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PERSPECTIVE

LePage Bakery case: Supreme Court hears argument on FAA Transportation Exemption

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On Feb. 20, the United States Supreme Court heard oral argument in *Bissonnette v. LePage Bakeries*, a case that could have a significant impact on the American workplace. The key question in the case is whether, in order to be exempt from coverage by the Federal Arbitration Act (FAA), workers who are "actively engaged in interstate transportation must also be employed by a company in the transportation industry."

The battleground issue in *Bissonnette* is whether a large sector of workers who engage in interstate transportation can be forced to waive their right to have workplace disputes heard in court solely because their employers' main business is in something other than transportation. Even though such workers often cross state lines to do their jobs, such interstate transit is secondary to the employer's underlying business, and thus these workers could be required to agree to mandatory arbitration of most workplace disputes, rather than taking those disputes to court.

A broad reading of the FAA's carve-out for workers engaged in interstate transportation - a reading that would include businesses outside the transportation industry - could significantly expand the number of workers who are exempt from arbitration under the FAA. Such a reading would make it more difficult for businesses to enforce mandatory arbitration agreements against workers whose jobs require them to cross state lines. A narrow reading of the FAA's interstate commerce exemption would, in contrast, result in far fewer workers being exempt from arbitration. Such a narrow reading would increase the likelihood of employers requiring their workers to agree to mandatory arbitration of workplace disputes.

The recent oral arguments on these issues before the Supreme Court were active and well presented by counsel for both parties: Jennifer Bennett for Petitioner Bissonnette and Traci Lovitt for Respondent LePage Bakeries. While the Court did not tip its hand as to any potential outcome of the case, the following circumstances and exchanges were noteworthy.

First, in a departure from the way most arguments are heard by the Court, in this proceeding all nine justices asked questions. Most of the questioning came from Justices Brett Kavanaugh, Amy Coney

Barrett and Ketanji Brown Jackson. These justices appeared interested in fully understanding the historical reasons for the 1925 enactment of the FAA's Section One exemption for workers in interstate commerce. That section provides that "contracts of employment of seamen, railroad employees, *or any other class of workers engaged in foreign or interstate commerce"* (emphasis added) are expressly exempted from coverage under the pro-arbitration FAA.

Justice Coney Barrett, for example, inquired whether the Section One exemption was still relevant in today's world of commerce, or was it simply an "anachronism" left over from when the FAA became law in 1925. Several justices grappled with whether the text of the exemption made sense in today's world, in a time when interstate shipment of goods and services by businesses is a ubiquitous part of the general economy.

These and other questions posed by the justices might suggest that the Court will ultimately decline to wordsmith the text of the FAA, choosing instead to defer the matter to Congress. If the Court chooses this route, it will be up to legislators to cure any uncertainty about the Section One exemption through an amendment to the statute.

Justice Kavanaugh went straight to the heart of the matter by asking counsel about the potential practical impact of the Court's ruling on businesses. He posed the following challenge to Respondent LePage's counsel: "[I] think the number of workers who are going to be exempt and the number of companies who are going to have to deal with this is massive if you lose. But I mean, spell that out for me. ...I'm not sure how to quantify it really...."

LePage's counsel agreed that the impact of such a ruling would be "massive" on American businesses and employers. She listed, as examples, the franchise restaurant industry, the medical industry, and the food (and beer!) industries, all of whom rely on prompt shipping of perishable products, as well as "every retail industry that is shipping their own [products and services]."

Counsel for Petitioner Bissonnette argued for a broad reading of the FAA's Section One exemption, contending that virtually all commerce now is to some degree "interstate." In response, LePage's counsel reminded the justices that the Supreme Court had historically taken a narrow view of the exemption so as to ensure a broad application of the FAA's pro-arbitration public policy to the American workforce.

In the end, Petitioner Bissonnette appears to have an uphill fight. Although there is no assurance that the Court will end up ruling on the side of businesses, Bissonnette will have had to persuade a very conservative and pro-arbitration Supreme Court to narrow the reach of arbitration by expanding the definition of "transportation worker" for purposes of the FAA's Section One exemption.

A ruling for Bissonnette could render a large number of American workers no longer subject to the FAA, giving them the right to have their employment disputes heard in court. Such workers, whose jobs involve interstate transportation, would no longer be subject to mandatory arbitration agreements. In the end, the Supreme Court could avoid making any decision in this case, instead electing to send the issue to Congress for resolution. We will know more in the coming months.

Rex Darrell Berry, *with four decades of experience specializing in employment law and arbitration issues, now focuses his energy on dispute resolution as a mediator and arbitrator with Signature Resolution. His experience spans across all areas of employment law, including single- and multi-plaintiff litigation, restrictive covenant enforcement, employment tort, employee discharge, Title VII, FEHA, FMLA, CFRA, and ADEA. He can be reached at rberry@signatureresolution.com.*