers]") (internal punctuation omitted).

As for the contention that a finding of preemption would "immunize" the MDA from "all state economic regulation" or provide it a "blank check … protecting it from any state regulation that increases the cost of doing business," Appx. at A 164-165, the Court grossly misperceives what is sought here. The MDA carefully confined this action to challenge only one subsection of the Independent Contractor law: the B prong, M.G.L. c. 149, § 148B(a)(2). Granting the MDA the relief requested would nonetheless leave its members subject to the A and C prongs of Section 148B. To engage couriers as independent contractors, these companies would still need to show that they do not exert control over their

[46] The District Court did not hold that Section 148B has only a "tenuous, remote, or peripheral" effect on motor carriers, nor could it. Section 148B's effect on the MDA's members is immediate, unavoidable, and undisputed, and therefore anything but "tenuous, remote, or peripheral." *See Bower*, 731 F.3d at 95 (noting the low threshold for an effect to be more than "tenuous"); *see also Morales*, 504 U.S. at 390 (laws considered too tenuous for preemption were those regarding "gambling and prostitution" or "obscene depictions").

couriers and that their couriers operate as an independent business. *Cf.* M.G.L. c. 149, § 148B(a)(1), (3). The MDA is only asking that its members have the same opportunity as motor carriers elsewhere to prove that their couriers are independent contractors, and thus provide customers with the best prices, routes and services as dictated by the market.[47]

Nor does the MDA argue (as the decision below suggests) that every possible cost imposed by a State regulation, no matter how slight, will lead to increased prices and thus preemption. *Cf.* Appx. at A 164-165. The dicta cited by the District Court on this point, from *DiFiore*, is distinguishable as that appeal presented a far different factual scenario: there, plaintiffs proposed nominal changes to the company's business – enlarging the print on a sign, modifying a website or installing cash registers – all of which would have imposed negligible costs on the defendant. 646 F.3d at 88. By contrast, the changes Section 148B

[47] The District Court leans heavily on *Schwann v. FedEx Ground Package Sys.*, 2013 U.S. Dist. LEXIS 93509 (D. Mass. July 3, 2013) and *Martins v. 3PD, Inc.*, 2013 U.S. Dist. LEXIS 45753 (D. Mass. Mar. 28, 2013). Appx. at 164-65. In both cases, the defendants argued for wholesale preemption of all of Section 148B. *See Schwann*, 2013 U.S. Dist. LEXIS 93509, at *7-8; *Martins*, 2013 U.S. Dist. LEXIS 45753, at *31-32. On the other hand, the MDA seeks to invalidate a fraction of Section 148B only. The concerns expressed in those decisions thus do not apply to this case.

foists upon delivery companies are extreme, with equally extreme increases in costs and therefore prices.[48]

The District Court offers no foundation for its slippery-slope concerns; nothing from the MDA even hints at such designs, nor are there any examples of other motor carriers seeking an exemption from "all state economic regulation" through the FAAAA. The District Court assails a straw man. The MDA asks only that this Court follow *Flores-Galarza* and reach a straightforward and common-sense conclusion: where a State law imposes drastically increased costs on a motor carrier – costs that far exceed the carrier's profits – delivery prices are necessarily implicated, bringing that State law within the FAAAA's preemptive sweep. *See Flores-Galarza*, 318 F.3d at 336; *Sanchez*, 937 F. Supp. 2d at 749-50 (collecting district court cases in accord).

The District Court also surmises that Section 148B's increased costs will not affect motor carriers' prices, because "[MDA] members will absorb those costs in other ways," such as "trim[ming] administrative staff," "reduc[ing] overhead

[48] The District Court cites to *Schwann* and *Martins* on this point as well. Appx. at A 164-65. These cases are inapposite because neither presented any factual evidence of the effect that Section 148B would have on their costs or business; rather, the motor carriers relied on facial challenges to the State law. *See Schwann*, 2013 U.S. Dist. LEXIS 93509, at *7-8; *Martins*, 2013 U.S. Dist. LEXIS 45753, at *31-32. *Martins* is further distinguishable in that the company there discussed Section 148B's effect on the prices couriers charged the company, not the prices the company charged to its customers for deliveries. 2013 U.S. Dist. LEXIS 45753, at *32-35.

costs," or "alter[ing] the means" by which they pay employees. Appx. at A 165. These suggestions are contrary to the FAAAA's command "that states cannot inflict their own public policies or regulations on a carrier's operations." *Data Mfg.*, 557 F.3d at 852. Furthermore, these "cost-cutting" proposals are nothing more than the District Court's own *ipse dixit*, and are both contrary to the record evidence and divorced from reality. For "trimming administrative staff" or "reducing overhead costs," the MDA established that Section 148B has the opposite effect. Using employees would force Xpressman to hire additional administrative staff, and would increase human resource overhead costs by $100,000 and hiring costs by $252,000. The cryptic proposal that Xpressman "alter the means by which employees are paid" is simply illegal: the manner, means and amounts that employees must be paid are all strictly regulated, regulations that ironically do not apply to independent contractors. *See* M.G.L. c. 149, § 148; c. 151, § 1A. In any case, it is inconceivable that Xpressman could wring $1.6 million in savings from a business currently run with just six full-time employees.

Faced with a marked increase in its labor costs from complying with Section 148B, Xpressman would have no choice but to increase its prices offered to customers for deliveries. Section 148B therefore relates to a motor carrier's prices for transporting property, making it FAAAA-preempted.

E. The FAAAA Also Preempts Section 148B On Its Face

FAAAA preemption may also be found from "the logical effect that a particular scheme has on the delivery of services or the setting of rates … [without] the presentation of empirical evidence." *NHMTA*, 448 F.3d at 82 n.14. The logical effect of Section 148B's ban on independent contractors is to disrupt the same-day delivery industry's very business model. This disruption will alter the prices, routes and services these carriers offer their customers for making deliveries, rendering Section 148B preempted on its face.

In rejecting the MDA's facial challenge to Section 148B, the District Court repeatedly states that the MDA "has failed to demonstrate that [Section 148B] has 'no valid application.'" Appx. at A 165; *see* Appx. at A 166, 167 (quoting *McGuire v. Reilly*, 386 F.3d 45, 57 (1st Cir. 2004)). The District Court's use of this standard is odd; neither party advanced it below, nor has the MDA found any other FAAAA case requiring a party to show that the challenged State law has "no valid application."[49] FAAAA jurisprudence is clear: a party need only show that a State law has connection with, or reference to, a motor carrier's prices, routes, or services with respect to the transportation of property, regardless of how many "valid applications" the law may have. *See Rowe*, 552 U.S. at 370.

[49] The case the district court cites, *McGuire*, involved a First Amendment challenge to a Massachusetts abortion-protest statute – a far cry from the FAAAA and its express preemption provisions. *Cf.* 386 F.3d at 57.

Applying the appropriate standard, the Ninth Circuit held the FAAAA *per se* preempted a comparable ban on independent contractors in *ATA I*. In 2009, the Port of Los Angeles ordered that no entity could provide drayage services unless it agreed to a wide-ranging "Concession Agreement," which required, among other things, that motor carriers phase out the use of independent contractors in favor of employees. 559 F.3d at 1049-50. The American Trucking Associations moved to preliminarily enjoin the Concession Agreement as contrary to the FAAAA. *Id.*

Based solely on the limited preliminary injunction record, the Ninth Circuit reasoned that the independent contractor phase-out would require a "vast increase in capital requirements for the purchase of equipment and personnel expenditures needed to turn independent contractors into employees," an effect that "would likely be fatal" to smaller motor carriers.[50] *Id.* at 1058. It also found that under the Concession Agreement, "[n]either motor carriers nor their customers (the enormous interstate and foreign shipping industry) would be able to select those with whom they would choose to contract;" rather, "desires for alleged efficiency, not the marketplace, would decide those questions." *Id.* at 1056. The court recognized that this was "a rather blatant attempt to decide who can use whom for drayage services, and is a palpable interference with prices and services," and

[50] The Court of Appeals likewise noted that "the phasing out of thousands of independent contractors (many or most of them small businessmen who own their own trucks) … denigrate[s] small businesses and insist[s] that individuals should work for large employers or not at all." *Id.* at 1055-56.

therefore "the independent contractor phase-out provision is one highly likely to be shown to be preempted." *Id.* (emphasis supplied); *see Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 2009 U.S. Dist. LEXIS 40656, at *27-29 (on remand, preliminarily enjoining independent contractor phase-out as FAAAA preempted).[51]

For the MDA's members, Section 148B has the same result as the Concession Agreement. Section 148B forces MDA members to incur a "vast increase in capital requirements …. to turn independent contractors into employees." This would be equally "fatal" to the MDA membership, most of whom are small family-run businesses (like Xpressman) and do not have access to such capital. As with the Concession Agreement's phase-out provision, Section 148B decides "who can use whom for [delivery] services" – employees, not independent contractors – and thus "is a palpable interference with prices and services." *See id.* Section 148B "thereby produces the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands for competitive market forces" in determining how motor carriers provide services in Massachusetts. *Rowe*, 552 U.S. at 372. The FAAAA thus preempts Section 148B on its face. *See ATA I*, 559 F.3d at 1056; *see also Central Transp., Inc. v. Public Serv. Comm'n*, 223 Mich. App. 288, 309 (1997) (FAAAA

[51] This is the same litigation discussed *supra*, which eventually wound its way to trial, back to the Ninth Circuit (*ATA II*, 660 F.3d 384), and to the Supreme Court (*Am. Trucking Ass'ns*, 133 S. Ct. 2096).

preempted statute requiring motor carriers to use employees on its face, as it impermissibly "affects routes and services and most probably affects prices").

The District Court distinguishes *ATA* because the Concession Agreement "pertained only to employees of trucking companies moving property," while Section 148B is general in its application. Appx. at A 161-162. The notion that general statutes can elude preemption where direct statutes cannot was rejected decades ago as "creating an utterly irrational loophole," as "there is little reason why state impairment of the federal [preemption] scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute." *Morales*, 504 U.S. at 386; *see DiFiore* 646 F.3d at 87 (finding a "generally applicable" employment law to be preempted). Whether a State chooses to ban independent contractors just for motor carriers or for all businesses is immaterial; the focus is always on the effect the law has on carriers and the prices, routes and services they offer customers for transporting property. Section 148B's effect is to impermissibly alter the prices, routes and services motor carriers offer for transporting property, and therefore is preempted.

1. Section 148B Burdens Out-of-State Companies As Well

The FAAAA also preempts Section 148B because of the turmoil it would wreak on the broader interstate transportation system. Congress intended the FAAAA to allow "national and regional carriers [] to conduct a standard way of

doing business," H.R. Conf. Rep. 103-667, at 87, sweeping away a "patchwork of state service-determining laws, rules, and regulations." *Rowe*, 552 U.S. at 373; *see Taylor v. Alabama*, 275 Fed. Appx. 836, 840 (11th Cir. 2008) ("The [FAAAA] replaced the then-existing patchwork of intrastate trucking laws with a uniform federal standard"). Massachusetts' ban on independent contractors – unique throughout the country – is contrary to this intention. A national motor carrier that uses independent contractors to make deliveries everywhere else would have to operate with a separate business model in Massachusetts, creating inefficiencies in how deliveries are made; or else abandon the Massachusetts market entirely, inhibiting competition, increasing delivery prices and reducing quality.

Section 148B is further preempted because it "constitute[s] a barrier to entry for many interstate motor carriers who relied upon independent contractors for drivers." *Central Transp.*, 223 Mich. App. at 308; *see* H.R. Conf. Rep. 103-667, at 86 (FAAAA intended to eliminate "entry controls at the state level"). An out-of-state company with independent contractor-couriers simply cannot operate in Massachusetts lawfully. Indeed, that out-of-state company could not even send a shipment through Massachusetts, unless it either incurred the time and costs to off-load the cargo to a second employee-driver at the border, or else routed the delivery around the Commonwealth, adding hundreds of miles to the trip. The FAAAA was meant "to leave such decisions, where federally unregulated, to the

competitive marketplace." *Rowe*, 552 U.S. at 373; *see Sanchez*, 937 F. Supp. 2d at 751 (Section 148B's effect "is to create a barrier of entry for interstate carriers and place an undue burden on market competition").

The District Court contends that "the singular manner in which Massachusetts has chosen to define 'employees'" is an example of "states as laboratories," and that "a state is free to enact laws that conflict with another state's laws as long as it does not work to unstitch any federal regulation." Appx. at A 167-168. This completely misses the point of the FAAAA. Congress' purpose in enacting the FAAAA was unmistakable: the motor carrier industry is a field where States cannot experiment or enact conflicting laws. Section 148B "unstitches" this deregulatory purpose, and therefore is preempted. *See Rowe*, 552 U.S. at 373.

Finally, Massachusetts' "intrastate" regulation of motor carriers through Section 148B does not even end at the Commonwealth's borders. In *Taylor v. Eastern Connection Operating, Inc*., the SJC recently held that Section 148B's ban on independent contractors applied to a group of couriers who lived and worked in New York and had never set foot in Massachusetts. 465 Mass. 191, 192 (2013); *see also Dow v. Casale*, 83 Mass. App. Ct. 751, 757 (2013) (Massachusetts wage laws applied to plaintiff who worked in Florida). Needless to say, Massachusetts

courts dictating to motor carriers in other States the terms under which they may engage their couriers constrains interstate commerce.

In enacting the FAAAA, Congress preempted State regulation to foster "the free flow of trade, traffic and transportation of interstate commerce." 108 Stat. at 1605, § 601(a)(1)(B). Because it is unique in categorically barring the use of independent contractors by motor carriers, Section 148B is a significant impediment to the free flow of interstate commerce, and therefore runs afoul of the FAAAA.

VI. CONCLUSION

Section 148B impermissibly alters the prices, route and services motor carriers offer their customers for the transportation of property, and therefore is preempted by the FAAAA. This Court should reverse the decision below and order that judgment be entered for the MDA.

Respectfully submitted,

MASSACHUSETTS DELIVERY ASSOCIATION,

By its attorneys,

/s/ David C. Casey

David C. Casey (First Cir. No. 26733)
Christopher B. Kaczmarek (First Cir. No. 117537)
Stephen T. Melnick (First Cir. No. 1135908)
Littler Mendelson, P.C.
One International Place, Suite 2700
Boston, MA 02110
Tel: 617.378.6000
Fax: 617.737.0052

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/s/ David Casey
David Casey

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I hereby certify that on January 28, 2014, this document was filed through the Electronic Case Filing system and copies will be sent to all parties electronically as identified in the Service Preference Report:

Kate J. Fitzpatrick, Esq.
Massachusetts Attorney General's Office
One Ashburton Place, 20th Floor
Boston, MA 02108

Douglas S. Martland, Esq.
Massachusetts Attorney General's Office
One Ashburton Place, 20th Floor
Boston, MA 02108

Harold L. Lichten
Shannon Liss-Riordan
Lichten & Liss-Riordan PC
100 Cambridge St., 20th Floor
Boston, MA 02114

William M. Jay, Esq.
Goodwin Procter LLP
901 New York Avenue NW
Washington, DC 20001

Wesley S. Chused, Esq.
Looney & Grossman LLP
101 Arch Street
Boston, MA 02110

/s/ David C. Casey
David C. Casey

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Addendum A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASSACHUSETTS DELIVERY ASSSOCIATION,	)	
Plaintiff	)	
v.	)	**Civil Action No. 10-11521-DJC**
MARTHA COAKLEY, in Her Official Capacity as Attorney General of the Commonwealth of Massachusetts,	)	
Defendant.	)	

MEMORANDUM AND ORDER

CASPER, J. **September 26, 2013**

I. Introduction

Plaintiff Massachusetts Delivery Association ("MDA") has brought this action to bar enforcement of Mass. Gen. L. c. 149, § 148B(a)(2), otherwise known as the "B prong" of the Massachusetts Independent Contractor Statute (the "Statute"). MDA's amended complaint includes three counts: Count I seeks injunctive relief barring the enforcement of the Statute because the Federal Aviation Administration Authorization Act ("FAAAA") preempts the Statute, D. 22 ¶¶ 28-34; Count II alleges that the commerce clause, U.S. Const. art. I, § 8, cl. 2, bars enforcement of the Statute because the Statute unduly burdens interstate commerce, id. ¶¶ 35-38; and Count III seeks a declaratory judgment that the FAAAA bars enforcement of the Statute, id. ¶¶ 39-42.

MDA has moved for summary judgment on its FAAAA preemption claim and its claim for a declaratory judgment regarding same. D. 67. The Massachusetts Attorney General has cross-moved for summary judgment as to all counts, arguing that MDA has failed to allege a case or controversy, D. 82, or in the alternative, has moved for additional discovery pursuant to Fed. R. Civ. P. 56(d). D. 80. In the event summary judgment is not granted in her favor, the Attorney General has also moved to compel additional deposition time and the further production of documents. D. 96. MDA has moved for a protective order as to certain third party subpoenas. D. 94. The Court DENIES MDA's motion for summary judgment, D. 67, and DENIES the Attorney General's cross-motion for summary judgment, D. 82, to the extent that it sought dismissal of this action on the grounds that this case did not present a justiciable case or controversy, but ALLOWS the relief requested by the Attorney General to the extent that Counts I and III are DISMISSED, D. 80 at 1, DENIES AS MOOT WITHOUT PREJUDICE the Attorney General's motion to compel, D. 96, and ALLOWS MDA's motion for a protective order, D. 94.

II. Burden of Proof and Standard of Review

A. Motion for Summary Judgment

The Court grants summary judgment where there is no genuine dispute as to any material fact and the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A fact is material if it carries with it the potential to affect the outcome of the suit under applicable law." Santiago–Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000). The movant bears the burden of demonstrating the absence of a genuine issue of material fact. Carmona v. Toledo, 215 F.3d 124, 132 (1st Cir. 2000); see Celotex v. Catrett, 477 U.S. 317, 323 (1986). If the movant meets her burden, the

non-moving party may not rest on the allegations or denials in his pleadings, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986), but must come forward with specific admissible facts showing that there is a genuine issue for trial. Borges ex rel. S.M.B.W. v. Serrano–Isern, 605 F.3d 1, 5 (1st Cir. 2010). The Court "view[s] the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor." Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009).

B. Discovery Motions

Trial courts have broad discretion to manage pretrial discovery. Poulin v. Greer, 18 F.3d 979, 986 (1st Cir. 1994). In general, provided that information is within the scope of Rule 26(b) and reasonably obtainable within the responding party's possession, custody or control, it is discoverable. Tyler v. Suffolk County, 256 F.R.D. 34, 37 (D. Mass. 2009). Under Rule 37(a), the party moving to compel discovery bears the burden of showing that the information is relevant. See Caouette v. OfficeMax, Inc., 352 F. Supp. 2d 134, 136 (D.N.H. 2005).

Although the scope of discovery extends to "any nonprivileged matter that is relevant to any party's claim or defense," Fed. R. Civ. P. 26(b)(1), a court is required to limit the frequency or extent of otherwise allowable discovery if the same information "can be obtained from some other source that is more convenient, less burdensome, or less expensive . . . or [if] the burden or expense of the proposed discovery outweighs its likely benefit . . . ." Fed. R. Civ. P. 26(b)(2)(C). Upon a showing of good cause, a court may issue a protective order limiting or preventing discovery. Fed. R. Civ. P. 26(c)(1). In doing so, the court must "balance the burden of proposed discovery against the likely benefit." Gill v. Gulfstream Park Racing Ass'n, 399 F.3d 391, 400 (1st Cir. 2005).

III. Background

A. The Independent Contractor Statute

The Statute provides, in relevant part that:

> (a) For the purpose of this chapter and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:--
>
> (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact ["Prong A"]; and
>
> (2) the service is performed outside the usual course of the business of the employer ["Prong B"]; and
>
> (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed ["Prong C"].

Mass. Gen. L. c. 149, § 148B. Section (d) of the Statute imposes civil and criminal penalties for those who fail "to properly classify an individual as an employee according to this section and in so doing fail[] to comply, in any respect, with chapter 149, or section 1, 1A, 1B, 2B, 15 or 19 of chapter 151, or chapter 62B . . . [or] chapter 152". Penalties for improperly classifying employees as independent contractors include "a fine of not more than $10,000, or . . . imprisonment for not more than six months for a first offense, and for a subsequent offense by a fine of not more than $25,000 or by imprisonment for not more than one year, or by both such fine and such imprisonment." Mass. Gen. L. c. 149, § 27C.[1]

The sections of Mass. Gen. L. c. 151 to which the Statute applies require employers to, inter alia: (1) pay employees a minimum wage of $8.00 per hour, Mass. Gen. L. c. 151, § 1; (2) pay employees overtime compensation of one and one half times the rate at which employees are

[1] The Statute provides that failure to comply with c. 152 will result in penalties as provided in that chapter. Mass. Gen. L. c. 149, § 148B (citing Mass. Gen. L. c. 152, § 14).

regularly employed, Mass. Gen. L. c. 151, § 1A; (3) keep personnel records, Mass. Gen. L. c. 151, § 15. In addition, various provisions of Mass. Gen. L. c. 149 require employers to provide employees with, inter alia: (1) eight weeks of maternity leave, Mass. Gen. L., c. 149, § 105D; (2) 24 hours off to care for children or elderly relatives, Mass. Gen. L. c. 149, § 52D; (3) 30 minutes off for every six hours worked, Mass. Gen. L. c. 149, § 100; and (4) one day off every seven days, Mass. Gen. L. c. 149, § 47. Finally, Mass. Gen. L. c. 152 requires employers to provide workers compensation insurance for their employees. As employers are vicariously liable for the conduct of its employees, but not necessarily its independent contractors, Corsetti v. Stone Co., 396 Mass. 1, 9-10 (1985), MDA alleges that reclassifying its contractors as employees would require its members to expend a significant amount of additional effort recruiting and screening employees "to avoid hiring individuals who may have a greater propensity to commit such torts." D. 72 at 17.

B. Factual Background

MDA is a non-profit trade organization whose members provide same-day delivery services. D. 73 ¶ 1. MDA's members engage independent contractor delivery drivers to deliver products throughout Massachusetts and across state lines. Id. X Pressman Trucking & Courier, Inc. ("Xpressman"), a delivery service company, is a member of MDA. Id. ¶ 2. MDA alleges that Xpressman provides both scheduled and unscheduled delivery services for its clients. Id. ¶ 4. MDA notes that Xpressman's on-demand delivery services are "variable and unpredictable." Id. ¶ 7. Xpressman's independent contractor drivers are paid for each route they complete, as contrasted with employees whom Xpressman pays by the hour or week, who receive health insurance, 401(k) plan benefits and for whom Xpressman provides workers' compensation insurance, pays payroll taxes and makes unemployment insurance contributions. Id. ¶¶ 11, 13.

MDA alleges that if Xpressman engaged its couriers as employees, Xpressman's annual labor costs would increase from $1,615,076 to $3,484,158. Id. ¶ 37. MDA alleges that this is true for several reasons: (1) employees would have "dead time,"[2] in which they would be getting paid for working but not actively making a pick-up or delivery; (2) employers would be required to pay benefits, including health insurance, which Massachusetts employers must offer; (3) employers would be required to pay mileage compensation; (4) employers would need to provide workers compensation and unemployment insurance; and (5) employers would be required to pay payroll taxes. Id. ¶¶ 29-36; D. 72 at 21. These cost increases, MDA alleges, would force Xpressman to increase its prices to customers. D. 73 ¶ 38

C. **Procedural History**

MDA commenced this action on September 7, 2010. D. 1. The Attorney General moved to dismiss this case on October 22, 2010 on the grounds that the Court was required to abstain from exercising jurisdiction under Younger v. Harris, 401 U.S. 37 (1971). D. 9. The Court granted this motion on April 8, 2011, but that the First Circuit reversed that decision on appeal. D. 37, 39, 44. Upon remand, the parties then proceeded with discovery.

MDA has now moved for summary judgment, arguing that the FAAAA preempts the B prong of the Statute (which is the basis for Counts I and III of the amended complaint). D. 67. The Attorney General has opposed this motion, D. 80, arguing that the FAAAA does not preempt the Statute and has asked for additional discovery pursuant to Federal Rule of Civil

[2] Because Xpressman currently engages its drivers on a per delivery basis, it pays drivers only for the time that they are actively engaged in a delivery. D. 73 ¶¶ 8, 13. By contrast, Massachusetts law requires employers to pay employees for time spent "on-call" if the employee is not "effectively free to use his or her time for his or her own purposes." 455 C.M.R. 2.03(2).

Procedure 56(d).[3] In addition, she has cross-moved for summary judgment on all counts, arguing that the case does not present a justiciable case or controversy. D. 82.

Since the parties moved for summary judgment, the Court has twice extended the deadline for fact and expert discovery. D. 70 (extending deadline to January 18, 2013); D. 89 (extending deadline to March 30, 2013). MDA has moved for a protective order as to certain third-party subpoenas to Xpressman customers. D. 94. In addition, the Attorney General moved to compel (1) additional deposition time as to Xpressman's designee under Fed. R. Civ. P. 30(b)(6), Michelle Cully; and (2) several categories of documents from Xpressman. D. 96. The Court heard oral argument on all pending matters on April 10, 2013 and took the matters under advisement. D. 107.

IV. Discussion

A. This Case Presents a Justiciable Case or Controversy

In her cross-motion, the Attorney General argues that MDA has not alleged a justiciable case or controversy. See U.S. Const. art. III, § 2. The case or controversy requirement prevents courts from issuing advisory opinions. Overseas Military Sales Corp., Ltd. v. Giralt-Armada, 503 F.3d 12, 16-17 (1st Cir. 2007). This requirement limits "the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." Flast v. Cohen, 392 U.S. 83, 95 (1968). In the context of a declaratory judgment, for a dispute to rise to the level of a case or controversy, the dispute

[3] Fed. R. Civ. P. 56(d) provides that: "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order."

must be of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Md. Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). By contrast, declaratory relief relative to the enforceability of a state statute is not available where the threat of state action is "imaginary, speculative, or chimerical." Shell Oil Co. v. Noel, 608 F.2d 208, 213 (1st Cir. 1979) (citing Steffel v. Thompson, 415 U.S. 452, 468-74 (1974)).

The Attorney General points out that the Statute contains a three-prong test for whether a person is an independent contractor or an employee. Even if the Court rules that the FAAAA preempts one prong of the Statute, she argues, this does not conclusively address whether the FAAAA preempts the entirety of the statute. Thus, the Attorney General argues, "a ruling as to Prong B alone would only resolve a case or controversy if an employer had first established that it complied with the first and third part of the test." D. 82 at 2.

The Court disagrees. For MDA's members to classify their drivers successfully as independent contractors within the meaning of the Statute, they would need to meet each of the three prongs of the Statute – that (1) the drivers were free from the delivery companies' control; (2) the drivers perform services outside the delivery companies' usual course of business; and (3) the drivers are customarily engaged in an independently established trade of the same nature as that involved in the service performed. Mass. Gen. L. c. 149, § 148B. Failure to establish a single prong would doom the delivery company's classification of workers as independent contractors. See Auwah v. Coverall N. Am., Inc., 707 F. Supp. 2d 80, 82 (D. Mass. 2010) (noting that the burden is on employer to "establish each element" of the Statute). In other words, each prong presents a barrier to the drivers' classification as independent contractors. Thus, "a decision in favor of the plaintiff in this case would provide effectual relief because it would clear a barrier" to the classification of MDA's couriers as independent contractors.

Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council, 589 F.3d 458, 469 (1st Cir. 2009) (finding that plaintiff had alleged case or controversy where it sought determination as to one of many steps in regulatory approval process). The relief requested by the plaintiff therefore will "neither be 'advisory' nor 'irrelevant.'" Id. The Court therefore DENIES the Attorney General's motion for summary judgment, D. 82, to the extent she seeks to dismiss the action for failure to allege a case or controversy.

B. The FAAAA Does Not Preempt Prong B of the Statute

1. The Federal Aviation Administration Authorization Act

The FAAAA arises out of a decades-long congressional effort to deregulate various facets of interstate transportation, including air travel and trucking, which as instrumentalities of interstate commerce fall squarely within Congress's power to regulate commerce. United States v. Lopez, 514 U.S. 549, 558 (1995); United States v. Ballinger, 395 F.3d 1218, 1226 (11th Cir. 2005) (noting that "[i]nstrumentalities of interstate commerce . . . include[e] automobiles, airplanes, boats and shipments of goods"). In 1978, Congress enacted the Airline Deregulation Act ("ADA") aiming to promote "maximum reliance on competitive market forces." 49 U.S.C. § 40101(a)(6). The ADA preempts any State from enacting or enforcing "any law . . . relating to rates, routes, or services of any air carrier." Morales v. Trans World Airlines, 504 U.S. 374, 378-79 (1992) (citations omitted). In 1980, Congress enacted the Motor Carrier Act, deregulating trucking. Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 368 (2008) (citing 94 Stat. 793). Finally, in 1994, Congress enacted the FAAAA, borrowing language from the ADA as to preemption: "[A] State . . . may not enact or enforce a law . . . related to a price, route, or service of any motor carrier," but adding the phrase, "with respect to the transportation of property." 49 U.S.C. § 14501(c)(1).

2. MDA Has Not Demonstrated that the FAAAA Preempts the Statute

For the FAAAA to preempt a state law, the state law must both: (1) relate to prices, routes or services of a motor carrier; and (2) relate to the transportation of property. 49 U.S.C. § 14501(c)(1); see City of Columbus v. Ours Garages and Wrecker Serv., Inc., 536 U.S. 424, 428 (2002). With respect to the first prong, courts have relied upon case-law relating to the FAAAA and ADA interchangeably. Rowe, 552 U.S. at 370 (noting that "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well") (quoting Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 85 (2006)).

a. The Statute does not relate to the transportation of property

Unlike the ADA, FAAAA preemption applies only reaches to state statutes regulating the "transportation of property." The Supreme Court recently clarified that the FAAAA does not preempt state law claims where the statute itself does not relate to the "movement of property." Dan's City Used Cars, Inc. v. Pelkey, --- U.S. ----, 133 S. Ct. 1769, 1779 (2013) (holding that the FAAAA did not preempt plaintiff's claims under a state consumer protection statute where the plaintiff alleged that the defendant wrongfully took possession of the plaintiff's car). The Court noted that the FAAAA's preemption clause differs from the ADA's preemption clause in that it includes the words "with respect to the transportation of property," after "relating to . . . prices, routes or services," which "massively limits the scope of preemption" ordered by the FAAAA. Id. at 1778. Prior to Dan's City, one plausible interpretation of the operative phrase was that the FAAAA would preempt state statutes where they had a significant effect on the prices, routes or services of those entities that transport property. See Sanchez v. Lasership, Inc., No. 12-0246, 2013 WL 1395733, at *1 (E.D. Va. Apr. 4, 2013). The Supreme Court's decision in Dan's City

has, however, foreclosed that line of reasoning. Indeed, one court in this district recently rejected a virtually identical preemption argument on similar grounds. Schwann v. FedEx Ground Package System, Inc., No. 11-11094, 2013 WL 3353776, at *3-4 (D. Mass. Jul. 3, 2013) (Stearns, J.). In applying Dan's City, the Schwann court found that because the Statute does not relate to the movement of property, the FAAAA cannot preempt it. Id.

The Court's analysis of this matter leads it to the same conclusion. The Statute has a broad application to a swath of state wage and hour laws, which, in turn, apply to all employees regardless of the underlying industry. See generally Mass Gen. L. c. 149, § 148B. Thus, the Statute applies not only to the trucking industry, but also, inter alia, to the janitorial cleaning industry, see Depianti v. Jan-Pro Franchising Int'l, Inc., 465 Mass. 607, 614 (2013), the home heating industry, see Crocker v. Townsend Oil Co., Inc., 464 Mass. 1, 2 (2012) and even municipalities, see Dixon v. City of Malden, 464 Mass. 446, 447 (2013). It does not address how MDA's members make deliveries, cf. Rowe, 448 F.3d at 80, nor the way their services are performed, cf. Brown, 720 F.3d at 62. As such, the Statute "has nothing to do with the regulation of the 'carriage of property.'" Schwann, 2013 WL 3353776 at *3 (quoting Dan's City, 133 S. Ct. at 1778).

MDA seeks to distinguish Dan's City by styling the Supreme Court's opinion as limiting the FAAAA's preemptive reach to industries that relate to the transportation of property. D. 115 at 1[4] (arguing that Dan's City held that the FAAAA did not preempt New Hampshire consumer protection statute because "selling a car does not relate to the movement of property") (internal citation omitted). Yet this argument is squarely at odds with the Supreme Court's finding that "it

[4] The parties have filed multiple Notices of Supplemental Authority along with additional relevant argument relative to each notice. D. 106, 110, 114, 115, 116, 118, 119, 120, 122. The Court is in receipt of each of these notices and has taken them into consideration in its analysis.

is not sufficient that a state law relates to the 'price, route, or service' of a motor carrier in any capacity; the law must also concern a motor carrier's 'transportation of property.'" Dan's City, 133 S. Ct. at 1778-79.[5]

MDA also argues that another recent Supreme Court case, Am. Trucking Ass'ns, Inc. v. City of L.A., Cal., --- U.S. ----, 133 S. Ct. 2096 (2013), compels an outcome in its favor. D. 115 at 2. In Am. Trucking, the Supreme Court held that the FAAAA preempted "concession agreements" governing the relationship between the Port of Los Angeles and trucking companies operating on the premises. Id. at 2100. These concession agreements contained a provision prohibiting these trucking companies from employing their drivers as independent contractors. Am. Trucking Ass'ns., Inc. v. City of L.A., 660 F.3d 384, 407 (9th Cir. 2011), rev'd in part sub nom. Am. Trucking, 133 S. Ct. at 2096. Yet by MDA's own admission, the defendant in that case chose not to appeal the Ninth Circuit's holding that the FAAAA preempted the Port of Los Angeles's all-out ban on the use of independent contractors. D. 115 at 2. As such, the operative issue in this case was not before the Supreme Court. Even if the Supreme Court had affirmed the Ninth Circuit in this respect, however, the ban at issue in Am. Trucking pertained only to employees of trucking companies moving property in and out of the Port of Los Angeles. As

[5] The Court is in receipt of MDA's most recent Notice of Supplemental Authority. D. 120, 122. To the extent that Burnham v. Ruan Transp., No. 12-00688-AG-AN, 2013 WL 4564496, at *5 (C.D. Cal. Aug. 16, 2013) (finding that California's meal and rest break laws were preempted by the FAAAA) could be said to stand for the proposition that state statutes relate to the transportation of property merely because they govern common carriers, the Court disagrees with that proposition. If that were true, then the limitation described in Dan's City would have no practical impact, as any regulation affecting operating costs would be preempted by the FAAAA. In the second case that MDA cites, Gennell v. Fedex Ground Package System, Inc., No. 05-145-PB, 2013 WL 4854362 (D.N.H. Aug. 21, 2013), the court rejected the argument that a state statute was preempted. Id. at *7 (citing Schwann, supra and Martins, infra). As such, this case supports the Attorney General's position, despite MDA's attempt to distinguish it.

such, the ban related directly to the "transportation of property." 49 U.S.C. § 14501(c)(1), which, as discussed above, the Statute does not.

b. The Statute's impact on prices, routes and services is insufficient to find that the FAAAA facially preempts it

As the parties' briefing pre-dated the Supreme Court's decision in Dan's City, the Court will address the focus of the parties' briefing – the nexus between the Statute and motor carriers' prices, routes and services. Nevertheless, the Court finds that even if the Statute did relate to the transportation of property, its connection to prices, routes and services is insufficient for the FAAAA facially to preempt it.

The FAAAA and ADA preempt state and local laws even where the state or local law's effect on a prices, routes or services "is only indirect." Morales, 504 U.S. at 386. State actions "having a connection with, or reference to" carrier "rates, routes, or services' are preempted." Id. at 384. State laws are preempted where they have a "significant impact" related to Congress' deregulatory and preemption-related objectives. Id. at 390. Nor, as the Attorney General suggests, is FAAAA preemption limited to laws of general applicability. Id. In deciding preemption issues, courts focus on "Congress' overarching goal as helping assure transportation rates, routes, and services that reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices,' as well as 'variety' and 'quality.'" Rowe, 552 U.S. at 371 (quoting Morales, 504 U.S. at 378).

By contrast, the FAAAA and ADA do not preempt state laws affecting prices, routes or services in only a "tenuous, remote, or peripheral . . . manner," including generally applicable criminal statutes prohibiting, for example, gambling. Id. at 390; see also N.H. Motor Transp. Ass'n v. Rowe, 448 F.3d 66, 81 (1st Cir. 2006) (holding that the FAAAA does not preempt generally applicable statute prohibiting carriers from acting as "knowing accomplices to the

illegal sale of tobacco products," but finding that state may not "dictate the procedures that a carrier should employ to locate these products in its delivery chain"), aff'd, 552 U.S. 364 (2008).

Courts have, in many cases, held that the FAAAA and ADA preempt state and local statutes that address restraints on the employment relationship. In DiFiore v. Am. Airlines, 646 F.3d 81, 83-84 (1st Cir. 2011), for example, airline porters brought suit against their employers alleging that the airline's $2 service charge for curbside baggage check-in violated the Massachusetts tip statute, Mass. Gen. L. c. 149, § 152A(f), in that the policy confused customers, who, the porters alleged, believed that the service charge was a gratuity awarded to the porters. Id. The First Circuit held that employees' claims were preempted by the ADA because the tip statute, under plaintiffs' formulation, controlled how airlines displayed the prices for curbside baggage check-in. Id. at 88-29. Accordingly, the tip statute had a significant impact on how the airline provided the service. The Court advised, however, that the ADA would not preempt claims "simply regulat[ing] the employment relationship between the skycaps and the airline," as opposed to those that have a direct connection to air carrier prices and services"—which the ADA would preempt because they are "related to a price, route or service." Id. at 87. The First Circuit similarly found that the ADA preempts similarly situated porters' claims of unjust enrichment and tortious interference. Brown v. United Airlines, Inc., 720 F.3d 60, 62 (1st Cir. 2013).

Even the manner in which employers classify individuals performing services can fall within the ambit of FAAAA preemption. Provided they relate to the transportation of property, local regulations requiring trucking companies to classify independent contractors as employees are likely preempted where they impose significant costs on employers where those costs are likely to either be passed onto consumers or alter the manner in which truckers provide their

services. Am. Trucking Associations, Inc. v. City of Los Angeles, 559 F.3d 1046, 1056 (9th Cir. 2009) (reversing denial of preliminary injunction upon concluding that reclassification of independent contractors as employees would increase prices for trucking services). Indeed, when faced with this very issue of whether the FAAAA preempts the Statute, one district court found that the FAAAA preempts the Statute. Sanchez, 2013 WL 1395733, at *1 (applying Massachusetts law and finding that the Statute made on-call delivery services cost-prohibitive, therefore dictating the services delivery services could provide).

Recent decisions from judges in this district have, however, expressed skepticism at preemption claims that seek to invalidate the Statute and other Massachusetts wage and hour laws. See Martins v. 3PD, Inc., No. 11-11313, 2013 WL 1320454, at *12 (D. Mass. Apr. 4, 2013) (Woodlock, J.) (concluding that "suggestion that FAAAA preempts wage laws because they may have indirect impact on [] pricing decisions amounts to an invitation to immunize it from all state economic regulation"); Schwann, 2013 WL 3353776, at *3-4 (same; distinguishing Sanchez). In addition, two Massachusetts trial courts have specifically addressed this issue and have concluded that the FAAAA does not preempt Section 148B. See Derochers v. Staples, Inc., No. 09-04845, 2010 WL 6576214, *2–3 (Mass. Super. Ct. Jun. 8, 2010); Oliveira v. Advanced Delivery Sys., Inc., No. 09-1311, 2010 WL 4071360, at *3–4 (Mass. Super. Ct. Jul. 16, 2010).

The Court agrees that to find the "FAAAA preempts wage laws because they may have an indirect impact on [a motor carrier]'s pricing decisions amounts to an invitation to immunize it from all state economic regulation," Martins, 2013 WL 1320454, at *12, which is a position that "the First Circuit specifically rejected." Id. (citing DiFiore, 646 F.3d at 89 (declining to "endorse American [Airlines]'s view that state regulation is preempted wherever it imposes costs on airlines and therefore affects fares because costs must be made up elsewhere . . . . This would

effectively exempt airlines from state taxes, state lawsuits of many kinds, and perhaps most other state regulation of any consequence.") (internal quotations omitted)). Put simply, in drafting the FAAAA, Congress did not draft a blank check to the trucking industry protecting it from any state regulation that increases the cost of doing business.

Indeed, Schwann and Martins stand for the rejection of a categorical approach that wage laws will always affect market forces and therefore always affect prices. The Court agrees that such a categorical approach is inappropriate and that MDA has failed to demonstrate that the Statute has "no valid application." McGuire v. Reilly, 386 F.3d 45, 57 (1st Cir. 2004) (discussing standard for facial invalidity). Indeed, "the FAAAA's preemption provision does not have infinite reach." Martins, 2013 WL 1320454 at *12. That a regulation on wages has the potential to impact costs and therefore prices is insufficient to implicate preemption. DiFiore, 646 F.3d at 89 (rejecting argument that "state regulation is preempted wherever it imposes costs on airlines and therefore affects fares because costs must be made up elsewhere"); see also S.C. Johnson & Son, Inc. v. Transp. Corp. of Am., Inc., 697 F.3d 544, 559 (7th Cir. 2012) ("It is important in this connection to consider whether enforcement of a state law has a generalized effect on transactions in the economy as a whole, or if it affects only particular arrangements"). Those courts that have found that the FAAAA and ADA preempts state and local regulation of the employment relationship have done so on an "as-applied" basis. See, e.g., Sanchez, 2013 WL 1395733, at *13 (considering Statute's effect on defendant in isolation).

Here, it could be the case that for some of MDA's members, although reclassifying their drivers as independent contractors will increase costs, members will absorb those costs in other ways. For example, member companies could trim their administrative staff, reduce overhead costs or alter the means by which employees are provided with salaries, wages and benefits.

None of these cost-cutting measures affects common carriers' prices, routes or services. See DiFiore, 646 F.3d at 87 (identifying "direct connection to air carrier prices and services" as critical inquiry). The Statute therefore may have multiple "valid application[s]." McGuire, 386 F.3d at 57. Thus, as here, where a law of general applicability merely has the potential to affect common carriers' prices, routes or services, the FAAAA does not preempt that law on its face.

MDA relies on Am. Trucking to contend otherwise. However, the ban in that case specifically targeted truckers carrying cargo in and out of two distinct, albeit large ports on the California coast. Am. Trucking, 559 F.3d at 1048. In other words, the ban related directly regulated trucking. Although the plaintiff in that case did not make an as-applied challenge to the independent contractor ban, the relief sought was relatively narrow as compared with the relief MDA seeks in this case and specific evidence related to the trucking industry. MDA also argues that Central Transport, Inc. v. Pub. Serv. Comm'n, 566 N.W.2d 299 (Mich. App. 1997), suggests that the FAAAA facially preempts bans on independent contractors. In that case, however, the procedural posture was fundamentally different than the posture of the case at bar, in that the Michigan Court of Appeals was reviewing a state regulatory agency's conclusion that the FAAAA preempted certain state laws. Id. at 307. The standard of review in that case was particularly deferential. Id. at 308 (finding that regulatory agency's "conclusion in this regard was . . . not unlawful or unreasonable").

c. Neither MDA's as-applied challenge nor its policy arguments are persuasive

MDA has also raised an as-applied challenge. This challenge focuses on increased labor costs Xpressman, one of its members, would incur as a result of reclassifying its independent contractor couriers as employees. D. 72 at 11. MDA relies in large part on Sanchez, but Sanchez was decided prior to the Supreme Court's decision in Dan's City and it is not clear that

the Sanchez court would have found that the FAAAA preempts the Statute had the Supreme Court's decision preceded its own. Ultimately, the Statute's effect on Xpressman's labor costs is immaterial. Even if the impact was "significant," Rowe, 552 U.S. at 375, this would not change the fact that the Statute does not relate to the "movement of property." Dan's City, 133 S. Ct. at 1779; see supra at § IV.c.2.a.

Finally, as a matter of policy, MDA warns that the Statute is inconsistent with other states' laws regarding the distinction between independent contractors and employees. MDA argues that "to allow Massachusetts to create its own rules for who is or is not a contractor-courier 'would allow other States to do the same . . . [and] lead to a patchwork of state service-determining laws, rules, and regulations.'" D. 72 at 9 (quoting Rowe, 552 U.S. at 373). Yet the singular manner in which the Massachusetts legislature has chosen to define "employees" does not bear on whether the Statute has a "significant impact" on prices, routes and services. Rowe, 552 U.S. at 375. MDA has not demonstrated that a ban on the use of independent contractors would have such an impact as to have "no valid application." McGuire, 386 F.3d at 57 (discussing facial challenges to statutes). Indeed, where state statutes do not implicate preemption or other constitutional concerns, the Supreme Court has approved of the notion of "states as laboratories" as one of the hallmarks of modern federalism. Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (quoting New State Ice Co., v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (noting that "[o]ne of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country"). Put another way, a state is free to enact laws that conflict with another state's laws as long as it does not work to unstitch any federal

regulation. MDA's concern in this regard is therefore unavailing. The Court therefore DENIES MDA's motion for summary judgment, D. 67 and ALLOWS the relief requested by the Attorney General to the extent that Count I, MDA's request that the Court enjoin enforcement of the Statute, and Count III, MDA's claim for a declaratory judgment that the FAAAA preempts the Statute, should be DISMISSED on the merits. D. 80 at 1.

C. The Attorney General's Motion to Compel is Moot

The Attorney General's motion to compel seeks additional deposition time and documents from Xpressman. According to the Attorney General, "[t]his information is directly relevant to . . . the preemption question before this court" because "MDA must show that [the Statute] significantly impacts Xpressman's prices, routes, or services." D. 97 at 3. Indeed, MDA has articulated that Xpressman's involvement in this lawsuit merely bears upon its preemption claim. D. 72 at 11 et seq. Accordingly, the Attorney General has only articulated the relevance of the proposed discovery to the extent it bears upon Counts I and III of the Amended Complaint. See D. 22 at 9-11.

Now that the Court has granted summary judgment to the Attorney General on Counts I and III, and with no clear articulation as to how the proposed discovery relates to Count II, the Court DENIES AS MOOT WITHOUT PREJUDICE the Attorney General's motion to compel.

D. MDA is Entitled to a Protective Order

The Attorney General has propounded third party subpoenas on two Xpressman customers seeking the following information:

1. Documents concerning or reflecting any recommendation, suggestion, inquiry, or requirement since January 1, 2009 to Xpressman Trucking & Courier, Inc. regarding classifying delivery drivers as independent contractors or employees;

2. Documents concerning or reflecting any recommendation, suggestion, inquiry or requirement since January 1, 2009 to Xpressman Trucking & courier, Inc. regarding the pay of delivery drivers;

3. Documents concerning or reflecting the requirements . . . as to how Xpressman Trucking & Courier, Inc. handles or services its routes;

4. Documents concerning or reflecting changes in routes handled by or serviced by Xpressman Trucking & Courier, Inc. since January 1, 2009;

5. Copies of contracts or agreements with Xpressman Trucking & Courier, Inc. concerning or reflecting the pricing of routes or . . . expectations or requirements with respect to those routes.

D. 95-1 at 1-2. MDA, on Xpressman's behalf, has moved for a protective order, arguing that the Court should quash these subpoenas because they are not likely to lead to the discovery of admissible evidence and aim to disrupt Xpressman's customer relationships.

1. MDA Has Standing to Move for a Protective Order

The Attorney General argues that neither MDA nor Xpressman has standing to move for a protective order. Rule 26(c)(1) ostensibly limits standing to "part[ies] . . . from whom discovery is sought." However, courts have relaxed this requirement where the moving party can show a "claim of personal right or privilege regarding the production or testimony." Accusoft Corp. v. Quest Diagnostics, Inc., No. 12-40007, 2012 WL 1358662, at *10 (D. Mass. Apr. 18, 2012). Here, MDA and Xpressman (a member of MDA) have claimed a personal right. MDA argues that dragging Xpressman's customers into this litigation could damage Xpressman's relationships with its customers. The Court agrees that Xpressman's customers might resent the expense and hassle of responding to third party discovery and that these frustrations could damage Xpressman's relationships with their customers. According, the Court finds that MDA has standing to move for a protective order.[6]

[6] Although the motion for a protective order is titled "Xpressman Trucking & Courier, Inc.'s Motion for a Protective Order," it is signed by MDA. D. 94.

3. The Attorney General's Requests Are No Longer Relevant in Light of the Court's Dismissal of Counts I and III

Prior to the Court's dismissal of Counts I and III, these categories of documents would have been relevant. Request 2 addresses the pay of delivery drivers – an element of Xpressman's costs; request 3 addresses how Xpressman handles or services its routes; request 4 addresses the manner in which Xpressman changes its routes; and request 5 addresses the pricing of routes. As the Court has dismissed Counts I and III, these requests are outside the scope of the remaining discoverable issues in this case. As such, the Court ALLOWS the motion for a protective order.

Nevertheless, the Court declines to award fees and costs to MDA. "An award of expenses under [Rule 37(a)(5)] is a sanction imposed on a litigant for his failure to cooperate with discovery where no 'substantial justification' exists for his failure to cooperate." Indus. Aircraft Lodge 707, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. United Technologies Corp., Pratt & Whitney Aircraft Div., 104 F.R.D. 471, 473 (D. Conn. 1985) (quoting 4A Moore's Federal Practice, ¶ 37.02[10] (2d ed. 1984)); Fed. R. Civ. P. 26(c)(3) (applying Rule 37(a)(5)'s standard for sanctions to motions for protective orders). Here, given that the Court has dismissed Counts I and III, the discovery that the Attorney General sought is moot. However, there may have been merit to the Attorney General's discovery requests absent dismissal. Thus, there was "substantial justification" for the discovery that the Attorney General sought. Indus. Aircraft Lodge, 104 F.R.D. at 473. The Court finds it inappropriate to award fees and costs under these circumstances.[7]

[7] MDA's Motion for Leave to File a Reply in Support of Its Motion for a Protective Order, D. 102, is ALLOWED. The Court considered the reply memorandum attached to this motion for leave in addressing the motion for a protective order, D. 94.

V. Conclusion

For the foregoing reasons, the Court DENIES MDA's motion for summary judgment, D. 67, and DENIES the Attorney General's cross-motion for summary judgment, D. 82, to the extent that it sought dismissal of this action on the grounds that this case did not present a justiciable case or controversy, but ALLOWS the relief requested by the Attorney General to the extent that Counts I and III are DISMISSED. See D. 80 at 1. The Court also and DENIES AS MOOT WITHOUT PREJUDICE the Attorney General's motion to compel, D. 96, and ALLOWS MDA's motion for a protective order. D. 94.

So Ordered.

/s/ Denise J. Casper
United States District Judge

Addendum B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASSACHUSETTS DELIVERY ASSOC.
Plaintiff(s)

v. CIVIL ACTION NO. **10-11521-DJC**

MARTHA COAKLEY
Defendant(s)

JUDGMENT IN A CIVIL CASE

CASPER, D.J.

☐ **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by the Court.** In accordance with the Memorandum and Order dated September 26, 2013 granting defendant's motion for summary judgment as to Counts I and III of the Amended Complaint;

IT IS ORDERED AND ADJUDGED

Judgment for the defendant Martha Coakley, in her Official Capacity as Attorney General of the Commonwealth of Massachusetts at to Counts I and III of the Amended Complaint.

Robert M. Farrell, Clerk

Dated: October 18, 2013

/s/ Lisa M. Hourihan
(By) Deputy Clerk

Addendum C

(2) The total fixed charges that result from the proposed transaction.

(3) The interest of carrier employees affected by the proposed transaction.

The Board may impose conditions governing the transaction.

(c) DETERMINATION OF COMPLETENESS OF APPLICATION.—Within 30 days after the date on which an application is filed under this section, the Board shall either publish a notice of the application in the Federal Register or reject the application if it is incomplete.

(d) COMMENTS.—Written comments about an application may be filed with the Board within 45 days after the date on which notice of the application is published under subsection (c).

(e) DEADLINES.—The Board shall conclude evidentiary proceedings by the 240th day after the date on which notice of the application is published under subsection (c). The Board shall issue a final decision by the 180th day after the conclusion of the evidentiary proceedings. The Board may extend a time period under this subsection; except that the total of all such extensions with respect to any application shall not exceed 90 days.

(f) EFFECT OF APPROVAL.—A carrier or corporation participating in or resulting from a transaction approved by the Board under this section, or exempted by the Board from the application of this section pursuant to section 13541, may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in the approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

(g) LIMITATION ON APPLICABILITY.—This section shall not apply to transactions involving carriers whose aggregate gross operating revenues were not more than $2,000,000 during a period of 12 consecutive months ending not more than 6 months before the date of the agreement of the parties.

(h) APPLICABILITY OF CERTAIN PROVISIONS.—When the Board approves and authorizes a transaction under this section in which a person not a carrier providing transportation subject to jurisdiction under subchapter I of chapter 135 acquires control of at least 1 carrier subject to such jurisdiction, the person is subject, as a carrier, to the following provisions of this title that apply to the carrier being acquired by that person, to the extent specified by the Board: sections 504(f), 14121–14123, 14901(a), and 14907.

(i) INTERIM APPROVAL.—Pending determination of an application filed under this section, the Board may approve, for a period of not more than 180 days, the operation of the properties sought to be acquired by the person proposing in the application to acquire those properties, when it appears that failure to do so may result in destruction of or injury to those properties or substantially interfere with their future usefulness in providing adequate and continuous service to the public. Transportation provided by a motor carrier under a grant of approval under this subsection is subject to this part.

(j) SUPPLEMENTAL ORDERS.—When cause exists, the Board may issue appropriate orders supplemental to an order made in a proceeding under this section.

(Added Pub. L. 104–88, title I, § 103, Dec. 29, 1995, 109 Stat. 897.)

PRIOR PROVISIONS

Provisions similar to those in this section were contained in sections 11341, 11343, 11344, 11345a, 11348, 11349, and 11351 of this title prior to the general amendment of this subtitle by Pub. L. 104–88, § 102(a).

CHAPTER 145—FEDERAL-STATE RELATIONS

AMENDMENTS

2005—Pub. L. 109–59, title IV, §§ 4305(c), 4306(b), Aug. 10, 2005, 119 Stat. 1773, 1774, added items 14504a and 14506.

Pub. L. 109–59, title IV, § 4305(a), Aug. 10, 2005, 119 Stat. 1764, as amended by Pub. L. 110–53, title XV, § 1537(c), Aug. 3, 2007, 121 Stat. 467, struck out item 14504 "Registration of motor carriers by a State", effective Jan. 1, 2008.

§ 14501. Federal authority over intrastate transportation

(a) MOTOR CARRIERS OF PASSENGERS.—

(1) LIMITATION ON STATE LAW.—No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to—

(A) scheduling of interstate or intrastate transportation (including discontinuance or reduction in the level of service) provided by a motor carrier of passengers subject to jurisdiction under subchapter I of chapter 135 of this title on an interstate route;

(B) the implementation of any change in the rates for such transportation or for any charter transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required; or

(C) the authority to provide intrastate or interstate charter bus transportation.

This paragraph shall not apply to intrastate commuter bus operations, or to intrastate bus transportation of any nature in the State of Hawaii.

(2) MATTERS NOT COVERED.—Paragraph (1) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle, or the au-

thority of a State to regulate carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

(b) FREIGHT FORWARDERS AND BROKERS.—

(1) GENERAL RULE.—Subject to paragraph (2) of this subsection, no State or political subdivision thereof and no intrastate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to intrastate rates, intrastate routes, or intrastate services of any freight forwarder or broker.

(2) CONTINUATION OF HAWAII'S AUTHORITY.—Nothing in this subsection and the amendments made by the Surface Freight Forwarder Deregulation Act of 1986 shall be construed to affect the authority of the State of Hawaii to continue to regulate a motor carrier operating within the State of Hawaii.

(c) MOTOR CARRIERS OF PROPERTY.—

(1) GENERAL RULE.—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) MATTERS NOT COVERED.—Paragraph (1)—

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the intrastate transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

(3) STATE STANDARD TRANSPORTATION PRACTICES.—

(A) CONTINUATION.—Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to—

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

(iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or

(v) antitrust immunity for agent-van line operations (as set forth in section 13907),

if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) REQUIREMENTS.—A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if—

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this part or a regulation issued by the Secretary or the Board under this part; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

(C) ELECTION.—Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

(4) NONAPPLICABILITY TO HAWAII.—This subsection shall not apply with respect to the State of Hawaii.

(5) LIMITATION ON STATUTORY CONSTRUCTION.—Nothing in this section shall be construed to prevent a State from requiring that, in the case of a motor vehicle to be towed from private property without the consent of the owner or operator of the vehicle, the person towing the vehicle have prior written authorization from the property owner or lessee (or an employee or agent thereof) or that such owner or lessee (or an employee or agent thereof) be present at the time the vehicle is towed from the property, or both.

(d) PRE-ARRANGED GROUND TRANSPORTATION.—

(1) IN GENERAL.—No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law requiring a license or fee on account of the fact that a motor vehicle is providing pre-arranged ground transportation service if the motor carrier providing such service—

(A) meets all applicable registration requirements under chapter 139 for the interstate transportation of passengers;

(B) meets all applicable vehicle and intrastate passenger licensing requirements of the State or States in which the motor carrier is domiciled or registered to do business; and

(C) is providing such service pursuant to a contract for—

(i) transportation by the motor carrier from one State, including intermediate stops, to a destination in another State; or

(ii) transportation by the motor carrier from one State, including intermediate

stops in another State, to a destination in the original State.

(2) INTERMEDIATE STOP DEFINED.—In this section, the term "intermediate stop", with respect to transportation by a motor carrier, means a pause in the transportation in order for one or more passengers to engage in personal or business activity, but only if the driver providing the transportation to such passenger or passengers does not, before resuming the transportation of such passenger (or at least 1 of such passengers), provide transportation to any other person not included among the passengers being transported when the pause began.

(3) MATTERS NOT COVERED.—Nothing in this subsection shall be construed—

(A) as subjecting taxicab service to regulation under chapter 135 or section 31138;

(B) as prohibiting or restricting an airport, train, or bus terminal operator from contracting to provide preferential access or facilities to one or more providers of pre-arranged ground transportation service; and

(C) as restricting the right of any State or political subdivision of a State to require, in a nondiscriminatory manner, that any individual operating a vehicle providing pre-arranged ground transportation service originating in the State or political subdivision have submitted to pre-licensing drug testing or a criminal background investigation of the records of the State in which the operator is domiciled, by the State or political subdivision by which the operator is licensed to provide such service, or by the motor carrier providing such service, as a condition of providing such service.

(Added Pub. L. 104–88, title I, § 103, Dec. 29, 1995, 109 Stat. 899; amended Pub. L. 105–178, title IV, § 4016, June 9, 1998, 112 Stat. 412; Pub. L. 105–277, div. C, title I, § 106, Oct. 21, 1998, 112 Stat. 2681–586; Pub. L. 107–298, § 2, Nov. 26, 2002, 116 Stat. 2342; Pub. L. 109–59, title IV, §§ 4105(a), 4206(a), Aug. 10, 2005, 119 Stat. 1717, 1754.)

REFERENCES IN TEXT

The Surface Freight Forwarder Deregulation Act of 1986, referred to in subsec. (b)(2), is Pub. L. 99–521, Oct. 22, 1986, 100 Stat. 2993. For complete classification of this Act to the Code, see Short Title of 1986 Amendment note set out under section 10101 of this title and Tables.

PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 11501 of this title prior to the general amendment of this subtitle by Pub. L. 104–88, § 102(a).

AMENDMENTS

2005—Subsec. (c)(2)(B). Pub. L. 109–59, § 4206(a), inserted "intrastate" before "transportation".

Subsec. (c)(5). Pub. L. 109–59, § 4105(a), added par. (5).

2002—Subsec. (d). Pub. L. 107–298 added subsec. (d).

1998—Subsec. (a). Pub. L. 105–178 reenacted heading without change and amended text of subsec. (a) generally. Prior to amendment, text read as follows: "No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to scheduling of interstate or intrastate transportation (including discontinuance or reduction in the level of service) provided by motor carrier of passengers subject to jurisdiction under subchapter I of chapter 135 of this title on an interstate route or relating to the implementation of any change in the rates for such transportation or for any charter transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required. This subsection shall not apply to intrastate commuter bus operations."

Subsec. (a)(1). Pub. L. 105–277 substituted "operations, or to intrastate bus transportation of any nature in the State of Hawaii" for "operations" in concluding provisions.

EFFECTIVE DATE

Chapter effective Jan. 1, 1996, except as otherwise provided in Pub. L. 104–88, see section 2 of Pub. L. 104–88, set out as a note under section 701 of this title.

§ 14502. Tax discrimination against motor carrier transportation property

(a) DEFINITIONS.—In this section, the following definitions apply:

(1) ASSESSMENT.—The term "assessment" means valuation for a property tax levied by a taxing district.

(2) ASSESSMENT JURISDICTION.—The term "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) MOTOR CARRIER TRANSPORTATION PROPERTY.—The term "motor carrier transportation property" means property, as defined by the Secretary, owned or used by a motor carrier providing transportation in interstate commerce whether or not such transportation is subject to jurisdiction under subchapter I of chapter 135.

(4) COMMERCIAL AND INDUSTRIAL PROPERTY.—The term "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use, and subject to a property tax levy.

(b) ACTS BURDENING INTERSTATE COMMERCE.—The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) EXCESSIVE VALUATION OF PROPERTY.—Assess motor carrier transportation property at a value that has a higher ratio to the true market value of the motor carrier transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) TAX ON ASSESSMENT.—Levy or collect a tax on an assessment that may not be made under paragraph (1).

(3) AD VALOREM TAX.—Levy or collect an ad valorem property tax on motor carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(c) JURISDICTION.—

Addendum D

Print

PART I ADMINISTRATION OF THE GOVERNMENT
(Chapters 1 through 182)

TITLE XXI LABOR AND INDUSTRIES

CHAPTER 149 LABOR AND INDUSTRIES

Section 148B Persons performing service not authorized under this chapter deemed employees; exception

Section 148B. (a) For the purpose of this chapter and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:—

(1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and

(2) the service is performed outside the usual course of the business of the employer; and,

(3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

(b) The failure to withhold federal or state income taxes or to pay unemployment compensation contributions or workers compensation premiums with respect to an individual's wages shall not be considered in making a determination under this section.

(c) An individual's exercise of the option to secure workers' compensation insurance with a carrier as a sole proprietor or partnership pursuant to subsection (4) of section 1 of chapter 152 shall not be considered in making a determination under this section.

(d) Whoever fails to properly classify an individual as an employee according to this section and in so doing fails to comply, in any respect, with chapter 149, or section 1, 1A, 1B, 2B, 15 or 19 of chapter 151, or chapter 62B, shall be punished and shall be subject to all of the criminal and civil remedies, including debarment, as provided in section 27C of this chapter. Whoever fails to properly classify an individual as an employee according to this section and in so doing violates chapter 152 shall be punished as provided in section 14 of said chapter 152 and shall be subject to all of the civil remedies, including debarment, provided in section 27C of this chapter. Any entity and the president and treasurer of a corporation and any officer or agent having the management of the corporation or entity shall be liable for violations of this section.

ADD 27

(e) Nothing in this section shall limit the availability of other remedies at law or in equity.

Addendum E

An Advisory from the Attorney General's Fair Labor Division on M.G.L. c. 149, s. 148B 2008/1[1]

The Office of the Attorney General (AGO) issues the following Advisory regarding M.G.L. c. 149, s. 148B, the Massachusetts Independent Contractor Law or the Massachusetts Misclassification Law (the "Law"). This Advisory provides guidance with respect to the Attorney General's understanding of and enforcement of the Law. This Advisory is not a formal opinion. Opinions of the Attorney General are formal documents rendered pursuant to specific statutory authority. M.G.L. c. 12, s. 3, 6, and 9. The Advisory is intended to provide guidance only and does not create any rights or remedies.

I. INTRODUCTION

A. The Need for Enforcement

The need for proper classification of individuals in the workplace is of paramount importance to the Commonwealth.[2] Entities that misclassify individuals are in many cases committing insurance fraud and deprive individuals of the many protections and benefits, both public and private, that employees enjoy. Misclassified individuals are often left without unemployment insurance and workers' compensation benefits. In addition, misclassified individuals do not have access to employer-provided health care and may be paid reduced wages or cash as wage payments.

Similarly, entities that misclassify individuals deprive the Commonwealth of tax revenue that the state would otherwise receive from payroll taxes. In addition, as a result of misclassification, the Commonwealth often incurs additional costs, such as providing health care coverage for uninsured workers. Other potential costs for the Commonwealth include providing workers' compensation benefits paid by the Workers' Compensation Trust Fund, and unemployment assistance without employer contribution into the Division of Unemployment Assistance fund, among other indirect costs.

Finally, businesses that properly classify employees and follow all of the relevant statutes regarding employment are likely to be at a distinct competitive disadvantage when vying for the same work, customers or contracts as those businesses that do not play by the rules. Further, by paying the proper taxes and insurance premiums, businesses following the Law are, in effect, subsidizing those businesses that do not. Misclassification undermines fair market competition and negatively impacts the business environment in the Commonwealth. The AGO expects businesses to contract only with businesses that properly classify their workers.

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[1] This Advisory supersedes the Attorney General's prior Advisories regarding M.G.L. c. 149, s. 148B, including "An Advisory from the Attorney General, Amendments to Massachusetts Independent Contractor Law," Advisory 2004/2; and an "Advisory from the Attorney General's Fair Labor and Business Practices Division on the Issue of Employee Versus Independent Contractor," Advisory 94/3.

[2] The Commissioner of Revenue is charged with administering the Massachusetts wage withholding laws under M.G.L. c. 62B, which provides a different definition of employee than M.G.L. c. 149, s. 148B, for purposes of Massachusetts income tax withholding. See *Department of Revenue TIR 05-11: Effect of New Employee Classification under M.G.L. c. 149, s. 148B on Withholding of Tax on Wages under M.G.L. c. 62B*. In addition, a definition similar but not identical to M.G.L. c. 149, s. 148B, exists for unemployment insurance purposes. M.G.L. c. 151A, s. 2. The Massachusetts Workers' Compensation Law also provides a different definition of employee. M.G.L. c. 152, s. 1(4).

B. The History of the Law

The proper classification of employees has long been an issue of great concern in the Commonwealth. Under common law, a number of factors determined the existence of an employer/employee relationship based on the totality of the relationship. See, e.g., *Commonwealth v. Savage*, 31 Mass. App. Ct. 714 (1991). Those factors included the degree of control, the opportunity for profit and risk of loss, the employee's investment in the business facility, the permanency of the relationship, the skill required and the degree to which the employee's services were integral to the business.

In 1990, Massachusetts enacted the first version of the Law. By enacting the Law, the Legislature established that notwithstanding that a working relationship could be considered to be one of independent contractor under common law, the worker may still be deemed in employment for the purposes of the Law. *Boston Bicycle Couriers v. Deputy Director of the Division of Employment and Training*, 56 Mass. App. Ct. 473, 477 (2002).

Subsequent to its enactment in 1990, the Law has undergone several amendments including: Section 214 of Chapter 286 of the Acts of 1992; Section 165 of Chapter 110 of the Acts of 1993; Section 12 of Chapter 236 of the Acts of 1998; and Section 26 of Chapter 193 of the Acts of 2004. The 2004 amendment was part of legislation making broad changes to the laws governing the public construction industry. However, the Law, including the 2004 amendment, applies more broadly to a wide range of industries. The 2004 amendment kept intact, in large part, the standard for determining whether an individual is an employee, but made several changes from the earlier version of the statute. The amendment deleted the element "or is performed outside of all places of the business of the enterprise" as an alternative factor in prong two. In addition, the first element of prong two of the Law had read: "such service is performed … outside the usual course of business *for which the service is performed*…" After the 2004 amendment, the element reads: "the service is performed outside the usual course of business *of the employer*." Finally, the amendment added "trade" to the list of activities eligible for independent contractor status in prong three.

II. THE LAW

M.G.L. c. 149, s. 148B, provides a three-part test which requires that all three elements (commonly referred to as prongs one, two and three or the A, B, C test) must exist in order for an individual to be classified other than as an employee. The burden of proof is on the employer, and the inability of an employer to prove any one of the prongs is sufficient to conclude that the individual in question is an employee. M.G.L. c. 149, s. 148B (using the term "unless"). See also *Scalli v. Citizens Financial Group*, 2006 WL 1581625, *14 (D. Mass. 2006); *Rainbow Development, LLC v. Com., Dept. of Industrial Accidents*, 2005 WL 3543770, *2 (Mass. Sup. Ct. 2005).

Courts have had a limited opportunity to interpret M.G.L. c. 149, s. 148B. In *College News Service v. Department of Industrial Accidents*, 21 Mass.L.Rptr. 464, 2006 WL 2830971, the Superior Court noted that M.G.L. c. 149, s. 148B is almost identical to M.G.L. c. 151A, s. 2, the statute used by the Division of Unemployment Assistance, and therefore relied on the case law analyzing M.G.L. c. 151A, s. 2, to interpret M.G.L. c. 149, s. 148B. See *4 ("If the Legislature uses the same language in several provisions concerning the same subject matter [e.g., the definition of an employee in distinction from an independent contractor], the courts will presume it to have given the language the same meaning in each provision.").

See also *Commonwealth v. Germano*, 379 Mass. 268, 275-76 (1979). Because prongs one and three of M.G.L. c. 149, s. 148B and M.G.L. c. 151A, s. 2 are nearly identical and because prong two of M.G.L. c. 149, s. 148B contains one of the two steps of prong two in M.G.L. c. 151A, s. 2, Massachusetts case law interpreting M.G.L. c. 151A, s. 2 provides a useful guide to interpreting M.G.L. c. 149, s. 148B.

A. The Three Prong Test

Prong One: Freedom from Control

The first prong of M.G.L. c. 149, s. 148B provides that the individual must be "free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact" in order for the individual to be an independent contractor. In *Commissioner of the Division of Unemployment Assistance v. Town Taxi of Cape Cod*, 68 Mass. App. Ct. 426, 434 (2007), the Court noted in interpreting the nearly identical language of prong one of M.G.L. c. 151A, s. 2 that:

> The first part of the test examines the degree of control and direction retained by the employing entity over the services performed. The burden is upon the employer to demonstrate that the services at issue are performed free from its control or direction. The test is not so narrow as to require that a worker be entirely free from direction and control from outside forces.

Id. (citations omitted).

The first prong of the test includes a determination of the employer's actual control and direction of the individual. See M.G.L. c. 149, s. 148B (using the phrase "in fact"). An employment contract or job description indicating that an individual is free from supervisory direction or control is insufficient by itself to classify an individual as an independent contractor under the Law. To be free from an employer's direction and control, a worker's activities and duties should actually be carried out with minimal instruction. For example, an independent contractor completes the job using his or her own approach with little direction and dictates the hours that he or she will work on the job.

Prong Two: Service Outside the Usual Course of the Employer's Business

Prong two of M.G.L. c. 149, s. 148B(a)(2) provides that the service the individual performs must be "outside the usual course of business of the employer" in order for the individual to not be classified as an employee. Prior to the 2004 amendment, the employer could alternatively demonstrate that the work was performed "outside of all places of the business of the enterprise." The Law does not define "usual course of business" and Massachusetts courts have had limited opportunities to do so. In *Athol Daily News v. Division of Employment and Training*, 439 Mass. 171, 179 (2003), the Court found that newspaper carriers were performing the "usual course of business" of the newspaper relying on the employer's own definition of its business. In *American Zurich v. Dept. of Industrial Accidents*, 2006 WL 2205085, *4 (Mass. Super. 2006), Judge Paul Troy noted that "a worker whose services form a regular and continuing part of the employer's business" and "whose method of operation is not such an independent business" through which workers' compensation costs can be channeled, "should be found to be an employee." *Id.* Yet, "if the worker is performing services that are part of an independent, separate, and distinct business from that of the employer," prong two is not implicated. *Id.*

Prong Three: Independent Trade, Occupation, Profession or Business

Prong three provides that the individual "is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed" in order for the individual to be classified other than as an employee. M.G.L. c. 149, s. 148B(a)(3). "Under the third prong, the court is to consider whether the service in question could be viewed as an independent trade or business because the worker is capable of performing the service to anyone wishing to avail themselves of the service or, conversely, whether the nature of the business compels the worker to depend on a single employer for the continuation of the services." *Coverall v. Division of Unemployment Assistance*, 447 Mass. 852, 857-58 (2006) (interpreting prong three of M.G.L. c. 151A, s. 2). The court went on to note in *Coverall*:

> Although the court can consider whether a worker is capable of performing the service to anyone wishing to avail themselves of the services, the court may also consider whether the nature of the business compels the worker to depend on a single employer for the continuation of the services [citation omitted]. In this regard, we determine whether the worker is wearing the hat of the employee of the employing company, or is wearing the hat of his own independent enterprise.

Id.

B. Issues Deemed Irrelevant

An employer's failure to withhold taxes, contribute to unemployment compensation, or provide worker's compensation is not considered when analyzing whether an employee has been appropriately classified as an employee. M.G.L. c. 149, s. 148B(b). Hence, an employer's belief that a worker should be an independent contractor has no relevance in determining whether there has been violation of the Law. Similarly, the Law deems irrelevant the status of a worker as a "sole proprietor or partnership," for the purpose of obtaining worker's compensation insurance. M.G.L. c. 149, s. 148B(c).

C. Violation of the Law

M.G.L. c. 149, s. 148B(d) provides that an employer violates the statute when two acts occur. First, the employer classifies or treats the individual other than as an employee although the worker does not meet each of the criteria in the three prong test. Second, in receiving services from the individual, the employer violates one or more of the following laws enumerated in the Law:

- The wage and hour laws set forth in M.G.L. c. 149.
- The minimum wage law set out in M.G.L. c. 151, s. 1A, 1B, and 19; 455 CMR 2.01, *et seq.*
- The overtime law set forth in M.G.L. c. 151, s. 1, 1A, 1B, and 19.
- The law requiring employers to keep true and accurate employee payroll records, and to furnish the records to the Attorney General upon request as required by M.G.L. c. 151, s. 15.
- Provisions requiring employers to take and pay over withholding taxes on employee wages. M.G.L. c. 62B.[3]
- The worker's compensation provisions punishing knowing misclassification of an employee. M.G.L. c. 152, s. 14.

[3] As noted in footnote 2, for purposes of income tax withholding, M.G.L. c. 62B provides a definition of employee that differs from the three prong test in M.G.L. c. 149, s. 148B.

The statute authorizes the Attorney General to impose substantial civil and criminal penalties, and in certain circumstances, to debar violators from public works contracts. M.G.L. c. 149, s. 27C(a)(3). The penalties and length of debarment depend upon the nature and number of violations. M.G.L. c. 149, s. 148B(d) also creates liability for both business entities and individuals, including corporate officers, and those with management authority over affected workers.

III. ENFORCEMENT GUIDELINES

A. General Enforcement Guidelines

The AGO recognizes that enforcement guidelines are useful to employers, entities and individuals who must determine whether a particular situation or individual has employee status. When enforcing the Law, the AGO attempts to protect workers, legitimate businesses and the Commonwealth, consistent with the goals of the Law outlined in the Introduction.

The Law is focused on the misclassification of individuals. In the event that all individuals performing a service are classified and legitimately treated as employees of an entity (paid W-2 income, received W-2 tax forms, subject to withholdings for federal and state taxes, covered by workers' compensation insurance, eligible for unemployment compensation benefits, etc.) and are performing the service as an employee, then there is no misclassification of those workers. Accordingly, in determining whether the Law has been violated, the initial question is whether an individual or individuals are classified other than an employee. For example, if painting company X cannot finish a painting job and hires painting company Y as a subcontractor to finish the painting job, provided that all of the individuals performing the painting are employees of company Y, then the Law does not apply. However, if painting company X hires individuals as independent contractors to finish the painting job, then this would be a violation of prong two and a misclassification under the Law.

The AGO is cognizant that there are legitimate independent contractors and business-to-business relationships in the Commonwealth. These business relationships are important to the economic wellbeing of the Commonwealth and, provided that they are legitimate and fulfill their legal requirements, they will not be adversely impacted by enforcement of the Law. The difficulty arises when businesses are created and maintained in order to avoid the Law. The AGO will enforce the Law against entities that allow, request or contract with corporate entities such as LLCs or S corporations that exist for the purpose of avoiding the Law. In these situations, the AGO will consider, among other factors, whether: the services of the alleged independent contractor are not actually available to entities beyond the contracting entity, even if they purport to be so; whether the business of the contracting entity is no different than the services performed by the alleged independent contractor; or the alleged independent contractor is only a business requested or required to be so by the contracting entity.

In reviewing situations for misclassification, the AGO considers certain factors to be strong indications of misclassification that warrant further investigation and may result in enforcement. These include:

- Individuals providing services for an employer that are not reflected on the employer's business records;
- Individuals providing services who are paid "off the books", "under the table", in cash or provided no documents reflecting payment;
- Insufficient or no workers' compensation coverage exists;
- Individuals providing services are not provided 1099s or W-2s by any entity;

- The contracting entity provides equipment, tools and supplies to individuals or requires the purchase of such materials directly from the contracting entity; and
- Alleged independent contractors do not pay income taxes or employer contributions to the Division of Unemployment Assistance.

Since it is not feasible to address in this Advisory every situation that could occur and since each case involves its own set of facts, it should be recognized that each potential enforcement action shall be reviewed by the AGO on a case-by-case basis, consistent with the Law.

B. Prong Two Guidelines

Due to the nature of prong two and the lack of judicial precedent, the AGO recognizes the complexity that prong two presents and the concerns regarding legitimate independent contractors, particularly among certain segments of the workforce.

As discussed above, the AGO emphasizes that the initial question in determining whether the Law has been violated is whether an individual or individuals are classified other than as an employee. Only when an individual or individuals are classified other than as an employee will there be a determination of whether any of the prongs – including the complex prong two – are violated.

In *Athol Daily News*, the Court advised that no prong should be read so broadly as to render the other factors of the test superfluous. 439 Mass. at 180. Thus, prong two should not be construed to include all aspects of a business such that prongs one and three become unnecessary.

In its enforcement actions, the AGO will consider whether the service the individual is performing is necessary to the business of the employing unit or merely incidental in determining whether the individual may be properly classified as other than an employee under prong two.

Some examples of how the Attorney General will apply prong two[4]:

- A drywall company classifies an individual who is installing drywall as an independent contractor. This would be a violation of prong two because the individual installing the drywall is performing an essential part of the employer's business.
- A company in the business of providing motor vehicle appraisals classifies an individual appraiser as an independent contractor. This would be a violation of prong two because the appraiser is performing an essential part of the appraisal company's business.
- An accounting firm hires an individual to move office furniture. Prong two is not applicable (although prongs one and three may be) because the moving of furniture is incidental and not necessary to the accounting firm's business.

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[4] In interpreting the Illinois independent contractor law, the Supreme Court of Illinois noted in *Carpetland U.S.A., Inc. v. IL Dept. of Employment Security*, 201 Ill.2d 351, 386-88 (2002):

> The washing of windows or mowing of grass for a business is incidental. But when one is in the business of selling a product, sales calls made by sales representatives are in the usual course of business because sales calls are necessary. When one is in the business of dispatching limousines, the services of chauffeurs are provided in the usual course of business because the act of driving is necessary to the business.

Although the Illinois statute is not the same as the Massachusetts statute, the court's analysis is useful for guidance on how the Attorney General will undertake prong two enforcement.

IV. CONCLUSION

As this Advisory reflects, the AGO will carry out its enforcement responsibilities to serve the goals of the Law as articulated in the Introduction. The Law has been passed and amended over time to address serious abuses by various entities, and the AGO's goal is to prevent and remedy those practices without disrupting legitimate business activity.