No. 18-

IN THE

Supreme Court of the United States

GULICK TRUCKING, INC., AN OREGON CORPORATION,

Petitioner,

v.

STATE OF WASHINGTON EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1), ("FAAAA") broadly preempts any state action that relates even indirectly to a carrier's prices, routes, or services. Washington State's statute defining independent contractors for unemployment compensation taxes, Wash. Rev. Code § 50.04.140, makes it impossible for such federally-authorized independent contractors in the trucking industry (owner/operators) to ever be anything but trucking carriers' employees. Such a reclassification eliminates an established business model in that industry. Is such a reclassification scheme preempted by the FAAAA, given its direct and indirect effects on prices, routes, and services of trucking carriers?

2. 49 C.F.R. § 376.12 regulates the relationship between trucking carriers and owner/operators, specifically providing in C.F.R. § 376.12(c)(4) that compliance with the federal requirement of exclusive carrier possession, control, and use of owner/operator equipment during the duration of the parties' equipment lease may not affect whether an owner/operator is an employee or independent contractor under state law. Are courts barred from considering federally-mandated lease contract provisions in determining carrier control over an owner/operator for purposes of unemployment compensation taxation?

PARTIES TO THE PROCEEDING

Petitioners

GULICK TRUCKING, INC., an Oregon corporation,

Respondent

STATE OF WASHINGTON EMPLOYMENT SECURITY DEPARTMENT

CORPORATE DISCLOSURE FORM

Pursuant to Supreme Court Rule 29.6, petitioner Gulick Trucking, Inc. provides the following Corporate Disclosure Statement:

1. Petitioner Gulick Trucking, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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Three separate divisions of the Washington Court of Appeals affirmed trial court decisions approving of the Washington State Employment Security Department's ("ESD") assessments of unemployment taxes against trucking carriers for remuneration paid to independent contractor owner/operators. *Swanson Hay Co. v. State of Washington Employment Security Department*, 404 P.3d 517 (Wash. App. 2017); *MacMillan-Piper, Inc. v. State of Washington Employment Security Department*, 2017 WL 6594805 (Wash. App. 2017); *Gulick Trucking Inc. v. State of Washington Employment Security Department*, 2018 WL 509096 (Wash. App. 2018). This case involves Gulick Trucking, Inc. ("Gulick"). App. A. The Washington Supreme Court denied review in all three cases, by separate orders, on July 12, 2018. *See* App. D (Gulick order).

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1257(a) to review federal questions arising from State courts.

STATUTORY PROVISIONS INVOLVED

49 U.S.C. § 14102:

(a) General authority of Secretary.—The Secretary may require a motor carrier providing transportation subject to jurisdiction under subchapter I of chapter 135 that uses motor vehicles not owned by it to transport property under an arrangement with another party to—

(1) make the arrangement in writing signed by the parties specifying its duration and the compensation to be paid by the motor carrier;

(2) carry a copy of the arrangement in each motor vehicle to which it applies during the period the arrangement is in effect;

(3) inspect the motor vehicles and obtain liability and cargo insurance on them; and

(4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier.

49 U.S.C. § 14501:

(c) MOTOR CARRIERS OF PROPERTY.—

(1) GENERAL RULE.—

Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 C.F.R. § 376.11:

Other than through the interchange of equipment as set forth in § 376.31, and under the exemptions set forth in subpart C of these regulations, the authorized carrier may perform authorized transportation in equipment it does not own only under the following conditions:

(a) ***Lease.*** There shall be a written lease granting the use of the equipment and meeting the requirements contained in § 376.12.

(b) ***Receipts for equipment.*** Receipts, specifically identifying the equipment to be leased and stating the date and time of day possession is transferred, shall be given as follows:

(1) When possession of the equipment is taken by the authorized carrier, it shall give the owner of the equipment a receipt. The receipt identified in this section may be transmitted by mail, telegraph, or other similar means of communication.

(2) When possession of the equipment by the authorized carrier ends, a receipt shall be given in accordance with the terms of the lease agreement if the lease agreement requires a receipt.

(3) Authorized representatives of the carrier and the owner may take possession of leased equipment and give and receive the receipts required under this subsection.

(c) ***Identification of equipment.*** The authorized carrier acquiring the use of equipment under this section shall identify the equipment as being in its service as follows:

(1) During the period of the lease, the carrier shall identify the equipment in accordance with the FMCSA's requirements in 49 CFR part 390 of this chapter (Identification of Vehicles).

(2) Unless a copy of the lease is carried on the equipment, the authorized carrier shall keep a statement with the equipment during the period of the lease certifying that the equipment is being operated by it. The statement shall also specify the name of the owner, the date and length of the lease, any restrictions in the lease relative to the commodities to be transported, and the address at which the original lease is kept by the authorized carrier. This statement shall be prepared by the authorized carrier or its authorized representative.

(d) ***Records of equipment.*** The authorized carrier using equipment leased under this section shall keep records of the equipment as follows:

(1) The authorized carrier shall prepare and keep documents covering each trip for which the equipment is used in its service. These documents shall contain the name and address of the owner of the equipment, the point of origin, the time and date of departure, and the point of final destination. Also, the authorized carrier shall carry papers with the leased equipment during its operation containing this information and identifying the lading and clearly indicating that the transportation is under its responsibility. These papers shall be preserved by the authorized carrier as part of its transportation records. Leases which contain the information required by the provisions in this paragraph may be used and retained instead of such documents or papers. As to

lease agreements negotiated under a master lease, this provision is complied with by having a copy of a master lease in the unit of equipment in question and where the balance of documentation called for by this paragraph is included in the freight documents prepared for the specific movement.

(2) [Reserved]

49 C.F.R. § 376.12:

Except as provided in the exemptions set forth in subpart C of this part, the written lease required under § 376.11(a) shall contain the following provisions. The required lease provisions shall be adhered to and performed by the authorized carrier.

(a) ***Parties.*** The lease shall be made between the authorized carrier and the owner of the equipment. The lease shall be signed by these parties or by their authorized representatives.

(b) ***Duration to be specific.*** The lease shall specify the time and date or the circumstances on which the lease begins and ends. These times or circumstances shall coincide with the times for the giving of receipts required by § 376.11(b).

(c) ***Exclusive possession and responsibilities.***

(1) The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee

shall assume complete responsibility for the operation of the equipment for the duration of the lease.

(2) Provision may be made in the lease for considering the authorized carrier lessee as the owner of the equipment for the purpose of subleasing it under these regulations to other authorized carriers during the lease.

(3) When an authorized carrier of household goods leases equipment for the transportation of household goods, as defined by the Secretary, the parties may provide in the lease that the provisions required by paragraph (c)(1) of this section apply only during the time the equipment is operated by or for the authorized carrier lessee.

(4) Nothing in the provisions required by paragraph (c)(1) of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements.

(d) ***Compensation to be specified.*** The amount to be paid by the authorized carrier for equipment and driver's services shall be clearly stated on the face of the lease or in an addendum which is attached to the lease. Such lease or addendum shall be delivered to the lessor prior to the commencement of any trip in the service of the authorized carrier. An authorized representative of the lessor may accept these documents. The amount to be paid may be expressed as a percentage of gross revenue, a flat rate per mile, a variable rate depending on the direction traveled or the type of commodity transported, or by any

other method of compensation mutually agreed upon by the parties to the lease. The compensation stated on the lease or in the attached addendum may apply to equipment and driver's services either separately or as a combined amount.

(e) ***Items specified in lease.*** The lease shall clearly specify which party is responsible for removing identification devices from the equipment upon the termination of the lease and when and how these devices, other than those painted directly on the equipment, will be returned to the carrier. The lease shall clearly specify the manner in which a receipt will be given to the authorized carrier by the equipment owner when the latter retakes possession of the equipment upon termination of the lease agreement, if a receipt is required at all by the lease. The lease shall clearly specify the responsibility of each party with respect to the cost of fuel, fuel taxes, empty mileage, permits of all types, tolls, ferries, detention and accessorial services, base plates and licenses, and any unused portions of such items. The lease shall clearly specify who is responsible for loading and unloading the property onto and from the motor vehicle, and the compensation, if any, to be paid for this service. Except when the violation results from the acts or omissions of the lessor, the authorized carrier lessee shall assume the risks and costs of fines for overweight and oversize trailers when the trailers are pre-loaded, sealed, or the load is containerized, or when the trailer or lading is otherwise outside of the lessor's control, and for improperly permitted overdimension and overweight loads and shall reimburse the lessor for any fines paid by the lessor. If the authorized carrier is authorized to receive a refund or a credit for base plates purchased by the lessor from, and issued in the name of,

the authorized carrier, or if the base plates are authorized to be sold by the authorized carrier to another lessor the authorized carrier shall refund to the initial lessor on whose behalf the base plate was first obtained a prorated share of the amount received.

(f) ***Payment period.*** The lease shall specify that payment to the lessor shall be made within 15 days after submission of the necessary delivery documents and other paperwork concerning a trip in the service of the authorized carrier. The paperwork required before the lessor can receive payment is limited to log books required by the Department of Transportation and those documents necessary for the authorized carrier to secure payment from the shipper. In addition, the lease may provide that, upon termination of the lease agreement, as a condition precedent to payment, the lessor shall remove all identification devices of the authorized carrier and, except in the case of identification painted directly on equipment, return them to the carrier. If the identification device has been lost or stolen, a letter certifying its removal will satisfy this requirement. Until this requirement is complied with, the carrier may withhold final payment. The authorized carrier may require the submission of additional documents by the lessor but not as a prerequisite to payment. Payment to the lessor shall not be made contingent upon submission of a bill of lading to which no exceptions have been taken. The authorized carrier shall not set time limits for the submission by the lessor of required delivery documents and other paperwork.

(g) ***Copies of freight bill or other form of freight documentation.*** When a lessor's revenue is based on a percentage of the gross revenue for a shipment, the

lease must specify that the authorized carrier will give the lessor, before or at the time of settlement, a copy of the rated freight bill or a computer-generated document containing the same information, or, in the case of contract carriers, any other form of documentation actually used for a shipment containing the same information that would appear on a rated freight bill. When a computer-generated document is provided, the lease will permit lessor to view, during normal business hours, a copy of any actual document underlying the computer-generated document. Regardless of the method of compensation, the lease must permit lessor to examine copies of the carrier's tariff or, in the case of contract carriers, other documents from which rates and charges are computed, provided that where rates and charges are computed from a contract of a contract carrier, only those portions of the contract containing the same information that would appear on a rated freight bill need be disclosed. The authorized carrier may delete the names of shippers and consignees shown on the freight bill or other form of documentation.

(h) ***Charge-back items.*** The lease shall clearly specify all items that may be initially paid for by the authorized carrier, but ultimately deducted from the lessor's compensation at the time of payment or settlement, together with a recitation as to how the amount of each item is to be computed. The lessor shall be afforded copies of those documents which are necessary to determine the validity of the charge.

(i) ***Products, equipment, or services from authorized carrier.*** The lease shall specify that the lessor is not required to purchase or rent any products, equipment, or services from the authorized carrier as a condition

of entering into the lease arrangement. The lease shall specify the terms of any agreement in which the lessor is a party to an equipment purchase or rental contract which gives the authorized carrier the right to make deductions from the lessor's compensation for purchase or rental payments.

(j) ***Insurance.***

(1) The lease shall clearly specify the legal obligation of the authorized carrier to maintain insurance coverage for the protection of the public pursuant to FMCSA regulations under 49 U.S.C. 13906. The lease shall further specify who is responsible for providing any other insurance coverage for the operation of the leased equipment, such as bobtail insurance. If the authorized carrier will make a charge back to the lessor for any of this insurance, the lease shall specify the amount which will be charged-back to the lessor.

(2) If the lessor purchases any insurance coverage for the operation of the leased equipment from or through the authorized carrier, the lease shall specify that the authorized carrier will provide the lessor with a copy of each policy upon the request of the lessor. Also, where the lessor purchases such insurance in this manner, the lease shall specify that the authorized carrier will provide the lessor with a certificate of insurance for each such policy. Each certificate of insurance shall include the name of the insurer, the policy number, the effective dates of the policy, the amounts and types of coverage, the cost to the lessor for each type of coverage, and the deductible amount for each type of coverage for which the lessor may be liable.

(3) The lease shall clearly specify the conditions under which deductions for cargo or property damage may be made from the lessor's settlements. The lease shall further specify that the authorized carrier must provide the lessor with a written explanation and itemization of any deductions for cargo or property damage made from any compensation of money owed to the lessor. The written explanation and itemization must be delivered to the lessor before any deductions are made.

(k) ***Escrow funds.*** If escrow funds are required, the lease shall specify:

(1) The amount of any escrow fund or performance bond required to be paid by the lessor to the authorized carrier or to a third party.

(2) The specific items to which the escrow fund can be applied.

(3) That while the escrow fund is under the control of the authorized carrier, the authorized carrier shall provide an accounting to the lessor of any transactions involving such fund. The carrier shall perform this accounting in one of the following ways:

(i) By clearly indicating in individual settlement sheets the amount and description of any deduction or addition made to the escrow fund; or

(ii) By providing a separate accounting to the lessor of any transactions involving the escrow fund. This separate accounting shall be done on a monthly basis.

(4) The right of the lessor to demand to have an accounting for transactions involving the escrow fund at any time.

(5) That while the escrow fund is under the control of the carrier, the carrier shall pay interest on the escrow fund on at least a quarterly basis. For purposes of calculating the balance of the escrow fund on which interest must be paid, the carrier may deduct a sum equal to the average advance made to the individual lessor during the period of time for which interest is paid. The interest rate shall be established on the date the interest period begins and shall be at least equal to the average yield or equivalent coupon issue yield on 91-day, 13-week Treasury bills as established in the weekly auction by the Department of Treasury.

(6) The conditions the lessor must fulfill in order to have the escrow fund returned. At the time of the return of the escrow fund, the authorized carrier may deduct monies for those obligations incurred by the lessor which have been previously specified in the lease, and shall provide a final accounting to the lessor of all such final deductions made to the escrow fund. The lease shall further specify that in no event shall the escrow fund be returned later than 45 days from the date of termination.

(l) ***Copies of the lease.*** An original and two copies of each lease shall be signed by the parties. The authorized carrier shall keep the original and shall place a copy of the lease on the equipment during the period of the lease unless a statement as provided for in § 376.11(c)(2) is carried on the equipment instead. The owner of the equipment shall keep the other copy of the lease.

(m) This paragraph applies to owners who are not agents but whose equipment is used by an agent of an authorized carrier in providing transportation on behalf of that authorized carrier. In this situation, the authorized carrier is obligated to ensure that these owners receive all the rights and benefits due an owner under the leasing regulations, especially those set forth in paragraphs (d)-(k) of this section. This is true regardless of whether the lease for the equipment is directly between the authorized carrier and its agent rather than directly between the authorized carrier and each of these owners. The lease between an authorized carrier and its agent shall specify this obligation.

STATEMENT OF THE CASE

(1) Owner/Operators in the Trucking Industry

Owner/operators have long been important in the trucking industry. *See generally,* Douglas C. Grawe, *Have Truck, Will Drive: The Trucking Industry and the Use of Independent Owner-Operators Over Time,* 35 Transp. L.J. 115 (2008). They are used in most, if not all, sectors of the industry, including long-haul trucking, household-goods moving, and intermodal operations. App. 42a. Because demand in the contemporary American trucking industry fluctuates so dramatically, the industry is structured around these independent owner/operators, who provide carriers with a flexible supply of trucking equipment.

For owner/operators, an independent-contractor relationship is similarly beneficial. In this era of increased shipping demand because of internet shopping, today's

shippers are sophisticated and now look for "one stop" shopping for their shipping needs. It would thus be extremely difficult for an individual owning a single truck to compete. By contracting with large trucking carriers, owner/operators can overcome this obstacle and still maintain a small business. The firms give owner/operators access to higher-paying freight than they would have access to if they operated under their own authority and make it easier for owner/operators to obtain insurance.

The federal government requires all motor carriers to engage owner/operators through a written lease agreement, under 49 C.F.R. § 376, known as the Truth-in-Leasing regulations. *Owner-Operator Indep. Drivers Ass'n v. Mayflower Transit, Inc.*, 161 F. Supp. 2d 948, 953 n.2 (S.D. Ind. 2001). These regulations not only require a written lease contract, but also specify certain terms that must be included in the equipment lease agreement. *See*, *e.g.*, 49 C.F.R. §§ 376.11, 376.12.[1]

(2) Petitioners' Operations

The four petitioning interstate motor carriers share certain common characteristics. Each is licensed by the

1. For example, the regulations *mandate* that owner/operators operate exclusively under a carrier's federal license granted by the USDOT and that the owner/operator be insured by the carrier (although the owner/operator must pay for that insurance). 49 C.F.R. § 376.12(c), (j). These requirements promote public safety by ensuring that all trucks are covered by adequate insurance and by facilitating the collection of safety data for carriers. As will be discussed *infra,* federal regulations specifically provide that these requirements do not constitute "control" for purpose of state law regulatory schemes.

United States Department of Transportation ("USDOT") and the Federal Motor Carrier Safety Administration ("FMCSA"). Each operates in interstate commerce.[2] Each carrier leases trucking equipment from owner/operators. Each carrier, with the exception of Mac-Millan Piper, is involved in the long haul of freight and utilizes both company drivers and owner/operators to accomplish such operations.[3]

Central to the existence of owner/operators as independent businesses, is the fact that owner/operators make an enormous capital investment in their businesses. The truck alone represents an investment of roughly $200,000. Owner/operators have a trade association designed to protect their interests as small businesses.[4]

In leasing equipment, each carrier had equipment lease agreements with owner/operators in the form mandated by federal law. 49 U.S.C. § 14102(a); 49 C.F.R. § 376.11; 49 C.F.R. § 376.12. As was generally determined by ESD in the administrative process, those agreements made clear that the owner/operator had complete control

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2. Underscoring this point is the fact that Gulick is headquartered in Vancouver, Washington, near the Oregon border. App. 34a. It competes with carriers in other jurisdictions in which unemployment taxes are not levied on carriers for the lease of equipment from owner/operators. *See* n.23, *infra*.

3. Gulick had equipment agreements with 152 owner/operators. App. 34a.

4. A national organization, the Owner/Operator Independent Drivers Association ("OOIDA") has 153,000 members nationally who value their business independence. https://www.ooida.com/WhoWeAre/.

over the selection of drivers or laborers for the trucks, and over the selection of the routes for the delivery of the cargo the carriers asked them to deliver. The owner/operators also determined employee hours, stops/rest breaks, attendance and performance standards, and general working conditions. The owner/operators could reject loads offered to them by the carriers. Critically, although the carriers might advance expenses to the owner/operators as a convenience, as federal regulations permitted, 49 C.F.R. § 376.12(h), the owner/operators were ultimately responsible for the cost of the operation of their equipment including general vehicle maintenance, insurance, permits, base plates, license fees, taxes, fuel, lubricants, cold weather protection, tie-down gear and cargo protection equipment, tires, tolls, fines, and driver wages and payroll taxes.[5] The owner/operators were generally paid a percentage of the fee paid to the carrier by the customer.

(3) The State Targeted Washington's Trucking Industry

Reversing Washington public policy that had long treated owner/operators as independent contractors,[6]

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5. In addition to paying worker compensation premiums and unemployment compensation taxes for their drivers, owner/operators may elect coverage for themselves, Wash. Rev. Code § 50.24.160; Wash. Rev. Code § 51.12.110.

6. Owner/operators are not carrier employees under Washington's worker compensation laws. Wash. Rev. Code § 51.08.180; *Wash. State Dep't of Labor & Indus. v. Mitchell Bros. Truck Line, Inc.*, 54 P.3d 711 (Wash. App. 2002). ESD previously treated owner/operators as independent contractors. *Penick v. Emp't Sec. Dep't,* 917 P.2d 136 (Wash. App. 1996), *review*

and without specific legislative authority, ESD joined with Washington's Department of Revenue ("DOR") and Department of Labor & Industries ("DOLI") (the agency administering worker compensation) to form an "underground economy task force" ("UETF").[7] The UETF targeted the trucking industry and its historical use of owner/operators.[8] None of the carriers here were "underground" enterprises. All were rigorously regulated under federal law and their relationship with owner-operators is also federally-regulated. The carriers' operations are also regulated for safety purposes under state law. Their trucks operate openly on Washington's roads. They are taxed under state law and were current in the payment of applicable Washington taxes.

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denied, 925 P.2d 989 (Wash. 1996). ESD previously instructed its auditors the distinction between independent owner/operators and employee truck drivers, on the basis of the "Independent Trucker Tests." These tests provide that owner/operators qualify as independent contractors if they: (1) normally have the right to hire and fire any driver of the truck, set wage amounts, select routes, and establish or approve procedures for loading and unloading; (2) perform all services other than loading or unloading freight outside the carrier's places of business; and (3) maintain a separate set of books and are responsible for the majority of cost items. ESD abandoned those tests when it targeted the industry.

7. http://www.lni.wa.gov/Main/AboutLNI/Legislature/PDFs/Reports/2015/ UndergroundEconomyBenchmarkReport.pdf (last visited November 2, 2016). Ch. 432, Laws of 2009, § 13 required DOR, DOLI, and ESD to "coordinate" their efforts and report annually to the Legislature. Apart from that direction to "coordinate," the Legislature, by statute, and ESD, by rulemaking, have never defined the UETF's organization, mission, or authority.

8. ESD notes from a meeting of its officials indicated that in the preceding eighteen months, ESD had audited 284 trucking companies. Those notes also stated that ESD "targeted trucking."

As noted *supra,* ESD had standards for conducting its audits including a Tax Audit Manual ("TAM") that provided factors for an auditor to consider in determining if work is performed by an independent contractor. ESD also provided its auditors a Status Manual ("SM") that supplied the Independent Trucker tests. Finally, ESD generally required that all audits be conducted according to Generally Accepted Auditing Standards, which mandate auditor objectivity. It did not follow any of these standards.[9]

Moreover, ESD auditors were compromised by ESD job performance quotas requiring them to assess a certain amount of unpaid taxes, and to reclassify a certain number of independent contractors to employee status. One auditor even had the audacity to ask the governor to pay her a percentage bonus based on revenues she generated for the State. In Hatfield's administrative proceedings, evidence was adduced that ESD leadership even directed auditors to impose taxes on owner/operator equipment *knowing* that such assessments were illegal under Washington law that confined unemployment compensation taxation to wages paid by the taxpayer; ESD wanted to "leverage" settlement by carriers. *See generally*, *Wash. Trucking Ass'ns v. State, Emp't. Sec. Dep't.* 369 P.3d 170, 176-77 (Wash. App. 2016) *rev'd*, 393 P.3d 761 (Wash. 2017).

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9. Although it initially admitted it had to follow the TAM/SM standards, in later cases, ESD shifted course and took the position that compliance with its manuals was optional. Brian Sonntag, Washington's elected State Auditor for 20 years, observed that ESD created a system of no standards, no supervisory or peer review, no quality control, and institutional interference with auditor objectivity.

Ultimately, based on these so-called "audits," ESD issued notices of assessment against the carriers (for taxes, penalties, and interest. ESD assessed taxes on *equipment payments* made by some of the carriers when state law expressly limited the tax to the wages paid to the covered worker. Wash. Rev. Code § 50.24.010. The carriers filed administrative appeals.

(4) Procedural History

The petitioning carriers were subjected to lengthy administrative proceedings in which ESD ultimately backed down on assessing unemployment taxes on the equipment the owner/operators leased to petitioners. In Gulick's case, ESD's Commissioner eventually affirmed the assessment, a final agency action for purposes of judicial review, app. B, and Gulick sought review in the superior court. The court affirmed the assessments. App. C.

On appeal, the Washington Court of Appeals affirmed the trial court decision. App. A. That opinion effectively upheld an interpretation of Wash. Rev. Code § 50.04.140, relating to independent contractors, that makes it impossible for an owner/operator to be anything but a trucking carrier employee. The Washington Supreme Court denied review. App. D.

REASONS FOR GRANTING THE PETITION

Washington State targeted Washington's trucking in hundreds of "audits," as part of a politically-motivated effort to restructure Washington's federally-regulated trucking industry by eliminating the industry's historical

use of owner/operators. Indeed, federal motor carrier law specifically *authorizes* owner/operators and specifies the contents of the carrier-owner/operator equipment-leasing agreements.

When Congress deregulated interstate trucking in 1980 and intrastate trucking in 1994, it enacted the FAAAA, 49 U.S.C. § 14501(c)(1), a statute that broadly preempts any local or state laws that affect routes, prices, or services in the trucking industry.

The Washington courts' interpretation of Wash. Rev. Code § 50.04.140, the definition of an independent contractor for purposes of unemployment compensation taxation, makes it *impossible* for an owner/operator to be an independent contractor, just as occurred in Massachusetts by statute and California by judicial decision, as will be discussed *infra*. The Washington courts' decisions condone the effective elimination of the owner/operator business model in the trucking industry for purposes of unemployment compensation taxation. Those courts failed to apply the FAAAA as Congress and this Court's precedents direct. The Washington courts' decisions permit a backdoor attempt by state authorities to disrupt the modern American trucking industry, and create a patchwork of inconsistent state-by-state regulations of interstate trucking, something Congress emphatically rejected.

(1) Washington State's Effective Elimination of the Owner/Operator Business Model Is Federally Preempted

The Washington courts' opinions are consistent in certain key respects. First, they interpret Wash. Rev.

Code § 50.04.140, the statute dealing with independent contractor status for unemployment compensation taxes that mirrors the so-called ABC test for independent contractor status, in a fashion that renders it impossible for an owner/operator to *ever* be an independent contractor for unemployment compensation tax purposes. In particular, no owner/operator will ever have an independently established business because such owner/operators function under a carrier's federal operating authority. App. 19a-21a. Second, the opinions all adopt the Ninth Circuit's limitation on FAAAA preemption with regard to statutes of "general applicability." App. 9a-10a. Finally, all three opinions allow federally-mandated equipment leasing contract terms to be used as evidence of control by carriers over owner/operators. App. 14a-15a.

(a) The Washington Courts Failed to Apply This Court's FAAAA Jurisprudence Providing Expansive Federal Preemption of Local Laws Affecting Prices, Routes, or Services in Trucking

The Washington court decisions are but further evidence of a split of authority on the proper interpretation of the FAAAA. Those decisions join the courts who have found what amounts to a nonexistent FAAAA exception for "background laws of general applicability."

When Congress de-regulated interstate trucking in 1980 and intrastate trucking in 1994, it sought to remove obstacles to "national and regional carriers attempting to conduct a standard way of doing business." *Cole v. City of Dallas*, 314 F.3d 730, 734 (5th Cir. 2002) (quoting H. R. Conf. Rep. No. 103-677, at 87, *reprinted in* 1994 U.S.C.C.A.N. at 1759). It enacted the FAAAA's express

preemption to make sure market forces would prevail and that local jurisdictions would not re-regulate the trucking industry in a "patchwork of state-service determining laws, rules, and regulations." *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 367-68, 370-71, 378 (2008).[10] The FAAAA's preemptive language bars states from "enacting or enforcing a law, regulation, or other provision . . . *related to a price, route, or service*" of any carrier with respect to the transportation of property. 49 U.S.C. § 14501(c)(1) (emphasis added). This Court has mandated that FAAAA preemption must be construed *broadly*, consistent with its broad interpretation of similar preemptive language enacted by Congress for airline deregulation. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992); *Rowe*, 552 U.S. at 370-71 (Congress adopted FAAAA preemptive language knowing of broad construction of same language in *Morales*).[11]

Given this broad federal preemption and the importance of owner/operators to the trucking industry,

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10. Congress also specifically directed USDOT to regulate lease agreements between carriers and owner/operators. 49 U.S.C. § 14102(a). In the interest of public safety, the regulations also mandate that trucking carriers provide liability insurance and ensure that drivers have undergone mandatory drug testing. 49 C.F.R. §§ 376.11, 376.12, 382.601

11. In *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251 (2013), this Court held that the FAAAA did not preempt a state law damages claim arising from storage and disposal of towed vehicle because FAAAA preempted only local laws addressing the transportation of property, but it also re-affirmed the holding in *Rowe* that the FAAAA's preemption is broad, and encompasses even local laws indirectly affecting carrier prices, routes, or services. *Id.* at 260.

every time a state or local government has attempted to *directly* ban owner/operators in the industry, courts have held such efforts to be FAAAA-preempted.[12]

As noted *supra*, the Washington courts concluded, however, that if the governmental action involves a law of "general applicability," even if carrier routes, prices, or services are affected, the law is not federally-preempted. This holding contradicts this Court's FAAAA preemption decisions. In *Rowe*, the Court made clear that even laws that *indirectly* impact prices, routes, or services are preempted, provided they have a significant impact. Even if a law can be characterized as "generally applicable," it is preempted if its effect intrudes upon trucking carrier routes, prices, and services, as this Court has made clear. *E.g.*, *American Airlines v. Wolens*, 513 U.S. 219 (1995) (preempting Illinois consumer protection statute, a statute of general applicability); *Nw., Inc. v. Ginsberg*, 572 U.S. 273 (2014) (preempting general common-law claim for breach of the implied covenant of good faith and fair dealing, principles of general applicability); *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003) (Puerto Rico's enforcement of excise tax against airlines was ADA-preempted).

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12. *E.g.*, *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 596 F.3d 602, 604-05 (9th Cir. 2010) (local regulation developed in the guise of promoting port environmental policies prohibiting use of independent contractor drivers at port was preempted); *In re Federal Preemption of Provisions of the Motor Carrier Act*, 566 N.W.2d 299, 308–09 (Mich. App. 1997), *review denied*, 587 N.W.2d 632 (Mich. 1998), *cert. denied,* 525 U.S. 1018 (1998) (striking down as preempted a regulation mandating that a truck be operated only by persons who were employees of the trucking carrier).

The Washington courts' misinterpretation of the FAAAA and this Court's precedents is not isolated. Other courts continue to mistakenly suggest that "general" state laws are not subject to the FAAAA's broad preemption, creating an exception found nowhere in the FAAAA's actual statutory language. Those courts failed to faithfully apply this Court's requisite analysis of the law's impact on carrier prices, routes, or services.[13] This Court has expressly rejected attempts to imply exceptions to the broad scope of the FAAAA preemptive language not found in the FAAAA itself. *Rowe*, 552 U.S. at 374 (rejecting public health exception to FAAAA preemption – "The Act says nothing about a public health exception.").

This Court should grant review to make it clear that there is no "generally applicable statute" exception to the broad sweep of FAAAA preemption. The Washington Supreme Court has joined the Seventh and Ninth Circuits (*Costello*, 810 F.3d at 1055; *Dilts*, 769 F.3d at 650) in an interpretation of the FAAAA that is directly at odds with this Court's expansive interpretation of that express federal preemption statute in *Rowe*. Rule 10(c). Those courts' FAAAA preemption interpretation simply cannot be squared with that of the First Circuit. Rule 10(b). This Court should reaffirm the *Rowe* court's holding that local

13. *E.g.*, *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999) (FAAAA does not preempt employee drivers' claims for violations of prevailing wage laws); *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2049 (2015) (FAAAA does not preempt employee drivers' claims for violations of meal and rest-break laws); *Costello v. BeavEx Corp.*, 810 F.3d 1045 (7th Cir. 2016), *cert denied*, 137 S. Ct. 2289 (2017).

laws indirectly affecting prices, routes, or services in more than a tenuous fashion are preempted.

(b) Washington State's Effective End to the Owner/Operator Business Model for Unemployment Compensation Tax Purposes Affects Prices, Routes, or Services in the Trucking Industry

The Washington courts' interpretation of Wash. Rev. Code § 50.04.140 makes it *impossible* for *any* owner/operator to *ever* qualify as an exempted independent contractor in the unemployment compensation tax context. Indeed, ESD never disputed this fact below. The Washington courts' decisions make such an outcome crystal clear. In this way, a state has deprived a federally-regulated industry of the right to use the owner/operator business model.[14] As such, the State's actions affect

14. Ultimately, at its most basic, under a conflict preemption type of analysis that is at the core of the FAAAA's express preemptive language, the Washington courts' interpretation of Wash. Rev. Code § 50.04.140 re-regulates (and makes illegal) what federal law specifically has determined is legal in the trucking industry (the owner/operator business model). *Hillman v. Maretta*, 569 U.S. 483, 490 (2013) (a conflict is present "when compliance with both federal and state regulations is impossible."). Stated another way, preemption is required if the state law is an obstacle to the accomplishment of the purposes and objectives of Congress. *Id.* at 1950. *See also*, *Remington v. J.B. Hunt Transport, Inc.*, 2016 WL 4975194 (D. Mass. 2016) (claim that the deduction of expenses for repairs, cargo losses, insurance, or administrative fees from owner/operator compensation constituted "control" by carriers where the owner/operator regulations of 49 C.F.R. Part 376 *authorized* such deductions was preempted; as the court succinctly observed: "What is explicitly permitted by federal regulations cannot be forbidden by state law." *Id.* at *4.); *Rodriguez*

prices, routes, and services in the industry. Washington State's action here as to unemployment compensation taxation is no different than the outright ban of owner/operators by the Ports of Los Angeles/Long Beach or the Michigan Legislature. For example, in finding that the control element of Wash. Rev. Code § 50.04.140 cannot be met, as noted *supra*, the Washington courts emphasized the fact that owner/operators must operate under a trucking carrier's federal authority or permit. But federal regulations *require* that leased equipment be operated under the carrier's USDOT authority.[15] This fact *alone* makes it impossible for an owner/operator *ever* to meet the test of Wash. Rev. Code § 50.04.140. The Washington courts also ruled that other federally-mandated terms in an equipment lease may be evidence of carrier direction or control.[16] As will be established *infra*, that decision

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v. RWA Trucking Co., 219 Cal. App. 4th 692, 710 (Cal. App. 2013) (California insurance law could not prohibit charge back to truck drivers of insurance costs in light of federal law). That there is confusion on the scope of FAAAA preemption is supported by the decision on Truth-in-Lending deductions in *Goyal v. CSX Intermodal Terminals, Inc.*, 2018 WL 4649829 (N.D. Cal. 2018) that arrives at a contradictory result to that of the *Remington* and *Rodriguez* courts.

15. *See* 49 C.F.R. § 390.21(b)(2) (requiring all commercial motor vehicles to bear the carrier's FMCSA identification number preceded by the letters "USDOT"); *see also,* 49 C.F.R. § 376.11(c)(1) (requiring carrier during lease period to identify equipment in accordance with 49 C.F.R. part 390).

16. *Compare* App. 5a-6a, 12a-19a with 49 C.F.R. §§ 376.11(c)(1) (requiring proper identification), 376.11(d)(1) (documentation must clearly indicate that the transportation is under the carrier's responsibility), 376.12(c)(1) (requiring carrier to take exclusive, use, possession, and control of and full responsibility for the leased equipment), 376.12(e) (requiring the lease to clearly specify which

is contrary to federal law. All of these lease terms are required by federal regulations for an owner/operator to have a valid contract with a trucking carrier; a carrier complying with federal law will *never* meet the test of Wash. Rev. Code § 50.04.140.

The Washington courts' interpretation of local laws to effectively bar the owner/operator business model in the trucking industry is not an isolated phenomenon. That business model is under attack in numerous states. For example, Massachusetts enacted a statute, Mass. Gen. Laws, ch. 149 § 148B, to distinguish between employees and independent contractors for a variety of its labor laws that adopted what amounts to the same standard Washington courts have adopted for independent contractors in Wash. Rev. Code § 50.04.140.[17] The

party is responsible for removing identification devices from the equipment upon lease termination), 376.22 (requiring written agreement for a carrier to lease equipment that is under lease to another carrier), 379 app. A (specifying required retention periods for various categories of records and reports, including shipping documents and inspection and repair reports), 382.601 (requiring carriers to institute drug and alcohol testing policy applicable to all "drivers"), 382.107 (defining "driver" as including "independent owner-operator contractors"), 385.5 (unqualified drivers and improperly driven vehicles adversely affect carrier's safety rating), 390.11 (carrier must require drivers to observe all duties imposed by federal motor carrier safety regulations); 392.60 (requiring carrier to give written authorization for any passengers), 396.3 (carriers must systematically inspect or cause to be inspected all vehicles subject to their control and keep inspection and maintenance records).

17. The Massachusetts statute sets out three elements that must be proven for an individual to be considered an independent contractor. It is a statute of *general applicability*, applying to various Massachusetts employment statutes.

California Supreme Court held in *Dynamex Operations West, Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018) that the so-called ABC test for determining if carrier drivers were independent contractors or carrier employees compelled the conclusion that they were employees. In particular, under category B of the test, because drivers were in the same general business as the carriers, they were employees. *Id.* at 38-39.[18]

In extended litigation over the Massachusetts statute that essentially incorporated the ABC test into the analysis of any labor statute, courts interpreting it have held that it is FAAAA-preempted with regard to its second statutory element as it relates to the trucking industry because it affects prices, routes, or services by effectively eliminating a particular employment or business model in the trucking industry, and creating a patchwork of state laws, contrary to the deregulation intent of Congress. *Sanchez v. Lasership, Inc.*, 937 F. Supp. 2d 730 (E.D. Va. 2013); *Mass. Delivery Ass'n v. Coakley*, 769 F.3d 11, 17 (1st Cir. 2014); *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429 (1st Cir. 2016); *Mass. Delivery Ass'n v. Healey*, 821 F.3d 187 (1st Cir. 2016).

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18. In *California Trucking Ass'n v. Su*, __ F.3d __, 2018 WL 4288953 (9th Cir. 2018), the Ninth Circuit held that California's common law definition of an independent contractor, applied generally by that State's labor laws, was not FAAAA-preempted, concluding that the FAAAA principally addressed barriers to entry in trucking, tariffs, price regulations, and laws governing the types of commodities carriers could transport. *Id.* at *4. The court consequently reaffirmed *Dilts*, ruling that FAAAA preemption did not extend to generally applicable "background regulation in an area of traditional state power." *Id.* The court determined *Dynamex* to be inapplicable to its analysis. *Id.* at *3 n.4.

Although this case pertains only to the trucking industry's use of the owner/operator business model in the unemployment compensation tax context, there is little doubt that the assault on such a model is more general both in Washington State and other states, requiring this Court to articulate the correct FAAAA test so that state re-regulation of the trucking industry in the guise of applying state wage and hour, worker compensation, or other laws will not continue unabated.[19] Indeed, one of the courts *conceded* that there is advocacy "from some quarters" for applying ESD's analysis of independent contractors elsewhere. *Swanson Hay*, 404 P.3d at 528-29.

(c) State Unemployment Compensation Laws that Effectively Ban the Use of the Owner/Operator Business Model Affect Carrier Prices, Routes, or Services and Are FAAAA- Preempted

Even if this Court's analysis focuses solely on an effective ban on the owner/operator business model in

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19. As noted *supra* at n.10, Washington State's effort to deny trucking firms the use of the owner/operator model in wage and hours laws and worker compensation, denominating those firms a part of the "underground economy" persists. *See also*, *e.g.*, *Filo Foods, LLC v. City of Sea-Tac*, 357 P.3d 1040 (Wash. 2015) (local minimum wage ordinance for airport-related hospitality and transportation industries not ADA preempted); *Henry Indus., Inc. v. Dep't of Labor & Indus.*, 381 P.3d 172 (Wash. App. 2016) (courier's owner/operator drivers were carrier employees for worker compensation purposes).

Moreover, the cases cited *supra* document that states like California similarly assault the owner/operator business model outside the narrow setting of unemployment compensation. *See Dynamex*, *Su*, *supra*.

the unemployment compensation setting alone, those statutes are preempted under the FAAAA and *Rowe*. The Washington courts found insufficient impact on trucking prices, routes, or services, despite *unrebutted* contrary evidence that ESD's conduct affected routes, prices, and services. App. 42a-43a.

Larry Pursley, Executive Vice President of the Washington Trucking Associations, Washington's principal trade organization for trucking firms, who has 33 years of experience in the trucking industry, testified that ESD's assessments would imperil the structure of Washington's trucking industry. He explained that owner/operators provide a flexible supply of equipment in an industry with volatile demand. To meet this demand with employees, carriers would need to maintain higher equipment and personnel levels than the market calls for normally. The added costs—not just of the equipment and the personnel, but also of the associated expenses—would necessarily be passed on to customers in the form of higher prices. *Id*. Joe Rajkovacz, formerly OOIDA's Director of Regulatory Affairs, testified that ESD's attempt to reclassify owner/operators will undoubtedly lead to diminished economic choices and reduced income for owner/operators. He also testified that owner/operators located outside Washington who lease equipment to carriers in Washington will enjoy a competitive edge in the marketplace.

The reality of ESD's effective ban on the owner/operator model for trucking carriers in the unemployment compensation tax context is that such carriers will be put to a choice. They can restructure their business

and make all drivers company employees.[20] If they do so, the impact on prices, routes, or services is manifest. Trucking companies will face the expense of permanent compensation and benefits for drivers as employees, even when there are times when such permanent drivers are unneeded due to the cyclical nature of service demand for such companies. The carriers will be obliged to pay state-mandated unemployment compensation taxes and worker compensation premiums.[21] If trucking carriers cannot use owner/operators, they will need to purchase equipment for company drivers. Such equipment is not cheap and may often sit idle as cargo needs fluctuate. These are *real* costs.

This interference also has a logical effect on routes. As the First Circuit in *Schwann* explained, independent contractors assume "the risks and benefits of increased

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20. In seeking to uphold ESD's assertion, its counsel argued below that trucking carriers could restructure their businesses to treat owner/operators as employees in some contexts and independent contractors in others. But that argument is unrealistic, and impractical as the district court in *Healey* noted in rejecting a similar argument, that such an approach was a "significant burden," that could be found *nowhere* in actual practice. *Mass. Delivery Ass'n v. Healey*, 117 F. Supp. 3d 86, 95 (D. Mass), *aff'd*, 821 F.3d 187 (1st Cir. 2016). This fact alone makes crystal clear the impact of Washington State's regulation on carrier services.

21. The district court in *Healey* explained that the "potential logical, if indirect, effect of Section 148B is to increase [the carrier's] prices by increasing its costs." *Healey*, *supra* at 93. The court ruled that the logical relation to prices could not be averted simply by claiming that cost increases were slight. *Id.* Likewise, the unemployment taxes here increase carriers' costs now and in the future.

or decreased efficiencies achieved by the selected routes," while employees would likely "have a different array of incentives that could render their selection of routes less efficient." 813 F.3d at 439. Forcing a carrier to treat owner/operators as employees relates to routes, in addition to prices and services.

Finally, the states' imposition of an unwanted business model – employees rather than owner/operators – on trucking firms impact trucking industry services.[22] FAAAA preemption is intended to prevent states from substituting their "own governmental commands for 'competitive market forces' in determining (to a significant degree) the services that motor carriers will provide." *Rowe*, 552 U.S. at 372 (quoting *Morales*, 504 U.S. at 378). As the district court in *Healey* explained, if a carrier wishes to fulfill on-demand requests for unscheduled deliveries with employee drivers, it necessarily must have on-call employees available. "Retaining on-call employees

22. Such a state effort to supplant the owner/operator business model for trucking companies with a model of the government's choosing necessarily constitutes an effort by Washington State to supplant market forces with State regulation, something the FAAAA was specifically designed to forestall. As the First Circuit noted in *Schwann*, whether to provide services through employees or through independent contractors is a significant business decision which "implicates the way in which a company chooses to allocate its resources and incentivize those persons providing the service." *Schwann*, 813 F.3d at 438. Washington State's interference with carriers' decision to lease equipment would pose "a serious potential impediment to the achievement of the FAAAA's objectives because a court, rather than the market participant, would ultimately determine what services that company provides and how it chooses to provide them." *Id*.

forces [the carrier] to incur costs that translate into increased prices. . . . Conversely, if [the carrier] endeavors to maintain its current prices, then the practical effect of [the statute] is to force it to abandon a service now demanded by the competitive marketplace." 117 F. Supp. 3d at 93.

The other option available to trucking carriers faced with an interpretation of unemployment compensation tax laws like that of the Washington courts is to retain the owner/operator model for unemployment compensation taxation and then risk whether such an admission that owner/operators are carrier employees in that setting will not be used against them in other settings like wage and hours laws or worker compensation. Such an uncertain prospect is a nightmare for carriers.

To remain competitive, trucking firms that rely on owner/operators as a flexible supply of equipment will have to change how they do business, adopting some combination of: (a) reducing their capacity to respond to fluctuating demand for transportation services; (b) increasing their operating costs by adding new employees and equipment, which would sit idle during leaner times; or (c) raising prices to account for increased costs and/or taxes. In fact, further evidencing the adverse impact of ESD's actions, Washington State even imposes a higher tax rate on businesses using a flexible personnel model. ESD punishes businesses using a flexible personnel model with short-term employees to fill temporary surges in demand, by increasing their tax rate whenever their employees file for unemployment compensation. *See* Wash. Rev. Code § 50.29.021(2), .025; Wash. Admin. Code § 192-320-005. Indeed, a trucking carrier would be at risk of

an unemployment claim, and corresponding tax increase, any time an owner/operator's income is reduced by 25% or more. *See* Wash. Rev. Code § 50.20.050(2)(b)(v). ESD incentivizes businesses that favor permanent employees and discourages businesses that seek to use a flexible workforce. All of these changes from the owner/operator business model constitute a direct interference with carriers' services.

In sum, the Washington courts interpretation of state unemployment compensation laws joins an interpretation of such laws by other states that affects carrier prices, routes, or services within the meaning of the FAAAA. This Court should grant review to vindicate the critical federal policy of deregulation in the trucking industry and to avoid the effective state re-regulation of trucking.[23]

(2) Compliance with Federally-Mandated Lease Terms in 49 C.F.R. § 376.12 Is Not Evidence of Carrier Control over Owner/Operators for State Law Purposes

Despite a contrary federal regulation, the Washington courts held that state agencies could treat federally-mandated elements in equipment leases as evidence of

23. A patchwork of state laws is not mere rhetoric. Washington's neighboring states, Oregon and Idaho, for example, have held carriers to be exempt from taxation for owner/operators. *See CEVA Freight, LLC v. Employment Dep't*, 279 Or. App. 570, 379 P.3d 776, *review denied*, 360 Or. 751 (2016); *Home Transp., Inc. v. Idaho Dep't of Labor*, 318 P.3d 940 (Ida. 2014). As noted *supra*, Gulick has its headquarters near Oregon

carrier direction or control over owner/operators.[24] Such a determination flouts federal law. This Court should grant review to make clear that this is impermissible.

Wash. Rev. Code § 50.04.140(1)(a) required the carriers to document that the owner/operators have been "and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact." The leasing agreements with owner/operators utilized by all of the petitioners contained terms mandated by 49 C.F.R. Part 376.

Those federally-mandated lease terms governing the relationship between carriers and owner/operators are extensive.[25] ESD concluded in each case that federally-

24. The *Swanson Hay* court focused on the fact that owner/operators do not operate under their federal licenses. 404 P.3d at 540-41. But federal law *requires* owner/operators to operate under a trucking carrier's FMCSA license. *See* 49 C.F.R. § 376.11(c). Simply put, owner/operators are not owner/operators if they operate under their own federal authority.

25. In addition to the provisions of 49 C.F.R. §§ 376.11 and 376.12 referenced *supra*, federal law even dictates that carriers must give written authorization for owner/operators to have passengers in a truck. 49 C.F.R. § 392.60. ESD used that fact against Gulick. App. 57a. ESD highlighted the fact that the petitioners must provide written authorization for equipment to be leased to other carriers. *Id.* This is a federal requirement, 49 C.F.R. § 376.22, designed to ensure accountability for the leased equipment. ESD also highlighted such cargo-protection requirements as owner/operators' responsibility to maintain equipment in good operating condition and supply safety devices. App. 58a. But properly functioning equipment that does not break down en route is important to the safety of the motoring public, ensures that a carrier's contractual purpose is achieved, and avoids liability exposure for the trucking carrier. ESD noted

mandated lease provisions established "control" by the petitioners, even though those trucking carriers exerted little actual control over how the owner/operators performed the trucking services in question. The owner/operators decided whether to take a load, who would drive the truck, the route the truck would take, and the hours of truck operation, to name a few. ESD's conclusion fundamentally misstates the law in two very key respects.

The carrier petitioners did not exercise control over the owner/operators merely because they complied with federally-mandated equipment lease terms. 49 C.F.R. Part 376.[26] *Western Ports v. Emp't Sec. Dep't*, 41 P.3d 510 (Wash. App. 2002), affirmed by the Washington court decisions here, was wrong as to this issue.

Those mandatory federal equipment lease terms carry out federal motor carrier safety policy. Anticipating that states would attempt to do exactly what ESD has done here, the federal government dealt with one of the mandatory lease terms – mandating that the carrier have exclusive control over the leased equipment – by expressly providing that "[n]othing" in the "exclusive use"

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further that the petitioners have the right to take possession of the equipment to complete a shipment if the owner/operator breaches the contract. App. 57a-58a. But completion of contracts is not just related to services––it *is* the service that carriers offer their customers.

26. 49 U.S.C. § 14102(a) provides for federal regulation of a carrier's lease of motor vehicle equipment. This regulation is necessary for the efficient management of the motor carrier industry. Jessica Goldstein, *The Lease and Interchange of Vehicles in the Motor Carrier Industry*, 32 Transp. L.J. 131 (Spring 2005). 49 C.F.R. § 376.11 *et seq.* dictates the specific terms and conditions by which a carrier may perform authorized transportation in equipment it does not own

requirement "is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee." 49 C.F.R. § 376.12(c)(4).

Recognizing that state authorities were confused about the impact of federally-mandated exclusivity on state law control issues, before the full federal deregulation of trucking, the Interstate Commerce Commission promulgated the predecessor to 49 C.F.R. § 376.12(c)(4), and issued an explanation for that regulation, emphasizing that "exclusive possession, control, and use" of an owner/operator's equipment was to have no impact on state law determinations of control over owner/operators. 1992 WL 17965. That agency reinforced that position in a subsequent 1994 declaratory order. 1994 WL 70557.[27]

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27. The court in *Swanson Hay* asserted that the ICC's ostensible rationale for its rule was incorrect. 404 P.3d at 532. But that court neglected to reference the 1992 ICC guidance, published when § 376.12(c)(4) was promulgated, which stated that "*most courts have correctly interpreted the appropriate scope of the control regulation and have held that the type of control required by the regulation does not affect 'employment' status....*" *Petition to Amend Lease & Interchange of Vehicle Regulations*, 8 I.C.C.2d 669, 671 (I.C.C. June 29, 1992) (emphasis added). But "some courts and State workers' compensation and *employment agencies*" had improperly used compliance with the leasing regulations as "prima facie evidence of an employer-employee relationship" and had erroneously found that it "evidences the type of control that is indicative of an employer-employee relationship." *Id.* (emphasis added). The intent of this section was not limited to rejecting some notion of federal vicarious liability. It was to disabuse courts and state administrative agencies of the notion that compliance with the federal requirement was *prima facie* evidence of an employer-employee relationship between carriers and owner/operators.

With regard to the other specific lease terms mandated in 49 C.F.R. Part 376 for inclusion in a carrier-owner/operator equipment lease agreement it is no different. The federal government, not the carrier, imposes the lease requirements on both the carrier and owner/operator. Thus, any "control" exercised is that of the federal government, not the carrier, and it is exercised over both parties. Ensuring compliance with federal regulatory and safety requirements is not evidence of a *carrier* right to control the owner/operator.[28]

In *Western Ports*, the Washington court determined that ESD could properly consider all such federally-mandated controls in applying the statutory test for exemption. *Western Ports* is wrong in light of the specific language of 49 C.F.R. § 376.12(c)(4) and the reason for the federal mandate of lease terms in 49 C.F.R. Part 376. Plainly, the *carriers* did not mandate such factors. When

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28. *See*, *e.g.*, *Reed v. Indus. Comm'n*, 534 P.2d 1090 (Ariz. App. 1975) (government regulations imposed on carriers and, in turn, applied to owner/operators do not indicate control); *Sida of Hawaii, Inc. v. NLRB*, 512 F.2d 354, 359 (9th Cir. 1975) ("fact that a putative employer incorporates into its regulations controls required by a government agency does not establish an employer-employee relationship."); *Pouliot v. Paul Arpin Van Lines, Inc.*, 292 F. Supp. 2d 374, 383 (D. Conn. 2003) (lease regulations have no impact on the type of relationship that exists between the parties to the lease); *Tamez v. S.W. Motor Transp., Inc.*, 155 S.W.2d 564, 573 (Tex. Civ. App. 2004) (existence of lease does not have any impact on relationship between owner/operator and trucking firm); *Hernandez v. Triple Ell Transp., Inc.*, 175 P.3d 199, 205 (Idaho 2007) (adherence to federal law" was not evidence of a carrier's control over an owner/operator); *Wilkinson v. Palmetto State Transp. Co.*, 676 S.E.2d 700, 705 (S.C. 2009), *cert. denied*, 130 S. Ct. 741 (2009) (federal regulation "is not intended to affect" the independent contractor determination under state law).

the government controls the contract provisions, it is *the government*, not the contracting parties, exercising control. *Western Ports* also missed the point recognized by the *Remington* court that the FAAAA itself may also preempt its analysis. 2016 WL 4975194 at *5.

As evidenced by the terms of 49 C.F.R. § 376.12(c)(4) on exclusivity, the case law from numerous jurisdictions opining that compliance with federally-mandated directives is not evidence of control for state law purposes, and *Western Ports*, there is a split of authority on the question of whether compliance with federal law mandates may, in effect, be used against parties under state law. This Court should grant review to vindicate the federal policy and to prevent states from using the federally-required provisions of 49 C.F.R. Part 376 in equipment leases against carriers in determining if they control owner/operators for state law purposes.

CONCLUSION

Lower courts are misapplying this Court's FAAAA precedents, creating an exemption from the broad federal preemption of local laws directed by Congress in that statute for "background laws of general applicability." The FAAAA's language does not authorize such an exception to Congressional policy any more than did "public health" in *Rowe*.

The business model for an entire industry is implicated by the Washington courts' decisions here. That business model drives today's modern trucking industry. Washington, like many other states utilizing a similar definition of an independent contractor, effectively eliminates the use of owner/operators in the unemployment

compensation tax setting, adversely affecting carrier prices, routes, and services. Washington's Wash. Rev. Code § 50.04.140 is preempted by the FAAAA, when properly analyzed.

Further, state courts are using trucking carrier compliance with federally-mandated equipment lease provisions to find that carriers "control" independent contractors for state law purposes. This is but an aspect of attempted re-regulation of trucking carriers despite Congressional de-regulation policy.

This Court should grant Gulick's petition and reverse the decision of the Washington court.

DATED this 10th day of October, 2018.

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APPENDIX

APPENDIX A — UNPUBLISHED OPINION IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II, FILED JANUARY 23, 2018

IN COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

December 7, 2017, Oral Argument;
January 23, 2018, Filed

No. 49646-1-II

GULICK TRUCKING, INC.,
A WASHINGTON CORPORATION,

Appellant,

v.

STATE OF WASHINGTON EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

UNPUBLISHED OPINION

JOHANSON, J. — Gulick Trucking Inc. seeks review of the Employment Security Department's (ESD) assessment of delinquent unemployment insurance taxes on the basis that Gulick's truck drivers were covered employees, rather than independent contractors, under Washington's Employment Security Act (ESA), Title 50 RCW. Gulick argues that federal law preempts the

ESD from reclassifying Gulick's owner-operator drivers as covered employees and, alternatively, that Gulick established all three prongs of the ESA's independent contractor exemption. We follow the decision of Division Three of this court in *Swanson Hay Co. v. Employment Security Department*, 1 Wn. App. 2d 174, 404 P.3d 517 (2017), and affirm the ESD commissioner's decision.

FACTS

I. Background

Gulick is an interstate motor carrier based in Vancouver, Washington that provides refrigerated carrier services. Gulick employs both company drivers, who drive equipment leased by Gulick, and owner-operators, who drive equipment that they either own or lease from third parties. The majority of Gulick's drivers are owner-operators, and by relying on owner-operators, Gulick ensures that it has the flexibility to meet fluctuating demand without having to purchase trucks and trailers or terminate employees when demand lags.

II. Esd Audit and Assessment Order

In 2012, the ESD audited Gulick and reclassified 120 owner-operators as Gulick's "employees" for unemployment insurance tax purposes under the ESA. The ESD issued an order and notice of assessment for delinquent contributions, penalties, and interest. Stipulations between the parties subsequently reduced the total amount owed.

Appendix A

III. Office of Administrative Hearings Proceedings

Gulick appealed the ESD's order and assessment notice to the Office of Administrative Hearings (OAH). Before Gulick's hearing, it moved for summary judgment, arguing that the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 49 U.S.C. § 14501, preempted reclassification of its owner-operators under the ESA.[1]

An administrative law judge (ALJ) denied Gulick's summary judgment motion regarding federal preemption as a matter of law, and the parties stipulated that Gulick's supporting declarations would be included in the record for purposes of appeal. Regarding the reclassification of Gulick's owner-operators as covered "employees," after an evidentiary hearing, the ALJ also entered an initial order that Gulick's owner-operators were in Gulick's employment and that they were not exempt independent contractors.

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1. The FAAAA's preemption statute applies to motor carriers of property and subject to exceptions not relevant here says that

> a State … may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier …) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1).

IV. ESD Commissioner Proceedings

Gulick then petitioned the commissioner for review of the OAH's summary ruling and initial order. The commissioner affirmed the OAH's decision.[2]

First, the commissioner addressed Gulick's federal preemption argument. The commissioner summarized Gulick's declarations submitted in support of its OAH summary judgment motion, in which various industry authorities described the reclassification's impact. The commissioner then adopted the OAH's analysis that the FAAAA did not preempt the ESA, as applied to motor carriers in the trucking industry.

Second, the commissioner concluded that the owner-operators were in Gulick's "employment," as defined by the ESA.

Third, the commissioner examined whether the ESA's independent contractor exemption applied and analyzed each of the exemption's three prongs. In doing so, the commissioner relied extensively upon the owner-operators' contracts with Gulick.[3]

Under the first prong, "freedom from control or direction," the commissioner noted "some autonomy" of

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2. The commissioner's 33-page order did not delineate individually numbered findings and conclusions.

3. The parties agree that the contracts in our record are materially identical.

owner-operators. Administrative Record (AR) at 1128. Namely, owner-operators could reject loads offered by Gulick; could arrange for loads with other brokers; selected their own routes; were responsible for proper and secure loading and providing labor to load, transport, and unload commodities; paid equipment operation, maintenance, and repair costs; maintained various insurances; and had the right to employ drivers and had sole responsibility over their employees.

However, the commissioner concluded that Gulick failed to show that its owner-operators were free from Gulick's control or direction. Gulick "exert[ed] extensive controls over the methods and details of how the driving services are to be performed" that were "generally incompatible with freeing the owner-operators from [Gulick's] control and direction." AR at 1129, 1130. That is, Gulick exclusively possessed, controlled, and used trucking equipment during the agreement's term, and owner-operators could not transport unauthorized passengers or property and had to display identification showing that Gulick was operating the equipment and immediately remove the identification from the equipment when the agreement terminated. Gulick could fine owner-operators for failure to meet appointments or follow temperature requirements and could retake possession of equipment and complete a failed delivery.

Further, Gulick required owner-operators to conduct daily equipment inspections and deliver vehicle inspection reports. Gulick required that owner-operators furnish accessories to load and transport freight, contact Gulick

immediately in event of incidents, check that cargo conformed to the loading manifest, and notify Gulick of discrepancies or be fined. Gulick also required owner-operators to pay usage fees and furnish accessories to install a telecommunication device in their trucks and to cooperate fully with dispatch and transport commodities in a manner that promoted Gulick's goodwill and reputation. Finally, Gulick could terminate the agreement upon a number of conditions, including failure to maintain equipment as defined by Gulick's maintenance guidelines.

Under the second prong, the commissioner concluded that Gulick failed to meet either alternative: that the services be performed outside Gulick's usual course of business or all places of business of Gulick for which such service was performed.

Under the third prong, whether owner-operators were independently established businesses, the commissioner noted that "some of the traditional factors" weighed in favor of finding independently established businesses. AR at 1138. For instance, some owner-operators had registered sole proprietorships. And owner-operators provided their own trucks and other supplies, made substantial investments in their businesses by purchasing trucks or trailers, and operated their businesses in their trucks. Other traditional factors weighed against such a finding—Gulick provided protection from customers' nonpayment, owner-operators could not haul third-party loads without Gulick's permission, owner-operators had to display Gulick's identification on their equipment, and Gulick prohibited owner-operators from competing or

soliciting customers for the term of an agreement plus five years.

Ultimately, the commissioner concluded that the evidence weighed against owner-operators being independent contractors based on an additional, industry-specific consideration: "whether an owner-operator has his or her own [federal] operating authority so as to be able to independently engage in interstate transportation of goods." AR at 1139. Because owner-operators did not have operating authority to independently engage in interstate transportation of goods, this "paramount" factor weighed against them being independent contractors. Having concluded that the reclassification was not preempted and that Gulick failed to meet any of the three prongs for the independent contractor exemption under the ESA, the commissioner affirmed the OAH.

V. Judicial Review

Gulick sought review of the commissioner's decision in the superior court. After the superior court affirmed the commissioner's decision, Gulick appealed.

ANALYSIS

I. ESA Background and Standards of Review

The ESA requires "employers" to pay unemployment insurance taxes for persons engaged in "employment." *Wash. Trucking Ass'ns v. Emp't Sec. Dep't*, 188 Wn.2d 198, 203, 393 P.3d 761, *cert. denied*, 138 S. Ct. 261 (2017).

Under RCW 50.04.100, "employment" includes "personal service, of whatever nature" performed under a contract.

The ESA definition of employment is "exceedingly broad" and includes even those who are "independent contractors" at common law, *W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 458, 41 P.3d 510 (2002), "so long as they perform 'personal services' under a contract and an exemption does not apply." *Wash. Trucking Ass'ns*, 188 Wn.2d at 203. In the employment security context, the relationship between two parties "is more likely … to be viewed as employment [than in any other context]." *Swanson Hay*, 1 Wn. App. 2d at 181.

An aggrieved employer may appeal an ESD assessment to an ALJ. RCW 50.32.010, .030. Review of the ALJ's decision is by the commissioner, and the commissioner's ruling is subject to judicial review under the Administrative Procedures Act (APA), ch. 34.05 RCW. RCW 50.32.070, .120. Under the APA, we review the commissioner's ruling, not the ALJ's or superior court's ruling. *Campbell v. Emp't Sec. Dep't*, 180 Wn.2d 566, 571, 326 P.3d 713 (2014). "[W]e apply the appropriate standards of review from [the APA,] RCW 34.05.570[,] directly to the agency record." *Affordable Cabs, Inc. v. Dep't of Emp't Sec.*, 124 Wn. App. 361, 366, 101 P.3d 440 (2004).

The party challenging the agency's action bears the burden of demonstrating its invalidity. RCW 34.05.570(1)(a). Our review is de novo, and we grant relief if "[t]he agency has erroneously interpreted or applied the law." RCW 34.05.570(3)(d); *Affordable Cabs*, 124 Wn. App. at 367.

II. *Swanson Hay*

Swanson Hay addresses the same issues on virtually identical facts to those presented here. *See* 1 Wn. App. 2d 174, 404 P.3d 517. Although opinions of other divisions of this court are not binding on us, we should follow them if their reasoning is sound. *West v. Pierce County Council*, 197 Wn. App. 895, 899, 391 P.3d 592 (2017). We agree with *Swanson Hay*'s analysis, and, accordingly, we adopt its reasoning and result to resolve the primary issues presented here, as set forth below.

III. Federal Preemption

The parties dispute whether the FAAAA preempted reclassification of Gulick's owner-operators for ESA purposes. We agree with *Swanson Hay* that the FAAAA does not preempt the reclassification.

The FAAAA's preemption statute prohibits states from enacting or enforcing "a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier … or any motor private carrier, broker, or freight forwarder with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). *Swanson Hay* held that this statute did not preempt the ESD from assessing unemployment taxes on amounts paid to owner-operators. 1 Wn. App. 2d at 198. *Swanson Hay* reached this conclusion after rejecting reliance on *Western Ports* and determining that the ESA's definition of "employment" applied only to the imposition of unemployment insurance taxes. 1 Wn. App. 2d at 190-92, 194. The carriers failed to show that the reclassification

essentially dictated their prices, routes, or services, so that their preemption arguments failed. *Swanson Hay*, 1 Wn. App. 2d at 196-98.

We adopt this analysis, and we hold that as a matter of law, the FAAAA does not preempt the reclassification at issue here.

IV. Independent Contractor Exemption

Gulick does not assert that the commissioner erred when it determined that the owner-operators were in Gulick's "employment" under the ESA. Rather, the parties dispute whether the commissioner erred when it determined that Gulick failed to meet any of the three prongs of the independent contractor exemption to the ESA. We hold that the commissioner correctly determined that Gulick failed to meet the first and third prongs and, accordingly, we affirm the commissioner's decision.[4]

In addition to reviewing questions of law de novo, we review the commissioner's factual findings for substantial evidence—that which is sufficient to persuade a fair-minded person of the truth or correctness of the agency's order. *Affordable Cabs*, 124 Wn. App. at 367; RCW 34.05.570(3)(e).

To show that an owner-operator fits within the independent contractor exemption, the carrier must show that

4. We do not reach the second prong.

> (1)(a) [s]uch individual has been and will continue to be free from control or direction over the performance of such service, both under his or her contract of service and in fact; and
>
> (b) Such service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed; and
>
> (c) Such individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service.

RCW 50.04.140. The carrier must establish all three prongs. *W. Ports*, 110 Wn. App. at 452. We must construe exemptions to the ESA narrowly. RCW 50.01.010; *Wash. Trucking Ass'ns*, 188 Wn.2d at 203.

In *Swanson Hay*, the carriers failed to show that owner-operators met the first or third prongs of the independent contractor exemption so that the owner-operators were not exempt from ESA coverage. 1 Wn. App. 2d at 215, 219.

Appendix A

A. Freedom from Control or Direction

The first prong of the independent contractor exemption is whether an "individual has been and will continue to be free from control or direction over the performance of such service, both under his or her contract of service and in fact." RCW 50.04.140(1)(a). Gulick asserts that the commissioner erred when it determined that the owner-operators were not free from Gulick's control and direction. Gulick advances several arguments in support of its position—that the commissioner (1) mischaracterized lease terms and misapplied the law by relying on (2) federally required terms, (3) terms showing "general contractual rights," and (4) terms showing mere obligations or liquidated damages. Br. of Appellant at 15. These arguments fail for the reasons set forth below.

1. Legal Principles

Related to the first prong of the independent contractor exemption, the commissioner may consider federally mandated terms in carriers' contracts with owner-operators to determine whether the owner-operators were free from control or direction. *Swanson Hay*, 1 Wn. App. 2d at 212. A federal regulation, 49 C.F.R. § 376.12(c)(4), states that certain federally required provisions are not intended to affect whether the driver is an independent contractor of the authorized carrier lessee. This regulation does not dictate what terms states may consider when determining whether a carrier has shown that its drivers are free from control or direction. *Swanson Hay*, 1 Wn. App. 2d at 203.

Additionally, statutory, not common law, definitions are applicable to the definitions of "'employment'" and "'freedom from control'" under the ESA. *Swanson Hay*, 1 Wn. App. 2d at 206-08.

2. Mischaracterization of Lease Terms

Gulick argues that certain contract provisions' references to "equipment" show that the provisions were evidence of control over the *equipment*, not over the owner-operators. Thus, Gulick argues that the commissioner erred when it relied on these provisions to show control over *owner-operators*.[5] We disagree.[6]

The commissioner found that many lease terms that referred to the "equipment" showed control over owner-operators. The provisions allowed Gulick to complete a delivery if an owner-operator failed to deliver a shipment, required owner-operators to complete inspections of the equipment at certain times, allowed Gulick to place equipment out of service that did not meet federal or Gulick's standards, required owner-operators to provide loading and transportation accessories, forbade owner-operators from transporting unauthorized people or property, required owner-operators to display Gulick's

5. Gulick argues that the commissioner improperly relied upon terms showing control over *equipment* as showing control over *owner-operators*. Gulick provides no legal argument, and its argument is an attack on whether substantial evidence supports the commissioner's determination in this regard. Thus, it is addressed first.

6. *Swanson Hay* did not address a similar argument.

identification during the term of the agreement, allowed Gulick to terminate an agreement for reasons including an owner-operator's failure to maintain the equipment by Gulick's guidelines, and required owner-operators to install a communications device in the equipment.

Nearly all of these provisions also expressly reference the owner-operator. By requiring the *owner-operator* to do something, these provisions are evidence of control over the owner-operator. Further supporting that the contracts contemplate control over the owner-operators is that the first section of the contract is titled "furnishing of transportation service." AR at 327 (capitalization and underlining omitted). The cited contract provisions and the contract as a whole thus provide evidence sufficient to persuade a fair-minded person that the contract contemplated control over the owner-operators. The commissioner's finding that the contract was evidence of control over "driving services" is accordingly supported by substantial evidence. *See Affordable Cabs*, 124 Wn. App. at 367. The commissioner did not err when it relied on contract provisions that showed control over the equipment as well as over owner-operators.

3. Federally Required Terms

Gulick argues that the commissioner misapplied the law when it relied on federally required terms.[7] But in

7. These terms included the following: furnish and display Gulick's identification, 49 C.F.R. § 376.11(d)(1); Gulick's exclusive possession, control, and use of the equipment during the agreement, 49 C.F.R. § 376.12(c)(1); daily equipment inspections and delivery

Swanson Hay, Division Three of this court rejected the same argument and held that RCW 50.04.140 has "no textual basis for concluding that the control exercised by the employer must be control it has freely chosen to exercise, as opposed to control it is required to exercise by law." 1 Wn. App. 2d at 210. We follow Division Three's reasoning that "federally mandated control counts" and reject Gulick's argument to the contrary. *Swanson Hay*, 1 Wn. App. 2d at 212. RCW 50.04.140 does not limit the evidence of freedom from control or direction to only freely chosen employer control. *Swanson Hay*, 1 Wn. App. 2d at 211.

Gulick also identifies a specific federal regulation, 49 C.F.R. § 376.12(c), that Gulick claims bars the ESD from looking to federally required contract provisions. But again, *Swanson Hay* examined and rejected this argument. 1 Wn. App. 2d at 201-03. *Swanson Hay* identified the provision, which states that certain required provisions are not intended to affect whether the driver is an independent contractor, as showing that the provisions were not intended to create "federal-law based vicarious liability." 1 Wn. App. 2d at 201. We agree that 49 C.F.R. § 376.12(c)'s language does not bar the ESD from looking to federally required contract provisions when determining employer control. Thus, we reject Gulick's argument.[8]

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of reports, 49 C.F.R. § 379 app. A, part K(2); 49 C.F.R. § 396.11; 49 C.F.R. §§ 396.3, .13; and Gulick's right to place equipment out of service that did not meet federal standards, 49 C.F.R. § 385.5.

8. At oral argument, Gulick faulted *Swanson Hay*'s analysis of this issue because Gulick claimed that the *Swanson Hay* decision

4. "General Contractual Rights"

Gulick argues that the commissioner erred because it relied on "general contractual rights"—the rights to supervise and ensure compliance. Br. of Appellant at 19. This argument derives from *Seattle Aerie No. 1 of the Fraternal Order of Eagles v. Commissioner of Unemployment Compensation & Placement*, 23 Wn.2d 167, 160 P.2d 614 (1945). But as *Swanson Hay* recognized, *Seattle Aerie*'s reliance upon common law principles to define an independent contractor was overruled by the legislature when it enacted RCW 50.04.100. 1 Wn. App. 2d at 205. That statute defines ESA-covered "employment" as "unlimited by the relationship of master and servant as known to the common law or any other legal relationship." RCW 50.04.100. We agree with *Swanson Hay* on this point.

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failed to consider the Interstate Commerce Commission's 1992 statement that federally required control does not affect employment status and is meant to have a neutral effect. Wash. Court of Appeals oral argument, *Gulick Trucking, Inc. v. Emp't Sec. Dep't*, No. 49646-1-II (Dec. 7, 2017) at 13 min., 44 sec. (on file with court); *see Petition to Amend Lease & Interchange of Vehicle Regulations*, 8 I.C.C.2d 669, 671 (I.C.C. June 29, 1992). But *Swanson Hay* relied upon the language of the neutrality provision itself, which similarly expresses that the regulations are not intended to affect "employment" status. 49 C.F.R. 376.12(c)(4). Further, the 1992 statement that Gulick points out is consistent with *Swanson Hay*'s reasoning that the neutrality provision takes a "'hands off' approach … to deciding matters of state law." 1 Wn. App. 2d at 202. Gulick's argument is unpersuasive as a reason to depart from *Swanson Hay*'s holding that federally required terms count when determining control under the ESA.

Relatedly, Gulick argues that the term "control or direction" in RCW 50.04.140(1)(a) is undefined so that common-law tests apply. Again, *Swanson Hay* rejects this argument by correctly reasoning that the common law understanding of *control* does not apply to cases under Title 50 RCW because the legislature chose to abandon common law definitions when it adopted RCW 50.04.140(1)(a). 1 Wn. App. 2d at 207. We adopt *Swanson Hay*'s reasoning and reject Gulick's arguments about "general contractual rights."

5. Contractual Obligations and Liquidated Damages

Gulick contends that something more than contractual obligations must be identified in order to conclude that an individual is subject to control or direction. And Gulick argues that liquidated damages cannot be used as evidence of control. We reject Gulick's arguments.[9]

A contractual obligation is a legal duty that arises from a contract. Black's Law Dictionary 1242-43 (10th ed. 2014). Liquidated damages are amounts contractually stipulated as a reasonable estimation of damages in the event of a breach. Black's 473.

Gulick provides no authority or legal argument for why contractual obligations and liquidated damages cannot be evidence of control or direction under RCW 50.04.140(1)(a). Rather, Gulick relies upon speculation that only an illusory contract would not contain evidence of control and

9. *Swanson Hay* did not address a similar argument.

argument that it is commercially reasonable to include liquidated damages clauses. Because Gulick bears the burden to show that the independent contractor exemption applies, its arguments fail. *See Swanson Hay*, 1 Wn. App. 2d at 215.

Further, it is logical that contractual obligations are evidence of control if they are obligations to perform some aspect of the service for which an individual is compensated. Similarly, by incentivizing compliance with contractual obligations, liquidated damages provisions can also be evidence of control. We reject Gulick's arguments.

6. Conclusion Regarding Freedom from Control and Direction

Gulick's arguments that the commissioner erred when it determined that Gulick failed to show that the owner-operators were free from control or direction all fail. The commissioner properly relied upon evidence that Gulick exerted control and direction over the owner-operators—Gulick's exclusive possession, control, and use of the trucking equipment during the agreement's term; fines for failure to meet appointments or follow temperature requirements; Gulick's ability to retake possession of equipment and complete a failed delivery and to terminate the agreement upon a number of conditions; the prohibition against owner-operators transporting unauthorized passengers or property; and the requirements that owner-operators had to display identification showing Gulick operated the equipment, remove the identification when the agreement terminated,

conduct daily equipment inspections, deliver vehicle inspection reports, furnish accessories to load and transport freight, contact Gulick immediately in event of incidents, check that cargo conformed to loading manifests, notify Gulick of discrepancies or be fined, pay usage fees and furnish accessories to install a telecommunication device in their trucks, cooperate fully with dispatch, and transport commodities in a manner that promoted Gulick's goodwill and reputation.

Accordingly, we affirm the commissioner's determination that Gulick failed to establish the independent contractor exemption under the first prong. Thus, the owner-operators were covered employees under the ESA.

B. Customarily Engaged in an Independently Established Business

The third prong of the independent contractor exemption is whether "[s]uch individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service." RCW 50.04.140(1)(c). Gulick argues that the commissioner erred under this prong when it overlooked evidence of independently established businesses and instead relied upon evidence that owner-operators did not have their own federal operating authority. Based on *Swanson Hay*, we disagree.

We traditionally rely upon a seven-factor test to determine whether an alleged employee was engaged in an independently established business:

> (1) [W]orker has separate office or place of business outside of the home; (2) worker has investment in the business; (3) worker provides equipment and supplies needed for the job; (4) the alleged employer fails to provide protection from risk of injury or non-payment; (5) worker works for others and has individual business cards; (6) worker is registered as independent business with state; and (7) worker is able to continue in business even if relationship with alleged employer is terminated.

Swanson Hay, 1 Wn. App. 2d at 216 (quoting *Penick v. Emp't Sec. Dep't*, 82 Wn. App. 30, 44, 917 P.2d 136 (1996)). The seventh factor is the most important. *Swanson Hay*, 1 Wn. App. 2d at 216. Further, in the trucking industry, whether the owner-operators have independent federal operating authority is relevant under the third prong. *Swanson Hay*, 1 Wn. App. 2d at 218.

Here, the commissioner determined that some factors weighed in favor of owner-operators having independently established businesses: their places of business were outside their homes, in their trucks (factor 1); they made substantial investments (factor 2); they provided equipment and supplies (factor 3); and some had registered sole proprietorships during the covered period (factor 6). But the remaining factors, including the most important factor, weighed against owner-operators having their own businesses: Gulick provided protection against nonpayment (factor 4), and Gulick forbade its owner-operators from working for other carriers without

permission or competing with Gulick during or for five years following the agreement (factor 5).

Most importantly, none of the owner-operators had their own operating authority because they all chose to operate under Gulick's authority (factor 7). *See Swanson Hay*, 1 Wn. App. 2d at 218. The commissioner explained that "one of the unique characteristics about the trucking industry is the federal requirement that an owner-operator obtain an operating authority … in order to engage in the business of transporting goods in interstate commerce." AR at 1137. "[O]therwise, the owner-operator must operate under another carrier's operating authority." AR at 1137.

Gulick's argument that the commissioner should not have relied upon whether the owner-operators had independent operating authority fails. *See Swanson Hay*, 1 Wn. App. 2d at 218. The commissioner did not overlook evidence favoring Gulick but made findings related to each prong and carefully weighed the evidence. *Swanson Hay* also rejected the out-of-state authority upon which Gulick relies. 1 Wn. App. 2d at 217. We affirm the commissioner's determination that Gulick failed to meet the third prong of the independent contractor exemption.[10]

10. Gulick argues that we should not defer to the commissioner. But no deference to the commissioner is required to affirm its decision as set forth above.

Appendix A

CONCLUSION

We affirm the ESD commissioner's decision that the FAAAA did not preempt the reclassification and that Gulick failed to establish the first and third prongs of the independent contractor exemption under RCW 50.04.140.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

/s/_____
JOHANSON, J.

We Concur:

/s/_____
MAXA, A.C.J.

/s/_____
Sutton, J.

APPENDIX B — DECISION OF COMMISSIONER BEFORE THE COMMISSIONER OF THE EMPLOYMENT SECURITY DEPARTMENT OF THE STATE OF WASHINGTON, DATED AUGUST 28, 2015

BEFORE THE COMMISSIONER OF THE
EMPLOYMENT SECURITY DEPARTMENT
OF THE STATE OF WASHINGTON

Review No. 2015-0110

Docket No. 012014-01281

In re:

GULICK TRUCKING, INC.
Tax ID No. 827604-00-8

DECISION OF COMMISSIONER

This is an unemployment insurance tax dispute between the Employment Security Department ("Department") and the interested employer, Gulick Trucking, Inc. ("Gulick"). The Department conducted an audit of Gulick for the period of 2009, 2010, 2011, and the first three calendar quarters of 2012. As a result of the audit, 120 individuals (i.e. owner-operators) hired by Gulick were reclassified as employees of Gulick and their wages were deemed reportable to the Department for unemployment insurance tax purposes. *See* Department's Exhibit 15; *see also* Stipulations, Attachment A. The Department issued an Order and Notice of Assessment on May 17, 2013, assessing Gulick contributions, penalties, and interest in the amount of $155,133.33. *See* Department's

Exhibit 1. Gulick filed a timely appeal from the Order and Notice of Assessment. *See* Department's Exhibit 2. Subsequently, the Department stipulated that it would remove the contributions, penalties, and interest assessed for all quarters of 2009 and the first quarter of 2010, *see* Stipulations ¶ 3; and Gulick stipulated to the correctness of the amount of wages for the remaining quarters (i.e. the second, third, and fourth quarters of 2010; the first, second, third, and fourth quarters of 2011; and the first, second, and third quarters of 2012). *See* Stipulations ¶ 6. As a result of the parties' stipulations, the total amount of the assessment in dispute became $112,855.17 for the period in question. *See* Situations ¶ 6.

Prior to the evidentiary hearing held on September 8 and 9, 2014, Gulick moved the Office of the Administrative Hearings ("OAH") for summary judgment on federal preemption ground. The OAH denied Gulick's motion, holding that the unemployment insurance taxation was not subject to federal preemption. *See* Order on Motion for Summary Judgment ¶ 7. Thereafter, the parties proceeded to the evidentiary hearing on the remaining issues of whether the owner-operators in dispute were in "employment" of Gulick pursuant to RGW-50.04.100 and, if so, whether their services were exempted from coverage pursuant to RCW 50.04.140. After the evidentiary hearing, the OAH issued an Initial Order on November 26, 2014, holding that the disputed owner-operators were in "employment" of Gulick pursuant to RCW 50.04.100 and that their services were not exempted from coverage pursuant to RCW 50.04.140. On December 23, 2014, Gulick timely petitioned the Commissioner for review of the Initial Order. Pursuant to chapter 192-04 WAC this

matter has been delegated by the Commissioner to the Commissioner's Review Office. On January 30, 2015, the Commissioner's Review Office received a reply filed by the Department. Having reviewed the entire record (including the audio recording of the various hearings) and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), we adopt the OAH's findings of fact and conclusions of law in the Initial Order, subject to the following additions and modifications.

PREEMPTION

The Social Security Act of 1935 (Public Law 74-271) created the federal-state unemployment compensation program. The program has two main objectives: (1) to provide temporary and partial wage replacement to involuntarily unemployed workers who have been recently employed; and (2) to help stabilize the economy during recessions. The Federal Unemployment Tax Act of 1939 ("FUTA") and Titles III, IX, and XII of the Social Security Act ("SSA") form the basic framework of the unemployment compensation system. The U.S. Department of Labor oversees the system, with each state administering its own program.

Federal law defines certain requirements for the unemployment compensation program. For example, SSA and FUTA set forth broad coverage provisions, some benefit provisions, the federal tax base and rate, and administrative requirements. Each state then designs its own unemployment compensation program within the framework of the federal requirements. The state statute sets forth the benefits structure (e.g., eligibility/

disqualification provisions, benefit amount) and the state tax structure (e.g., state taxable wage base and tax rates).

Generally speaking, FUTA applies to employers who employ one or more employees in covered employment in at least 20 weeks in the current or preceding calendar year or who pay wages of $1,500 or more during any calendar quarter of the current or preceding calendar year. *See* 26 U.S.C. § 3306(a)(1). Under FUTA, the term "employee" is defined by reference to section 3121(d) of the Internal Revenue Code. *See* 26 U.S.C. § 3306(i). In turn, 26 U.S.C. § 3121(d)(2) defines "employee" to be any individual who, under the *usual common law rules* applicable in determining the employer-employee relationship, has the status of an employee. In 1987, the IRS issued Revenue Ruing 87-41, distilling years of case law interpreting "usual common law rules" into a more manageable 20-factor test.[1] While these 20 factors are commonly relied upon, it is not an exhaustive list and other factors may be relevant. Furthermore, some factors may be given more weight than others in a particular case. In 1996, the IRS reorganized the 20 factors into three broad categories: behavioral control, financial control, and relationship of the parties. *See* IRS, *Independent*

1. The 20 factors are instructions; training; integration; services rendered personally; hiring, supervising, and paying assistants; continuing relationship; set hours of work; full time required; doing work on employer's premises; order or sequence set; oral or written reports; payment by hour, week, month; payment of business and/or traveling expenses; furnishing of tools and materials; significant investment; realization of profit or loss; working for more than one firm at a time; making service available to general public; right to discharge; and right to terminate. *See* Rev. Rul. 87-41, 1987-1 C.B. 296.

Contractor or Employee? Training Materials, Training 3320-102 (October 30, 1996). However, regardless of the length and complexity of the tests developed by the IRS to clarify coverage issues for federal taxation purposes, we have cautioned that FUTA does not purport to fix the scope of coverage of state unemployment compensation laws. *See In re Coast Aluminum Products, Inc.*, Empl. Sec. Comm'r Dec. 817 (1970) ("A wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books." *(quoting Steward Machine Co. v. Davis*, 301 U.S. 548, 593 (1937))).

State legislatures tend to cover employers and employment that are subject to the federal taxation. Although the extent of state coverage is greatly influenced by federal statute, each state is free to determine the employers who are liable for contributions and the workers who accrue rights under its own unemployment compensation laws. Here in Washington, the first version of the Employment Security Act (or "Act"), which was then referred to as "Unemployment Compensation Act," was enacted by the state legislature in 1937. *See* Laws of 1937, ch. 162. This first version of the Act contained a definition of "employment," *see* Laws of 1937, ch. 162, § 19(g)(1)[2]; and a three-prong "independent contractor" or ABC test. *See* Laws of 1937, ch. 162, § 19(g)(5).[3]

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2. In the first version of the Act, "employment" was defined to mean "service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied." *See* Laws of 1937, ch. 162, § 19(g)(1).

3. In the first version of the Act, the "independent contractor" or ABC test read as follows:

Appendix B

The legislature introduced major revisions to the definition of "employment" in 1945 by adding; among other things, the phrase "*unlimited* by the relationship of *master and servant as known to the common law or any other legal relationship.*" *See* Laws of 1945, ch. 35, § 11 (emphasis added). The added language greatly expanded the scope of the employment relationship as covered by the Employment Security Act beyond the scope of the employment relationship as covered by FUTA *Compare* RCW 50.04.100 *with* 26 U.S.C. § 3306(i) and 26 U.S.C. § 3121(d)(2); *see also In re All-State Constr. Co.*, 70 Wn.2d 657, 664, 425 P.2d 16 (1967) (the test to be applied in determining the employment relationship under the Act is a statutory one; and common law distinctions between employees and independent contractors are inapplicable); *Skrivanich v. Davis*, 29 Wn.2d 150, 158, 186 P.2d 364 (1947) (the 1945 legislature intended and

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> Services performed by an individual for remuneration shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the director that: (i) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and (ii) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed; and (iii) Such individual is customarily engaged in an independently established trade, occupation, profession or business, of the same nature as that involved in the contract of service.

See Laws of 1937, ch. 162, § 19(g)(5).

deliberately concluded to extend the coverage of the Act and by express language to preclude any construction that might limit the operation of the Act to the relationship of master and servant as known to the common law or any other legal relationship); *Unemp't Comp. Dep't v. Hunt*, 17 Wn.2d 228, 236, 135 P.2d 89 (1943) (our unemployment compensation act does not confine taxable employment to the relationship of master and servant, but brings within its purview many individuals who would otherwise have been excluded under common law concepts of master and servant, or principal and agent). Since then, the definition of "employment" under the Act has remained largely unchanged. Moreover, the "independent contractor" or ABC test has also remained the same, except that in 1991 the legislature added a separate, six-prong test to the traditional three-prong test *See* ESSB 5837, ch. 246 § 6, 52nd Leg., Reg. Sess. (Wash. 1991); *compare* RCW 50.04.140(1) *with* RCW 50.04.140(2).

Over the years; the appellate courts in Washington as well as the Commissioner's Review Office (as the final agency decision-maker on behalf of the Department) have grappled with the concept of "employment" under RCW 50.04.100 and applied the "independent contractor" test under RCW 50.04.140 in various factual scenarios, finding any given relationship either within or outside the intended scope of the Act. *See, e.g., State v. Goessman*, 13 Wn.2d 598, 126 P.2d 201 (1942) (barbers were held to be in employment of the barber shop; but the legislature later enacted RCW 50.04.225 to exempt barbers from covered employment); *Skrivanich*, 29 Wn.2d 150 (crew members were in employment of the fishing vessel); *All-*

State Constr. Co., 70 Wn.2d 657 (siding applicators were in employment of the construction company); *Miller v. Emp't Sec. Dep't*, 3 Wn. App. 503, 476 P.2d 138 (1970) (individuals performing bucking and falling activities were in employment of the logging contractor); *Schuffenhauer v. Emp't Sec. Dep't*, 86 Wn.2d 233, 543 P.2d 343 (1975) (clam diggers were in employment of the wholesaler of clams); *Daily Herald Co. v. Emp't Sec. Dep't*, 91 Wn.2d 559, 588 P.2d 1157 (1979) (bundle droppers were in employment of the newspaper publisher); *Jerome v. Emp't Sec. Dep't*, 69 Wn. App. 810, 850 P.2d 1345 (1993) (food demonstrators were in employment of the food demonstration business); *Affordable Cabs, Inc. v. Emp't Sec. Dep't*, 124 Wn. App. 361, 101 P.3d 440 (2004) (taxicab drivers were in employment of the taxicab company); *but, see, e.g., Cascade Nursing Serv., Ltd. v. Emp't Sec. Dep't*, 71 Wn. App. 23, 856 P.2d 421 (1993) (nurses were not in employment of the nurse referral agency); *In re Judson Enterprises, Inc.*, Empl. Sec. Comm'r Dec.2d 982 (2012) (no employment relationship was found because a business entity could not be an employee unless it was shown that the business entity is actually an individual disguised as a business entity).

Two state appellate decisions pertained specifically to the trucking industry. In *Penick v. Emp't Sec. Dep't*, 82 Wn. App. 30, 917 P.2d 136 (1996), Division Two of the Court of Appeals dealt with the relationship *between* a motor carrier who owned the trucks *and* the drivers who were hired to drive the trucks ("contract drivers"). In that case, the motor carrier owned the trucks and operated them under its authority from the Interstate

Commerce Commission. The carrier supplied fuel, repairs and maintenance, license, and insurance; and it also handled state and federal reporting requirements. The contract drivers paid their own federal income tax, social security and medicare taxes, and motel and food expenses; they did not receive sick leave, vacations, or other benefits. The contract drivers could hire a "lumper" if they needed help in loading or unloading. The contracts, which could be terminated by either party at any time, entitled the contract drivers to 20 percent of the gross revenue generated by the loads they hauled. In the event of an accident, the contract drivers were required to pay damages not covered by the $2,500 deductible of the carrier's insurance policy. The contract drivers were also liable for shortage and cargo damage. The drivers often installed a variety of amenities on their assigned trucks to make life on the road more comfortable. The motor carrier secured the load for the outgoing trip, and the contract drivers occasionally obtained their own loads. Any driver was free to reject an offer to haul a load secured by the carrier and, instead, could choose to haul a load obtained by the driver. The carrier obtained return loads for about half the trips, and the drivers found their own return loads for the other half of the trips. The motor carrier handled the billing and collection and provided bi-weekly draws for trip expenses to the drivers. It also made bi-weekly payments to the drivers for their share of the payment for a particular haul. The carrier required its drivers to clean the inside and outside of the truck, adhere to all federal and state laws and safety regulations, and to call in every day by 10 a.m. while en route. But the motor carrier allowed the drivers to select their own routes

and to select their driving hours, so long as the hours complied with legal requirements regarding maximum driving time and rest periods. The carrier also permitted the drivers to take other people with them. *Id.* at 34-35. After examining all relevant facts, the *Penick* court held that the contract drivers were in employment of the motor carrier pursuant to RCW 50.04.100 and that their driving services were not exempted from coverage under the "independent contractor" test pursuant to RCW 50.04.140. *Id.* at 39-44. However, the *Penick* court did not address the coverage issue pertaining to the owner-operators (who owned the trucks but leased them to the carrier) because the motor carrier prevailed on that issue before the Commissioner's Review Office and did not appeal. *Id.* at 39. Because the Commissioner's Review Office did not publish the decision in the *Penick* matter, our holdings in that matter cannot be deemed precedential. *See* RCW 50.32.095 (commissioner may designate certain decisions as precedents by publishing them); *see also W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 459, 41 P.3d 510 (2002) (unpublished decisions of Commissioner have no precedential value).

Six years later, Division One of the Court of Appeals spoke on the coverage issue pertaining to the relationship between a motor carrier and one of its owner-operators. *See W. Ports Transp.*, 110 Wn. App. 440. In *W. Ports*, the motor carrier contracted for the exclusive use of approximately 170 trucks-with-drivers (or owner-operators). The owner-operators either provided and drove their own trucks or hired others to drive them exclusively for the carrier. The standard independent contractor agreement

contained various requirements that were dictated by federal regulations governing motor carriers that utilized leased vehicles-with-drivers in interstate commerce; it also contained the carrier's own rules and policies. Pursuant to the independent contractor agreement, the owner-operators were required to operate their trucks exclusively for the carrier, have the carrier's insignia on the trucks, purchase their insurance through the carrier's fleet insurance coverage, participate in all the company's drug and alcohol testing programs, obtain the carrier's permission before carrying passengers, notify the carrier of accidents, roadside inspections, and citations, keep the trucks clean and in good repair and operating condition in accordance with all governmental regulations, and submit monthly vehicle maintenance reports. The carrier determined the owner-operators' pickup and delivery points and required them to call or come in to its dispatch center to obtain assignments not previously scheduled and to file daily logs of their activities. The owner-operators received flat rate payments for the loads hauled and were paid twice per month. The carrier had broad rights of discharge under the independent contractor agreement, and could terminate the contract or discipline the owner-operators for tardiness, failure to regularly contact the dispatch unit, failure to perform contractual undertakings, theft, dishonest, unsafe operation of the trucks, failure of equipment to comply with federal or state licensing requirements, and failure to abide by any written company policy. The owner-operators, however, did have some autonomy. For example, the owner-operators decided the route to take in making deliveries; they also could have other drivers to operate the trucks in providing services

under terms of the independent contractor agreement. The owner-operators paid all of their truck operating expenses and deducted the expenses on their federal income tax returns. *Id* at 445-47. Based on these facts, the *W. Ports* court found that the carrier exerted considerable direction and control over the driving services performed by the owner-operator and, accordingly, it failed the first prong of the "independent contractor" test under RCW 50.04.140(1)(a). *Id* at 452-54. The *W. Ports* court also considered and rejected the carrier's contention that federal transportation law preempted state employment security law. *Id* at 454-57.

In this case, the interested employer, Gulick, is an interstate motor carrier duly licensed by the U.S. Department of Transportation and the Federal Motor Carrier Safety Administration (the successor agency to Interstate Commerce Commission). Gulick operates throughout the 48 contiguous states and is based in Vancouver, Washington. *See* Declaration of Adams in Support of Petitioner's Motion for Summary Judgment ("Decl. of Adams") ¶ 3. Gulick is a family-owned business and has been: in operation since approximately 1973. *See* Decl. of Adams ¶ 2. Gulick employs company drivers to drive equipment that it leases; and it currently has four employee drivers on staff. Besides the employee drivers, Gulick also uses 152 owner-operators, who either own their trucking equipment or are leasing or purchasing their trucking equipment from third parties unrelated to Gulick. *See* Decl. of Adams ¶¶ 4 & 5.[4] Gulick enters

4. Here, we rely on the record developed in support of the summary judgment motion. Subsequently, the parties stipulated to

into written contracts with all of the owner-operators from whom Gulick leases the trucking equipment, *see* Decl. of Adams ¶ 6; and it provides owner-operators with loads, access to insurance, operating authority, billing, collections and all regulatory support. *See* Department's Exhibit 5, p. 1. According to Adams, the use of owner-operators is a common and widespread practice within the trucking industry; and it provides Gulick with seasonal flexibility by allowing Gulick to meet the fluctuating demand without having to purchase expensive trucks and trailers and without having to terminate employees when the demand subsides. Additionally, this business model provides a market for owner-operators within which they may establish their own independent businesses; and the owner-operators will have the same flexibility and are not subject to termination as a result of a dip in demand from one carrier as they can provide services to another carrier. *See* Decl. of Adams ¶ 4.

As discussed above, the Department conducted an audit of Gulick for various quarters in 2010, 2011, and 2012; and, subsequently, reclassified the owner-operators as employees of Gulick and deemed their wages to be reportable for unemployment insurance tax purposes. Gulick moved the OAH for summary judgment on federal preemption ground, essentially arguing that it is entitled to judgment as a matter of law because RCW 50.04.100 and RCW 50.04.140 as applied to motor carriers of the

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the fact that all owner-operators owned their trucking equipment. *See* Stipulations ¶ 4. Mr. Adams corrected the number of the owner-operators to be 142. *See* Testimony of Adams, Transcript of Record at 157.

trucking industry in Washington is preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"). The crux of Gulick's argument is that the Department's efforts in applying RCW 50.04.100 and RCW 50.04.140 to the trucking industry will eliminate the use of owner-operators from the trucking industry and effectively restructure that industry, resulting in a substantial impact on its prices, routes, and services. The Department responded by arguing that the Washington's leading case, *W. Port*, has rejected the argument that the state employment security law is preempted by federal motor carrier law; and that preemption should not apply because any impact its application of RCW 50.04.100 and RCW 50.04.140 may have on motor carriers is far too tenuous, remote, or peripheral to be preempted.

Federal preemption is based on the United States Constitution's mandate that the "Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." *See* U.S. CONST., art. VI, cl. 2; *see also Ameriquest Mortg. Co. v. Washington State Office of Atty. Gen.*, 170 Wn.2d 418, 439, 241 P.3d 1245 (2010) (federal law may preempt state law by force of the Supremacy Clause of the United States Constitution). A state law that conflicts with federal law is said to be preempted and is "without effect." *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608 (1992). Federal law may preempt state law in any of the three ways: (1) expressly by the federal law's terms; (2) impliedly by Congress' intent to occupy an entire field of regulation; or (3) by the state law's direct conflict with the federal law. *See Michigan Canners & Freezers Assoc.*

v. Agric. Mktg & Bargaining Bd., 467 U.S. 461, 469, 104 S. Ct. 2518 (1984). There are "two cornerstones" of federal preemption jurisprudence: First, the purpose of Congress is the ultimate touchstone in every preemption case; second, where Congress has legislated in a field traditionally occupied by states, there is a presumption against preemption. *See Wyeth v. Levine*, 555 U.S. 555, 565, 129 S. Ct. 1187 (2009). Where Congress has superseded state legislation by statute, the courts' task is to identify the domain expressly preempted. To do so, the courts must first focus on the statutory language, which necessarily contains the best evidence of Congress' preemptive intent. *See Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013) (internal citations and quotation marks omitted).

Congress enacted the Airline Deregulation Act ("ADA") in 1978 with the purpose of furthering "efficiency, innovation, and low prices" in the airline industry through "maximum reliance on competitive market forces." *See* 49 U.S.C. §§ 40101(a)(6) & (a)(12)(A). The ADA included a preemption provision that Congress enacted to "ensure that the States would not undo federal deregulation with regulation of their own." *See Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 368, 128 S. Ct. 989 (2008) *(quoting Morales v. Trans World Airlines*, 504 U.S. 374, 378, 112 S. Ct. 2031 (1992)). The provision specifically provides that "a State ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier ...." *See* 49 U.S.C. § 41713(b)(1).

Appendix B

In 1980, Congress deregulated the trucking industry. *See Rowe*, 552 U.S. at 368 *(citing* Motor Carrier Act of 1980, 94 Stat. 793) Then; a little over a decade later, in 1994; Congress borrowed the preemption language from the ADA to preempt state trucking regulation and thereby ensure that the states would not undo the deregulation of trucking. *Id (citing* FAAAA, 108 Stat. 1569, 1605-06). The FAAAA preemption provision states:

> ... [A] State ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... with respect to the transportation of property.

See 49 U.S.C. § 14501(c)(1). Consistent with its text and history, the U.S. Supreme Court ("Court") has instructed that, in interpreting the preemption language of the FAAAA, courts should follow decisions interpreting the similar language in the ADA. *See* Rowe, 552 U.S. at 370.

In *Morales*, the Court first encountered the identical preemption provision under the ADA; and the Court adopted its construction of the term "related to" from its preemption jurisprudence under the Employee Retirement Income Security Act of 1974, defining the term broadly as "having a connection with or reference to airline rates, routes, or services." *See Morales*, 504 U.S. at 384. The Court, however, reserved the question of whether some state actions may affect airline fares in "too tenuous, remote, or peripheral a manner" to trigger preemption, giving as examples state laws prohibiting gambling and prostitution as applied to airlines. *Id.* at 390. Over a

decade later, in *Rowe*, the Court examined whether the FAAAA preempted a state's tobacco delivery regulation, which imposed several requirements on drivers of tobacco products. *See Rowe*, 552 U.S. at 369. In holding that the state's statute was preempted by FAAAA, the Court essentially adopted its reasoning in *Morales*, because ADA and FAAAA consisted of identical preemption language and further because "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." *Id.* at 370 *(quoting Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85, 126 S. Ct. 1503 (2006)). In reaffirming *Morales*, the Court in Rowe explained:

> ... (1) that "[s]tate enforcement actions having a connection with, or reference to," carrier "'rates, routes, or services' are pre-empted";
>
> (2) that such pre-emption may occur even if a state law's effect on rates, routes, or services "is only indirect"; (3) that, in respect to preemption, it makes no difference whether a state law is "consistent" or "inconsistent" with federal regulation; and (4) that pre-emption occurs at least where state laws have a "significant impact" related to Congress' deregulatory and pre-emption-related objectives.

Id. (internal citations omitted). Subsequently, the Court cautioned that the breath of the words "related to" did not mean the sky was the limit and that the addition of the

words "with respect to the transportation of property" massively limited the scope of preemption ordered by the FAAAA. *See Pelkey*, 133 S.Ct. at 1778 (FAAAA did not preempt state-law claims for damages against a towing company regarding the company's post-towing disposal of the vehicle) (internal quotation marks omitted). Finally, in *Am. Trucking Ass'n, Inc. v. City of Los Angeles*, 133 S. Ct. 2096 (2013), the Court addressed another aspect of the FAAAA preemption—the "force and effect of law" language, drawing a distinction between a government's exercise of regulatory authority and its own contract-based participation in the market. The Court held that, when the government employed the "hammer of the criminal law" to achieve its intended goals, it acted with the force and effect of law and thus the concession agreement's placard and parking provisions were preempted by the FAAAA because such provisions had the "force and effect of law." *Id.* at 2102-04.

In the meantime, the Ninth Circuit Court of Appeals has on several occasions spoken on the FAAAA's preemptive effects on state law. For example, in *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca,* 152 F.3d 1184, 1189 (1998), the Ninth Circuit held that California's prevailing wage law, a state law dealing with matters traditionally within a state's police powers, had no more than an indirect, remote, and tenuous effect on and, thus, was not "related to" the motor carriers' prices, routes, and services within the meaning of the FAAAA's preemption clause. Most recently, the Ninth Circuit, in holding that California's meal and rest break laws were not preempted by FAAAA, reasoned that:

> [The meal and break laws] 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. They are "broad law[s] applying to hundreds of different industries" with no other "forbidden connection with prices[, routes,] and services." They are normal background rules for almost *all* employers doing business in the state of California. And while motor carriers may have to take into account the meal and rest break requirements when allocating resources and scheduling routes—just as they must take into account state wage laws or speed limits and weight restrictions, the laws do not "bind" motor carriers to specific prices, routes, or services. Nor do they "freeze into place" prices, routes, or services or "determin[e] (to a significant degree) the [prices, routes, or] services that motor carriers will provide." Further, applying California's meal and rest break laws to motor carriers would not contribute to an impermissible "patchwork" of state-specific laws, defeating Congress' deregulatory objectives.

See Dilts v. Penske Logistics, LLC, 769 F.3d 637, 647 (2014), *cert. denied,* 135 S. Ct. 2049 (2015) (internal citations omitted).

It is against the backdrop of the U.S. Supreme Court's decisions in *Morales*, *Rowe*, *Pelkey* as well as the Ninth

Circuit's decisions in *Mendonca* and *Dilts*, that we now confront Gulick's federal preemption argument. Gulick contends that the FAAAA preempts the Washington's Employment Security Act as applied to the trucking industry because it directly affects and therefore, is "related to" the prices, routes, and services of its motor carrier business. Gulick introduced four declarations in its motion for summary judgment to support its contention: (1) a declaration by Aaron Riensche, Counsel for Gulick, with attached Exhibits A through I; (2) a declaration by Larry Pursley, Executive Vice President of Washington Trucking Association; (3) a declaration by Donald Adams, Controller for Gulick; and (4) a declaration by Joe Rajkovacz, Director of Governmental Affairs & Communications for the California Construction Trucking Association.

According to Pursley, the owner-operators have long been an important component of the trucking industry, both nationally and locally. The owner-operators are utilized in most, if not all, sectors of the industry, including long-haul trucking, household goods moving, and intermodal operations. The vast majority of interstate truck load transportation businesses in Washington operate to some extent through contractual relationships with owner-operators for operational flexibility: contracting with independent owner-operators enables the carriers to provide on demand and as-needed deliveries and to address variations in the need to move cargo without having to purchase expensive equipment. *See* Declaration of Pursley in Support of Petitioner's Motion for Summary Judgment ("Decl. of Pursley") ¶ 7. Pursley asserts that

the assessments imposed by the Department on motor carriers will fundamentally change the business models of both motor carriers and owner-operators throughout Washington, because the Department will effectively eliminate a historical cornerstone of the trucking industry. The effect of this material change will dictate the employment relationship that motor carriers must use in their operations going forward, which will impact their prices; routes; and services. *See* Decl. of Pursley ¶ 10. Pursley asserts that the assessments will impact services because the carriers will be forced to provide trucking services only through employees and to purchase expensive trucks and trailers and hire drivers to operate the equipment, which in turn will severely curtail the carriers' operational flexibility. *See* Decl. of Pursley ¶ 11. The Department's restructuring of the trucking industry will also require carriers to alter their routes to avoid liability under Washington's Employment Security Act and will thus prevent carriers from making their own decisions about where to deliver cargo. *See* Decl. of Pursley ¶ 12. Finally, Pursley asserts that the assessments will likely have a significant impact on prices because of the additional employment-related taxes such as state and federal social security taxes and unemployment insurance taxes, which will undoubtedly have to be recouped by raising prices. *See* Decl. of Pursley ¶ 13.

According to Adams, the Department's assessment will place Gulick at a competitive disadvantage with carriers outside Washington who are not subject to the Washington's Employment Security Act. To remain competitive, Gulick could be forced to change customer

lanes, drop customers, and downsize so as to adjust to the new cost structure. *See* Decl. of Adams ¶ 11. Adams asserts that the Department's actions would have a negative impact on Gulick's experience rating by making the owner-operators potentially eligible for unemployment insurance benefits. *See* Decl. of Adams ¶¶ 16-18. According to Adams, the assessment will impact the services *(see* Decl. of Adams ¶ 13), routes *(see* Decl. of Adams ¶ 14), and prices *(see* Decl. of Adams ¶ 15), offered by its motor carrier business. Adams warns that the Department's position may cause interstate carriers, such as Gulick, to move their businesses out of Washington and owner-operators to move their residences out of Washington. *See* Decl. of Adams ¶ 14.

Additionally, Gulick requests us to depart from our state's appellate decision in *W. Ports*, which held that federal transportation law did not preempt state employment security law. *See W. Ports*, 110 Wn. App. at 454-57. Gulick argues that *W. Ports* court never analyzed the FAAAA preemption clause under 49 U.S.C. § 14501(c)(1) and that *W. Ports* court's two bases for rejecting the preemption argument are no longer valid in light of the subsequent U.S. Supreme Court's decision in *Rowe*. *See* Gulick's Petition for Review at 2-3.

While Gulick's arguments are appealing and we are tempted to address the merits of the federal preemption issue, we must be mindful of our limited authority as a quasi-judicial body. As a general proposition, the Commissioner's Review Office, being an office within the executive branch of the state government, lacks

the authority or jurisdiction to determine whether the laws it administers are constitutional; only the courts have that power. *See* RCW 50.12.010; RCW. 50.12.020; *Bare v. Gorton*, 84 Wn.2d 380, 383, 526 P.2d 379 (1974); *In re Kellas*, Empl. Sec. Comm'r Dec.2d 825 (1991) (Commissioner's Review Office is part of an administrative agency in the executive branch of government and is thus without power to rule on constitutionality of a legislation; that function is reserved to judicial branch of government); *In re Bremerton Christian Schools*, Empl. Sec. Comm'r Dec.2d 809 (1989); *In re Ringhofer*, Empl. Sec. Comm'r Dec.2d 145 (1975). On the other hand, the superior court, on judicial review of a final agency order issued by the Commissioner's Review Office, may hear arguments and rule on the constitutionality of the Department's orders. *See* RCW 34.05.570(3)(a) (the court shall grant relief from an agency order in an adjudicative proceeding if the order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied). Consequently, in keeping with the authority of the highest tribunals of Washington State and federal jurisprudence, we are of the view that, to the extent the Washington's Employment Security Act as applied to motor carriers of the trucking industry implicates the Supreme Clause of the United States Constitution (on the basis that the Department's enforcement effort is allegedly preempted by the FAAAA), the Commissioner's Review Office, as an executive branch administrative office, is not the appropriate forum to decide such a constitutional issue.

Despite the general prohibition on administrative agencies from deciding constitutional issues, but with an

eye toward assuring that the constitutional issue in this case has been properly addressed at the administrative level, we have reviewed the entire record developed by the OAH below and are satisfied that the parties were allowed to present all evidence (via four declarations with exhibits filed on behalf of Gulick and one declaration filed on behalf of the Department) they deemed relevant to the federal preemption issue. Consequently, we are of the opinion that the OAH and the parties have developed a substantial and sufficient record from which a court can make an informed and equitable decision on the constitutional front.

Finally, the Commissioner's Review Office, as the final decision-maker of an executive agency, is bound by the state appellate court's decisions; and Gulick has not supplied any authorities for us to do otherwise. As such, to the extent that the *W. Port* court already considered and rejected the argument that federal transportation laws preempted state employment security law, *see W. Ports*, 110 Wn. App. at 454-57, we concur with the OAH that the Washington's Employment Security Act as applied to motor carriers of trucking industry is not preempted by the FAAAA preemption clause. Accordingly, we will adopt the OAH's analysis in its Order on Motion for Summary Judgment issued in this matter on August 8, 2014.

EMPLOYMENT

Gillick is liable for contributions, penalties, and interest as set forth in the Order and Notice of Assessment if, during the period at issue, the owner-operators are in "employment" of Gulick as defined in RCW 50.04.100. *See*

RCW 50.04.080; RCW 50.24.010. If the owner operators' employment is not established, Gulick is not liable for the assessed items. If employment is established, Gulick is liable unless the services in question are exempted from coverage.

We consider the issue of whether an individual is in employment subject to this overarching principle: The purpose of the Employment Security Act (or "Act"), Title 50 RCW, is to mitigate the negative effects of involuntary unemployment. This goal can be achieved only by application of the insurance principle of sharing the risks, and by the systematic accumulation of funds during periods of employment. To accomplish this goal, the Act is to be liberally construed to the end that unemployment benefits are paid to those who are entitled to them. *See* RCW 50.01.010; *Warmington v. Emp't Sec. Dep't*, 12 Wn. App. 364, 368, 529 P.2d 1142 (1974). This principle has been applied so as to generally find the existence of an employment relationship. *See, e.g., All-State Constr. Co.*, 70 Wn.2d at 665; *Penick*, 82 Wn. App. at 36.

"Employment," subject only to the other provisions of the Act, means personal service of whatever nature, unlimited by the relationship of master and servant as known to the common law or any other legal relationship, including service in interstate commerce, performed for wages or under any contract calling for the performance of personal services, written or oral, express or implied. RCW 50.04.100. To determine whether a work situation satisfies the definition of "employment" in RCW 50.04.100, we must determine (1) whether the worker

performs personal services for the alleged employer; and (2) whether the employer pays wages for those services. *See Skrivanich*, 29 Wn.2d at 157. The test for personal service is whether the services in question were clearly for the entity sought to be taxed or for its benefit. *See Daily Herald*, 91 Wn.2d at 564. In applying this test, we look for a clear and direct connection between the personal services provided and the benefit received by the entity sought to be taxed. *See Cascade Nursing*, 71 Wn. App. at 31.

In this case, Gulick is engaged in the business of transporting goods in interstate commerce for its customers; and the owner-operators performed truck-driving services for Gulick (in addition to leasing their equipment to Gulick). As such, the owner-operators' personal services directly benefited Gulick's business. Moreover, it is beyond dispute that Gulick paid wages for the services provided by the owner-operators. *See* Department's Exhibit 10, p. 5, ¶ 14.1 ("Carrier shall make settlement payments to Contractor of the rental herein provided on a per-shipment basis at a rate of eighty percent (80%) of the total income received by Carrier on each completed shipment that is using Carrier's trailer or eighty-seven percent (87%) if Contractor is using their own trailer."); *see also* Department's Exhibit 7—Form 1099, Nonemployee compensation. Consequently, the administrative law judge correctly concluded that the owner-operators were in employment of Gulick pursuant to RCW 50.04.100. *See* adopted Conclusion of Law No. 4 in Initial Order; *see also Penick*, 82 Wn. App. at 40 (as transportation of goods necessarily required services of truck drivers, it was clear that the carrier directly used and benefited from the drivers' services).

Appendix B

In its Petition for Review, Gulick argues that it essentially acts as a *broker* who finds loads for the owner-operators and then receives 20% of the fees (paid by the customers) as commission in exchange for its service and administrative support. *See* Gulick's Petition for Review at 3. We must reject Gulick's argument as it is not supported by the record of the case. To be clear, although Gulick may have a brokerage component to its business, it is first and foremost a *common, for hire carrier* who transports goods in interstate commerce for its customers:

> Q. What type of business is Gulick in?
>
> A. We are a common carrier.

See Testimony of Adams, Transcript of Record at 154.

> Q. You stated yesterday that Gulick is a common carrier; is that correct?
>
> A. Yes.
>
> Q. As a common carrier, does that mean Gulick is for hire?
>
> A. Yes.
>
> Q. What does it mean to be a for-hire motor carrier?
>
> A. A for-hire motor carrier can provide its services to any customer…

…

> Q. In fact, that is Gulick's business, is to transport cargo of another customer?
>
> A. Yes.

See Testimony of Adams, Transcript of Record at 219-21.

Moreover, the customers are Gulick's customers, and Gulick's alone; they are not "mutual" customers who are shared by Gulick and the owner-operators:

> Q. In general, who are Gulick's customers?
>
> A. We are mostly a refrigerated carrier in the items that we move, so our customers tend to be in the food or wine and beer industry.
>
> Q. How do you get customers?
>
> A. Many of our customers have been with us since almost the inception of the company, and other customers we get in many cases are by word of mouth.

See Testimony of Adams, Transcript of Record at 219. In fact, the lease and subhaul agreements (entered between Gulick and the owner-operators) specifically prohibit the owner-operators from competing or soliciting Gulick's customers during the term of the agreement and for at least five years after termination of the agreement *See, e.g.,* Department's Exhibit 10, p. 8, ¶ 20.9. Such a provision

would not have been necessary if Gulick were indeed sharing its customers with the owner-operators. Simply put, the fact that the customers belong to Gulick (not the owner-operators) abundantly proves that the truck-driving services performed by the owner-operators are clearly for Gulick as well as for its benefits.

Gulick next contends that an owner-operator cannot be an employee of Gulick on the basis that Gulick does not have "any ownership interest in the cargo, in the owner-operator's equipment, or in the origin or destination locations." *See* Gulick's Petition for Review at 3. Gulick seems to suggest that an ownership interest in those personal or real properties is a deciding factor in meeting the "employment" test under RCW 50.04.100. We reject Gulick's contention in this regard, and reiterate that the test for "personal service" under RCW 50.04.100 is whether the services in question are clearly for the entity sought to be taxed or for its benefit, *see Daily Herald*, 91 Wn.2d at 564; and that in applying this test, we look for a clear and direct connection between the personal services provided and the benefit received by the entity sought to be taxed. *See Cascade Nursing*, 71 Wn. App. at 31. In other words, the test" for "personal service" under RCW 50.04.100 has nothing to do with a putative employer's ownership interest in some personal or real properties.

Finally, relying on *Henry Broderick, Inc. v. Riley*, 22 Wn.2d 760, 776, 157 P.2d 954 (1945), Gulick argues that the owner-operators did not receive "wages" because Gulick and the owner-operators merely formed "an association ... for the mutual benefit of both" and agreed to share the customers' payments as compensation. We disagree. The

Penick court considered and rejected a similar argument, and reasoned that:

> In *Broderick,* receipts from real estate sales were deposited into escrow or trust accounts entitled in the names of the buyers and sellers. The brokers and the company obtained their real estate commissions directly from this account when the transaction closed. The brokers' commissions were never intended to be and never did become the property of the company. Here [the carrier] collected payment from the customers and then paid the drivers on a bi-weekly basis. There is no evidence of separate accounts. It appears that the funds belonged to [the carrier] until they were disbursed to the drivers. Nor did the drivers, like the brokers in *Broderick,* receive payment at the time of closure of a transaction.

See Penick, 82 Wn. App. at 41 (internal citations omitted). The *Penick* court's reasoning is equally applicable in this case. Here, there is no evidence to show the owner-operators received payment immediately upon delivery of a load or directly from an account of a customer. Instead, Gulick collected payment from the customer when a load was delivered. *See* Testimony of Adams, Transcript of Record at 226. Gulick then remitted 80 percent of the proceeds to owner-operators using Gulick's trailers and 87 percent to owner-operators using their own trailers. *See* Testimony of Adams, Transcript of Record at 226; *see also* Department's Exhibit 10, p. 5, ¶ 14.1. Gulick paid the

owner-operators even if Gulick's customers did not pay Gulick. *See* Testimony of Adams, Transcript of Record at 227. Gulick "may withhold any revenue due [an owner-operator] until all paperwork required for settlements are submitted to [Gulick]" or if "there is a known claim for any type of cargo loss pending for any reason or if [Gulick] has good cause to believe that one will be made ...." *See* Department's Exhibit 10, p. 5, ¶ 14.3. As such, the proceeds received from Gulick's customers remain Gulick's property unless and until they are disbursed to the owner-operators. Consequently, we are satisfied that the owner-operators received wages from Gulick for their truck-driving services and, thus, they are in "employment" of Gulick pursuant to RCW 50.04.100.

INDEPENDENT CONTRACTOR EXEMPTION

The services performed by the owner-operators are taxable to Gulick unless they can be excluded pursuant to some other provisions of Title 50 RCW. *See Skrivanich,* 29 Wn.2d at 157. The provisions of the Act that exclude certain services from the definition of employment are found at RCW 50.04.140 through RCW 50.04.240, RCW 50.04.255, RCW 50.04.270, and RCW 50.04.275. The burden of proof rests upon the party alleging the exemption. *See All-State Constr.*, 70 Wn.2d at 665. Just as RCW 50.04.100 is to be liberally construed to the end that benefits be paid to claimants who are entitled to them, the provisions of Title 50 RCW that exclude certain services from the definition of employment are strictly construed in favor of coverage. *See, e.g., In re Fors Farms, Inc.*, 75 Wn.2d 383, 387, 450 P.2d 973 (1969); *All-State Constr.*, 70

Wn.2d at 665. Because the Act is intended for the benefit of a group that society seeks to aid, any exemption available through the application of these tests must be scrutinized even more closely than an exemption to a tax levied purely for revenue-raising purposes. *See Schuffenhauer v. Emp't Sec. Dep't*, 86 Wn.2d 233, 239, 543 P.2d 343 (1975).

In this case, the only exception that concerns us is found at RCW 50.04.140(1) and (2). The truck-driving services performed by the owner-operators are excepted from employment only if all of the requirements of either section are met. *See* All-State Constr., 70 Wn.2d at 663. Here, the lease and subhaul agreements between Gulick and the owner-operators required the owner-operators to provide their UBI numbers or to provide proof that they had filed for UBI numbers with the State of Washington. *See* Department's Exhibit 10, p. 8, ¶ 20.4. Additionally, the agreements referred to the owner-operators as independent contractors:

> [The owner-operator] is an independent contractor and is not an employee, agent, joint venture or partner of Carrier for any purpose whatsoever. Carrier shall have no right to and shall not control the manner or prescribe the method of accomplishing the services required by this Agreement, except as necessary for the Carrier to comply with applicable law .... None of the provisions of this Agreement shall be interpreted or construed as creating or establishing the relationship of employer [and] employee between Carrier and Contractor, or

> Carrier and driver, agent or employee of [the owner-operator].

See Department's Exhibit 10, p. 2, § 4. This contractual language, however, is not dispositive of the issue of whether the services at issue were rendered in employment for purposes of the Act. Instead, we consider all the facts related to the work situation. *Penick*, 82 Wn. App. at 39.

RCW 50.04.140(1) and (2) provide two-alternative tests indetermining whether an individual hired by an alleged employer to perform personal services is an "independent contractor" for the purpose of unemployment insurance tax. The first three criteria in each test are essentially identical in all aspects that are relevant to this case. The employer is required to prove that an individual meets all of the criteria in one of the tests in order to qualify that individual for this exemption. Therefore, if an individual fails to meet any single criterion, he or she will not be considered an "independent contractor" and the employer is liable for contributions based on wages paid to the individual pursuant to RCW 50.24.010.

A. Direction and Control.

The first criterion under RCW 50.04.140(1)(a) and (2)(a) is freedom from control or direction. The key issue here is not whether the alleged employer actually controls; rather, the issue is whether the alleged employer has the right to control the *methods and details* of the performance, as opposed to the *end result* of the work. Existence of this right is decisive of the issue as to whether

an individual is an employee or independent contractor. *See Jerome v. Emp't Sec. Dep't*, 69 Wn. App. 810, 816, 850 P.2d 1345 (1993).

In this case, Gulick entered into standard lease and subhaul agreements with the owner-operators governing the relationship between the parties. *See, e.g.,* Department's Exhibit 10. On the one hand, the owner-operators enjoy some autonomy with regard to the performance of their truck-driving services. For example, the owner-operators are free to accept or reject any loads offered by Gulick; and they can contact other brokers directly and arrange their own loads. *See* Testimony of Matlock, Transcript of Record at 253-54; Testimony of DeJean, Transcript of Record at 284; Testimony of Carnes, Transcript of Record at 302; *see also* Department's Exhibit 10, p. 3, § 8 ("Should Carrier not be able to provide a load to Contractor, the Contractor may secure a load himself from a third party."). The owner-operators select the routes they use in making the deliveries. *See* Testimony of Adams, Transcript of Record at 195; Testimony of Matlock, Transcript of Record at 258; Testimony of DeJean, Transcript of Record at 284; Testimony of Carnes, Transcript of Record at 303. The owner-operators are responsible for proper and secure loading and shall provide all labor necessary to load, transport and unload the commodities provided by Gulick. *See* Department's Exhibit 10, p. 1, ¶ 1.7. The owner-operators are also responsible for all costs incurred in operation and maintenance of the equipment, including fuel and service costs, repair and maintenance costs, taxes, tolls, and other charges, fines, and fees. *See* Department's Exhibit 10, p,. 6, ¶ 16.1. The owner-operators

maintain various insurances, such as liability and property damage insurance, collision and specified insurance, and non-trucking use/bobtail liability insurance, at their own expense. *See* Department's Exhibit 10, pp. 4-5, § 13. Finally, the owner-operators have the right to employ drivers and are solely responsible for hiring, firing, supervision, training, working conditions, hours and compensation of their employees. *See* Department's Exhibit 10, p. 3, ¶ 9.1.

On the other hand, Gulick exerts extensive controls over the methods and details of how the driving services are to be performed by the owner-operators. For example, Gulick has exclusive possession, control, and use of the trucking equipment during the term of the agreement; and the owner-operators may not transport persons or property for any third party without Gulick's express written consent. *See* Department's Exhibit 10, p. 2, ¶ 5.8. The owner-operators must furnish and display identification on the equipment to show such equipment is being operated by Gulick; and upon termination of the agreement, the owner-operators shall immediately remove all identification from the equipment and return any placards to Gulick. *See* Department's Exhibit 10, p. 3, § 7. Gulick will fine an owner-operator $50 each time the owner-operator fails to meet the scheduled pickup or delivery appointments, *see* Department's Exhibit 10, p. 1, ¶ 1.5; or each time the owner-operator fails to follow temperature requirements. *See* Department's Exhibit 10, p. 1, ¶ 1.6. If an owner-operator fails to complete the transportation of commodities in transit, abandons a shipment, or otherwise fails to deliver shipment,

Gulick retains the right to take physical possession of the equipment and complete the transportation and delivery. *See* Department's Exhibit 10, p. 1, ¶ 1.4; *see also* Department's Exhibit 10, p. 5, ¶ 15.3. The owner-operators are required to inspect their trucks prior to operation each day, perform tire checks and visual inspection each 150 miles or three hours of operation (whichever comes first), and perform a post-trip inspection upon completion of each day's operation. The owner-operators shall complete, sign, and deliver to Gulick a daily vehicle inspection report as required by federal motor carrier safety regulations. *See* Department's Exhibit 10, p. 2, ¶ 5.4. Gulick may place any equipment out of service if, in Gulick's opinion, the equipment does not meet the standards set by the government or by Gulick. *See* Department's Exhibit 10, p. 2, ¶ 5.6. The owner-operators are required to furnish all accessories required to properly load and transport the freight, including tire chains, a minimum of three load locks, and temperature recording device. *See* Department's Exhibit 10, p. 2, ¶ 5.7. The owner-operators must immediately contact Gulick by telephone in the event of an accident resulting in personal injury or damage to cargo, or in the event of an incident involving hazardous materials. *See* Department's Exhibit 10, p. 4, ¶ 12.5. The owner-operators shall check the identity, temperature, condition, and count of all cargo to confirm that the cargo conforms to the bill of lading or loading manifest. *See* Department's Exhibit 10, p. 5, ¶ 15.1. The owner-operators must immediately notify Gulick of any cargo shortage, damage, or temperature discrepancies; and failure to do so will result in a $50 fine imposed by Gulick. *See* Department's Exhibit 10, p. 5, ¶ 15.2. Although

Gulick furnishes the telecommunication device such as Qualcomm, it requires the owner-operators to provide mounting brackets and to pay wiring and installation fees as well as a monthly usage fee of $60. *See* Department's Exhibit 10, p. 8, ¶ 20.1. The owner-operators are expected to cooperate fully with Gulick's dispatch personnel and to transport commodities in a manner that promotes Gulick's goodwill and reputation. *See* Department's Exhibit 10, p. 1, ¶¶ 1.2 & 1.3. Finally, Gulick may terminate the agreement if an owner-operator: (i) substantially violates federal, state, provincial, or Gulick's safety rules and regulations; (ii) is convicted of a felony or traffic crime; (iii) exhibits a continuing pattern of late pickups and deliveries; (iv) becomes unavailable for dispatch; (v) exhibits a continuing pattern of uncivil or impolite communications with Gulick's employees or customers; (vi) does not adequately maintain equipment as defined by Gulick's maintenance guidelines. *See* Department's Exhibit 10, p. 7, ¶ 19.2.

The above-referenced requirements imposed by Gulick are generally incompatible with freeing the owner-operators from its control and direction; in other words, Gulick is not just interested in the *end result* of the transportation services performed by the owner-operators, but it also concerns itself as to "*how*" the transportation services are to be performed by the owner-operators. *See Jerome*, 69 Wn. App. at 817 (a putative employer's ability to control was evidenced by the fact that it could enforce the control by unilaterally deciding not to give referrals to any food demonstrator). In sum, we concur with the administrative law judge that the owner-operators have not met the first criterion—freedom

from control or direction—under RCW 50.04.140(1)(a). *See* adopted Conclusion of Law No. 9 in Initial Order.

In its Petition for Review, Gulick requests us to apply a "common law definition" of the term "control or direction" under RCW 50.04.140(1)(a). *See* Gulick's Petition for Review at 4. Relying primarily on *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 52 P.3d 472 (2002), Gulick asserts that the common law definition of control requires a showing of something more than "general contractual rights," *Id.* at 121; rather, it means "control over the manner in which the wor[k] is done," such that the contractor "is controlled as to his methods of work, or as to operative detail" and "is not entirely free to do the work in his own way." *Id. (quoting* Restatement Second of Torts § 414 cmt. c (1965)). Initially, we note that *Kamla* is a case addressing the issue of whether an employer retained the right to direct a contractor's work so as to bring the employer within the "retained control" exception to the general rule of nonliability for injuries of a contractor, *Id.* at 119; and it is not a case interpreting the "control or direction" criterion under RCW 50.04.140(1) (a). As such, we do not find the *Kamla*'s reasoning readily applicable to the case at bar. However, even if we were to consider *Kamla* as persuasive authority for this case, we find nothing said in *Kamla* is inconsistent with the decisions interpreting the "control or direction" criterion under RCW 50.04.140(1)(a). As correctly noted by Gulick, we must consider the amount of control exercised over the "methods and details" of the work in evaluating the "control or direction" criterion under RCW 50.04.140(1) (a). *See Jerome*, 69 Wn. App. at 816; *W. Ports*, 110 Wn. App. at 452.

Gulick then takes the argument one step further by contending that many of the contract provisions do not show controls over "methods and details" of how the freight-hauling services are performed, but merely show the *conditions of the agreement* (i.e. what the owner-operators agreed to do and what the remedies are in the event of a breach) or the terms by which Gulick *controls the leased equipment. See* Gulick's Petition for Review at 5. Gulick's argument is not persuasive. In fact, conditions of an agreement can be viewed as controls over methods and details of the services rendered. For example, under the terms and conditions of the independent contractor agreement in *W. Ports*, 110 Wn. App. at 447, the carrier could terminate the contract or discipline the owner-operator for tardiness, failure to regularly contact the dispatch unit, failure to perform contractual undertakings, theft, dishonesty, unsafe operation of the truck, failure of equipment to comply with federal or state licensing requirements, and failure to abide by any written company policy. The *W. Ports* court specifically considered those terms and conditions of the agreement in evaluating the "control or direction" criterion under RCW 50.04.140(1)(a). *Id.* at 454. Moreover, controls over an equipment can be viewed as controls over the services performed by the individual operating the equipment. Again, both the *Penick* court and the *W. Port* court deemed the carrier's requirement that the owner-operators keep their trucks clean to be control over the owner-operators' personal services. *See Penick*; 82 Wn. App*.* at 43; *see* also *W. Ports*, 110 Wn. App. at 454.

Finally, Gulick would like us to focus on the *very specifics* of the "methods and details" in evaluating whether a putative employer has the right to control a putative employee's work performance. At the hearing, Gulick sought to establish that it does not control *how* its owner-operators check the identity or count of the cargo *(see* Testimony of Adams, Transcript of Record at 193-94); *how* they check the temperature of the cargo *(see* Testimony of Adams, Transcript of Record at 194); *how* they properly protect and promptly transport cargo *(see* Testimony of Adams, Transcript of Record at 195); *how* they install the Qualcomm devices (*see* Testimony of Adams, Transcript of Record at 203); *how* they manage to arrive on time for scheduled pickups and delivery *(see* Testimony of Matlock, Transcript of Record at 255); *how* they load or unload the cargo (*see* Testimony of Matlock, Transcript of Record at 256, 258-59); *how* they drive their trucks *(see* Testimony of Matlock, Transcript of Record at 258); or *how fast* they drive their trucks (*see* Testimony of Carnes, Transcript of Record at 301). Gulick's view of the term "right to control the methods and details" is too narrow and rigid; and we shall not adopt such a view in analyzing the "control or direction" criterion under RCW 50.04.140(1)(a). Our appellate courts and the Commissioner's Review Office have never applied the "control or direction" test in a way that requires a putative employer's *absolute control* over *every minute detail* of a putative employee's work performance. *See, e.g., W. Ports*, 110 Wn. App. 440 (the court found "control and direction" without any of the specific controls identified by Gulick at the hearing). After all, even in a genuine employment relationship, an employer does not necessarily have absolute control over every single detail of an employee's

job performance. Here, Gulick's lack of control over some specific details of the owner-operators' truck-driving services does not neutralize the extensive direction and control it does exercise.

In sum, it is not any single condition of an agreement, or any single control over an equipment, or any single detail of the personal services rendered, that will help this tribunal distinguish an independent contractor from an employee; inevitably, it has to be all of those things and more, considered *in aggregate,* that will aid us in deciding whether an individual is an independent contractor or an employee for unemployment insurance tax purposes.

B. Outside Usual Course of Business or Outside All Places of Business.

The second criterion under RCW 50.04.140(1)(b) is that the service in question either be performed outside the usual course of business for which such service is performed, or that it be performed outside all places of business of the enterprise for which such service is performed. Regarding the first alternative, Gulick's usual course of business is to transport goods in interstate commerce, and the owner-operators provided truck-driving services to Gulick. As such, the owner-operators' services were performed within, not outside, the usual course of Gulick's business. Accordingly, Gulick fails the first alternative under RCW 50.04.140(1)(b).

Regarding the second alternative under RCW 50.04.140(1)(b), the critical inquiry in this case is whether the trucks owned by the owner-operators but leased to

Gulick constitute the places of Gulick's business. *W. Ports* did not address this issue as the court there disposed of the case on the first criterion of the independent contractor test under RCW 50.04.140(1)(a). *See W. Ports*, 110 Wn. App. at 459. Although the court in *Penick* held that the trucks were the carrier's places of business, it relied on the fact that the carrier owned the trucks used by the contract drivers. *See Penick*, 82 Wn. App. at 43. Thus, *Penick* is factually distinguishable because Gulick did not own the trucks at issue here but, instead, leased the trucks owned by the owner-operators. Other appellate decisions seem to suggest that premises leased by a putative employer or otherwise specified by a putative employer for work purposes, could constitute such employer's place of business. *See, e.g., Schuffenhauer*, 86 Wn.2d at 237 (clam digging on land leased by employer not outside all places of business); *Miller v. Emp't Sec. Dep't*, 3 Wn. App. 503, 506, 476 P.2d 138 (1970) (timber harvesting on land leased by employer performed at place of business of employer); *Affordable Cabs, Inc. v. Emp't Sec. Dep't*, 124 Wn. App. 361, 371, 101 P.3d 440 (2004) (taxi driver drove to locations specified by the employer; while these places were not owned by the employer, they were places where the driver was "engaged in work"); however, these appellate decisions did not deal with the type of leasing practices prevalent in interstate trucking industry and, hence, their applicability to the case at bar is rather limited.

Here, we are dealing with a unique contractual relationship between common carriers and owner-operators that effectuates the lease of equipment (i.e. trucks) along with driving services; and such contractual

relationship is subject to extensive federal safety regulations designed for the protection of the public and applying to both motor carriers as well as owner-operators. *See, generally,* Federal Motor Carrier Safety Administration ("FMCSA") Regulations, 49 C.F.R. Parts 300-399. In order to clarify the role of federal leasing regulations and their impact on independent contractor status; the Interstate Commerce Commission (the predecessor agency to FMCSA) promulgated 49 C.F.R. § 376.12(c)(4), which states:

> Nothing in the provisions required by paragraph (c)(1) of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements.

In essence, 49 C.F.R. § 376.12(c)(4) cautions us that an independent contractor relationship may still exist between a motor carrier and an owner-operator, notwithstanding the fact that the motor carrier must comply with 49 U.S.C. § 14102 and 49 C.F.R. Part 376 in general, and 49 C.F.R. § 376.12(c)(1) in particular. 49 C.F.R. § 376.12(c)(1) specifically provides that:

> The lease shall provide that the authorized carrier lessee shall have *exclusive possession, control, and use of the equipment* for the duration of the lease. The lease shall further

> provide that the authorized carrier lessee shall assume *complete responsibility for the operation of the equipment* for the duration of the lease. (Emphasis added.)

Consequently, pursuant to 49 C.F.R. § 376.12(c)(4), a carrier's "exclusive possession, control, and use of the equipment" and a carrier's "complete responsibility for the operation of the equipment" do not completely negate the possibility of finding an independent contractor relationship between a carrier and an owner-operator.

Consistent with the spirit of 49 C.P.R. § 376.12(c)(4) and in light of the lack of appellate decisions on the issue, we conclude that a mere leasing arrangement where a carrier (i.e. the lessee) assumes possession of and responsibility for the equipment (i.e. truck) owned by an owner-operator (i.e. lessor) does not in and of itself transform the equipment into the carrier's place of business. To conclude otherwise will effectively preclude a carrier from ever being able to satisfy the second alternative under RCW 50.04.140(1)(b). With that being said, a carrier, however, may still fail the second alternative—outside all places of business—under RCW 50.04.140(1)(b), if its owner-operators are to engage themselves in other places of the carrier's business, such as the carrier's office or repair shop, in addition to simply driving the trucks leased to the carrier.

In this case, Gulick leased the trucks owned by the owner-operators; and, as required by 49 C.F.R. § 376.12(c)(1), the contracts between Gulick and the owner-operators provided that Gulick "shall have the exclusive

possession, control and use of the Equipment during the duration of this Agreement." *See* Department's Exhibit 10, p. 2, ¶ 5.8. As discussed above, the sheer fact that Gulick leased the trucks with driving services does not automatically transform the trucks (leased to Gulick but owned by the owner-operators) into the places of Gulick's business pursuant to 49 C.P.R. § 376.12(c)(4). However, our inquiry does not stop there; we must continue our quest to determine whether the owner-operators engaged themselves in other places of Gulick's business.

Here, the owner-operators' equipment is subject to inspection by Gulick's authorized representatives, agents, or employees at *Gulick's regular inspection station* before the start of any trip and at any place en route as deemed necessary by Gulick. *See* Department's Exhibit 10, p. 2, ¶ 5.2. Regular safety inspections are also required to be done by *Gulick's contract shop,* although the owner-operators have the options to have Gulick's shop do the repairs or use another repair shop. *See* Department's Exhibit 10, p. 2, ¶ 5.9. If an owner-operator leases a trailer from Gulick (and the majority of the owner-operators do, *see* Testimony of Carnes, Transcript of Record at 298), he or she must return the trailer to *Gulick's terminal* upon termination of the contract. *See* Department's Exhibit 10, p. 3, ¶ 6.5. Consequently, the owner-operators here did more than just driving their trucks, they also engaged themselves at Gulick's terminal, inspection station, and contract shop. Based on the record of this case, we must conclude that the truck-driving services performed by the owner-operators were not performed outside *all* places of Gulick's business and, thus, Gulick has failed the second alternative under RCW 50.04.140(1)(b).

C. Independently Established Business.

Of the 120 owner-operators in dispute *(see* Stipulations, Attachment A), Gulick introduced into record business registrations for about half of them. *See* Petitioner's Exhibit 4. Among the business registrations in the record, some of them do not pertain to the audit period in question, *see* Petitioner's Exhibit 4, p. 2 (sole proprietorship opened on March 1, 2014, almost two years after the audit period), Petitioner's Exhibit 4, p. 13 (sole proprietorship closed on December 31, 2006, over three years before the audit period); some of them do not pertain to the general freight-hauling business, *see* Petitioner's Exhibit 4, p. 34 (sole proprietorship was a flooring contractor), Petitioner's Exhibit 4, p. 60 (sole proprietorship is an auto part and accessary store), Petitioner's Exhibit 4, p. 61 (sole proprietorship is in physical, occupational, and speech therapy business); and, yet, some of them are outright suspicious, *see* Petitioner's Exhibit 4, p. 3 (sole proprietorship was opened and closed in one day on April 1, 2012), Petitioner's Exhibit 4, p. 11 (no name or nature of the business is identified), Petitioner's Exhibit 4, p. 40 (sole proprietorship was registered in the same name as "Gulick Trucking"). For those owner-operators who had valid business registrations during the audit period, the Department checked whether they had open, active accounts with the Department of Revenue to determine if they were actually reporting their business incomes during the audit period (*see* Testimony of Lim, Transcript of Record at 54-55, 126-28); but none of the owner-operators reclassified by the Department were reporting their earnings to the Department of Revenue

during the audit period. *See* Testimony of Lim, Transcript of Record at 55.

Further, if a business intends to operate as an authorized for-hire motor carrier that transports regulated commodities in interstate commerce in exchange for a fee or other compensation, such business must obtain an interstate operating authority (MC number) through the FMCSA. A business may need to obtain multiple operating authorities to support its planned business operations. *See Get Authority to Operate (MC Number)*, Fed. Motor Carrier Safety Admin., http://www.fmcsa.dot.gov/registration/get-mc-number-authority-operate (last visited August 21, 2015). The types of operating authorities include the authority for motor carrier of property (except household goods), the authority for motor carrier of household goods, the authority for broker of property (except household goods), and the authority for broker of household goods. *See Types of Operating Authority*, Fed. Motor Carrier Safety Admin., http://www.fmcsa.dot.gov/registration/types-operating-authority (last visited August 21, 2015). Here, Gulick has its own operating authority to operate as a for-hire motor carrier transporting goods in interstate commerce (*see* Department's Exhibit 3 showing Gulick's MC number is MC-192093), while none of the owner-operators have their own operating authorities. *See* Testimony of Lim, Transcript of Record at 49-50. Instead, the owner-operators contracted with Gulick so that they may operate their equipment (i.e. trucks) under Gulick's operating authority.

Appendix B

The third criterion under RCW 50.04.140(1)(c) requires a showing that an individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service with the alleged employer. Proof of independently established business requires evidence of an enterprise created and existing separate and apart from the relationship with the alleged employer, an enterprise that will survive the termination of that relationship. The courts have traditionally examined the following factors as indicia of an independently established business: (1) the worker has a separate office or place of business outside of his or her home; (2) the worker has an investment in the business; (3) the worker provides equipment and supplies needed for the job; (4) the alleged employer fails to provide protection from risk of injury or non-payment; (5) the worker works for others and has individual business cards; (6) the worker is registered as an independent business with the state; and (7) the worker is able to continue in business even if the relationship with the alleged employer is terminated. *See Penick*, 82 Wn. App. at 44.

As discussed above, one of the unique characteristics about the trucking industry is the federal requirement that an owner-operator obtain an operating authority (MC number) in order to engage in the business of transporting goods in interstate commerce; otherwise, the owner-operator must operate under another carrier's operating authority. In other words, when it comes to the trucking industry, whether an owner-operator has his or her own operating authority is an *additional paramount* factor for the purpose of proving independently established business

under the third criterion of RCW 50.04.140(1)(c). If an owner-operator wishes to sell his or her services, invoice for the services, collect for the services, and maintain safety records as required by federal regulations, all the while continuing to operate his or her truck, maintain the truck, and manage the load, then he or she has the option to obtain the operating authority. And if an owner-operator does not wish to take upon the administrative burdens of running a business, he or she still has the option of leasing onto an authorized motor carrier with operating authority. *See* Douglas C. Grawe, *Have Truck, Will Drive: The Trucking Industry and The Use of Independent Owner-Operators Over Time*, 35 Transp. L.J. 115, 133 (2008).[5]

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5. This commentator's observations are consistent with the owner-operators' testimony in this case:

> Q. Okay. Can you think of anything else that Gulick does in exchange for the 20 percent that you pay them?
>
> A. Well, they do the bookkeeping and they—they rent us their trailer, find us loads. I don't have to find my own loads; they find them for me. That's why a lot of guys do this, you know. Who wants their own MC number, man? It's too big of a headache and people don't pay and Gulick pays. If I had my own MC number, I'd have to factor loads, I'd have to wait six or - six weeks, you know, three months for a customer to pay us. It's just too much of a headache. That's why I don't do it.

See Testimony of Matlock, Transcript of Record at 260.

Q. And do you ever reject loads?

> A. I haven't in a long time, but yes, I have rejected loads from Gulick and have gotten my own broker and

However, if an owner-operator chooses the latter option, certain legal consequences may flow from that choice, one of which is that such owner-operator may be deemed an employee of the carrier for the purpose of unemployment insurance tax under the appropriate circumstances.

In this case, some of the traditional factors certainly weigh in favor of finding independently established business. For example, some, but not all, of the owner-operators had registered sole proprietorships in Washington during the audit period; the owner-operators provided equipment (i.e. trucks) and other supplies needed for the transportation of goods; the owner-operators made substantial investment in their businesses by purchasing

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> brokered my own loads back from Florida, because I didn't like what they were giving me so I got another one. And they—they-you know, it's — it still processes through Gulick because they do — you know, I pay them to find me loads and to, you know, help me with my fuel taxes and all of the regulations that us owner/operators have to conform to. You know, they take care of those things for me so I can actually driver my truck.
>
> Q. Okay. And what does Gulick do for you in exchange for the 20 percent that Gulick gets?
>
> A. They provide me a trailer, which I can drop and hook it at different customers. They do my fuel tax reporting. They supply me with a fuel card, and a lot of little regulations that it's really hard for us to keep up with as —you know, and drive the truck at the same time.

See Testimony of DeJean, Transcript of Record at 284-85.

the trucks or trailers; and their places of business were their trucks, which were outside of their homes. However, other traditional factors weigh against finding independently established business. For example, Gulick, the putative employer here, provided protection from the risk of non-payment by the customers, *see* Testimony of Adams, Transcript of Record at 227; and the owner-operators could not haul for any third party without Gulick's express written consent. *See* Department's Exhibit 10, p. 2, ¶ 5.8. Moreover, the contracts required the owner-operators to display identification on their equipment to show the equipment was being operated by Gulick. *See* Department's Exhibit 10, p. 3, § 7. Significantly, Gulick prohibited the owner-operators from competing or soliciting its customers during the term of the agreement and for at least five years thereafter. *See* Department's Exhibit 10, p. 8, ¶ 20.9. Regardless of how the traditional factors may play out one way or the other, we must assign paramount weight to one additional factor when it comes to the trucking industry, namely, whether an owner-operator has his or her own operating authority so as to be able to independently engage in interstate transportation of goods. In this case, it is beyond dispute that the owner-operators did not have their own operating authorities. *See* Testimony of Lim, Transcript of Record at 49-50. As such, they could not engage in interstate transportation of goods independent of another carrier with such operating authority. Because this additional factor weighs heavily against finding independently established business and further because at least some of the traditional factors are also not in favor of finding independently established business, we are satisfied that the owner-operators have

not met the third criterion of the exemption test under RCW 50.04.140(1)(c). *See accord Stafford Trucking, Inc. v. Dep't of Indus., Labor & Human Relations*, 306 N.W.2d 79, 84 (1981) ("A truly independently established businessman would obtain his own operating authority, equipment, insurance and customers. If the owner-operators were terminated by [the carrier], in all likelihood they would be out of work until they could make similar arrangements with another carrier.").

In summary, Gulick has not carried its burden to prove the owner-operators are independent contractors because these owner-operators have not met at least one of the criteria under RCW 50.04.140(1) and (2). All of the disputed owner-operators are in "employment" of Gulick pursuant to RCW 50.04.100 and are not exempted under either RCW 50.04.140(1) or (2), or any other provisions of law. Consequently, Gulick is liable to pay the contributions, penalties, and interest assessed pursuant to RCW 50.24.010 in the amount of $112,855.17 for the period in question.

Now, therefore,

IT IS HEREBY ORDERED that the November 26, 2014, Initial Order issued by the Office of Administrative Hearings is **AFFIRMED.** Gulick is liable for the contributions, penalties, and interest assessed pursuant to RCW 50.24.010 regarding the owner-operators (*see* Stipulations, Attachment A) in the amount of $112,855.17 for the second, third, and fourth quarters of 2010; the first, second, third, and fourth quarters of 2011; and the first,

second, and third quarters of 2012.

Dated at Olympia, Washington, August 28, 2015.*

S. Alexander Liu
Deputy Chief Review Judge
Commissioner's Review Office

APPENDIX C — FINDINGS OF FACT/ CONCLUSIONS OF LAW/ORDER/JUDGMENT OF THE STATE OF WASHINGTON, CLARK COUNTY SUPERIOR COURT, DATED OCTOBER 11, 2016

STATE OF WASHINGTON
CLARK COUNTY SUPERIOR COURT

NO. 15-2-04271-1

GULICK TRUCKING, INC.,
A WASHINGTON CORPORATION,

Petitioner,

v.

STATE OF WASHINGTON EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; JUDGMENT; JUDGMENT SUMMARY

JUDGMENT SUMMARY (RCW 4.64.030)

1.	Judgment Creditors:	State of Washington Employment Security Department
2.	Judgment Debtors:	Gulick Trucking, Inc., a Washington corporation

3.	Principal Amount of Judgment:	-0-
4.	Interest to Date of Judgment:	-0-
5.	Attorney Fees:	$200
6.	Costs:	$0
7.	Other Recovery Amounts:	$0
8.	Principal Judgment Amount shall bear interest at 0% per annum.	
9.	Attorney Fees, Costs, and Other Recovery Amounts shall bear Interest at 12% per annum.	
10.	Attorneys for Judgment Creditors:	Leah Harris, AAG Office of the Attorney General 800 Fifth Ave., Ste. 2000 Seattle, WA 98104-3188 (206) 464-7676
11.	Attorneys for Judgment Debtors:	Aaron P. Riensche Ogden Murphy Wallace, PLLC 901 Fifth Ave., Suite 3500 Seattle, WA 98164 (206) 447-7000

This matter came on regularly for hearing on October 11, 2016, before the above-entitled court pursuant to the Washington Administrative Procedure Act; the

Commissioner of the Employment Security Department was represented by ROBERT W. FERGUSON, Attorney General, and LEAH HARRIS, Assistant Attorney General; attorney AARON RIENSCHE appeared on behalf of petitioner GULICK TRUCKING, INC. The Court, having reviewed the Commissioner's Record, pleadings on file, and having heard arguments, and in all premises being fully advised, hereby makes the following:

FINDINGS OF FACT

I.

At the time of filing the petition, Petitioner, GULICK TRUCKING, INC., was a resident of Clark County, State of Washington.

II.

The Commissioner's delegate found that the owner-operators performed services in employment of the Petitioner, that the Petitioner did not establish the owner-operators satisfied all elements of the independent contractor exception from coverage, and that the assessment was not preempted by federal law.

From the foregoing Findings of Fact, the court makes the following:

Appendix C

CONCLUSIONS OF LAW

I.

The court has jurisdiction over the parties and subject matter.

II.

The Commissioner's findings of fact are supported by substantial evidence.

III.

The Commissioner's conclusions of law do not constitute an error of law and are otherwise in accordance with the Washington Administrative Procedure Act.

IV.

The Federal Aviation Administration Authorization Act does not preempt the Department's assessment or application of the Employment Security Act with respect to services performed by owner-operators.

From the foregoing Findings of Fact and Conclusions of Law, the court enters the following:

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the decision of the Commissioner of

the Employment Security Department of the State of Washington made in the above-titled matter is affirmed.

The Clerk of the Court is hereby ordered to release to the Commissioner the sums held in the registry pursuant to RCW 50.32.130.

It is further ordered that pursuant to RCW 4.84.080, the Commissioner is awarded and the Petitioner is ordered to pay costs for statutory attorney fees of $200.

DATED this 11 day of October, 2016.

s/_____
Honorable Scott Collier

APPENDIX D — ORDER OF THE SUPREME COURT OF WASHINGTON, FILED JULY 12, 2018

THE SUPREME COURT OF WASHINGTON

No. 95556-5

Court of Appeals No. 49646-1-II

GULICK TRUCKING, INC.,

Petitioner,

v.

STATE OF WASHINGTON EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

ORDER

This matter came before the Court on its July 12, 2018, *En Banc* Conference. The Court considered the petition and the files herein. A majority of the Court voted in favor of the following result:

Now, therefore, it is hereby

ORDERED:

That the petition for review and motion to consolidate are both denied.

Appendix D

DATED at Olympia, Washington this 12th day of July, 2018.

For the Court

/s/_____
CHIEF JUSTICE