Federal Preemption in Employment Matters Involving Interstate Commerce

By Hon. Robert Freedman (Ret.)

Choice of law in employment matters involving issues of interstate commerce is a constant and evolving concern for attorneys, their clients, judges and arbitration and mediation neutrals.

Proposed amendments to the Federal Aviation Administration Authorization Act of 1994 (FAAAA) provide a case in point. The amendments would have the effect of preempting state law and regulation of meal and rest periods for drivers in the trucking industry.

Yes, the Federal *Aviation* Administration Authorization Act [emphasis added] can and does regulate the trucking industry. This will come as no surprise to practitioners experienced in this area of law, but it may be a revelation to those newer to the subject matter.

Currently, drivers in interstate commerce may operate in two or more states during a single workday. Because the laws of individual states vary as to meal and rest periods, the resolution of disputes about breaks and compensation for alleged violations is often complex. Cases involving these controversies, frequently brought as class actions in state and federal courts, will routinely invoke issues of preemption of state law by federal law.

Dilts v. Penske Logistics, LLC (9th Cir. 2014) is regularly cited as a leading case holding that the FAAAA did not preempt (California) state law on meal and rest periods for truck drivers. The Supreme Court denied the employer's petition for a writ of certiorari on May 4, 2015.

Since the *Dilts* decision, a variety of amendments to the FAAAA on this subject have passed in both the Senate and the House during the current legislative session, but ultimate action on the proposed legislation remains pending. Prior proposed amendments on this subject have been adopted at legislative committee levels in the past two years, but they ultimately died before final adoption.

Lawyers, judicial officers and neutrals active in this subject matter may wish to pay particular attention to an aspect of the pro-

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posed amendments relating to retroactivity. Specifically, one provision of a proposed amendment would make preemption retroactive to the year 1994; i.e., the year the FAAAA first became effective.

If full preemptive retroactivity is adopted and construed literally, the effect on pending cases and those yet to be filed could be perplexing. For cases resolved at the trial or appellate level, but with further appellate review still available or pending, a retroactivity analysis could be even more daunting. The enforceability of such a far-reaching preemption provision, if adopted, would no doubt engender its own debate.

For now, uncertainties abound. For those active in this evolving area of employment law who are or may be involved in efforts to settle claims or active litigation currently or potentially subject to the FAAAA, these potential amendments should be considered so that a settlement fully resolves a case.

Experience teaches that uncertainties contribute to settlement. Here is one more set to ponder.

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