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.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF DEFENDANT-APPELLEE

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The Federal Aviation Administration Authorization Act of 1994 (FAAAA) is an economic-deregulation measure that removes anticompetitive state tariffs, barriers to entry, price regulations, and restrictions on what carriers may transport. To that end, Congress provided 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)(2)(1).

The district court properly held that this measure – displacing a "cumbersome" patchwork of state-based economic regulations on carriers – does not insulate Massachusetts Delivery Association members from complying with the Commonwealth's generally-applicable wage-and-hour laws. These background laws, applying to employers in all industries, do not "relate to" the transportation of property and are not the type of regulations Congress intended the FAAAA to preempt. Even if such generally-applicable laws could be preempted based on a "significant impact" on a carrier's prices, routes, or services, MDA has made no such showing here.

STATEMENT OF ISSUES

MDA claims the FAAA preempts one prong ("Prong B") of M.G.L. c. 149 § 148B(a)'s three-prong definition of "employee." The appeal presents two issues:

I. Does Article III jurisdiction exist over MDA's challenge to one prong of section 148B(a)'s conjunctive three-prong test, where failing *any* of the prongs

would preclude MDA's members from classifying their drivers as independent contractors, no record evidence establishes that MDA's members satisfy the other two prongs, and it is thus unlikely that the relief sought will affect MDA's members in a concrete way?

II. Does the FAAAA preempt Massachusetts's generally applicable requirement, embodied in section 148B(a)'s Prong B, bearing on whether a worker is an "employee" for purposes of the Commonwealth's wage-and-hour laws?

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1291 over this appeal from a final judgment. The district court lacked jurisdiction, however, because MDA has not established that an Article III case or controversy exists. *See* Part I *infra*; *United Seniors Ass'n, Inc. v. Philip Morris USA*, 500 F.3d 19, 23 (1st Cir. 2007).

STATEMENT OF THE CASE

A. Federal Statutory History

In 1978, Congress enacted the Airline Deregulation Act of 1978 (ADA). Pub. L. No. 95-504, 92 Stat. 1705 (1978). The ADA curbed federal economic regulation of the airline industry, enacting a policy of "maximum reliance on competitive market forces." ADA § 3(a), 92 Stat. 1705. To "ensure that the States would not undo federal deregulation with regulation of their own," *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992), and to "prevent conflicts and inconsistent regulation[]," H.R. Rep. No. 1211, 95th Cong., 2d Sess. 16 (1978), the

ADA included a provision preempting state laws "relating to the rates, routes, or services" of any air carrier. 49 U.S.C. App. § 1305(a)(1).

Two years later, Congress began deregulating the trucking industry. *See* Motor Carrier Act of 1980 (MCA), Pub. L. No. 96-296, 94 Stat. 793 (1980). Like the ADA, the MCA sought to reduce federal regulation. The MCA did not, however, include a similar preemption provision. As a result, by 1994, "41 jurisdictions" had regulated, "in varying degrees, intrastate prices, routes, and services of motor carriers." H.R. Conf. Rep. 103-677, at 86 (1994). This economic re-regulation disadvantaged delivery companies organized as motor carriers (like UPS), because air carrier competitors (like Federal Express) were immune from similar regulation under the ADA. *Id*. at 87 (citing *Fed. Express Corp. v. Cal. Pub. Utils. Comm'n*, 936 F.2d 1075 (9th Cir. 1991)).

To address these problems, in 1994, Congress included language in the FAAAA to extend the ADA's preemption provision to motor carriers. 49 U.S.C. § 14501(c)(1). Congress believed the provision would eliminate the 41-jurisdiction "patchwork" of economic regulation, allow motor-carrier service options and prices to "be dictated by the marketplace" rather than "by an artificial regulatory structure," and put motor and air carriers on the same footing. H.R. Conf. Rep. 103-677, 87-88.

Congress's intent was to preempt then-common forms of state economic regulation like "entry controls, tariff filing and price regulation." *Id*. at 86. Congress believed "entry controls" should be preempted because they "often served to protect [incumbent] carriers" and "restrict[ed] new applicants from directly competing." *Id*. Congress found "price regulations" should be preempted too, as they artificially controlled prices. *Id*. at 86-87. In some cases these "price regulations" made it more cost effective for "small package express business[es]" to ship goods out of state and back in again to avoid higher intrastate rates. *Id*. at 88. Congress sought to eliminate this "patchwork" of state economic regulations that imposed "significant inefficiencies, increased costs, [and] reduc[ed …] competition." *Id*. at 87.

Congress did not, however, also intend to immunize motor carriers from background state laws under which all industries operate. H.R. Conf. Rep. No. 103-677, at 86. For instance, it did not intend the provision to "change the application of State tax laws to motor carriers." *Id*. at 85. Likewise, Congress emphasized that regulations governing "safety, financial responsibility relating to insurance, transportation of household goods, vehicle size and weight and hazardous materials routing" were "not [regulations of] a price, route, or service." *Id*. at 84. Congress further indicated that this list was not "all inclusive." *See id*. at 84 (list serves "merely to specify some of the matters which are not" prices, routes,

or services, although states should not employ their authority "as a guise for continued economic regulation as it relates to prices, routes or services").

Additionally, Congress recognized ten jurisdictions that did not regulate "intrastate prices, routes and services of motor carriers." H.R. Conf. Rep. No. 103-677, at 86. Of those ten, at least eight had minimum wage laws, each with its own respective definitional section (and rate), and seven had prevailing wage laws.[1] Congress thus did not view state labor laws as the type of anti-competitive economic regulation the FAAAA preempted. *See also id*. at 88 (explaining provision's purpose "to preempt economic regulation by the States, not to alter, determine or affect in any way … whether any carrier is or should be covered by one labor statute or another").

Contemporaneous sources confirm that view. As President Clinton explained in his signing statement, "[s]tate regulation preempted under this provision takes the form of controls on who can enter the trucking industry within a State, what they can carry and where they can carry it, and whether competitors can sit down and arrange among themselves how much to charge shippers and

[1] *See* Alaska Stat. §§ 23.10.065 & 23.10.145 (1990); Del. Code Ann. tit. 19, §§ 901-902 (1990); 1992 D.C. Laws 9-248, codified at D.C. Code §§ 36-220 & 36-220.2 (1992); Me. Rev. Stat. tit. 26, §§ 663-664 (1993); Md. Code Ann., Lab. & Empl. §§ 3-401 & 3-413 (1992); 1990 N.J. Sess. Law Serv. 18, codified at N.J. Stat. Ann. § 34:11-56a4 (1990) & 34:11-4.1 (1991); Vt. Stat. Ann. tit. 21, §§ 383-384 (1993) (not including prevailing wage provision); Wis. Stat. §§ 104.01-104.02 (1975).

consumers." President William J. Clinton, Statement on Signing the Federal Aviation Administration Authorization Act of 1994, 2 Pub. Papers 1494 (Aug. 23, 1994). Similarly, a U.S. Department of Transportation report submitted during the House Subcommittee on Transportation's hearing on the FAAAA's preemption provision defined state "economic regulation" of transportation to be "control of entry to the industry or parts of the industry, of exit from the industry, over rates charged, over mergers, etc." W. Bruce Allen, *et al*., *The Impact of State Economic Regulation of Motor Carriage on Intrastate and Interstate Commerce*, (May 1990), p. 35, n. 13.[2]

B. Massachusetts' Wage-and-Hour Laws

Section 148B delineates the workers protected under the wage-and-hour laws set forth in M.G.L. c. 149 and 151. M.G.L. c. 149, § 148B(a). Most workers classified as "employees" under section 148B are guaranteed a minimum wage of $8.00 per hour, M.G.L. c. 151, § 1, a voluntary, unpaid thirty-minute meal break every six hours, M.G.L. c. 149, § 100, and an optional, unpaid day off if required to work on Sunday. *Id.* § 47. In certain instances, employers must pay employees overtime premiums for hours worked each week in excess of forty, M.G.L. c. 151, § 1A, and maintain certain records. M.G.L. c. 149, § 52C & c. 151, § 15. An

[2] Available at http://ntl.bts.gov/lib/5000/5500/5577/771a.pdf (last visited March 10, 2014).

employer additionally may not engage in certain forms of employment discrimination and other prohibited practices. *See* Argument III.B.3 *infra*.

Section 148B establishes a three-part test for classifying a worker as an independent contractor (or other non-employee status). M.G.L. c. 149, §148B. Where an employer cannot meet its burden and also has violated one of the wage-and-hour laws in § 148B(d), the Attorney General may seek criminal and civil penalties. *Id*. § 148B(d); *see also id*. §§ 27C(a)(1)-(2), (b)(1).

The second prong of 148B(a) – "Prong B" – asks whether a service performed by a worker is "outside the usual course of the business of the employer." Every section 148B analysis therefore "involves its own set of facts" unique to the company's business. *See* "Advisory from the Attorney General's Fair Labor Division on M.G.L. c. 149, § 148B, 2008/1," ("AG Advisory"), p. 6.[3] Under this fact-specific analysis, there can be and in fact "are legitimate independent contractors and business-to-business relationships in the Commonwealth," *see id*. at 5, including in the courier and motor-carrier industries.[4]

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[3] Available at http://www.mass.gov/ago/docs/workplace/independent-contractor-advisory.pdf (last visited March 10, 2014).

[4] Section 148B does not "ban independent contractors [either] for motor carriers" or "for all businesses," as MDA (Br. 48) and its *amici* suggest, and as the court erroneously concluded in *Sanchez v. Lasership, Inc.*, 937 F.Supp.2d 730, 742 (footnote continued)

C. Facts and Proceedings Below

In 2010, MDA filed suit on behalf of its members—delivery-service companies operating in Massachusetts—to enjoin enforcement of section 148B against those companies, claiming section 148B was preempted by the FAAAA and violated the Commerce Clause. JA 4 (entry 1). MDA later amended its complaint, narrowing the requested relief to enjoining enforcement of only "Prong B." JA 20, ¶¶ 1, 28-34 (Count I), 38-42 (Count III). The district court granted the Attorney General's motion to dismiss on *Younger* abstention grounds, a decision this Court reversed. *Massachusetts Delivery Ass'n v. Coakley*, 671 F.3d 33, 35 (1st Cir. 2012).

On remand, MDA nominated Xpressman Trucking and Courier, Inc. to serve as the test case for determining preemption. *See New Hampshire Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 70 (1st Cir. 2006). "Xpressman is a same-day delivery service company." JA 59 ¶ 7. It provides "delivery services," "scheduled route

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(footnote continued)
(E.D. Va. 2013). *See infra* Section III.B.5 (discussing *Sanchez* court's multiple errors in ruling section 148B preempted). Indeed, in 2013, one district judge applied section 148B in two different cases, involving different delivery companies, and came to opposite conclusions regarding independent-contractor classification. *Debnam v. FedEx Home Delivery*, 2013 WL 5434142 (D. Mass. Sept. 27, 2013) (O'Toole, J.) (driver was independent contractor, engaged in "legitimate ... business-to-business relationship" with FedEx); *Anderson v. HomeDeliveryAmerica.com. Inc.*, 2013 WL 6860745 (D. Mass. Dec. 30, 2013) (O'Toole, J.) (drivers were employees; distinguishing *Debnam*).

services," and "on-demand services." *Id.* at ¶¶ 8, 11. Xpressman cannot satisfy Prong B with respect to its drivers, because they perform delivery work within its usual course of business. JA 26 ¶ 21; AG Advisory, pp. 3, 6 (employer's definition of its business governs "usual course of business" analysis). *See also infra*, pp. 13-14 & n.5 (record lacks evidence establishing Xpressman satisfies statute's *other* two prongs).

Two weeks after the parties jointly moved to extend the discovery period to permit the Commonwealth to explore the factual basis for MDA's allegations about the impact of Prong B on Xpressman, MDA moved for summary judgment. JA 11-12 (entries 64-68), 155-156. MDA argued that the FAAAA preempts Prong B because Prong B triggers a host of state and federal laws and also forces MDA's members to comply with "industry standards." JA 46-47, 155.

The Attorney General responded that summary judgment should instead enter in her favor, because MDA had not shown either that the case presented a justiciable case or controversy under Article III, or that compliance with Massachusetts wage-and-hour laws has a significant effect on Xpressman's prices, routes, and services. JA 155-156. Alternatively, the Attorney General asked that MDA's motion be denied under Fed. R. Civ. P. 56(d), because the Attorney General had not had an opportunity to conduct critical discovery on MDA's factual

assertions. JA 155-156. *See also* Affidavit of Kate Fitzpatrick, Ex. A to Attorney General's Statement of Disputed Facts (filed Nov. 30, 2012).

The district court ruled that it had jurisdiction because, in its view, section 148B's three prongs, each of which must be satisfied to classify a driver as an independent contractor, presented distinct barriers to such a classification. JA 157-158. Therefore, a decision on Prong B alone would provide MDA "effectual relief" by allowing its members to "clear a barrier" to independent-contractor classification of drivers. *Id*. at 157 (quoting *Weaver's Cove Energy, LLC v. Rhode Island Coastal Res. Mgmt. Council*, 589 F.3d 458, 468 (1st Cir. 2009)).

On the merits, the court ruled that MDA had failed to demonstrate that the FAAAA preempts Prong B. Relying on the Supreme Court's recent decision in *Dan's City Used Cars, Inc. v. Pelkey*, __ U.S. ___, 133 S. Ct. 1769, 1779 (2013), the court determined that because section 148B "does not relate to the movement of property, the FAAAA cannot preempt it." JA 160. The district court then rejected MDA's "facial" and fact-based challenges to Prong B. JA 166-168.

STANDARD OF REVIEW

This Court must first review *de novo* the district court's determination that Article III jurisdiction exists. *Philip Morris USA*, 500 F.3d at 23. If there is jurisdiction, the federal-preemption question is also reviewed *de novo*. *DiFiore v. American Airlines, Inc.*, 646 F.3d 81, 85 (2011).

SUMMARY OF ARGUMENT

I. Article III's case-or-controversy requirement prevents courts from issuing advisory opinions. MDA has failed to meet its burden of demonstrating Article III jurisdiction, where a declaration on Prong B may not be felt by MDA's members because they may not satisfy section 148B's other two prongs and thus may still have to classify their drivers as independent contractors.

II. The FAAAA does not preempt generally applicable "background laws," because their impact on carriers' prices, routes, and services is *per se* "tenuous" and *per se* "insignificant." Section 148B's definition of "employee" is the quintessential "background law" that applies to every industry in the Commonwealth and that arises in an area – general employment law – that is separate and distinct from the regulation of inter-firm competition that concerned Congress in the FAAAA. The Seventh Circuit has recently recognized that such "state laws of general application that provide the backdrop for private ordering" are "too tenuously related to the regulation of the rates, routes, and services in the trucking industry to fall within the FAAAA's preemption rule." *S.C. Johnson & Son v. Transport Corp. of America*, 697 F.3d 544, 558-59 (7th Cir. 2012). Other Circuits besides the Seventh have effectively recognized such a *per se* rule regarding general "background laws," particularly in the worker-protection area. The Seventh Circuit's approach is also fully consistent with the decisions of both

the Supreme Court and this Court. In addition, the presumption against preemption, the development of the law under ERISA's cognate preemption provision, and the FAAAA's legislative history all confirm the correctness of excluding background laws from preemption. And the fact that Section 148B defines criminal conduct makes preempting a background law particularly inappropriate here.

III. Even if generally applicable background laws like section 148B could be preempted upon an evidentiary showing that they had a "significant impact" on prices, routes, or services, MDA has failed to make that showing here, for two reasons. First, MDA vastly overstates the number of legal requirements actually triggered by section 148B, by including in its analysis numerous federal and state laws that use different definitions of employee. Second, as to laws actually triggered by section 148B—certain provisions of M.G.L. chapters 149 and 151—MDA either has not shown that such laws would have any effect on Xpressman in light of the record facts, or has misstated or greatly exaggerated those effects.

IV. MDA's argument that section 148B is "facially preempted" fails, because MDA cannot show from the language of section 148B alone that it has an impermissibly "significant impact" on prices, routes, or services. MDA's argument that section 148B is preempted due to its effect on out-of-state

companies fails because MDA lacks standing and did not raise the argument below.

ARGUMENT

I. No Article III Case or Controversy Exists.

The district court erred in ruling that MDA alleged a justiciable case or controversy. MDA essentially seeks an advisory opinion on whether one prong of section 148B's three-prong test is preempted. Because the test is conjunctive, MDA must prove that Xpressman's drivers meet all three prongs to classify them as independent contractors. *See Somers v. Converged Access, Inc.*, 454 Mass. 582, 589, 911 N.E.2d 739, 747 (2009). It has made no effort to do so. As a result, even if this Court determined that the FAAAA preempts Prong B, its decision may never be "felt in a concrete way by [Xpressman]" because "decisive questions remain open"—specifically, whether Xpressman's drivers satisfy Prongs A and C. *See City of Fall River v. F.E.R.C*, 507 F.3d. 1, 6, 7 (1st Cir. 2007).

Given the conjunctive nature of section 148B(a), *Weaver's Cove*, 589 F.3d 458, is inapposite. There the plaintiff established Article III standing without showing it met certain remaining, sequential permitting steps, because the challenged action essentially prevented it even from trying to satisfy those next steps. *Id*. at 467-468. No such sequence of steps exists here—Xpressman was free to show simultaneously that it satisfied all three prongs of section 148B(a) but did

not do so (probably because it seems unlikely to meet its burden under Prong A[5]).

Instead, MDA seeks an advisory opinion on one isolated, hypothetical element of a misclassification claim. *See Columbian Fin. Corp. v. BancInsure, Inc.*, 650 F.3d 1372, 1382 (10th Cir. 2011) (declaratory judgment was impermissibly advisory because court lacks jurisdiction over actions seeking "an advance ruling on an affirmative defense" or "an element of [a] cause of action"); *Green v. Lehman*, 744 F.2d 1049, 1052-1053 (4th Cir. 1984) (no justiciable controversy where midshipman disenrolled for two separate reasons but complaint challenged only one).

Put differently, holding Prong B preempted is unlikely to redress MDA's members' purported injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) ("irreducible constitutional minimum of standing" requires, *inter alia*, that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision'" (internal citations omitted)). MDA's members still would have to classify their drivers as employees, unless they show the drivers satisfy Prongs A and C. Consequently, the complaint should have been dismissed

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[5] Xpressman likely exercised sufficient direction and control over its "Independent Contractors Bank Route Drivers" to fail Prong A. *See* AG Advisory, p. 3. Xpressman controlled how drivers made deliveries, documented and executed deliveries, identified themselves, and secured packages. *See* Addendum pp. 10, 14 (Ex. 1 to Affidavit of Jocelyn B. Jones supporting Attorney General's Cross-Motion for Summary Judgment).

due to MDA's failure to meet its burden of demonstrating jurisdiction. *Id*. at 561 (party invoking jurisdiction bears "burden of establishing these elements [of standing]").

II. As a Matter of Law, the FAAAA Does Not Preempt Generally Applicable Labor "Background Laws" Such as Section 148B, Because Their Impact on a Carrier's Prices, Routes, and Services Is *Per Se* Not "Significant."

The FAAAA expressly preempts state enactments "related to a price, route, or service of any motor carrier … with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The "related to" language is nearly identical to the ADA, *see* 49 U.S.C. § 41713, and the two provisions have been generally interpreted interchangeably. *See, e.g.*, *Rowe v. New Hampshire Motor Transport Ass'n*, 522 U.S. 364, 370 (2008). In its initial decision construing the ADA's "relating to" language, the Supreme Court looked to cases construing another statute with "relate-to" preemption phrasing, ERISA, and held that "State enforcement actions having a connection with or reference to airline 'rates, routes, or services' are preempted under" the ADA. *Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 384 (1992); *see Rowe*, 552 U.S. at 370 (extending standard to FAAAA). Again borrowing from ERISA case law, *Morales* elaborated that State laws affecting rates, routes, or services "in too tenuous, remote, or peripheral a manner" will not satisfy this standard. 504 U.S. at 390. On the other hand, preemption will occur

"where state laws have a 'significant impact' related to Congress' deregulatory and preemption-related objectives." *Rowe*, 552 U.S. at 371.

This Court has recognized that these decisions do not "provide[] an easily applied test":

> The difficulty is that the key connector in the statute—"related to"—is highly elastic, and so of limited help, given that countless state laws have *some* relation to the operations of airlines and thus *some* potential effect on the prices charged or services provided. Equally general is the gloss supplied by the cases of a "'significant impact' related to Congress' deregulatory and pre-emption related objectives," rather than one merely "tenuous, remote, or peripheral."

DiFiore, 646 F.3d at 86 (citations omitted). As a result, this Court has carefully analyzed both the Supreme Court decisions and case law from other Circuits to ascertain the "dividing line" between preemption and non-preemption in a particular case. *Id*. at 87. At the same time, this Court has emphasized that "there are numerous claims that survive preemption," *Bower v. Egyptair Airlines Co*., 731 F.3d 85, 93 (1st Cir. 2013), and has declined to "endorse [a] view" "effectively exempt[ing] airlines from state taxes, state lawsuits of many kinds, and perhaps most other state regulation of any consequence." *DiFiore*, 646 F.3d at 89.

This case plainly falls on the side of non-preemption. As explained below, the FAAAA does not preempt generally applicable labor "background laws" such as section 148B, because their impact on a carrier's prices, routes, and services is *per se* "tenuous" and "insignificant."

A. State Worker-Protection and Other General Background Laws Are *Per Se* "Tenuous" and "Remote" for Purposes of FAAAA Preemption.

Numerous courts approaching similar cases have followed a sensible rubric in confining FAAAA preemption to the scope Congress intended: background state statutes are not preempted if they are generally applicable and not directed to a particular area of federal authority.

In *S.C. Johnson & Son v. Transport Corp. of America*, 697 F.3d 544, 558-59 (7th Cir. 2012), a manufacturing company alleged it had been damaged by bribery and kickback arrangements between several ground-transportation companies and an employee responsible for selecting which carriers the manufacturer would employ. Because of the bribes and kickbacks, the employee had chosen carriers, some unqualified, charging above-market rates. 697 F.3d at 546-47. The manufacturer asserted that the carriers fraudulently procured the manufacturer-carrier contracts (by failing to disclose that they were bribing its employee), engaged in "civil conspiracy to violate the Wisconsin [criminal] bribery statute," and violat[ed] … the Wisconsin Organized Crime Control Act." *Id*. at 546. The Seventh Circuit held that the claims based on fraud in the manufacturer-carrier relationship *were* preempted. *Id*. at 557. Relying on *Morales*, the court reasoned that the fraud claims sought "to substitute a state policy … for the agreements that the parties [manufacturer and carriers] had reached" and thereby "displace the

[manufacturer-carrier] market," in violation of the FAAAA's goal of unfettered competition between carriers for customers. *Id*.

The bribery- based and Organized Crime Act claims fared differently. *S.C. Johnson*, 697 F.3d at 557-59. Those claims relied on Wisconsin laws serving as the general legal "backdrop" for the manufacture-carrier contracts, rather than laws that sought to override the terms of the contracts themselves:

> Neither . . . statute provides non-bargained alternatives to the contractual terms that the parties selected. … We have here state laws of general application that provide the backdrop for private ordering; it is not necessary or even helpful to lard a contract with clause after clause promising not violate such laws, whether those laws are the anti-gambling laws to which the Supreme Court referred in *Morales* [as not preempted] or they are *minimum wage laws*, safety regulations (as recognized in *Rowe* [as not preempted]), zoning laws, laws prohibiting theft and embezzlement, or laws prohibiting bribery or racketeering.

Id. at 558 (emphasis added). The court reasoned that such "backdrop" laws—including minimum-wage laws—had too "remote" and "tenuous" a relationship with the underlying manufacturer-company market transaction, because they "operate[d] one or more steps away from it":

> Another way to look at this problem is to consider the production function that drives market transactions in the transportation industry. This function … typically includes inputs such as labor, capital, and technology. These inputs are often the subject of a particular body of law. For example, *labor inputs are affected by a network of labor laws, including minimum wage laws, worker-safety laws, anti-discrimination laws, and pension regulations.* Capital is regulated by banking laws, securities rules, and tax laws, among others. Technology is heavily influenced by intellectual property laws. Changes to these background laws will ultimately affect the costs of these

> inputs, and thus, in turn, the "price … or service" of the outputs. *Yet no one thinks that the … FAAAA preempts these and the many comparable state laws …, because their effect on price is too "remote."* Instead, laws that regulate these inputs operate one or more steps away from the moment at which the firm offers its customer a service for a particular price. The laws prohibiting bribery, racketeering, embezzlement, … and gambling similarly set basic rules for a civil society, rather than particular terms of trade between parties to a transaction.

Id. at 558 (emphasis added). Ultimately, the anti-bribery laws were "too tenuously related to the regulations of the rates, routes, and services in the trucking industry" to be preempted; "an effect on price may be necessary for preemption, but it is not sufficient." *Id*. at 558-59.

Here, the employment laws affected by section 148B's definition of "employee," and the definition itself, also do not override the negotiated terms of the ground-transport agreements between delivery services (like Xpressman) and their customers—the market in which the FAAAA wants unfettered firm-to-firm competition. They instead are just the sort of "backdrop" labor laws that, per the Seventh Circuit, "no one" views as preempted. *S.C. Johnson*, 697 F.3d at 558. They clearly fall outside FAAAA preemption as categorically "remote" or "tenuous[ ]." *Id*. at 558, 559.

This result accords with those reached by other courts finding state background laws to be too "remote" or "tenuous" for FAAAA preemption, even if other cases lack the extended explanation that the Seventh Circuit provides. For example, in *Californians For Safe and Competitive Dump Truck Transp. v.*

Mendonca, 152 F.3d 1184 (9th Cir. 1998), the Ninth Circuit considered an FAAAA preemption challenge to California's "prevailing wage" statute, a "state law[ ] ... traditionally within a state's police powers[.]" *Id*. at 1186. As in *S.C. Johnson*, the employer made a "higher cost equals preemption" argument regarding this background law, contending it "increase[d] its prices by 25%, cause[d] it to utilize independent owner-operators, and compel[led] it to re-direct and re-route equipment to compensate for lost revenue." *Id*. at 1189. And, like the Seventh Circuit, the Ninth Circuit rejected that argument, "hold[ing] that the [higher-cost] effect is no more than indirect, remote, and tenuous." *Id*.

The Sixth Circuit reached an identical result in *Wellons v. Northwest Airlines, Inc*., 165 F.3d 493 (6th Cir. 1999), rejecting an ADA preemption challenge to a Michigan statute prohibiting racial discrimination in employment, "[b]ecause the plaintiff's claims bear only the most tenuous relation to airline rates, routes, or services[.]" *Id*. at 494. And the Second Circuit, while not explicitly employing the "tenuous" standard, reached a similar result regarding an airline worker's age-discrimination claim, explaining that "[p]ermitting full operation of New York's age discrimination law will not affect competition between airlines—the primary concern underlying the ADA." *Abdu-Brisson v. Delta Air Lines, Inc*.,

128 F.3d 77, 84 (2nd Cir. 1997);[6] *accord Parise v. Delta Airlines, Inc.*, 141 F.3d 1463 (11th Cir. 1998) (airline employee's State-law age-discrimination claim not ADA-preempted). Decisions in other Circuits thus echo the Seventh by rejecting preemption of background worker-protection laws. They should be followed here.

B. This Approach to Background Laws Is Consistent with Decisions of the Supreme Court and this Court Finding Preemption.

The decisions of the Supreme Court and this Court are fully consistent with the Circuit decisions that have held general State employment statutes and other State background laws to be *per se* "tenuous" and "remote." The four Supreme Court decisions finding ADA or FAAAA preemption all addressed State laws that did *not* involve "backdrop" fields and instead directly regulated relations between carriers and either their customers or other transport-market participants. *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 133 S. Ct. 2096 (2013) (marine terminals required to hire carriers that comply with certain parking regulations); *Morales*, 504 U.S. at 374 (law regulating airline fare advertisements); *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) (law regulating frequent flyer programs); *Rowe*, 552 U.S. at 367 (law "regulat[ing motor carriers'] delivery

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[6] After making this categorical ruling, the Second Circuit added that "even were we to consider the actual impact of New York human rights laws on Delta's prices, we would reach the same result on the record before us." *Id.*; *see id.* at 84-86 (extended record-specific discussion).

of tobacco to customers").[7] Those laws were therefore ones that, in *S.C. Johnson*'s words, *did* "substitute a state policy" for the free-market relations that would otherwise control carriers' relationships with their customers (or other transport-market participants), 697 F.3d at 546, and hence were potentially subject to preemption.[8] At the same time, and while not labeling them as such, the Supreme

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[7] *American Trucking* held that because certain parking-related "concession agreements" imposed by the Port of Los Angeles on trucking companies were enforceable through criminal sanctions imposed on the Port's freight-terminal operators with whom they contracted, the "force and effect of law" requirement of FAAAA's preemption clause was satisfied. 133 S. Ct. at 2100, 2103-04. "All parties agree[d]" that this criminal enforcement of the agreements, "relate[d] to a motor carrier's price, route, or service with respect to transporting property." *Id*. at 2102. Thus the Court had no need to interpret that phrase in finding preemption.

[8] Earlier in the *American Trucking* litigation, a district court addressed whether the FAAAA preempted the port's enhancement of California's generally applicable background laws with a municipal ordinance requiring motor carriers to use employees for port operations. Additionally, and critically, however, the port also sought to compel carriers' compliance by imposing criminal liability on any terminal that allowed non-complying carriers to transport goods from its premises. *See* n.7 *supra*. The ordinance, in other words, was directly regulating the carrier *and* interfering with the carrier's transport-market relationships to accomplish that goal indirectly. *See ATA*, 133 S.Ct. at 2103-2104; *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384, 407-409 (9th Cir. 2011); *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 2010 WL 3386436 *19 (C.D. Cal. Aug. 26, 2010).

Section 148B does neither. It does not direct how MDA's members perform deliveries for their clients. Nor does it shift the regulatory goal downstream by overriding members' ordinary contractual arrangements with their clients or compelling clients to mandate the form of service (*i.e.*, delivery by an employee). Rather it is a generally-applicable law defining how employers must classify their workers for purposes of Massachusetts' wage-and-hour laws.

(footnote continued)

Court twice pointed to background laws that would *not* be preempted. *Morales*, 504 U.S. at 390 ("state laws against gambling and prostitution as applied to airlines"); *Rowe*, 552 U.S. at 375 ("a prohibition on smoking in certain public places").[9]

And this Court, in the *Rowe* litigation, *declined* to preempt "a generally applicable law barring any person from knowingly delivering contraband tobacco ... insofar as the law pertains to carriers." *Rowe*, 448 F.3d at 80. Citing the Supreme Court's unwillingness to preempt gambling and preemption laws in *Morales*, 504 U.S. at 390, this Court stated that it "underst[oo]d the *Morales* Court to have meant that states may continue to enjoy the power to ban primary conduct,

(footnote continued)

[9] Similarly, *Dan's City*, where the Supreme Court concluded the FAAAA did not preempt Pelkey's consumer-protection claim relating to disposal of his towed vehicle, acknowledges a distinction between state background laws and laws regulating the carrier-customer relationship (there, the relationship between Dan's City towing company and a landlord who had contracted with Dan's City to tow Pelkey's vehicle). *See* 133 S.Ct. at 1779 (explaining the state law "has neither a direct nor an indirect connection to any transportation services a *motor carrier offers its customers*") (emphasis added); *see also id*. at 1778-1779 (phrase "with respect to transportation of property" "massively limits the scope of preemption"; requires that state's law "concern a motor carrier's 'transportation of property'").

and that the ADA and FAAAA do not preempt laws applying these prohibitions to airplanes and carriers." 448 F.3d at 80.[10]

Five years later, this Court reviewed the then-existing range of Circuit decisions and said that those "cases confirm [its] view that the Supreme Court would be unlikely – with some possible qualifications – to free airlines from most conventional common law claims for tort, *from prevailing wage laws*, and [from] ordinary taxes," even though "such measures must impact airline operations – and so, indirectly, may affect fares and services." *DiFiore*, 646 F.3d at 87 (emphasis added).[11] Although the Court ultimately held preempted a Massachusetts law that prohibited companies from charging customers a fee that the customers "would reasonably expect to be given to [the] service employee ... in lieu of, or in addition to, a tip," the Court made clear that its ruling was not meant to extend to preempt employment laws generally: "Importantly, the tips law does more than simply regulate the employment relationship between the skycaps and the airlines; unlike the cited circuit cases, the tips law has a *direct connection* to air carrier prices and

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[10] The Supreme Court's subsequent grant of certiorari did not include this ruling. *Rowe*, 552 U.S. at 369.

[11] *Accord id*. at 89 ("We do not endorse American's view that state regulation is preempted whenever it imposes costs on airlines and therefore affects fares," since "[t]his would effectively exempt airlines from ... most other state regulation of any consequence").

services and can fairly be said to regulate both." *Id*. (emphasis in original). Thus, the law "directly regulates how an airline service is performed and how its price is displayed to customers – not merely how the airline behaves as an employer or proprietor." *Id*. at 88. In short, and as in *Morales*, *Wolens*, and *Rowe*, the preempted law extended to a direct regulation of the carrier-customer relationship.[12]

Most recently, this Court held that the ADA preempted a common-law negligence claim by a customer against an airline for failures in screening passengers boarding international flights for attempted child abductions. *Bower*, 731 F.3d at 96-97. The Court thus again was addressing an attempt to regulate the carrier-customer relationship in the competitive air-travel market, rather than the relationship between carriers and their employees. And even regarding such carrier-customer regulation, the Court made clear that common-law claims generally applicable to all businesses would not be preempted: Unlike "more generalized tort cases" such as "dealing with drunks" or "taking general care to

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[12] The Court reiterated its *DiFiore* holding, this time with respect to skycaps' common-law claims regarding the same carrier practice, in *Brown v. United Airlines*, 720 F.3d 60, 64 (1st Cir. 2013). Also directly regulating the carrier-customer relationship were the state laws at issue in *Buck v. American Airlines*, Inc., 476 F.3d 29 (1st Cir. 2007) (state-law challenges to ticket refund practices), and *United Parcel Service, Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003) (Puerto Rico tax-collection regime directly regulating carriers' parcel delivery to customers).

avoid deplaning injuries," the plaintiff's passenger screening claim "would impose duties on the airlines beyond what is expected of nearly every other business." *Id.* at 97. *Bower* thus supports the Seventh Circuit's approach, and the Court should adopt it here.

C. Multiple Considerations Confirm the Correctness of Holding Worker-Protection and Other General Background Laws to Be *Per Se* "Tenuous" and "Remote."

Several traditional tools of statutory construction confirm the Seventh Circuit's approach to background laws. The presumption against preemption, the Supreme Court's construction of ERISA's cognate preemption language, and the FAAAA's legislative history all point to background laws being outside the FAAAA's preemptive reach.

1. The Presumption Against Preemption Fully Applies to the FAAAA and Counsels Against According That Statute a Wide Preemptive Sweep of State Background Laws.

"In all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied,'" the Supreme Court "'start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U. S. 470, 485 (1996)). The Supreme Court has specifically invoked this presumption, and used its traditional language, when construing the FAAAA's preemption provisions:

> Preemption analysis "starts with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic*, ... 518 U.S. [at] 485 .... Section 14501(c)(2)(A) [of the FAAAA] seeks to save from preemption state power "in a field which the States have traditionally occupied." *Ibid*.

Columbus v. Ours Garage & Wrecker Serv., 536 U.S. 424, 438 (2002); *accord Mendonca*, 152 F.3d at 1186-87 (invoking presumption when construing FAAAA's "relating to" preemption language); *see generally DeCanas v. Bica*, 424 U.S. 351, 356 (1976) ("States possess broad authority under their police powers to regulate the employment relationship").

This Court has declined to invoke the presumption against preemption twice regarding the ADA, *Brown v. United Airlines*, 720 F.3d 60, 68 (1st Cir. 2013); *DiFiore*, 646 F.3d at 86, and once regarding the FAAAA "within the field of air transportation," *Flores-Galarza*, 318 F.3d at 336 (not discussing Supreme Court's previously quoted language regarding FAAAA preemption in *Columbus*, 536 U.S. at 438). The reason is that "[i]n matters of air transportation, the federal presence is both longstanding and pervasive." *Brown*, 720 F.3d at 68. Whatever the effect of *Columbus* on these rulings "within the field of air transportation,"[13] they have

[13] Aside from their tension with *Columbus*, these air-transport cases conflict with decisions in four other Circuits invoking the presumption against preemption in ADA cases. *Air Transport v. City & County of San Francisco*, 266 F.3d 1064, 1070 (9th Cir. 2001); *Wellons*, 165 F.3d at 495; *Parise*, 141 F.3d at 1465; *Abdu-Brisson*, 128 F.3d at 83.

no bearing on FAAAA cases *outside* the air-transport context, such as the present claim regarding driver-based delivery services. *Columbus* must control in non-air cases, *see* 536 U.S. at 438, and the presumption against preemption fully applies here.

The sweeping scope of preemption MDA urges is directly at odds with the presumption against preemption. That presumption again requires showing that it was the "clear and manifest purpose of Congress" to preempt the State law at issue. *Columbus*, 536 U.S. at 438. MDA can point to no "clear and manifest" Congressional purpose to preempt wide swaths of general state background laws one or more steps removed from the FAAAA-governed carrier-customer market relationship. The presumption against preemption should be given full effect here.

2. The Restrictive Scope Given ERISA's "Relate to" Preemption Provision Supports a Similarly Modest Construction of the FAAAA's Cognate Language.

As previously noted, the Supreme Court looks to its decisions construing ERISA's "relates to" preemption language when interpreting the "relating to" phrasing in both the ADA, *see Morales*, 504 U.S. at 383-84, and the FAAAA, *see Dan's City*, 133 S. Ct. at 1778. The "connection with" and "tenuous, remote, or peripheral" standards that *Morales* adopted for ADA preemption indeed originated in ERISA preemption cases. *Morales*, 504 U.S. at 384, 390.

It is therefore significant that soon after *Morales*, the Supreme Court decided several ERISA cases applying the "connection with" and "tenuous, remote, or peripheral" standards that notably reduced ERISA's preemptive reach by declining to preempt generally applicable state background laws. *N.Y. Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661 (1995) ("nothing in the language of [ERISA] or the context of its passage indicates that Congress chose to displace general health care regulation"); *Cal. Div. of Labor Standards Enf. v . Dillingham Construction*, 519 U.S. 316, 334 (1997) (California prevailing-wage law "is 'no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate'") (quoting *Travelers*, 514 U.S. at 668).

Soon thereafter, the Second and Ninth Circuits relied upon the Supreme Court's more limited reading of ERISA preemption in *Travelers* when declining to find FAAAA or ADA preemption of state background laws. *Abdu-Brisson*, 128 F.3d at 82-83; *Mendonca*, 152 F.3d at 1188-89. This Court has previously seen itself as constrained in FAAAA and ADA cases to follow the broad ERISA constructions as they existed 22 years ago, at the time of *Morales*, and to disregard the substantial narrowing of the ERISA standard since then. *Buck v. American Airlines*, 476 F.3d 29, 35 n.7 (1st Cir. 2007); *Flores-Galarza*, 318 F.3d at 335. The Court is now freed of this constraint, since in the past year the Supreme Court has

cited a post-*Morales* ERISA case—indeed, *Travelers* itself—in support of a ruling that *limited* FAAAA preemption. *Dan's City*, 133 S. Ct. at 1778 (citing *Travelers* as evidence that "the breadth of the words 'related to' does not mean the sky is the limit"); *cf. Carpenters Local Union No. 26 v. U.S. Fid. & Guar. Co.*, 215 F.3d 136, 141 (1st Cir. 2000) ("When emergent Supreme Court case law calls into question a prior opinion of another court, that court should pause to consider its likely significance before giving effect to an earlier decision").

Current ERISA-preemption standards are significant here in two respects. First, courts "look … to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Travelers*, 514 U.S. at 656; *see Abdu-Brisson*, 128 F.3d at 82 (applying *Travelers*'s mandate to ADA). As developed in the Statement of the Case above and Section II.C.3 below, the FAAAA's legislative history is quite explicit about which laws Congress intended the FAAAA to preempt, and general worker-protection laws do not fall among them. Second, "[i]t is common ground that state laws of general application are safe from ERISA preemption even if they impose some incidental burdens on the administration of covered plans." *Carpenters*, 215 F.3d at 144. Section 148B is a quintessential "state law[ ] of general application," and given *Dan's City*'s recent reaffirmation of the general congruence between ERISA and FAAAA preemption, it should be "safe from [FAAAA] preemption" as well.

3. The FAAAA's Legislative History Shows No Congressional Intent to Preempt Background Worker-Protection Laws.

A major component of the preemption inquiry is to "look … to the objectives of the … statute as a guide to" the laws Congress meant to preempt. *Travelers*, 514 U.S. at 656. Here both the FAAAA's objectives and the laws Congress intended to preempt are quite clearly laid out in the statute's Conference Committee Report. H.R. Conf. Rep. No. 103-677, at 82-88. As set forth in the Report and detailed in the Statement of the Case above, the underlying goal of the FAAAA's preemption provision is to "permit our transportation companies to freely compete more efficiently," so that their "[s]ervice options will be dictated by the marketplace and not by an artificial regulatory structure." *Id.* at 88.

As a result, "[t]he purpose of this section is to preempt economic regulation by the States," *id*. at 88, with "[t]ypical forms of [such] regulation include[ing] entry controls, tariff filing and price regulation, and types of commodities carried," *id*. at 86. In short, according to the Committee Report, the FAAAA targets laws that restrain trade – *i.e*., practices that likely would encounter problems under the antitrust laws if implemented by private agreement. The Committee Report is also quite clear that broader background laws in other areas are not meant to be preempted. Some are specifically identified as non-preempted (*e.g*., laws regulating "financial fitness and insurance," *id*. at 85), in a "list [that] is not

intended to be all inclusive, but merely to specify some of the matters which are not 'prices, rates, or services' and which are therefore not preempted." *Id*. at 84.

The Attorney General recognizes that the Supreme Court in *Rowe* declined "to distinguish between a State's 'economic' and 'health'-related motivations," 552 U.S. at 374, with the result that a State "law … regulat[ing] the delivery of tobacco to customers within the State," *id*. at 367, could not be defended as solely a "health" regulation. *Id*. at 373-76. While *Rowe* unquestionably makes it harder to justify "statutes aim[ed] directly at the carriage of goods" by pointing in categorical fashion to other public purposes the laws serve, *id*. at 376, it in no way precludes looking to the FAAAA's legislative history to determine whether Congress intended *other* statutes to fall within its ambit. Legislative history is, after all, a "main source[]" of determining legislative intent, *Jalbert Leasing, Inc. v. Mass. Port Auth.*, 449 F.3d 1, 2 (1st Cir. 2006), and the FAAAA's history leaves little doubt that Congress did not intend to preempt background laws such as section 148B.[14]

[14] This Court in *DiFiore* addressed a state law that also effected a direct regulation of the carrier-customer relationship, and its very brief discussion of the economic-regulation issue is distinguishable for the same reason. *See* 646 F.3d at 86 & n.5.

D. Preempting a State Background Law That Proscribes Criminal Conduct Is Especially Inappropriate.

Accentuating the misguided nature of MDA's preemption claim is the fact that the challenged law defines criminal conduct. M.G.L. c. 149, §§ 27C, 148B. "The States possess primary authority for defining and enforcing the criminal law," *Engle v. Isaac*, 456 U.S. 107, 128 (1982), and nothing lies closer to the core of their police power. *See Screws v. U.S.*, 325 U.S. 91, 109 (1945) ("Under our federal system the administration of criminal justice rests with the States."); *Younger v. Harris*, 401 U.S. 37, 55 n.2 (1971) (Stewart, J., concurring) ("A State's decision to classify conduct as criminal provides some indication of the importance it has ascribed to prompt and unencumbered enforcement of its law.") . As a result, it is particularly necessary to show a "clear and manifest" Congressional intent to preempt when criminal laws are at issue.

Nothing remotely approaching such a "clear and manifest" intent to preempt criminal "backdrop" laws appears in the FAAAA or ADA. That is undoubtedly why the Supreme Court took pains to distinguish state prostitution and gambling laws in its initial ADA preemption decision. *Morales*, 504 U.S. at 390. Moreover, Congress knows how to be explicit about preempting state criminal laws when it wants to do so. *See, e.g.*, 8 U.S.C. § 1324a(h)(2) (Immigration Reform and Control Act preempts "any State or local law imposing civil or criminal sanctions ... upon those who employ … unauthorized aliens"). The absence of such express

language in the FAAAA regarding preemption of backdrop criminal laws should be dispositive.

MDA's attempt to invalidate a criminal law is emblematic of the breadth of the preemption it seeks. Crossing the divide between laws regulating the carrier-customer relationship and general background laws would dramatically expand the range of state laws potentially subject to preemption. Yet nowhere in MDA's Brief does it even hint of a limiting principle that would keep the resulting scope of preemption within reasonable bounds. That may be because it in fact hopes to use a favorable decision in this case regarding section 148B to argue for even more preemption in the future regarding background laws in other areas.[15] The Court should rebuff any such efforts at the outset and hold that MDA's preemption challenge to section 148B fails as a matter of law, since such background laws are *per se* beyond the FAAAA's preemptive reach.

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[15] MDA likely would broadly assert, as it has done here, that the challenged state law varies from those in other states, creating an impermissible "patchwork" that frustrates national "uniformity." Br. 48-49. This "patchwork" argument proves too much. *Any* state background law will almost always form part of a national "patchwork" of such laws, yet prior decisions already make clear that many such laws are not preempted. *See* Section II.B. The issue is not whether the challenged law is part of a "patchwork," but instead whether that "patchwork" falls within an area where Congress has expressed a clear and manifest intent to preempt.

III. Were the Record to Be Considered, MDA Has Not Proven that Section 148B Has a "Significant Impact" on Xpressman's Prices, Routes, or Services; Any Impact Shown by the Record Remains Too "Tenuous, Remote, or Peripheral" to Justify Preemption.

Even if generally applicable background labor laws such as section 148B could be preempted upon an evidentiary showing that they had a "*significant* impact" on prices, routes, or services, *Rowe*, 552 U.S. at 375 (quoting *Morales*, 504 U.S. at 390; emphasis the *Rowe* Court's), MDA has made no such showing here. And the burden of proof would plainly be on MDA to overcome the presumption against preemption, by establishing the requisite impact and resulting frustration of the FAAAA's deregulatory purposes. *See, e.g.*, *Texas Cent. Business Lines v. City of Midlothian*, 669 F.3d 525, 529 (5th Cir. 2012) (party claiming preemption bears burden of persuasion); *Abdu-Brisson*, 128 F.3d at 83 (same in ADA case). Despite having had a free hand to submit factually unrebutted evidence about section 148B's effect on MDA's chosen exemplar Xpressman, MDA has shown at most a minimal impact on Xpressman's prices, routes, or services—an impact "too tenuous, remote, or peripheral" to warrant preemption. *Rowe*, 552 U.S. at 375.

As an initial matter, the FAAAA, ADA, and ERISA case law reviewed above sets a high bar for establishing "*significant* impact," as the United States has itself recently well described. The position of the United States on FAAAA

preemption in the labor-law area illustrates this well.[16] In two Ninth Circuit cases regarding whether the FAAAA preempts California's meal-and-rest-break law as applied to motor carriers, that court invited the United States to file an amicus brief. Brief for the United States as Amicus Curiae, *Dilts v. Penske Logistics, LLC*, Ninth Circuit No. 12-55705 (filed Feb. 14, 2014). With respect to broadly applicable state labor standards, the United States advised:

> The central objective of the FAAA Act's preemption clause is to ensure that the goal of deregulating the motor carrier industry is not stymied by state regulation. Laws of general applicability that do not target the industry but instead merely increase the labor costs of all employers are not at odds with these purposes. A state income tax, workers' compensation scheme, or minimum wage law could all have a large impact on a motor carrier's cost of doing business and thus its prices and capacity to deliver services. But there is nothing to suggest that, in legislating to promote maximum reliance on competitive market forces, Congress intended to insulate motor carriers from the ordinary incidents of state regulation applicable to every employer. …
>
> Indeed, a contrary rule would suggest that the FAAA Act cuts a wide preemptive swath through state laws intended to protect the health and welfare of employees – a result that … is contrary to the presumption against preempting the state's exercise of its police power and one that would not further the fundamental, deregulatory purposes of the federal statute.

Id. at 19-21 (internal citations omitted). The United States then went on to analyze whether the record there established "the imposition of acute costs [that] … compel[led] the carrier to alter its prices, routes, or services," *id.* at 21-22 (citing

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[16] The Supreme Court relied on the United States Department of Transportation's views regarding ADA preemption in *Wolens*, 513 U.S. at 226.

Mendonca),[17] finding "no basis for concluding that compliance costs approach that level here." *Id*. at 22.[18]

The Court should approach any review of the record in a like manner here, and MDA's attempted showing similarly fails, for the two principal reasons set forth below: MDA overstates the laws actually triggered by section 148B, and MDA has not shown that the limited range of laws actually triggered by section 148B would have any significant effect.

A. Section 148B Triggers Only Chapters 149 and 151 of the Massachusetts General Laws, Not Every Conceivable Federal and State Employment Statute.

Section 148B(a) provides that its definition of employee operates only "[f]or the purpose of this chapter [149] and chapter 151[.]" Section 148B therefore does

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[17] The Supreme Court originated the "acute effects" formulation in the ERISA context, *Travelers*, 514 U.S. at 668 (indirect economic effects, if "acute," could lead to ERISA preemption). The *Mendonca* court then applied it to hold that the FAAAA did not preempt California's prevailing wage law because the law did "not . . . frustrate[] the purpose of deregulation by *acutely* interfering with the forces of competition." *Mendonca*, 152 F.3d at 1189 (emphasis in original; citing *Travelers*).

[18] These considerations indeed led the United States initially to opine that the effects of the California break law "are common to all employers and thus bear too tenuous and remote a connection to the core deregulatory purposes of the FAAA Act to warrant preemption." *Id*. at 11. The United States saw itself as "nonetheless" compelled by *Mendonca* and *Travelers* to review the record for the imposition of sufficiently "acute" costs. *Id*. at 21-22. The Attorney General believes that the United States did not have to take that additional step, for the reasons set forth in Section II.C.2 above.

not determine the applicability of the federal or other Massachusetts laws of whose impact MDA complains.

1. Section 148B Does Not Trigger Application of Any Federal Laws.

MDA errs in arguing that section 148B requires compliance with a host of federal statutes, assertedly imposing "effort and cost" on its members, Br. 11, 15. Section 148B's definition of employee does not trigger the application of any federal laws, because each has its own definition, refined by case law, of when a worker is an "employee" for that law's purposes. Section 148B does not trigger Title VII, the Age Discrimination in Employment Act (ADEA), or the Americans with Disabilities Act.[19] It does not trigger the Family and Medical Leave Act (FMLA).[20] It does not trigger the Federal Insurance Contribution Act (FICA) governing Social Security and Medicare tax contributions; the Federal

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[19] Under those three laws, "employee" is defined with reference to common law agency principles. *See Lopez v. Mass.*, 588 F.3d 69, 83-87 (1st Cir. 2009) (Title VII); *Speen v. Crown Clothing Corp.*, 102 F.3d 625, 631 (1st Cir. 1996) (ADEA); *Clackamas Gastroenterology Assocs., P. C. v. Wells*, 538 U.S. 440, 448-50 (2003) (Americans with Disabilities Act).

[20] Under the FMLA, 29 U.S.C § 2601, the relevant term is "employ," defined by reference to the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(g). Under both laws, the existence of an employer-employee relationship depends "upon the circumstances of the whole activity" including the underlying "economic reality[.]" 29 C.F.R. 825.105(a).

Unemployment Tax Act (FUTA);[21] or section 401(k) of the Internal Revenue Code.[22] Each of those laws uses its own definition of employee that in no way relies on section 148B. Indeed, MDA states that the IRS audited Xpressman and determined that its drivers "were appropriately classified as independent contractors." Br. 5.

Accordingly, the Court should disregard MDA's generalized assertion about the burdens of complying with federal laws, and its expert reports attributing to section 148B specific cost figures for federal payroll taxes. Br. 15 (citing Sealed A195); *id*. 36-37.

2. Section 148B Does Not Trigger Application of State Employment Laws Beyond Chapters 149 and 151.

Section 148B controls the application only of certain employment laws found in chapters 149 and 151. It does not govern the employer tax withholding or workers compensation laws (chapters 62B and 152), or any of the other state employment laws of which MDA complains.

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[21] Under FICA, "employee" is generally defined using "the usual common law rules[.]" 26 U.S.C § 3121(d)(2). This definition is incorporated in FUTA, 26 U.S.C. § 3306(i), with exceptions not relevant here.

[22] For plans under 26 U.S.C. § 401(k), "employee" is defined as "a common law employee," with exceptions not relevant here. 26 C.F.R. 1.410(b)-9.

a. Section 148B does not determine who is an employee for Chapter 62B tax-withholding or Chapter 152 workers compensation purposes.

Contrary to MDA's argument, Br. 27, section 148B does not control the applicability of Massachusetts' income-tax-withholding laws, M.G.L. c. 62B, or workers compensation laws, *id*. c. 152. Each uses its own separate definition of employee to determine coverage, differing from section 148B(a)'s three-prong test.[23]

To be sure, section 148B(d) does authorize remedies (including debarment) against "[w]hoever 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 62B … [or] violates chapter 152[.]" M.G.L. c. 149, § 148B(d) (emphasis added). But such enhanced remedies are available only where an employer violates one of those chapters with respect to a worker who meets the definition of

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[23] For tax withholding, "In contrast to G.L. c. 149, § 148B, chapter 62B adopts the federal definition[] of . . . 'employee' found in section 3401(c) of the Code[.]" Commissioner of Revenue's Technical Information Release TIR 05-11, "Effect of New Employee Classification under Mass. Gen. Laws c. 149, s. 148B on Withholding of Tax on Wages under Mass. Gen. Laws c. 62B," at http://www.mass.gov/dor/businesses/help-and-resources/legal-library/tirs/tirs-by-years/2005-releases/tir-05-11-effect-of-new-employee.html (last visited March 8, 2014).

The workers compensation statute defines "employee" as "every person in the service of another under any contract of hire, express or implied, oral or written," with exceptions not relevant here. M.G.L. c. 152, § 1(4).

employee in that chapter and *also* meets section 148B(a)'s three-prong definition of employee. All three enforcing agencies—the Departments of Revenue and Industrial Accidents and the Attorney General[24]—agree that the definitions of "employee" in the tax-withholding and workers compensation statutes, chapters 62B and 152, control the coverage of those statutes. Respectfully, the contrary dictum in this Court's prior decision, *MDA I*, 671 F.3d at 36-37, stating that section 148B "governs whether an individual is deemed an employee for purposes of . . . chapters 62B, 149, 151 and 152," was overinclusive in referring to chapters 62B and 152.[25]

b. Section 148B does not determine who is an employee for purposes of other state employment laws.

MDA errs in arguing that section 148B controls the coverage of various other state employment laws. To the contrary, each of those laws uses another, separate definition of "employee." This is true for the Commonwealth's laws

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[24] *See* AG Advisory, p. 1 n.2.

[25] An employee suing under M.G.L. c. 149, c. 150, for a section 148B violation may recover damages attributable to being misclassified as an independent contractor; such damages may include workers compensation premiums improperly withheld from the employee's pay, but only if the employee also meets the definition of "employee" in the workers compensation law. *Awuah v. Coverall N. America, Inc.*, 460 Mass. 484, 494-95 & n.21, 952 N.E.2d 890, 898-99 & n.21 (2011).

pertaining to unemployment compensation,[26] employment discrimination,[27] and maternity[28] and other forms[29] of leave, as well as the now-repealed "fair share contribution" law.[30] Those statutes do not use section 148B's definition of employee; whatever costs they might impose on Xpressman are not attributable to section 148B.

3. Section 148B Does Not Require "Personnel Policies."

MDA errs in attacking section148B based on the costs of various personnel policies and practices that MDA itself concedes are "not directly mandated by statute." Br. 12. These assertedly "common personnel management practices"

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[26] M.G.L. c 151A, § 2, includes its own three-part definition of "employee" containing a "Prong B" markedly different from section 148B.

[27] Under M.G.L. c. 151B, "employee" is construed in accordance with common law. *Comey v. Hill*, 387 Mass. 11, 15, 438 N.E.2d 811, 814 (1982). M.G.L. c. 151B, § 4(9½), which restricts criminal record inquiries on employment applications, is subject to the same construction.

[28] M.G.L. c. 149, § 105D, uses the same common-law definition of "employer" found in the employment discrimination law, M.G.L. c. 151B, § 1(5). *See supra* n.27.

[29] M.G.L. c. 149, § 52D(a) ("small necessities" leave), adopts the definitions used in the federal FMLA.

[30] Under M.G.L. c. 149, § 188 (repealed, Mass. St. 2013, c. 39, §§ 108, 219 (eff. July 1, 2013)), which governed employer contributions to employee health insurance costs, the regulations construed "employee" and "employer" by referring to the unemployment and workers compensation statutes, not to section 148B. *See* 956 C.M.R. 16.02.

include "performance reviews, discipline and conduct policies, attendance policies, and policies regarding hiring and termination," as well as maintaining an employee handbook. Br. 12. Because the statute concededly does not require employers to adopt these practices, any related voluntarily-incurred costs cannot demonstrate that section 148B is so burdensome as to be preempted.

Nor does section 148B require "companies with employee-drivers [to] spend significant time evaluating and screening applicants, to avoid hiring individuals who may have a greater propensity to commit . . . torts[,] those with poor driving records, criminal backgrounds, drug use, and so on." Br. 9. MDA points to no law triggered by section 148B mandating such steps.[31] The Court should therefore disregard MDA's allegations regarding additional hiring and human resources costs, Br. 36, which section 148B does not require Xpressman to incur.[32]

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[31] MDA also errs in implying that section 148B somehow governs employer tort liability. Generally, "a business is vicariously liable for the conduct of its employees, but not [its] independent contractors." Br. 9 & n.9 (citing *Corsetti v. Stone Co.*, 396 Mass. 1, 9-10, 483 N.E.2d 793, 797-99 (1985)). But *Corsetti* analyzes tort liability under common-law principles, citing the Restatement (Second) of Torts. *Corsetti* says nothing about section 148B. Given the proliferation of definitions of "employee" in numerous different state and federal statutes, there is no reason to believe a court would seize upon Prong B in determining common-law tort liability.

[32] MDA also errs in implying that section 148B would trigger statutory regulation of "the content of employee advertisements." Br. 9 & n.10 (citing M.G.L. c. 149, § 21). That statute prohibits "publish[ing] a false or fraudulent notice or advertisement for *help* or for obtaining *work* or employment" (emphasis (footnote continued)

B. Section 148B Does Not Trigger Any Requirements of Chapters 149 or 151 that Would Require Xpressman to Change its Prices, Routes, or Services.

MDA wrongly attributes to section 148B a variety of mandates or effects of chapter 149 and 151 that supposedly, taken together, would require Xpressman to alter its prices, routes, or services. Br. 13-14, 15-17. Yet the factors MDA cites are not legal requirements at all, or are requirements that, while triggered by section 148B, either do not apply to Xpressman or would not have the effects MDA claims.

1. MDA's arguments depend on "industry standards" or practices, which are not legally required.

MDA complains of certain costs Xpressman would supposedly have to incur to meet "industry standards," including that "drivers are paid for mileage driven"; that "companies … provide the vehicles that [their] employees drive"; and that "employee drivers are given shifts of at least four hours." Br. 13-14, 16, 31. But MDA itself admits these are only (asserted) "industry standards." Section 148B does not require them, nor can section 148B be blamed for any resulting costs, scheduling constraints, or effects on prices, routes or services.

(footnote continued)
added). Coverage is not limited to "employers," and it would likely apply regardless of Xpressman's drivers' section 148B classification.

Similarly, MDA refers to various practices as if they are requirements, when they are not. MDA states that while "independent contractor-couriers at Xpressman are paid by the route, employee-drivers are paid an hourly rate." Br. 13 (citing M.G.L. c. 151, § 1A). But that minimum wage statute does not *require* payment of an hourly rate. Instead, the implementing regulations allow payment "on a piece work basis, salary, or *any basis other than an hourly rate*," so long as the total pay divided by hours worked at least equals the minimum wage. 455 C.M.R. 2.01 (emphasis added).

Likewise, MDA claims "employee-drivers must start and end their workday at the company's worksite, adding what is known as 'stem miles' to the route," thereby "increas[ing] the length of Xpressman's delivery routes by 28%." Br. 14, 30-31. But MDA cites nothing, and there is nothing, in section 148B or the wage laws *requiring* employees to start and end their workdays at the company's worksite. Nor must employees be paid for "stem miles" or other travel to and from wherever their work usually begins and ends. "Ordinary travel between home and work is not compensable working time." 455 C.M.R. 2.03(4). FLSA regulations say the same, adding, "This is true whether [the employee] works at a fixed location or at different job sites." 29 C.F.R. 785.35.

2. MDA misstates or overstates the effect of various requirements triggered by section 148B.

Although section 148B does trigger some legal requirements that would apply to Xpressman, MDA misstates or overstates their effect on Xpressman's prices, routes, and services.

Minimum wage. MDA overstates the effect of the $8/hour minimum wage on Xpressman. If 148B required Xpressman to classify drivers as employees, Xpressman would indeed have to comply with the $8/hour minimum wage. M.G.L. c. 151, § 1. But MDA's expert assumed that treating drivers as employees would result in having to pay an hourly wage of $14.50/hour, "based upon the US Bureau of Labor Statistics median pay for Couriers and Messengers[.]" JA 75. Presumably the expert concluded that companies like Xpressman would have to pay that higher wage to attract sufficient numbers of qualified drivers. Where market conditions require paying $14.50/hour, the law's $8/hour floor does not affect Xpressman's prices, let alone the routes and services it could offer.[33]

[33] Nor does the law requiring time-and-one-half pay for work in excess of forty hours per week have any demonstrated effect on Xpressman. Br. 12 (citing M.G.L. c. 151, § 1A). Xpressman's president avers only that its drivers "*may* drive more than 40 hours in a week in making deliveries for Xpressman's customers." JA 148 ¶ 3(emphasis added). That drivers "may" do so does not mean they actually do. Nor is there evidence that Xpressman's prices, routes, or services would be affected if it limited drivers to forty hours per week.

"On-call" wage regulation. MDA misstates the effect of the "on-call" wage regulation—in tandem with the "industry standard four-hour shift" discussed above—as requiring Xpressman to pay drivers classified as employees under section 148B for four-hour shifts, whether or not they are actually performing deliveries for Xpressman. Br. 17 (citing 455 C.M.R. 2.03(2)). MDA claims Xpressman would have to either "rework[] its routes" to last four hours or "abandon short-distance routes altogether." Br. 16.

The regulation provides: "An on-call employee who is not required to be at the work site, *and who is effectively free to use his or her time for his or her own purposes*, is not working while on call." 455 C.M.R. 2.03(2) (emphasis added).

Xpressman's drivers, after driving a short-distance route, or while awaiting a possible "on-demand" job from Xpressman, are indeed "*free to use [their] time for [their] own purposes*." They are "not working" during such times, and the regulation does not require Xpressman to pay them for it. Indeed, Xpressman's president avers that its "on demand couriers can and do make deliveries for other delivery service companies while waiting for a job from Xpressman, or even while en route to a pick-up or drop-off for Xpressman." JA 62, ¶ 32; *see* Br. 16. Although MDA asserts that "employee-drivers work for just one company," *id*., it identifies no law or regulation—let alone a prohibition triggered by section 148B "employee" status—that prevents Xpressman's drivers from being employed by

and making deliveries for other companies when they are not making deliveries for Xpressman during any given day.[34]

"Reporting pay" regulation. Similarly, MDA misstates the effect of the so-called "reporting pay" regulation, which requires that "[w]hen an employee *who is scheduled to work three or more hours* reports for duty at the time set by the employer, and that employee is not provided with the expected hours of work," the employee shall receive three hours' pay. 455 CMR 2.03(1) (emphasis added). MDA claims that this regulation will require paying employees for three hours whether they are needed to work those hours or not, thus making "on-demand" delivery services economically impossible. Br. 17. But MDA itself describes "on-demand" services not as "scheduled" services, but instead as "short-notice rush deliveries," "inherently variable and unpredictable," in which Xpressman "engag[es] various couriers on an as-needed basis"; [i]f a client's on-demand delivery request coincides with a courier's availability, Xpressman will offer the delivery to him." Br. 6.

The reporting pay regulation requires three hours of pay only for certain employees "*scheduled to work three or more hours*[.]" 455 CMR 2.03(1)

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[34] In 2010, 5.5% of employees in Massachusetts held multiple jobs simultaneously. U.S. Bureau of Labor Statistics, "New England and State Multiple Jobholders: 1997-2010," http://www.bls.gov/ro1/nemjh.htm (last visited March 9, 2014).

(emphasis added). By MDA's own account, Xpressman does not "schedule" on-demand drivers "to work three or more hours." Instead, whether and how long such drivers work depends on their availability and clients' unpredictable "on-demand" delivery requests. Thus the regulation would not *require* three hours of pay if Xpressman offered "on-demand" deliveries using employee-drivers.

Meal break statute. MDA also misstates the effect of the provision that "[n]o person shall be required to work for more than six hours during a calendar day without an interval of at least thirty minutes for a meal." M.G.L. c. 149, § 100. Meal-break time is not "working time," 455 C.M.R. 2.01, and therefore is unpaid. MDA and Xpressman's president mischaracterize the statute as requiring that employees "*must be given* a thirty-minute uninterrupted meal break every six hours of work." Br. 16 (emphasis added); JA 62 ¶ 34. MDA states that Xpressman has "routes that need more than six hours of continuous driving" and argues that if drivers must be treated as employees, Xpressman "would either have to cease offering these routes, or else split them up between multiple drivers." Br. 16.

But Xpressman has had no difficulty finding drivers willing to perform deliveries for six hours without a break. The routes in question, "scheduled routes," involve "regular pick-ups and drop-offs of packages at times and locations dictated by the client." Br. 5. To provide them, "Xpressman locates a courier who can accommodate the client's pick-up/drop-off schedule," normally "through

online advertisements"; "[i]nterested couriers bid on a posted route, and Xpressman awards the route [to] . . . the most competitive bid[der]." Br. 5-6.

Thus Xpressman, far from "requiring" any driver to work more than six hours without a meal break (all the statute prohibits), apparently finds numerous drivers willing to compete for the opportunity. And MDA and Xpressman offer no evidence that if such drivers were treated as employees, they would start insisting on unpaid meal breaks.[35] In short, MDA has not shown that the meal break law poses any obstacle to Xpressman whatever routes it chooses.[36]

Sunday-work statute. MDA misstates the effect of the law imposing sanctions on "[w]hoever, *except at the request of the employee, requires* an employee engaged in any commercial occupation … or in the work of transportation … to do on Sunday the usual work of his occupation, *unless he is allowed* during the six days next ensuing twenty-four consecutive hours without labor[.]" M.G.L. c. 149, § 47. MDA claims this law requires that "if an employee works on a Sunday, the company *must* designate one day off within the next six."

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[35] Nor does MDA's evidence regarding Xpressman, in referring to scheduled routes as involving "regular pick-ups and drop-offs of packages at times and locations dictated by the client," Br. 5, indicate that clients served by six-hour routes have scheduling demands too stringent to accommodate an unpaid 30-minute meal break, *if* the driver desired one. JA 62 ¶ 34.

[36] As discussed *supra*, in the United States' view, expressed in its *Dilts amicus* brief, the FAAAA does not preempt California's meal-break statute.

Br. 11-12 (emphasis added). But the plain language of the statute does not require an employee who *wants* to work Sunday to take one of the next six days off.

Even if the statute imposed such a requirement, it would not interfere with Xpressman's routes or services. The most Xpressman can say on the issue is, "Couriers who perform services for Xpressman's customers *may* work seven days in a week, *if they so choose* (including driving on Sunday), and sometimes do so." JA 148 ¶ 5 (emphasis added). Xpressman does not claim either that it needs individual drivers to work seven days in a row or that it would be unable to find such drivers if needed. Thus the Sunday-work statute—like all the other statutes and regulations discussed above—would have no "*significant* impact" on Xpressman's routes or services.[37]

[37] MDA also errs in complaining of the effect of M.G.L. c. 149, §§ 48-51. Br. 12 n.21. The general rule of those statutes, contained in section 48, applies only to a "*manufacturing, mechanical or mercantile establishment or workshop,*" and requires such employers to furnish one day's rest out of every seven consecutive days. The emphasized terms are all defined in M.G.L. c. 149, § 1, and a delivery service like Xpressman does not fall within the definitions. MDA's complaint about the two-hours-off-to-vote statute (Br. 12 n.23)—which also applies only to "manufacturing, mechanical or mercantile establishment[s]," M.G.L. c. 149, §178—is likewise baseless.

3. MDA does not attribute any specific price, route, or service impacts to the remaining requirements triggered by section 148B.

Although the above suffices to show that section 148B does not trigger any requirements that would significantly affect Xpressman's prices, routes, or services, for the sake of completeness the Attorney General addresses here the additional state statutes cited by MDA as being triggered by section 148B. MDA references most of them simply in passing, with a footnote to the respective statute, and without any developed argument. Br. 9-11. And MDA does not identify any specific (let alone "significant") impact that any of them would have on Xpressman's prices, routes, or services.

Most of the cited laws ban certain conduct by employers, including: paying unequally based on sex, M.G.L. c. 149, § 105A; discriminating against military reservists upon reentry, *id*. § 52A; dismissing or refusing to hire employees based on their age, *id*. §§ 24A-24J; using lie detector tests in employment, *id*. § 19B; and knowingly employing illegal aliens, *id*. § 19C. MDA offers no evidence that Xpressman engages or wishes to engage in any of these prohibited practices.

The remaining laws require employers to keep certain employment records. *Id*. §§ 52, 52C; M.G.L. c.151, § 15. These obligations are quite moderate. Section 52 requires records only of "the names and addresses of all employees and the hours worked by each of them in each day." Section 52C does not require an

employer to create records, providing instead that "to the extent prepared by an employer," certain records be maintained and made accessible to the employee. And M.G.L. c. 151, § 15, requires an employer to maintain records only of "the name, address and occupation of each employee, of the amount paid each pay period to each employee, of the hours worked each day and each week by each employee[.]" Xpressman already appears to be keeping records containing much of this information. Xpressman's president says that Xpressman "maintains records regarding the times that couriers perform their pick-ups and deliveries for pressman's customers, and records regarding the settlements paid to couriers for driving their routes." JA 149 ¶ 6.

In sum, MDA has not shown that any of these additional requirements triggered by section 148B would have an impermissible "*significant* impact" on Xpressman's prices, routes, or services.

4. The requirements triggered by section 148B do not establish "control" sufficient to transform drivers into employees for purposes of other laws.

MDA engages in classic boot-strapping by arguing that because section 148B requires Xpressman to treat its drivers as employees for *some* purposes, Xpressman thereby gains sufficient "control" over those drivers to make them employees for *all* purposes. Br. 28-29. Because section 148B actually triggers only certain provisions in chapters 149 and 151, MDA's argument fails. As

described, MDA errs in claiming section 148B requires Xpressman to "set[] daily and weekly schedules," pay wages on an "hourly" basis, "deduct[] payroll taxes," or "provid[e] insurance benefits[.]" Br. 28. The requirements section 148B does trigger—including paying overtime (*if* drivers exercise what Xpressman says is their choice to work more than forty hours per week), "maintaining personnel records," *id*., and *refraining* from violating statutes like the meal-break, Sunday-work, and anti-discrimination laws discussed above—hardly establish sufficient "control" to transform Xpressman's drivers into "employees" for purposes of all other laws.[38] To the extent that those drivers do not meet other laws' separate definitions of "employee," Xpressman remains free to treat the drivers as independent contractors.

Given section 148B's limited reach, MDA's claim that the result of such differential treatment would be an "administrative nightmare" is greatly

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[38] The cases MDA cites regarding factors establishing sufficient "control" to create an "employee" are inapposite. *Alexander v. Rush North Shore Medical Center*, 101 F.3d 487, 492 (7th Cir. 1996) (scheduling denotes right to control), is irrelevant, because section 148B does not trigger any law requiring scheduling. *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 119 (2nd Cir. 2000), does not hold, as MDA claims, that "payment based on time worked shows right to control." *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998), examined whether a temporary-employment agency performed enough employer-like functions to be considered a "joint employer" of the workers it furnished to clients. *Twin Rivers Farm, Inc. v. Commissioner*, T.C. Memo. 2012-184 (2012), is irrelevant because section 148B does not trigger workers compensation or fringe benefit requirements, nor did the Tax Court treat making such payments as indicia of employer "control."

exaggerated. Br. 29. MDA has not shown that any administrative issues that might result would have an impermissible "*significant* impact" on Xpressman's prices, routes, or services. *See Rowe*, 552 U.S. at 375 (emphasis in original).

5. MDA's reliance on the erroneous *Sanchez v. Lasership* decision is unavailing.

MDA's myriad citations to *Sanchez v. Lasership, Inc.*, 937 F.Supp.2d 730, 742 (E.D. Va. 2013) (holding section 148B preempted) cannot cure its failure to prove "*significant* impact" on *Xpressman's* prices, routes or services. In *Sanchez*, the court interpreted section 148B as imposing a ban on independent contractors in Massachusetts, *id.* at 742—plainly false, *see supra* at 7 & n.4. The court also erroneously accepted the propositions that "employee" status under section 148B triggers workers compensation and health insurance costs, re-routing, and the cessation of providing on-demand services, 937 F.Supp.2d at 747-50—all demonstrably false in this case, *see supra* Section III. The court's conclusion, based on these fundamentally mistaken premises, that section 148B had a forbidden "significant impact" on another carrier's prices, routes, and services therefore simply cannot be credited and should carry no persuasive authority with this Court.

IV. MDA's Remaining Arguments Fail.

MDA's arguments that section 148B is "facially preempted" and is preempted due to its effect on out-of-state companies both fail.

A. Section 148B is Not Preempted "Facially" or as a Matter of "Logical Effect."

There is no merit to MDA's claim that section 148B is "facially preempted." In some instances, FAAAA preemption may be established by looking at "the logical effect that a particular scheme has on the delivery of services or the setting of rates," even without "empirical evidence." *Rowe*, 448 F.3d at 82 n.14. But once MDA's overstated arguments about the supposedly vast array of federal and state requirements triggered by section 148B are stripped away, MDA fails to show any "logical effect" on prices, routes or services that—necessarily and without considering empirical evidence—is impermissibly "significant." To the contrary, any effects MDA has shown are "tenuous, remote, or peripheral[.]"*Rowe*, 552 U.S. at 375.

To be sure, this Court in *Rowe* discussed the "logical effect" of one section of a challenged Maine law "ma[king] it *illegal for any person to knowingly deliver* tobacco products to a Maine consumer if the products were purchased from an unlicensed retailer." 448 F.3d at 70 (emphasis added); *see id*. at 82 & n.14. *Cf. American Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1049-50, 1056 (9th Cir. 2009) (port's specific requirement that motor carriers phase out independent-contractor drivers in favor of employee-drivers preempted, as "palpable interference with prices and services"). The logical and impermissibly "significant" impact of those prohibitions expressly aimed at motor carrier services

may have been clear even without extensive empirical evidence. The effect of section 148B is not.[39]

B. MDA May Not Assert Preemption Based on Section 148B's Claimed Effect on Out-of-State Carriers.

Finally, MDA's argument that section 148B is preempted due to its effect on out-of-state companies fails, for two reasons. First, MDA lacks standing to raise the claim, because MDA has not alleged that any of its members operate primarily from outside Massachusetts. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000) (associational standing requires members with standing to sue in their own right). The most MDA's amended complaint says is that members make deliveries "throughout the state and across state lines." JA 22 ¶ 6; JA 24 ¶ 15. Nor does MDA offer evidence that members are harmed by any difference between section 148B's definition of "employee" and other states' laws. MDA's claim that "an out-of-state company with independent contractor-couriers simply cannot operate in Massachusetts lawfully," Br. 49, is unsupported by any evidence about MDA members, let alone citations to laws. Nothing in section 148B or the laws it triggers requires a company to have an employee-driver waiting at the border to take the wheel when an independent contractor-driver

[39] Certainly section 148B does not logically "ban independent contractors just for motor carriers," let alone "for all businesses," as MDA implies. Br. 48. *See supra* n.4.

crosses into Massachusetts from another state. MDA's and its *amici*'s arguments along these lines are not properly part of this case.

Second, MDA did not raise this issue below. It is therefore waived. *Demelo v. U.S. Bank Nat. Ass'n*, 727 F.3d 117, 123 (1st Cir. 2013). MDA has likewise waived its newly-raised argument that section 148B's effect "does not even end at the Commonwealth's borders." Br. 50.[40]

CONCLUSION

For the forgoing reasons, this Court should either order entry of judgment dismissing MDA's amended complaint for failure to establish a case or controversy, or affirm the judgment that the FAAAA does not preempt Prong B of section 148B(a). If the Court does neither, it should remand the case to permit the Attorney General to conduct additional discovery on MDA's factual assertions.

[40] Moreover, the cases MDA cites are inapposite. One merely enforced an employer-drafted contract specifying that Massachusetts law governed. *Taylor v. Eastern Connection*, 465 Mass. 191, 193, 988 N.E.2d 408, 409 (2013). The other was a choice-of-law case, concerning a different wage law, not section 148B. *Dow v. Casale*, 83 Mass. App. Ct. 751, 756-58, 989 N.E.2d 909, 913-15 (2013).

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March 13, 2014

CERTIFICATES OF COMPLIANCE AND SERVICE

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1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13, 961 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman style, 14-point font.

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CERTIFICATE OF SERVICE

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ADDENDUM

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United States Code Annotated
Title 49. Transportation (Refs & Annos)
Subtitle IV. Interstate Transportation (Refs & Annos)
Part B. Motor Carriers, Water Carriers, Brokers, and Freight Forwarders (Refs & Annos)
Chapter 145. Federal-State Relations

49 U.S.C.A. § 14501

§ 14501. Federal authority over intrastate transportation

Effective: August 10, 2005
Currentness

(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 authority 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 prearranged 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.

CREDIT(S)

(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.)

Notes of Decisions (99)

49 U.S.C.A. § 14501, 49 USCA § 14501

Current through P.L. 113-74 approved 1-16-14

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 149. Labor and Industries (Refs & Annos)

M.G.L.A. 149 § 27C

§ 27C. Penalties for violations of certain sections by employers, contractors, subcontractors or their employees

Effective: September 8, 2004
Currentness

(a)(1) Any employer, contractor or subcontractor, or any officer, agent, superintendent, foreman, or employee thereof, or staffing agency or work site employer who willfully violates any provision of section 26, 27, 27A, 27B, 27F, 27G, 27H, 148, 148A, 148B or 159C or section 1A, 1B or 19 of chapter 151, shall be punished by a fine of not more than $25,000 or by imprisonment for not more than one year for a first offense, or by both such fine and imprisonment and for a subsequent willful offense a fine of not more than $50,000, or by imprisonment for not more than two years, or by both such fine and such imprisonment.

(2) Any employer, contractor or subcontractor, or any officer, agent, superintendent, foreman or employee thereof, or staffing agency or work site employer who without a willful intent to do so, violates any provision of section 26, 27, 27A, 27B, 27F, 27G, 27H, 148, 148A, 148B or 159C or section 1A, 1B or 19 of chapter 151, shall be punished by a fine of not more than $10,000, or by 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. A complaint or indictment hereunder or under the provisions of the first paragraph may be sought either in the county where the work was performed or in the county where the employer, contractor, or subcontractor has a principal place of business. In the case of an employer, contractor, or subcontractor who has his principal place of business outside the commonwealth, a complaint or indictment may be sought either in the county where the work was performed or in Suffolk county.

(3) Any contractor or subcontractor convicted of willfully violating any provision of section 26, 27, 27A, 27B, 27F, 27G, 27H or 148B shall, in addition to any criminal penalty imposed, be prohibited from contracting, directly or indirectly, with the commonwealth or any of its agencies or political subdivisions for the construction of any public building or other public works, or from performing any work on the same as a contractor or subcontractor, for a period of five years from the date of such conviction. Any contractor or subcontractor convicted of violating any provision of section 26, 27, 27A, 27B, 27F, 27G, 27H or 148B shall, in addition to any criminal penalty imposed, be prohibited from contracting, directly or indirectly, with the commonwealth or any of its agencies, authorities or political subdivisions for the construction of any public building or other public works or from performing any work on the same as a contractor or subcontractor, for a period not to exceed six months from the date of such conviction for a first offense and up to three years from the date of conviction for subsequent offense. After final conviction and disposition of a violation pursuant to this paragraph in any court, the clerk of said court shall send a notice of such conviction to the attorney general, who shall publish written notice to all departments and agencies of the commonwealth which contract for public construction and to the appropriate authorities of counties, authorities, cities and towns that such person is prohibited from contracting, directly or indirectly, with the commonwealth or any of its authorities or political subdivisions for the period of time required under this paragraph. The attorney general may take such action as may be necessary to enforce the provisions of this paragraph, and the superior court shall have jurisdiction to enjoin or invalidate any contract award made in violation of this paragraph.

(b)(1) As an alternative to initiating criminal proceedings pursuant to subsection (a), the attorney general may issue a written warning or a civil citation. For each violation, a separate citation may be issued requiring any or all of the following: that the infraction be rectified, that restitution be made to the aggrieved party, or that a civil penalty of not more than $25,000 for each violation be paid to the commonwealth, within 21 days of the date of issuance of such citation. For the purposes of this paragraph, each failure to pay an employee the appropriate rate or prevailing rate of pay for any pay period may be deemed a separate violation, and the pay period shall be a minimum of 40 hours unless such employee has worked fewer than 40 hours during that week.

(2) Notwithstanding the foregoing, the maximum civil penalty that may be imposed upon any employer, contractor or subcontractor, who has not previously been either criminally convicted of a violation of the provisions of this chapter or chapter 151 or issued a citation hereunder, shall be no more than $15,000, except that in instances in which the attorney general determines that the employer, contractor or subcontractor lacked specific intent to violate the provisions of this chapter or said chapter 151, the maximum civil penalty for such an employer, contractor or subcontractor who has not previously been either criminally convicted of a violation of the provisions of this chapter or said chapter 151 or issued a citation hereunder shall be not more than $7,500. In determining the amount of any civil penalty to be assessed hereunder, said attorney general shall take into consideration previous violations of this chapter or said chapter 151 by the employer, the intent by such employer to violate the provisions of this chapter or said chapter 151, the number of employees affected by the present violation or violations, the monetary extent of the alleged violations, and the total monetary amount of the public contract or payroll involved.

(3) In the case of a citation for violating any provision of section 26, 27, 27A, 27B, 27F, 27G, 27H or 148B, the attorney general may also order that a bond in an amount necessary to rectify the infraction and to ensure compliance with sections 26 to 27H, inclusive, and with other provisions of law, be filed with said attorney general, conditioned upon payment of said rate or rates of wages, including payments to health and welfare funds and pension funds, or the equivalent payment in wages, on said public works to any person performing work within classifications as determined by the commissioner. Upon any failure to comply with the requirements set forth in a citation, said attorney general may order the cessation of all or the relevant portion of the work on the project site. In addition, any contractor or subcontractor failing to comply with the requirements set forth in a citation or order, shall be prohibited from contracting, directly or indirectly, with the commonwealth or any of its agencies or political subdivisions for the construction of any public building or other public works, or from performing any work on the same as a contractor or subcontractor, for a period of one year from the date of issuance of such citation or order. Any contractor or subcontractor who receives three citations or orders occurring on three different occasions, each of which includes a finding of intent, within a three year period shall automatically be debarred for a period of two years from the date of issuance of the third such citation or order or a final court order, whichever is later. Any debarment hereunder shall also apply to all affiliates of the contractor or subcontractor, as well as any successor company or corporation that said attorney general, upon investigation, determines to not have a true independent existence apart from that of the violating contractor or subcontractor.

(4) Any person aggrieved by any citation or order issued pursuant to this subsection may appeal said citation or order by filing a notice of appeal with the attorney general and the division of administrative law appeals within ten days of the receipt of the citation or order. Any such appellant shall be granted a hearing before the division of administrative law appeals in accordance with chapter 30A. The hearing officer may affirm or if the aggrieved person demonstrates by a preponderance of evidence that the citation or order was erroneously issued, vacate, or modify the citation or order. Any person aggrieved by a decision of the hearing officer may file an appeal in the superior court pursuant to the provisions of said chapter 30A.

(5) In cases when the decision of the hearing officer of the division of administrative law appeals is to debar or suspend the employer, said suspension or debarment shall not take effect until 30 days after the issuance of such order; provided, however, that the employer shall not bid on the construction of any public work or building during the aforementioned 30 day period unless the superior court temporarily enjoins the order of debarment or suspension.

(6) If any person shall fail to comply with the requirements set forth in any order or citation issued by the attorney general hereunder, or shall fail to pay any civil penalty or restitution imposed thereby within 21 days of the date of issuance of such citation or order or within 30 days following the decision of the hearing officer if such citation or order has been appealed, excluding any time during which judicial review of the hearing officer's decision remains pending, said attorney general may apply for a criminal complaint or seek indictment for the violation of the appropriate section of this chapter.

(7) Notwithstanding the provisions of paragraph (6), if any civil penalty imposed by a citation or order issued by the attorney general remains unpaid beyond the time period specified for payment in said paragraph (6), such penalty amount and any restitution order, together with interest thereon at the rate of 18 per cent per annum, shall be a lien upon the real estate and personal property of the person who has failed to pay such penalty. Such lien shall take effect by operation of law on the day immediately following the due date for payment of such fine, and, unless dissolved by payment, shall as of said date be considered a tax due and owing to the commonwealth, which may be collected through the procedures provided for by chapter 62C. In addition to the foregoing, no officer of any corporation which has failed to pay any such penalty may incorporate or serve as an officer in any corporation which did not have a legal existence as of the date said fine became due and owing to the commonwealth.

(c) Civil and criminal penalties pursuant to this section shall apply to employers solely with respect to their wage and benefit obligations to their own employees.

Credits

Added by St.1935, c. 461. Amended by St.1961, c. 475, § 1; St.1971, c. 744; St.1987, c. 284, § 2; St.1987, c. 559, § 10; St.1998, c. 236, § 7; St.1999, c. 127, §§ 140 to 142; St.2002, c. 32, §§ 1, 2; St.2004, c. 125, §§ 5 to 11, eff. Sept. 8, 2004.

Notes of Decisions (3)

M.G.L.A. 149 § 27C, MA ST 149 § 27C

Current through Chapter 43 of the 2014 2nd Annual Session

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Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 149. Labor and Industries (Refs & Annos)

M.G.L.A. 149 § 148B

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

Effective: July 19, 2004
Currentness

(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.

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

Credits

Added by St.1990, c. 464. Amended by St.1992, c. 286, § 214; St.1993, c. 110, § 165; St.1998, c. 236, § 12; St.2004, c. 193, § 26, eff. July 19, 2004.

Notes of Decisions (21)

M.G.L.A. 149 § 148B, MA ST 149 § 148B

Current through Chapter 43 of the 2014 2nd Annual Session

End of Document

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASSACHUSETTS DELIVERY ASSOCIATION, PLAINTIFF, v. MARTHA COAKLEY, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, DEFENDANT.	CIVIL ACTION NO.: 1:10-cv-11521-DJC

AFFIDAVIT OF JOCELYN B. JONES

I, Jocelyn B. Jones, under oath hereby state as follows:

1. I am the Deputy Chief of the Fair Labor Division (the "Division") within the Massachusetts Office of the Attorney General ("AGO"). I was appointed to serve as Deputy Chief in 2007. I have been an Assistant Attorney General within the Division since 2000.
2. The Division is charged with investigating and enforcing the Massachusetts laws contained in M.G.L. c. 149 and c. 151 (collectively known as and hereinafter referred to as the "wage and hour laws"), including laws regarding minimum wage, overtime, prevailing wage, misclassification, tip pooling, child labor, the payment of wages, Sunday and holiday premium pay laws, among others.
3. In keeping with her duties as the chief enforcement agency of the state's wage and hour laws, the Attorney General accepts complaints from members of the public with respect

to alleged wage and hour complaints. The form and instructions for completing the form are accessible at: http://www.mass.gov/ago/doing-business-in-massachusetts/labor-laws-and-public-construction/file-a-wage-complaint.html

4. The Fair Labor Division receives approximately 3,300 wage and hour complaints yearly from members of the public.

5. I have conducted a search of complaints sent to the Fair Labor Division with respect to Xpressman Trucking & Courier, Inc. ("Xpressman"). In response I found two Non-Payment of Wage and Workplace Complaints, one which was received by the Division on March 22, 2010 (Case No. 10-01049-A-PRE) and a second which was received by the Division on September 27, 2011 (Case No. 11-10-10672). The complainant in each case named Xpressman as his or her employer.

6. Attached to the complaint in Case No. 10-01049-A-PRE were several documents, including a one-page memorandum to "Independent Contractors Bank Route Drivers" from "Xpressman Courier" regarding "Customer Required Pick [sic] and Delivery Procedures." That document is attached to this Affidavit as **Exhibit 1**.

Signed under pain and penalty of perjury this November 30, 2012.

/s/ Jocelyn B. Jones
Jocelyn B. Jones

Certificate of Compliance with CM/ECF Administrative Procedure J(3)

Pursuant to CM/ECF Administrative Procedure J(3), the undersigned counsel for the filing with which this affidavit is associated certifies that affiant has signed an original paper copy of this affidavit and that it will be retained in the undersigned counsel's case file in accordance for the time period specified in Procedure J(3).

/s/ Kate J. Fitzpatrick
Kate J. Fitzpatrick

Certificate of Service

I hereby certify that on November 30, 2012, I caused a copy of this document to be served by electronic filing on all counsel of record.

/s/ Kate J. Fitzpatrick
Kate J. Fitzpatrick

EXHIBIT 1

Xpressman Courier

Date:_____
To: Independent Contractors Bank Route Drivers
From: Xpressman Courier
Subject: Customer Required Pick and Delivery Procedures

1. All Independent contractors MUST have their ID displayed at all times while working.

2. All route sheets (manifests) must be filled out fully and legibly (i.e. time in and out, pickup info and delivery info).

3. At start of route, all mail and supplies must be checked, accounted for and delivered on first run of the day. Mark your manifest accordingly on delivery side and get a signature for secured mail from bank personnel. (All work must be in the trunk of vehicle; if you do not have a trunk it must be in the rear of vehicle not front or back seat.)

4. When you make your pick up's, you must bring your route sheet and mail bin in with you. Check the numbers on the bags to the numbers in the branch logbook to be sure they match and are sealed. Only sign for what you receive. Fill out your route sheet in the branch before you leave to make sure it is filled out accurately. Put everything you picked up in the mail bin before you leave the branch.

5. When you get to your vehicle separate the work into individual bins. The bins must be in the rear of the vehicle and vehicles window's MUST be closed and doors locked at all times.

6. When delivering and picking up, count all items to be sure everything is accurate and accounted for.

7. No riders allowed in vehicle when on route.

8. Line haul drivers must go directly from pickup to drop off point, no stopping on the way. Be sure to have enough fuel to do your run when you start.

9. Line haul drivers at meet points must verify counts from other drivers and sign their route sheets to complete the chain-of-custody. Receiving hubs must do the same.

10. All drivers must adhere to the scheduled start, pickup and delivery times on the manifests.