A Timely Analysis of Legal Developments

ASAP®

July 15, 2014

Ninth Circuit Holds FAAAA Does Not Preempt California's Meal and Rest Break Laws

By Richard Rahm and Kai-Ching Cha

Last week the U.S. Court of Appeals for the Ninth Circuit concluded, in *Dilts v. Penske Logistics, LLC*,[1] that the Federal Aviation Administration Authorization Act of 1994[2] (FAAAA) does not preempt the application of California's meal and rest break laws to motor carriers because these state laws are not sufficiently "related to" prices, routes, or services. The decision is contrary to the decisions of approximately a dozen district court cases holding that such laws were preempted. Moreover, if the Ninth Circuit's decision goes unchallenged, trucking companies that have operations in California will be required to comply with California's meal and rest break laws instead of the Department of Transportation regulations.

Background of the FAAAA

Congress passed the FAAAA for the purpose of preempting state trucking regulations following the deregulation of the trucking industry. The FAAAA preempts state laws or regulations or any other provision having the force and effect of law "*related* to a price, route, or service any motor carrier."[3] The purpose of the preemption clause in the FAAAA, similar to the Airline Deregulation Act (ADA), was to prevent states from enacting, either directly or indirectly, "a patchwork of state service-determining laws, rules, and regulations," so as to "leave such decisions, where federally unregulated, to the competitive marketplace."[4] Expressly excluded from preemption is the ability of a state's motor vehicle "safety regulatory authority" to impose various motor vehicle safety regulations, such as highway route controls or limitations based on the size and weight of the motor vehicle or the hazardous nature of the cargo, in addition to, *inter alia*, a state's ability to set minimum amounts of financial responsibility relating to insurance requirements.[5]

Nevertheless, these express exclusions from FAAAA preemption still leave the scope of the term "related to" extremely broad and, as noted by Justice Scalia in a concurrence concerning the same term used in ERISA, "everything is related to everything else."[6] The Supreme Court has held that

1 2014 U.S. App. LEXIS 12933 (9th Cir. Jul. 9, 2014).

2 The FAAAA is also known as the Trucking Deregulation Act.

3 49 U.S.C. § 14501(c)(1) (emphasis supplied).

4 *Rowe v. New Hampshire Motor Transport Assn.*, 552 U.S. 364, 373 (2008).

5 Id. at § 14501(c)(2).

6 *California Div. of Labor Standards Enforcement v. Dillingham Constr.*, N.A., 519 U.S. 316, 335 (1997) (emphasis supplied).

the term "related to" means "having a connection with, or reference to," prices, routes and services, regardless of whether that connection is direct or indirect, and that preemption "occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption related objectives."[7] Conversely, the FAAAA does not preempt state laws that affect prices, routes and services only in a "tenuous, remote, or peripheral ... manner, such as state laws forbidding gambling."[8] Although the Supreme Court has never said where, or how, "it would be appropriate to draw the line" in borderline situations,[9] the Ninth Circuit has held that when a law does not refer directly to rates, routes, or services, "the proper inquiry is whether the provision, directly or indirectly, *binds* the carrier to a particular price, route or service and thereby interferes with the competitive market forces within the industry."[10]

Factual and Procedural Background of *Dilts*

The plaintiffs represent a certified class of almost 350 delivery drivers and installers of appliances in a class action against Penske, a motor carrier. The plaintiffs worked exclusively within California and alleged that the motor carrier routinely violated California's meal and rest break laws. As delivery drivers and installers, they typically worked in pairs with one driver and one installer in each truck. Because California's meal and rest break laws were not expressly targeted at the motor carrier industry, the district court used the Ninth Circuit's "borderline" formulation in determining that these laws would be preempted only if they would "bind" the motor carrier to particular prices, routes, or services and thereby "interfere with competitive market forces within the ... industry."[11]

The motor carrier argued that California's meal and rest break laws necessarily would force its drivers to alter their routes daily in search of an appropriate place to exit the highway and to locate stopping places that safely and lawfully accommodate their vehicles. The district court found that, "while the laws do not strictly bind [the motor carrier's] drivers *to* one particular route," they would not be able to take routes that did not offer adequate places to stop, and therefore "the laws bind motor carriers to a smaller set of possible routes."[12] Likewise, the district court held that "by virtue of simple mathematics," forcing the drivers to take a number of breaks within specified time windows would "reduce the amount and level of service [the motor carrier could] offer its customers without increasing its workforce and investment in equipment," which would also have a significant impact on prices.[13] Finally, the district court found that "to allow California to insist exactly when and for exactly how long carriers provide breaks for their employees" would allow other states to do the same, thus creating the forbidden "patchwork of state service-determining laws."[14]

The plaintiffs appealed. Nevertheless, following the district court's published decision, numerous district courts followed the *Dilts*' analysis and likewise held that California's meal and rest breaks were preempted either by the FAAAA for motor carriers or the ADA for air carriers.[15] Building on that analysis, two district courts held that California's minimum wage laws, as applied to piece-rate compensation, were preempted,[16] and a Virginia district court used the same analysis to hold that the Massachusetts Independent Contractor Law, which effectively prohibits motor carriers from using independent contractors as drivers, was preempted.[17]

The U.S. Supreme Court's Decision in *Northwest, Inc. v. Ginsberg*

Oral argument on the *Dilts* appeal took place on March 3, 2014. One month later (but three months before the Ninth Circuit issued its decision in *Dilts*), the U.S. Supreme Court decided *Northwest, Inc. v. Ginsberg*, reversing a Ninth Circuit decision on the proper test for preemption,

7 *Rowe*, 552 U.S. 370.

8 *Id.*

9 *Id.*

10 *Am. Trucking Assns. v. City of Los Angeles*, 660 F. 3d 384, 397 (9th Cir. 2011) (emphasis supplied).

11 *Dilts v. Penske Logistics LLC*, 819 F. Supp. 2d 1109, 1118 (S.D. Cal. 2011).

12 *Id.* at 1118-1119.

13 *Id.* at 1120.

14 *Id.* at 1120.

15 *See, e.g. Rodriguez v. Old Dominion Freight Line, Inc.*, 2013 U.S. Dist. LEXIS 171328 (C.D. Cal. Nov. 27, 2013) (FAAAA); *Miller v. Southwest Airlines Co.*, 923 F. Supp. 2d 1206 (N.D. Cal. 2013) (ADA).

16 *Burnham v. Ruan Transportation*, 2013 U.S. Dist. LEXIS 118892 (C.D. Cal. Aug. 16, 2013); *Ortega v. J.B. Hunt*, 2014 U.S. Dist. LEXIS 79720 (C.D. Cal. Jun. 3, 2014).

17 *Sanchez v. Lasership, Inc.* 937 F. Supp. 2d 730 (E.D. Va. 2013).

also applicable in *Dilts*[18] The case concerned a common-law claim for breach of the implied covenant of good faith and fair dealing made by the plaintiff because he was terminated from a frequent flyer program. The Supreme Court referred to the Ninth Circuit's holding as being based on "pre-*Wolens* Circuit precedent" that such a claim is "too tenuously connected to airline regulation to trigger preemption under the ADA" because it "does not interfere with the [ADA's] deregulatory mandate" and does not "force the Airlines to adopt or change their prices, routes or services—the prerequisite for ... preemption."[19] Instead, the Supreme Court held that what is important is "the effect of a state law, regulation, or provision, *not its form*, and the ADA's deregulatory aim can be undermined just as surely by a state common-law rule as it can be by a state statute or regulation."[20] Nevertheless, the Ninth Circuit chose to ignore the Northwest holding in deciding the *Dilts* case.

The Ninth Circuit's Decision in *Dilts*

On July 9, 2014, the Ninth Circuit reversed the district court's ruling in *Dilts*. In discussing how a court should "draw a line" between laws that are significantly related to prices, routes and services, and those that are only tenuously related, the Ninth Circuit concluded that the type of law that can be preempted is one in which "the existence of a price, route or service [is] essential to the law's operation." Otherwise, in "borderline cases" concerning laws of general application, the proper inquiry is "whether the provision, directly or indirectly, *binds* the carrier to a particular price, route or service and thereby interferes with the competitive market forces within the industry."[21] As such, "generally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted, even if employers must factor those provisions into their decisions about the prices that they set, the routes that they use, or the services that they provide." In this respect, the Ninth Circuit noted that many of the laws the FAAAA expressly excludes from preemption, such as transportation safety and insurance regulations, "are likely to increase a motor carrier's operating costs" far more than compliance with California's meal and rest break laws.[22] The holding in *Northwest* notwithstanding, the Ninth Circuit concluded that if the law is of general application, it can only be preempted if it "binds" the carrier with respect to prices, routes and services.

Holding that broad laws cannot be preempted simply because they "shift[] incentives and make[] it more costly for motor carriers to choose some routes or services *relative* to others," the Ninth Circuit easily concluded that California's meal and rest break laws are not preempted by the FAAAA because "[t]hey do not set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide, either directly or indirectly."[23] Furthermore, such laws do not create an impermissible "patchwork" of state-specific laws that would defeat Congress' deregulatory objectives because, again, citing to its own Circuit precedent, such laws are more analogous to state wage laws, "which may differ from the law adopted in neighboring states but nevertheless is permissible."[24]

The Ninth Circuit then addressed each of the motor carrier's arguments, often noting that those laws which are expressly excluded from preemption by the FAAAA would cost a motor carrier more than compliance with California's break laws. For instance, the Ninth Circuit held that, contrary to the motor carrier's argument, California's break laws do not actually require a cessation of service, or a change in service, or the frequency of a service; instead, the laws simply require individual employees to be given breaks and, to the extent that this impacts services, then the motor carrier can hire more employees. "They simply must take drivers' break times into account—just as they must take into account speed limits or weight restrictions, ... which are not preempted by the FAAAA." Likewise, the court held that forcing drivers to pull over to take breaks was not the sort of route control that Congress sought to preempt and, in any event, the motor carrier did not present any evidence that such minor deviations limited its drivers to a small set of possible routes. "Indeed, Congress has made clear that even more onerous route restrictions, such as weight limits on particular roads, are not 'related to' routes and therefore are not preempted." Nor did the court find that such laws do not interfere with the FAAAA's deregulatory objectives insofar as "all motor carriers in California are subject to the same laws" and thus "equally subject to the relevant market forces."[25]

18 134 S. Ct. 1422 (2014).

19 *Id.* at 1428, quoting from *Ginsberg v. Northwest, Inc.*, 695 F. 3d 873, 881 (9th Cir. 2012).

20 *Id.* at 1430.

21 *Id.* at *19-20.

22 *Id.* at *15-16.

23 *Id.* at *24-25.

24 *Id.* at *25-26.

25 *Id.* at *27-32.

Significance for Employers

There is much in the Ninth Circuit *Dilts* decision that arguably conflicts with the Supreme Court's decision in *Northwest*. Not only did the Supreme Court in *Northwest* find that the Ninth Circuit was wrong in the "must-bind" test for preemption, but it clearly stated that it is the law's *effect* on prices, rates and services, that determines preemption—not the form of the law. Regardless, it is of course unclear whether the motor carrier in this case will be able to obtain a rehearing *en banc* or, failing that, whether it will successfully petition the Supreme Court for review. However, if the Ninth Circuit's decision stands, motor carriers operating in California will be subject to California's meal and break laws. As a result, all motor carriers transporting property within the state of California should examine their meal and rest break policies and practices to assess the impact of this case on their operations.

Richard Rahm is a Shareholder, and Kai-Ching Cha is an Associate, in Littler's San Francisco office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Rahm at rrahm@littler.com, or Ms. Cha at kcha@littler.com.