

## Amazon, Drivers Duel Over Arbitrability Of FLSA Action

By **Linda Chiem**

Law360 (March 7, 2019, 8:11 PM EST) -- Online retailer Amazon and delivery drivers duked it out Wednesday over whether a proposed Fair Labor Standards Act collective action alleging the e-commerce giant misclassified drivers as independent contractors should proceed in Washington federal court or be bumped into arbitration following the [U.S. Supreme Court's](#) recent New Prime ruling.

[Amazon.com Inc.](#) and Amazon Logistics Inc. filed a supplemental response brief urging U.S. District Judge John C. Coughenour to dismiss a collective FLSA action from delivery drivers Freddie Carroll, Raef Lawson, Iain Mack, Bernadean Rittmann and Julia Wehmeyer. Amazon maintains that the independent contractor drivers must fight out their claims in individual arbitration and they don't fit the definition of a "transportation worker" for the purposes of a Federal Arbitration Act exemption.

Amazon argued that the drivers, who made local deliveries within state lines, are trying to stretch the Supreme Court's narrow **January ruling** in [New Prime v. Oliveira](#) to somehow include them under the FAA's Section 1 exemption for "transportation workers" who are "engaged in interstate commerce," but that simply cannot fly, according to the supplemental brief.

"Plaintiffs' argument that local delivery drivers are exempt from the FAA cannot be reconciled with the transportation worker exemption's language or underlying purposes or the weight of relevant case law," Amazon said.

Section 1 of the FAA exempts from arbitration "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." But Section 2 of the FAA governs whether the FAA applies in the first place and broadly relates to "contract[s] evidencing a transaction involving commerce."

"Plaintiffs' argument begs the question: Why would Congress choose different words in sequential statutory sections if they intended the words to mean the same thing?" Amazon said. "Plaintiffs' argument collapses the distinction between Sections 1 and 2. They argue that the drivers here should be excluded because 'their work involves interstate transportation of goods' — regardless of whether they engage in interstate transportation."

But "involving commerce" is not interchangeable with "workers engaged," Amazon argued.

"Plaintiffs' conflation of the two different standards explains their groundless argument that the FAA does not apply 'at all' (under Section 2) unless the exemption (under Section 1) applies," the company said.

New Prime doesn't bolster the drivers' arguments here, Amazon argued, because New Prime didn't even address the meaning of "engaged in interstate commerce" given that both sides in that dispute already agreed that the plaintiff Dominic Oliveira qualified as a "worker engaged in interstate commerce." The justices concluded in New Prime that transportation workers, regardless of whether they're employees or independent contractors, are **exempt** from the FAA.

"Under Section 1, it is not enough for local drivers to be in some attenuated sense 'involved in the flow of interstate commerce because they facilitate the transportation of goods that originated across state lines,'" Amazon said.

Meanwhile, the local Amazon delivery drivers countered Thursday that they do, in fact, qualify for the Section 1 exemption and the company is flat-out wrong in arguing that the drivers only make local intrastate deliveries.

"First, some Amazon drivers themselves cross state lines to make deliveries. And courts have recognized that 'delivery drivers may fall within the exemption for 'transportation workers' even if they make interstate deliveries only 'occasionally,'" the drivers said in a supplemental brief. "But second, it is not necessary for the drivers themselves to cross state lines. What qualifies them for the transportation worker exemption is that they deliver goods that are 'within the flow of interstate commerce.'"

Amazon keeps trying to characterize the drivers' work as "local transportation activity" to differentiate their work from that which "serve[s] a critical role in the national economy" like "cross-country trucking fleets, airplanes, or railways," according to the drivers, but that paints a false portrait.

Given the size and reach of Amazon today, a strike by Amazon drivers could indeed have an enormous impact on the national economy, stranding thousands upon thousands of packages at warehouses and terminals and preventing them from reaching their destinations, they argued.

"It is disingenuous for Amazon to contend that its drivers, which services its vast national delivery network, are merely involved in local commerce, akin to pizza delivery drivers working for small local companies," the drivers maintained. "A prolonged disruption in Amazon's vast delivery network would indeed pose a threat to commerce at the national level."

The drivers' attorney Shannon Liss-Riordan of [Lichten & Liss-Riordan PC](#) told Law360 on Thursday that Amazon drivers are the most clear-cut example of workers eligible for the transportation worker exemption.

"We look forward to defeating the arbitration clause here so that we can press forward against Amazon for violating the rights of thousands of workers on whose backs it has been growing its business," she said.

Amazon declined to comment on pending litigation.

The delivery drivers are represented by Shannon Liss-Riordan, Harold Lichten and Adelaide Pagano of [Lichten & Liss-Riordan PC](#), and Michael C. Subit of [Frank Freed Subit & Thomas LLP](#).

Amazon is represented by Richard G. Rosenblatt and James P. Walsh of [Morgan Lewis &](#)

Bockius LLP, and Suzanne J. Thomas of K&L Gates LLP.

The case is Rittmann et al. v. Amazon.com Inc. et al, case number 2:16-cv-01554, in the U.S. District Court for the Western District of Washington.

--Editing by Jay Jackson Jr.