ARBITRATION OF OCCUPATIONAL INJURY CLAIMS

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ARBITRATION OF OCCUPATIONAL INJURY CLAIMS

I. Arbitration Generally

A. Based in Contract Law

An arbitration clause allows a party to contract for means of alternative dispute resolution. Parties *to a contract* can decide that disputes that may arise will go to arbitration rather than litigation. Parties can elect to include contractual provisions that provide the option of arbitration or litigation. An arbitration clause can apply to all disputes that arise under a contract or only to certain types to disputes. Language within the contract or arbitration provision can exclude specific disputes from arbitration or determine which disputes *must* be arbitrated.

An arbitration clause in a contract cannot be read separately from the rest of the contract. "It is a 'cardinal principle' of contract construction that all provisions of a contract be given effect whenever possible."[1] Other provisions within the contract can impact the arbitration or even prevent the arbitration from occurring. For example, arbitration can be conditioned upon certain requirements being met such as the arbitration must occur in a specific forum, only one arbitration can be held to settle all disputes with common questions of law and fact, or mandating that mediation occur prior to arbitration. Further, the scope of the arbitration provision could be limited by the type of disputes it covers, or a provision in the contract may provide the parties with the option of litigation over arbitration. The federal presumption in favor of arbitration will not compel a party to arbitrate in a dispute if it is not already contractually bound.

B. Overview & Statutes

Historically, the common law did not look favorably upon arbitration. Protective of their own power to resolve disputes, courts typically refused to enforce arbitration agreements. This general opposition to arbitration was reduced when the Federal Arbitration Act ("FAA")[2] was enacted in 1925. The purpose of the FAA was to make arbitration agreements as enforceable as other contracts. After the adoption of the FAA, courts could no longer unreasonably refuse to enforce valid arbitration agreements. The FAA can be divided into three parts 1) sections 1-6, 8 and 14-16 address how to get into arbitration; 2) section 7 deals with matters during arbitration; and 3) sections 6, 9-13, and 16 speak to post-arbitration issues.

Texas enacted its own Texas Arbitration Act ("TAA")[3] to provide for enforcement of arbitration clauses. The TAA applies generally to all arbitration agreements, but specific types of agreements are exempt from its application, such as arbitration agreements between an employer and labor unions and claims for worker's compensation benefits.[4] Under the TAA, Texas courts may compel arbitration and stay litigation, among other things.[5] Similar to the analysis under the FAA, a court will examine whether there is a valid agreement to arbitrate that encompasses the dispute at issue.[6]

C. Purposes & Goals of Arbitration

One view of arbitration is that it plays a considerable role in reducing legal expenses, especially for businesses. On closer inspection, it may well be found that arbitration costs mirror those of litigation. For example, in federal or state court, if one party sues instead of abiding by the arbitration agreement, the defendant must prove the enforceability of the arbitration clause in order to get the case dismissed. This 'mini' trial could conceivably cost as much as a trial on the merits and simply 'wins' the defendant a chance to proceed into an arbitration proceeding. Proper drafting may help reduce the cost of combating improper litigation proceedings.

II. FAA & TAA

A. Applicability

When the parties' arbitration agreement does not specify whether the Federal Arbitration Act

[1] *Higman Marine Services, Inc. v. BP Amoco Chemical Co.,* 114 F. Supp 2d 593, 597 (S.D. Tex. 2000).

[2] 9 U.S.C.S

[3] Tex. Civ. Prac. & Rem. Code § 171.001 et seq.

[4] CPRC § 171.001-.002

[5] CPRC § 171.021

[6] *see Nationwide of Bryan, Inc. v. Dyer,* 969 S.W.2d 518 (Tex. App. – Austin 1998, no pet.).

("FAA") or the Texas Arbitration Act ("TAA") applies, the court examines whether the underlying transaction affects interstate commerce; if it does, the FAA will usually apply[7], although both may apply if the TAA is not preempted[8].

The FAA provides a basis to enforce many arbitration clauses as it applies to any contract involving maritime transaction or evidencing a transaction involving foreign or interstate commerce.[9] Interstate commerce extends beyond the interstate shipment of goods to include all contracts which relate to interstate commerce.[10] Basically, numerous contracts, unless undeniably local, have enough of a relation to interstate commerce to fall within the FAA. Therefore, those drafting contracts for transportation contracts will typically be concerned with enforcement of arbitration agreements under the FAA unless there is a particular advantage to invoking the TAA.

B. Preemption

Federal law protects arbitration clauses from state legislation that could invalidate the terms of an arbitration clause. Title 9 section 2 provides that a written contract provision to settle disputes by arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of the contract."[11] This language has been interpreted to bar states from enacting laws that will invalidate arbitration provisions.[12] "In enacting [section] 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[13] Courts will enforce the national policy declared by Congress favoring arbitration and prevent states from requiring a judicial forum when the parties agreed to arbitration.[14]

The United States Supreme Court has also all but eroded state practices of prohibiting remedies available in arbitration and reserving them entirely for the courts.[15] For example, a state may not limit the types of damages available to parties in arbitration when those damages would be available in the judicial system. Relying on the FAA's broad remedial purposes the court has held that in so far as parties fail to explicitly agree to exclude an otherwise available award, it will be implicit in the agreement.[16] Therefore, employers who wish to avoid certain awards of damages by an arbitrator should incorporate unequivocal clauses into their arbitration agreements which explicitly exclude that relief from arbitration. It is no longer sufficient to simply provide in such agreements that they are to be interpreted under state law.

When both acts apply, the FAA only preempts the TAA where the state law would thwart the goals and policies of the FAA[17]. The Texas Supreme Court articulated a four-part test to determine whether the FAA preempts the TAA: 1) The agreement is in writing; 2) The agreement involves interstate commerce, 3) the agreement can withstand scrutiny under state contract law; and 4) the Texas law in question must be contrary to the FAA[18]. But even when the FAA preempts the TAA, the agreement, except for the inconsistent provisions, can still be arbitrated under the TAA[19].

C. Review

1. Procedural Process & Burdens

Whether you are proceeding under the FAA or TAA also affects the procedural process and appellate burden. Under the TAA, there is no mandamus relief, only the ability to bring

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[7] *In re Education Management Corp., Inc.,* 14 S.W.3d 418, 423 (Tex.App.—Houston [14th Dist.] 2000, orig. proceeding).

[8] *See In re D. Wilson Constr.,* 196 S.W.3d 774 (Tex. 2006).

[9] 9 U.S.C.S. § 1; Freudensprung v. Offshore Technical Servies, Inc., 379 F.3d 327 (5th Cir. 2004).

[10] *In re First Merit Bank, N.A*., 52 S.W.3d 749, 754 (Tex. 2001).

[11] 9 U.S.C.S § 2

[12] *OPE International LP v. Chet Morrison Contractors, Inc.,* 258 F.3d 443, 446 (5th Cir. 2001).*quoting Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

[13] *OPE,* 258 F.3d at 443

[14] *Id.* at 446

[15] Mastrobuono v. Shearson Lehman Hutton, Inc., ___ US ___

[16] *Id.*

[17] *In re Nexion Health, Inc.,* 173 S.W.3d 67 (Tex. 2005).

[18] *Id.*

[19] *See In re D. Wilson Constr.,* 196 S.W.3d 774 (Tex. 2006).

interlocutory appeals.[20] However, under the FAA, a petition for writ of mandamus is the proper procedure.[21] The appellate burden in mandamus proceedings is proving an abuse of discretion.[22] Considering that arbitrators do not necessarily have to follow the law in deciding a dispute, this can be a very high burden.

Another difference between enforcing arbitration agreements under the FAA or TAA is the ability to expand judicial review of arbitration awards. Under the TAA, parties to an arbitration agreement do not have to rely on the courts and law to completely determine the scope of the judicial review permitted. The Fifth Circuit and Texas courts have held that the parties can expand the scope of appellate review allowed as long as the contract clearly states their intention.[23] Examples of an expanded scope of review include allowing errors of law to be appealed and permitting de novo review.[24] However, because the FAA and the TAA are not mutually exclusive, the contractual provisions allowing expanded review of the arbitrator's decisions and/or award must be very clear.

In contrast, the U.S. Supreme Court has held that a contract purporting to allow judicial review of an arbitration award for evidentiary and legal errors *cannot* be enforced under the FAA.[25] Although this decision precludes parties from contracting for expanded judicial review under the FAA, it does not do so for similar agreements under state law. Because the trigger for enforcing an agreement under the FAA is whether it "involves commerce," it is likely that most transportation contracts will be limited in their abilities to expand judicial review. However, in the future, in order to circumvent this limitation, parties arbitrating within the FAA may choose to build levels of review into the arbitration process and turn to 'arbitration appellate panels' before attempting the judicial remedy of a restricted appeal.

2. Appeals

At the conclusion of the arbitration, the arbitrator issues the award, but the question can remain open as to whether a party will challenge the award. If a party challenges the award in court, a district court will conduct a very narrow review of the arbitration award.[26] The FAA limits the circumstances in which an award may be vacated to four factors: 1) the award was procured by corruption, fraud, or undue means, 2) there is evidence of partiality or corruption among the arbitrators, 3) the arbitrators were guilty of misconduct which prejudiced the rights of one of the parties, or 4) the arbitrators exceeded their powers.[27]

In Texas, judicial review of the award will be very limited, and any doubts are resolved in favor of the arbitrator's award. The court may not vacate the arbitrator's award even if the award is based on a mistake of law or fact.[28] Typically, the only way a court will vacate an award is if the decision is tainted with fraud, misconduct, or gross mistake as would imply bad faith and failure to exercise honest judgment.[29]

D. Types of Contracts & Signature Requirements

Whether or not an arbitration provision is enforceable without the signatures of each party and/or their legal counsel depends on 1) whether the agreement is being enforced under the FAA or TAA and 2) what type of claim is involved.

1. Types of Contracts & Signature Requirements Generally

The FAA does not require that arbitration agreements be signed, but simply written and agreed to by the parties.[30] Under the FAA, the agreement to arbitrate must be in writing, but it

[20] TEX. RULES APP. PROC. 28; *In re Valero Energy Corp.,* 968 S.W.2d 916 (Tex. 1998).
[21] TEX. RULES APP. PROC. 52; *In re Bank One, N.A., 216 S.W.3d 825, 826 (Tex. 2007) (orig. proceeding); Jack B. Anglin v. Tipps,* 842 S.W.2d 266 (Tex. 1992).
[22] *In re Oakwood Mobile Homes, Inc.,* 987 S.W.2d 571 (Tex. 1999).
[23] *See Gateway Technologies, Inc. v. MCI Telecomm. Corp.,* 64 F.3d 993 (5th Cir. 1995); *Tanox, Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P.,* 105 S.W.3d 244 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).
[24] 64 F.3d at 997.
[25] *Hall Street Associate, L/L/C/ v. Mattel, Inc.* ____*US*_____
[26] *Antwine v. Prudential Bache Securities, Inc.,* 899 F.2d 410, 413 (5th Cir. 1990).
[27] 9 U.S.C.A. § 10(a)(1)-(4).
[28] *Universal Computer Sys. Inc. v. Dealer Solutions,* 183 S.W.3d 741, 752 (Tex. 2005).
[29] *Id.*
[30] *In re AdvancePCS Health L./P.,* 172 S.W.3d 603, 605 (Tex. 2005).

does not have to be signed by the parties.[31] The Texas Supreme Court has even held that simply continuing employment constituted acceptance of an arbitration agreement by an employee.[32]

2. Signature Requirements based on Type of Claim

Under Texas law, the arbitrability of personal injury claims is conditioned on whether the claimant was represented by counsel when the arbitration agreement was signed and whether council signed it as well.[33] Therefore, if an employee can show that the underlying contract does not 'involve commerce,' or is a 'contract of employment of… a class of workers engaged in…interstate commerce', the employee may invoke the TAA and avoid arbitration if the more specific state requirements are not met. However, if the employer can show that the contract involves commerce and the employee does not fall under the exemption, the FAA will control and arbitration will likely be compelled. Unless the parties expressly exclude the application of the FAA in favor of state law, the FAA will preempt any state provisions constricting arbitration beyond the boundaries of the FAA.[34] Under the FAA, the agreement to arbitrate must be in writing, but it does not have to be signed by the parties.[35]

III. Arbitration Agreements & Contracts

A. Separate Documents

Many times more than one contract can be executed as part of a business deal or other matter, but not all the contracts involved may provide for arbitration. If a dispute arises, a party may attempt to avoid arbitration and only sue under the contract that lacks an arbitration provision. However, under general principles of contract law, separate agreements executed contemporaneously by the same parties, for the same purposes are to be construed together.[36] Whether the arbitration clause applies to the dispute would depend on the applicability of the clause to the dispute in question and the interaction of the contracts at issue.

Because the FAA has a specific exemption affecting employment contracts of transportation workers, special care must be taken to ensure that any arbitration agreement with an employee will be construed apart from the contracts concerning employment status if the goal is to enforce arbitration under the FAA. Contracts with third parties, that may have an impact on employees, should also be reviewed with this exemption in mind.

B. Unconscionability

Unconscionability, as generally accepted under contract law principle, consists of two aspects: 1) procedural, which refers to the circumstances surrounding the adoption of the arbitration provision, and 2) substantive, which refers to the fairness of the arbitration provision itself.[37] The existence of a valid agreement is determined by the substantive contract law of the state.[38] Because, even under the FAA, the provisions will be analyzed under state law, Texas contract law dealing with unconscionability of entire contracts or particular provisions will be applied to these types of questions presented before either federal or state court.

Texas courts have not found the disparity in bargaining power between an employer and an at-will employee to be procedurally unconscionable[39]. Also, adhesion contracts or contracts that bind only one of the parties to arbitration are not per se unconscionable either[40]. However, contracts that impose excessive costs for arbitration on one party may be substantively unconscionable[41].

IV. Compelling Arbitration

If a contracting party refuses to arbitrate per the contractual terms, the other party to the contract may have to go to court to enforce the arbitration

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[31] *Caley v. Gulfstream Aero. Corp.,* 428 F.3d 1359, 1368-69 (11th Cir. 2005).

[32] *In re Halliburton,* 80 S.W.3d 566, 569 (Tex. 2002) (orig. proceeding).

[33] Cite 171.002

[34] *Freudensprung v. Offshore Technical Services, Inc.,* 379 F.3d 327, 338 n. 7 (5th Cir. 2004).

[35] *Caley v. Gulfstream Aero. Corp.,* 428 F.3d 1359, 1368-69 (11th Cir. 2005).

[36] *Neal v. Hardee's Food Systems, Inc*., 918 F.2d 34,37 (5th Cir. 1990).

[37] *Id.* at 571.

[38] *Tenen Healthcare, Ltd. V. Cooper,* 960 S.W.2d 386, 388 (Tex. App.—Houston [14th Dist.] 1998, writ dism'd w.o.j.).

[39] *In re Halliburton Co.,* 80 S.W.3d at 572.

[40] *In re Palm Harbor Homes,* 195 S.W.3d 672.

[41] *Olshan Found Repair CO. v. Ayala,* 180 S.W.3d 212 (Tex. App.—San Antonio 2005, pet. denied).

clause. Federal law creates a strong presumption in favor of enforcing arbitration clauses[42] and provides a means to compel arbitration through the courts.[43] However, the mere existence of an arbitration clause does not necessarily mean that arbitration will occur. The entire contract must be examined to determine if the clause is applicable to the current dispute and whether the clause is enforceable.

If one party refuses a demand to arbitrate pursuant to a valid arbitration clause, the other contracting party may file an action in court to enforce the agreement and have the court order arbitration.[44] If a dispute ordered to arbitration is currently in litigation, a party may petition the court for a stay of the litigation pending the arbitration and such stay must be granted.[45]

In order for a court to compel arbitration under the FAA, an aggrieved party must demonstrate that the dispute falls within the scope of a valid arbitration clause.[46] Until a party is aggrieved i.e. an arbitration demand is refused, the FAA is not applicable. Once a party can seek enforcement under the FAA, the court will examine 1) whether there is an agreement to arbitrate and 2) whether the agreement pertains to the current dispute between the parties.

To utilize the FAA to enforce an arbitration agreement, a demand for arbitration must have been issued and refused. Thus, only an aggrieved party can seek an order compelling arbitration. Specifically, the FAA provides, "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court…for an order directing that such arbitration proceed in the manner provided for in such agreement.[47] Further, "it is doubtful that a petition to compel arbitration filed before the 'adverse' party has refused arbitration would present an Article III court with a justiciable case of controversy in the first instance."[48]

The court's initial query into the arbitration clause begins with the question of whether the parties agreed to arbitrate the dispute in question. State-law principles will be applied in making this determination.[49] Evaluating the parties' agreement involves a two-part inquiry: "(1) whether there is a valid agreement to arbitrate between the two parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement.[50] Ambiguities will be resolved in favor of arbitration.[51]

The United States Supreme Court has established four (4) guiding principles regarding arbitrability. First, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agree to submit."[52] Second, the court is to determine the question of arbitrability unless the parties clearly provide otherwise. Third, the court must not rule on the potential merits of the underlying claims when addressing the issue of arbitrability. Finally, there is a presumption of arbitrability when a contract contains an arbitration clause unless it expressly excludes the asserted dispute.[53]

V. Federal Transportation Worker Exemption

The FAA contains a narrow exemption to its applicability. Under Section 1 of the Act, employment contracts of transportation workers are exempt, even when interstate commerce is involved.[54] Because the legislative history is relatively silent on the reasons for the exemption, there are several theories why such a specific exclusion was added to the bill. Whether it can be attributed to disreputable individuals or strong union lobbyists may be a question better answered by historians or conspiracy enthusiasts. Regardless, the U.S. Supreme Court has found it reasonable to assume that the exclusion of employment contracts of transportation workers

[42] *OPE International LP v. Chet Morrison Contractors, Inc.,* 258 F.3d 443, 446 (5th Cir. 2001).
[43] 9 U.S.C. §§ 1-4.
[44] *Id.*
[45] *Id*.
[46] *In re First Merit Bank,* 52 S.W.3d 749, 753 (Tex. 2001).
[47] 9 U.S.C. §§1-4*; Painewebber Inc. v. Faragalli*, 61 F3d 1063, 1068 (3rd Cir. 1995).
[48] *Painwebber,* 61 F.3d at 1067
[49] *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002).
[50] *Id*.
[51] *Id*.
[52] *AT&T Techs., Inc. v. Communications Workers of Am*., 475 U.S. 643, 648 (1986).
[53] *Id.*
[54] 9 U.S.C.A. § 1; *Circuit City Stores v. Adams,* 522 U.S. 105 (2001).

was to avoid unsettling "established or developing statutory dispute resolution schemes covering specific workers."[55]

Therefore, two (2) questions must then be answered to determine whether a contract falls within this exemption: 1) is the employee a 'transportation worker?' and 2) is the agreement a 'contract of employment?'

A. Transportation Worker

In determining whether an employee's job duties are so closely related to interstate commerce that he would be considered a 'transportation worker', the Eighth Circuit utilizes an eight (8) factor test synthesized from factors used by other courts.[56] If the employee at question is a truck driver, he would have been "indisputably" considered a transportation worker for the purposes of the exemption.[57] However, "a more difficult question arises when an employee…works for a transportation company but is not a truck driver or transporter of goods."[58] These more tangential employees can be evaluated using the following non-exclusive list of factors: 1) whether the employee works in the transportation industry; 2) whether the employee is directly responsible for transporting the goods in interstate commerce; 3) whether the employee handles goods that travel interstate; 4) whether the employee supervises employees who are themselves transportation workers, such as truck drivers; 5) whether, like seamen or railroad employees, the employee is within a class of employees for which special arbitration already existed when Congress enacted the FAA; 6) whether the vehicle itself is vital to the commercial enterprise of the employer; 7) whether a strike by the employee would disrupt interstate commerce; and 8) the nexus that exists between the employee's job duties and the vehicle the employee uses in carrying out his duties.[59]

B. Contract of Employment

The transportation industry has utilized various types of personnel in moving goods, which has evolved with technology and changes in government regulation. Transportation companies may directly hire employees, rely on independent contractors, or utilize the services of companies that aid in the management of assets and personnel.

Third party logistics companies ("3PLs") and labor leasing companies are commonly utilized in the transportation industry. While 3PLs originally were primarily non-asset based companies, used for facilitation, today many invest in physical assets in order to provide broader range of services. Labor leasing companies, 'employment agencies' for drivers, cargo handlers, and owner-operators, will typically negotiate separate contracts with their clients, usually private carriers and warehouses, and the laborers.

Prior to deregulation by The Motor Carrier Act of 1980, the trucking industry was highly unionized. With deregulation, price competition increased, and many companies could not operate efficiently with union labor. The reduction in union labor also resulted in a reduction in many benefits for transportation employees. By pooling employees, labor leasing companies have helped to fill in this benefit gap.

1. Definition of "Employee"

Although some trucking companies have their own fleets and hire the employees that drive the trucks, most companies will utilize independent contractors in order to reduce costs. There are three basic types of independent contractors: 1) owner-operators, 2) subhaulers, and 3) porthaulers. An owner-operator owns and operates his own truck and typically earns a percentage of the freight bill. Subhaulers and porthaulers are owner-operators that provide more specific services.

An individual who works as a truck driver may be classified as an employee, and not an independent contractor, by statute[60] or by

[55] *Circuit City Stores v. Adams,* 522 U.S. 105 (2001).
[56] *Lenz v. Yellow Transportation, Inc.,* 431 F.3d 348 (8th Cir. 2005).
[57] *Id.*
[58] *Id.*
[59] *See Barker v. Halliburton Co.,* No. H-07-2677, 2008 WL 1883880 (S.D. Tex. Apr. 25, 2008).

[60] IRC § 3121 (d)(4)(A). driver engaged in distributing meat products, vegetables products, fruit products, bakery products, beverages (other then milk) , or laundry or dry-cleaning services.

common-law.[61] The Internal Revenue Service has adapted twenty (20) common law factors that provide guidelines to determining employee or independent contractor status.[62] Private letter rulings may also provide assistance when there is some concern about classification.

1) Is there a significant investment in equipment? If the drivers own their own transportation equipment, then they are free to render services to others.

2) Who determines the route? How much control is exerted over the manner in which the independent contractor handles the deliveries?

3) How is the independent contractor able to realize a profit or incur a loss? Who has liability for lass or damage to goods?

4) Are services rendered to different firms? If yes, this would indicate they are an independent contractor.

5) Does the employer have the right to terminate or discharge the driver without liability? An independent cannot be fired if the terms of the contract are met.

6) Can the driver terminate without liability? If yes, this would indicate an employer/employee relationship. An independent contractor can be held liable to complete a specific job.

7) Are the services provided by the independent contractor integrated in the business? (For example, the distribution of goods or services of the business).

8) Does the independent contractor pay for operating expenses by reimbursing the company or paying them directly? If no, then this may indicate that they are an employee.

9) Is the worker provided with tools and materials? If the driver/helper operates the employer's equipment such as tractors, forklifts, etc. this would be an indication they are an employee.

10) Does the driver have the basic training to drive a truck and a license to operate a tractor and trailer? Most drivers will have basic training. However, if the driver has to be trained to operate additional equipment other then the equipment owned, then he may be an employee.

11) Must the driver personally render services? The driver not having the ability to hire someone else to drive the truck indicates that he or she may be an employee.

12) Must the driver comply with written instructions and attend meetings? If yes, then this indicated the amount of control exerted over the drivers.

13) Are there preset work hours?

14) Must the driver devote full time to business? If yes, this indicates a restriction placed on the earning potential of the independent.

15) Is the work performed on employer's premises? If yes, they may be employees.

16) How is payment for services handled? Is the driver paid at the end of a specific job or on a regular basis such as a set rate per hour or week? Hourly rates and fixed salaries tend to indicate the driver is an employee.

17) Does the driver have to submit oral or written reports? Most drivers are required to complete a manifest sheet showing daily deliveries and provide proof of delivery.

18) Can the driver hire or fire assistants? If no, this indicates they are not in control of their operations but are directed by an employer

19) Does the driver offer services to public? Does the driver have the proper operating authority?

20) Is the working relationship continuous? If yes, this may indicate they are an employee.

If using a common-law definition of an employee is important to the contracting goals of the employer, instead of defining him as a "statutory employee," the client should specifically reject the definition within *section 390.5* of the

[61] Treas. Reg. § 31.3401(c) -1
[62] Rev. Rul. 87-41, 1987-1 C.B. 296.

Department of Transportation regulations[63]. *Section 390.5* defines an "employee" as:

> any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle (*including an independent contractor while in the course of operating a commercial motor vehicle*), a mechanic, and a freight handler. (emphasis added)

49 C.F.R. § 390.5

Because the purpose of the regulation is public safety, as long as the intention is clearly made by the parties to exclude this definition, the parties' indication should be followed by the court[64].

2. Impact of Arbitration Agreement contained in separate document

Employers who want to provide for future arbitration with their transportation employees should take special care to ensure that all arbitration agreements are separate and distinct from contracts of employment. Although there is scant authority defining "contracts of employment" in this context, most authority suggests that transportation worker agreements involving collective bargaining agreements, employee handbooks, employment applications, or some sort of contractual agreement affecting the nature and extent of the employer-employee relationship are likely to be considered contracts of employment.[65]

However, in 2007, in *Dextel Terrebonne v. K-Sea Transportation Corp***,** the Fifth Circuit upheld arbitration proceedings compelled under the FAA in a personal injury claim between a transportation worker and his employer.[66] The employee entered into a post-injury Release Agreement which provided for partial settlement and future arbitration.[67] After a second accident, the employee filed litigation that was successfully moved to arbitration by the company.[68] The Fifth Circuit ruled that the Release covered items that were "separate and distinct" from the actual employment contract and included language that did not in any way change the "obligations or nature" of the worker's employment.[69] Therefore, because the Release was not subsumed into the worker's employment contract, it did not fall under the FAA transportation worker exemption as a matter of law.[70]

Relying on the ruling by the Fifth Circuit in *Terrebonne*, in *Awe v. I & M Rail Link, L.L.C***,** the Iowa Court of Appeals exhaustively addressed the scope of "contracts of employment" and contractual obligations in the employment context.[71] The court addressed at-will employment relationships, as well as employment contracts in the employee handbook context.[72] Finding that the agreement in dispute did not change the nature and extent of the employment, because the employees remained at-will employees, and that the new promises were based on mutual agreement and consideration, the court held that the agreement was not a contract of employment but rather a completely new and separate contract that did not alter the employer-employee relationship in any way.[73]

VI. Impact of Workers' Compensation

Texas workers' compensation is a system that provides for the payment of compensation and other benefits for workers or beneficiaries of workers who are injured or killed on the job.[74] An employee covered under this Act will be compensated without regard to fault or

[63] 49 C.F.R. § 390.5

[64] *Consumers County Mutual Ins.Co. v. Paillet,* 307 F.3d 362 (5th Cir. 2002).

[65] *Rosen v. Tranx Ltd.,* 816 F. Supp. 1364, 1371 (D. Minn. 1993); *Bacashihua v. United States Postal Service,* 859 F.2d 402, 405 (6th Cir. 1998); *Harden v. Roadway PackageSystems, Inc.,* 249 F. 3d 1137 (9th Cir. 2001); *Lorntzen v. Swift Transportation, Inc.,* 316 F. Supp 2d 1093, 1095 (D. Kan. 2004); and *Cf. Lenz v. Yellow Transportation, Inc.* 431 F.3d 348, 351 (8th Cir. 2005).

[66] *Dextel Terrebonne v. K-Sea Transportation Corp.,* 477 F.3d 271 (5th 2007).

[67] *Id.*

[68] *Id.*

[69] *Id.* at 279

[70] *Id.*

[71] *Awe v. I & M Rail Link, L.L.C.* (2007 ND Iowa) 2007 US Dist LEXIS 65234.

[72] *Id.*

[73] *Id.*

[74] Tex. Lab. Code § 402.001 et seq.

negligence.[75] Private employers may choose to participate in the workers' compensation system by electing to procure worker's compensation coverage from a licensed insurance company or, if qualified, through self-insurance.[76] Workers' compensation benefits, intending to supersede previous common-law remedies, are the exclusive remedy for most work-related injuries.[77] Generally, a covered employee under an employer obtained workers' compensation insurance or approved self-insured plan has no right of action against his employer under any other state statute or at common law for personal injury or death sustained during the course or scope of employment.[78]

In most cases, the preclusion of common-law remedies does not violate the open courts requirements of the Texas Constitution[79] because the more certain, although more limited, recovery of compensation under workers' compensation is an adequate substitute for previous remedies.[80] One exception to this general rule is when a work related injury or death to a covered employee is attributed to an intentional tort committed by the employer or an agent of the employer.[81] Additionally, if an employer elects not to obtain workers' compensation coverage or an employee opts out of the system, the parties are subject to other preexisting statutory and common-law actions and defenses, such as negligence or statutory violations.[82]

Within the Act, the term "employee" is defined as a "person in the service of another under any contract of hire, whether express or implied, oral or written," but excludes independent contractors or employees of independent contractors.[83] A company defined as a "motor carrier" is one that contracts to or operates a motor vehicle over a public highway to transport passengers or property.[84] Generally, for workers' compensation purposes, a person who performs work or provides a service for a motor carrier is an employee of that motor carrier unless he is an independent contractor, an owner-operator or hired by an independent contractor or owner-operator[85] and there is not a written agreement to the contrary.[86]

If either the employee or employer waives protection under the Workers' Compensation Act, different rules apply. The injured employee may only sue under common-law negligence or statutory violations and has no recourse under the Act.[87] If the employer waived the protection, his defenses in court may be very limited. Assuming a duty owned, the common-law defenses of 1) contributory negligence, 2) assumption of risk, and 3) negligence of a fellow employee are not available and generally leave the employer with the defense that the employee negligence was the sole proximate cause of the injury.[88]

Under Texas law, a negligence cause of action based on a valid employee's injury may not be waived by the employee before the injury, and any such agreement would be void and unenforceable.[89] Also, the TAA does not apply to a claim for personal injury unless each party to a claim, on the advice of counsel, agrees to arbitrate in writing, and the agreement is signed by each party and each party's attorney.[90]

However, an employee's agreement to submit to a dispute over a claim against a non-subscribing employer to arbitrate under the FAA may still be enforceable despite these anti-waiver provisions. Because the FAA favors arbitration, preempts any state substantive or procedural policies to the contrary, is not inconsistent with any state law or policy of Workers' Compensation Act, and the federal McCarran-Ferguson Act does not reverse

[75] Tex. Lab. Code § 406.031
[76] Tex. Lab. Code § 406.002-003
[77] Tex. Lab. Code § 408.001(a)
[78] Tex. Lab. Code § 406.034
[79] Tex. Const. art. 1 § 13
[80] *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 520-521 (Tex. 1995).
[81] Tex. Const. art. 1, § 13; Tex. Lab Code § 408.001 (b); *Rodriguez v. Naylor Indus., Inc*., 763 S.W. 2d 411,412 (Tex. 1989).
[82] Tex. Lab. Code §§ 408.001, 406.033-034; *Garza v. Exel Logistics, Inc*., 161 S.W.3d 473, 478-480 (Tex. 2005).
[83] Tex. Lab. Code § 401.012
[84] TEX. LAB. CODE § 406.121
[85] TEX. LAB. CODE § 406.122
[86] TEX. LAB. CODE § 406.123
[87] TEX. LAB. CODE § 408.001; *Garza v. Excel Logistics, Inc.,* 161 S.W.3d 473, 478-480 (Tex. 2005).
[88] TEX. LAB. CODE § 406.033; *Brookshire GroceryCo. v. Goss,* 208 S.W.3d 706, 715 (Tex. App. –Texarkana 2006, pet. Filed); *Kroger Co. v. Keng,* 23 S.W.3d. 347, 249-353 (Tex. 2000).
[89] TEX. LAB. CODE § 406.033
[90] TEX. CIV. PRAC. & REM. CODE ANN. 171.002

preempt FAA, an arbitration clause that falls within the FAA[91] would probably be enforceable. Considering the loss of defenses in court, arbitration under the FAA could be a very attractive alternative to a non-subscribing employer.

VII. Thoughts & Recommendations

A. Drafting Considerations

Parties must carefully consider the impact of adding an arbitration clause in contracts they enter into. They need to understand the disputes that will be subject to arbitration, what parties are subject to arbitration, how the arbitration will proceed and other contractual provisions that will affect the arbitrations clause. Numerous questions and challenges can arise in attempts to enforce and/or avoid an arbitration clause.

Careful drafting can eliminate a lot of uncertainty in the future as to how the arbitration will proceed and what legal challenges can be raised. The parties can plan ahead and define what disputes will be subject to arbitration and how the arbitration will proceed. They can set forth in the contract how the arbitration will occur, the law that must be applied, how the arbitrator will be selected, and what rules and procedures will be applicable to the arbitration. They may even go so far as to define the enforceability and appeal-ability of the award.

Questions to ask when deciding whether or not to include arbitration in contracts are: 1) do all the parties agree; 2) are the parties willing to live with wrong decisions; 3) are the terms of the agreement favorable; 4) are the facts surrounding the possible disputes common; 5) can the amount in controversy be reasonably anticipated; and 6) is the law in this area well developed?

Once a decision has been made to arbitrate, a party should devise a checklist of points to include in the arbitration provisions. Clauses should be specific as to: 1) where to arbitrate; 2)what damages are available; 3) where responsibility for attorney fees lies; 4) limits on pre and post judgment interest; 5) limits on discovery; 6) limits on time for presentation; 7) requirements for a reasoned opinion vs. a mere award; 8)availability of injunctive relief; and 9) methods of appeal-ability. It may be helpful to include a "non-joinder, then out" clause, in case a necessary party cannot be joined. Also, include a savings clause that provides that in the case one provision in the clause is found to be unenforceable; the rest of the provisions will still be valid.

Planning ahead when entering into an arbitration agreement can eliminate questions and uncertainty if disagreements arise. Defining how the arbitration will occur will help ensure that the parties are able to pursue arbitration as they originally planned.

B. FAA vs. TAA

Parties must be specific in arbitration agreements if there is a clear preference between state and federal acts. The choice of law must be made carefully and expressly stated when the intention is to proceed under the FAA or TAA. It is also necessary to consider whether the parties intend to incorporate or exclude specific rules of procedure and evidence.

C. Other Issues

An arbitration clause can open the door for a few surprises the signatories may not have anticipated, such as a third party attempting to compel a signatory to arbitration or vice versa. Situations arise where a non-signatory to a contract can demand and compel arbitration against a party to the contract. Two theories commonly relied upon are 1) equitable estoppel and 2) third party beneficiary rights.

Equitable estoppel provides a basis for compelling arbitration based on fairness. A non-signatory can rely on equitable estoppel to compel arbitration in two (2) circumstances: 1) where the signatory's claims against a non-signatory arise out of and relate directly to the contract containing the arbitration clause; and 2) when claims made by the signatory against a non-signatory and another signatory raise allegations of substantially interdependent and concerted misconduct by both parties.[92]

[91] Assuming the clause is not within the exemption applying to "contracts of employment of…workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 et seq.

[92] *Grigson v. Cretive Artists Agency, L.L.C.,* 210 F.3d 524, 527 (5th Cir. 2000).

In contrast, a signatory to a contract may find it very difficult to compel a non-signatory to arbitration. As arbitration is based on contract principles, it would involve forcing a contractual clause upon a non-party that never agreed to the contract.[93] However, the Fifth Circuit recognized six theories that could be used to possibly compel a non-signatory to arbitration: 1) incorporation by reference, 2) assumption, 3) agency, 4) veil-piercing/alter ego, 5) estoppel, and 6) third-party beneficiary.[94] Incidental beneficiaries do not suffice in a motion to compel.[95] These issues may need to addressed when transportation companies are using labor leasing companies and 3PLs where many separate contracts can be in existence.

VIII. Summary

When drafting arbitration agreements for transportation employees, every effort should be made to ensure that the agreement will be subject to the FAA. However, personal injury arbitration within the transportation industry has unique issues. When drafting arbitration provisions for personnel within the industry, careful consideration of several factors are necessary.

The status of the individual, whether or not he is an employee, can be subject to interpretation. The categories of owner-operator, independent contractor and leased employees require a transportation employer to do a more in depth analysis then may be found in other industries. Contracts with each of these groups will have different drafting considerations.

Understanding how the variances between state and federal law affect arbitration is also more complex in the transportation industry because of the FAA section 1 exemption. In most industries, employers will be able to enforce arbitration agreements with employees under the FAA. However, the analysis of transportation personnel arbitration involves determining whether or not the provision is within a contract excluded from the FAA, specifically a contract of employment. If it is, then enforcement of the clause will be subject to TAA specifications. Although this might not be a factor in many types of employment disputes, the TAA has very stringent guidelines for determining the enforceability of arbitration agreements for personal injury claims. Careful drafting can provide clients with a better way to resolve disputes in a sometimes complicated environment.

[93] *See MAG Portfolio Concult, GMBH v. Merlin Biomed. Group LLC,*268 F.3d 58, 62 (2nd Cir. 2001).
[94] *See Sapic v. Government of Turkmenistan,* 345 F.3d 347 (5th Cir. 2003).
[95] *Fleetwood Enterprises, Inc. v. Gaskamp,* 280 F.3d 1069, 1076.