Airline Industry Workplaces:
Not Exempt from State and Local Regulations

By Daniel Rosenthal and Michael Ellement

State and local governments have a legitimate interest in setting standards for pay and working conditions of employees within their jurisdictions, especially those who work at publicly owned facilities such as airports. Yet, in recent years, corporations and industry groups have frequently—though usually unsuccessfully—challenged such actions as preempted by federal law. Two recent articles in this publication have suggested that the courts are getting it wrong: Douglas Painter and Robert Span's 2019 article discussing the market participant exception to preemption[1] and Ryan McCoy's 2022 article discussing regulation of pilot and flight attendant rest breaks.[2]

This article argues that courts have acted properly in rebuffing overly broad preemption assertions and permitting states and localities to establish and enforce rules affecting pay and working conditions for airline and airport workers.

Overview of Preemption Doctrines Applicable to Employment in the Airline Industry

Four Federal Statutes and Relevant Preemption Doctrines

Four federal statutes have given rise to preemption arguments in this area: the Railway Labor Act (RLA), National Labor Relations Act (NLRA), Airline Deregulation Act (ADA), and the Federal Aviation Administration Authorization Act of 1994 (FAAAA).

The RLA and NLRA govern relations between unions and employers. Among other things, they establish processes for workers to join unions and for unions and employers to make and enforce collectively bargained agreements with each other. The statutes may therefore preempt efforts to regulate union-employer relations and union-organizing activity, as well as strikes, picketing, and other economic pressure strategies by workers, unions, or employers.

In particular, the Supreme Court has recognized two main labor preemption doctrines.[3] The first, the *Garmon* preemption, applies to regulations of "activity that the NLRA protects, prohibits, or arguably protects or prohibits."[4] Under the *Garmon* preemption, for instance, a state was barred from imposing additional penalties for violations of the NLRA.[5] The second doctrine, the *Machinists* preemption, holds that states and localities cannot regulate "conduct that Congress intended to be unregulated"—that is "conduct that was to remain a part of the self-help remedies left to the combatants in labor disputes."[6] This doctrine has been applied, for instance, to bar a state from prohibiting union members from engaging in a concerted refusal to do overtime work.[7]

Though the *Garmon* and *Machinists* doctrines were developed under the NLRA, the same general principles apply under the RLA, which governs railroad and airline employees. In addition, under both statutory regimes, federal law generally preempts state-law causes of action that require interpretation of collective bargaining agreements.[8]

The ADA and FAAAA may also preempt state and local action. The ADA explicitly prohibits states from enacting or enforcing laws "related to a price, route, or service of an air carrier."[9] Congress's "overarching goal" in enacting the ADA was to "help[] ensure transportation rates, routes, and services that reflect maximum reliance on competitive market forces, thereby stimulating efficiency, innovation, and low prices, as well as variety and quality."[10] Through the statute's preemption provision, Congress sought to prevent states from "undo[ing] federal deregulation."[11] In nearly identical language, the FAAAA prohibits states from enacting or enforcing laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property."[12]

Though seemingly straightforward, these prohibitions in the ADA and FAAAA require a detailed and context-specific analysis. This is because, as a federal appeals court has observed, "the key connector in the statute—'related to'—is highly elastic, and so of limited help, given that countless state laws have *some* relation to the operations of airlines and thus *some* potential effect on the prices charged or services provided."[13] Below, we expand on the ADA/FAAAA preemption test as applied to employment regulation.

Daniel Rosenthal (dmrosenthal@jamhoff.com) and **Michael Ellement**, (mpellement@jamhoff.com) are partners with James & Hoffman, P.C., in Washington, D.C. They represent workers and their unions in court litigation, administrative proceedings, arbitration, and collective bargaining.

Market Participant Exception

Regardless of the asserted source of preemption, states and localities are not subject to preemption when they act in a proprietary capacity rather than a regulatory capacity. Often referred to as the "market participant exception," this doctrine arose in *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.* (*Boston Harbor*).[14] In *Boston Harbor*, the Supreme Court distinguished between government "regulation" and governmental "interact[ion] with private participants in the marketplace."[15] In a regulatory capacity, the government "performs a role that is characteristically a governmental rather than a private role" and "is more powerful than private parties."[16]

In assessing the application of the market participant exception, federal appellate courts have generally asked two questions:

- (1) Do the government's actions "essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances"?[17]
- (2) "[D]oes the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?"[18]

Courts have held that this test is "disjunctive[]," meaning that government action should be upheld as long as it passes muster under either of the two inquiries.[19]

Notably, in assessing whether government action constitutes market participation, courts do not consider the subjective reasons for that action.[20] That approach is consistent with the Supreme Court's admonition that "[j]udicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government."[21]

Preemption Challenges to Employment-Related Laws and Policies

Over the past decade, courts often have been confronted with preemption challenges to state and local action in the employment arena. In most cases, courts have rightly rejected those challenges.

As the Supreme Court has held, the preemption analysis starts with the assumption that, "in fields of traditional state regulation . . . the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[22] Relations between employees and employers constitute one such area of traditional state oversight. Long before the passage of the first federal labor and employment laws in the 1920s and 1930s, labor and employment were typically governed by state common law and statutes.

Rejection of ADA/FAAAA Preemption

As to ADA/FAAAA preemption, although the Supreme Court has not yet decided a preemption challenge to employment-related law or policy under those statutes, circuit courts have reached a general consensus that the ADA and FAAAA have limited application in that area. For instance, at least four circuits have rejected preemption challenges to state and local wage-related laws.[23]

In reaching these decisions, the circuit courts have held that "laws that affect . . . the carrier's relationship with its workforce" are less likely to be preempted than "laws that affect the carrier's relationship with its customers."[24] This is because the ADA and FAAAA are primarily "concerned with . . . the services [the industry] provides" and not the "inputs" such as "labor, capitol, and technology," which "have too remote an effect on the price the company charges, the routes it uses, and service outputs it provides."[25]

Over the past decade, courts often have been confronted with preemption challenges to state and local action in the employment arena. In most cases, courts have rightly rejected those challenges.

Further, as these same courts have recognized, employment rules rarely "mention carrier prices, routes, or services," which is a trigger for ADA/FAAAA preemption.[26] Nor does a typical employment rule "bind[] the carrier to provide a particular price, route, or service" or "directly regulate how a carrier's service is performed."[27]

These courts have also recognized that preemption is unlikely to apply to generally applicable laws, such as laws applying to most or all employers in a state or local area.[28]

Finding of ADA/FAAAA Preemption

Nevertheless, courts have sometimes found ADA/FAAAA preemption of an employment-related law. There are two such circuit court decisions, both decided by the U.S. Court of Appeals for the First Circuit. Those cases appear at first glance to be outliers, but they can be explained by distinctive features of the state action at issue.

First, in *Schwann v. FedEx Ground Package System, Inc.*, the First Circuit struck down a state law providing that an individual can be considered an independent contractor only if the person performs a service "outside the usual course of the business of the employer"

(among other requirements).[29] The court reasoned that the state law dictated the choice of whether to provide delivery services directly or through an independent contractor, in violation of the FAAAA. However, as the court recognized, the state law at issue was unique in making this factor dispositive as opposed to making it one consideration among many.[30]

Second, in *DiFiore v. Am. Airlines, Inc.*, the First Circuit found a state tip law to be preempted as applied to baggage handling fees.[31] The law provided that employees were entitled to any fee collected by an employer that was "designated as a service charge, tip, gratuity, or a fee that a patron or other consumer would reasonably expect to be given to a service employee in lieu of, or in addition to, a tip."[32] The court held that the law was preempted because it regulated how airlines displayed their prices to customers.[33] Again, the state law at issue in *DiFiore* appears to be unusual: to our knowledge, no similar case has arisen.

Rejection of NLRA/RLA Preemption

As discussed above, the NLRA and RLA provide another source of potential preemption. These statutes, unlike the ADA and FAAAA, directly pertain to the employment relationship. However, the scope of the NLRA and RLA is narrow, relating specifically to union-employer relations and other employee collective action. Accordingly, the Supreme Court has held that federal labor law does not preempt "minimal labor standards," such as requirements to provide specified pay or benefits.[34] Further, the NLRA and RLA generally do not apply to independent contractors. Thus, state action in that area is also unlikely to be preempted.[35]

Rejection of Preemption in Proprietary Situations

Finally, there is a long history of both private parties and governmental entities acting in a proprietary capacity to impose labor standards on parties with which they interact in the marketplace. For instance, for decades, public and private construction projects have used project labor agreements, in which they establish labor standards for firms performing work on a construction site, often requiring that such firms be unionized. In *Boston Harbor*, the Supreme Court held that such agreements are not preempted by federal law.[36]

California's Meal and Rest Break Law and LAX's Labor Peace Policy

Two recent U.S. Court of Appeals for the Ninth Circuit preemption decisions have been the subject of criticism in this publication. These cases rejected challenges to California's rest break law and to the labor peace policy at the Los Angeles International Airport (LAX). In our view, those challenges were correctly rejected, just like most other preemption challenges to employment laws and policies, as discussed above. Notably, in both cases, petitions for rehearing and for review by the Supreme Court were denied without noted dissent.

California's Meal and Rest Break Law

First, the Ninth Circuit correctly rejected an assertion of ADA preemption regarding California's meal and rest break requirements in *Bernstein v. Virgin America*.[37] In line with the circuit consensus described above and its own prior precedent,[38] the court held that "background regulations . . . such as prevailing wage laws or safety regulations" are "several steps removed from prices, routes, or services" and do not "bind[] the carrier to a particular price, route, or service and thereby interfere[] with the competitive market forces within the industry."[39]

Critics of the *Bernstein* decision have wrongly claimed that it was contrary to "well-established U.S. Supreme Court precedent" and "create[s] a circuit split in which the Ninth Circuit is a rogue actor."[40] As to Supreme Court precedent, the Court's prior ADA cases have analyzed state laws directly governing how airlines interact with consumers—for example, advertising of prices and frequent-flier programs—which is the core concern of the ADA.[41] An employment regulation, such as the one at issue in *Bernstein*, is distinguishable because it does not directly relate to this core concern. Indeed, as discussed above, the circuit precedent forms a general consensus that ADA preemption rarely applies in the employment arena. Thus, *Bernstein* is not an outlier; on the contrary, had the Ninth Circuit struck down the meal and rest break law, it would have departed from the consensus. The only counterexamples appear to be the First Circuit decisions in *DiFiore* and *Schwann*, but, as discussed above, those cases arose from unique circumstances.

Advocates for a more expansive preemption regime suggest that a state or local employment law should be preempted whenever it has a "significant impact" on prices, routes, or services. To be sure, the Supreme Court used the term *significant impact* in *Morales v. Trans World Airlines, Inc.* when describing why state regulation of airline advertisements is preempted under the ADA.[42] However, that case involved direct regulation of the airline-consumer relationship.

Nothing in *Morales* or any other Supreme Court opinion suggests that preemption should apply to *any* law whose downstream effects on prices, routes, or services are significant when that law has no direct connection to those core concerns of the ADA. And if that test were adopted, it would appear to bar every state law imposing substantial costs on airlines because increased costs could necessitate increased prices. Courts—even the First Circuit—have correctly rejected that overbroad conception of preemption. In *DiFiore*, the First Circuit held, "We do not endorse [the airline's] view that state regulation is preempted wherever it imposes costs."[43]

The employer in *Bernstein* also asserted preemption based on federal regulations addressing flight attendant duty and rest periods.[44] The court rejected that argument because, among other things, California law did not conflict with any federal requirement.[45] The employer in *Bernstein* did not pursue this issue in its petition for certiorari.[46]

Finally, we also note that the allegedly disastrous effects of California's law on airlines appear to be overstated. For instance, the district court noted that Virgin America's own estimate of compliance costs was only $100 per flight.[47] Furthermore, the district court permitted the plaintiffs to pursue claims only for time actually spent in California.[48]

In sum, except where clearly intruding into areas of federal responsibility, state and local governments should be free to use their judgment to increase baseline employment protections, particularly where Congress has failed to keep pace with economic change and the evolving nature of work.

LAX's Labor Peace Policy

The Ninth Circuit also reached the correct result in *Airline Service Providers Ass'n v. Los Angeles World Airports*, where it considered a rule requiring certain service providers at LAX to enter into a "labor peace agreement" with any employee organization that requests one.[49] Such agreements were required to include provisions prohibiting picketing, boycotting, stopping work, or other economic interference.[50] The policy did not, however, require that the service providers collectively bargain with or recognize any labor organization as a representative of employees—only that they reach a labor peace agreement with a labor organization requesting one.[51] The Ninth Circuit rejected the preemption challenge on the grounds that the city was acting as a market participant. Specifically, LAX had a commercial interest in "avoid[ing] disruption of its business" through strikes, pickets, or work stoppages.[52]

In seeking Supreme Court review, the challengers argued that the Ninth Circuit wrongly allowed the market participant exception to apply where the government is not directly procuring goods or services. But the exception has never been so narrowly cabined. Under *Boston Harbor*, the point of the doctrine is to distinguish between when the government acts in its regulatory capacity and when it exercises its "proprietary interests" in "manag[ing] its own property."[53] Private parties engage in market activity even when they are not directly procuring goods or services, and the government should be allowed to do so as well.

Indeed, as the Solicitor General noted in opposing certiorari, state and local governments participate in commercial markets in several respects beyond procuring goods or services, including by owning property and financing construction projects.[54] Thus, the market participant exception does not "stop at the boundary of formal privity of contract" and may encompass "economic activity in which the [government] is a major participant."[55]

Good Public Policy: Broad Leeway for States/Localities to Set Labor/Employment Standards

In rejecting preemption challenges to workplace regulation, courts have advanced good public policy. State and local governments are often in the best position to assess the needs of workers, and the corresponding responsibilities of employers, in their own geographic area. Furthermore, local government bodies can be better held accountable by stakeholders on such matters.

By contrast, federal law is often slow to react to the economic realities of work—for instance, the federal minimum wage has not increased in over 13 years,[56] and workers continue to lack entitlement to paid leave under federal law.[57] Furthermore, federal laws generally fail to account for regional differences such as cost of living. State and local governments, however, have shown over the last several years that they can respond to the changing needs of the workplace while also accounting for geographic-specific factors.[58]

In addition, federal law has fallen behind the evolution of how work is performed. Increasingly, employers classify workers as independent contractors—particularly those employed in the "gig" economy. Against this backdrop, federal employment protections have remained stagnant, leaving doubt as to the protections afforded workers with nontraditional employment relationships. By contrast, some state and local governments have adapted to these new forms of work and provided needed regulation that accounts for the change.[59]

Similarly, when the COVID-19 pandemic struck, the federal government reacted slowly to the drastic change that the virus caused in workplaces—doing little more than temporarily providing for certain enhanced leave rights.[60] States and localities enacted new laws in response to the pandemic, including New York and New Jersey, which set new wage and benefits standards for airport workers in the Healthy Terminals Act.[61]

Conclusion

In sum, except where clearly intruding into areas of federal responsibility, state and local governments should be free to use their judgment to increase baseline employment protections, particularly where Congress has failed to keep pace with economic

change and the evolving nature of work. And that authority should be particularly robust with respect to workplace policies on government property where there is a proprietary governmental interest.

Endnotes

1. Douglas R. Painter & Robert S. Span, *Local Labor Law Preemption and the Market Participant Exception: A Need for Clarity*, 32:3 Air & Space Law. 1 (2019).

2. Ryan McCoy, *California's (Improper) Regulation of Pilot and Flight Attendant Rest*, 34:3 Air & Space Law. 1 (2022).

3. *See* Belknap, Inc. v. Hale, 463 U.S. 491, 498–99 (1983).

4. Wis. Dep't of Indus. v. Gould Inc., 475 U.S. 282, 286 (1986). The Supreme Court has, in some opinions, described *Garmon* as establishing a "presumption" that can be rebutted. *See Belknap*, 463 U.S. at 498; Farmer v. Carpenters, 430 U.S. 290, 296–97 (1977) (collecting examples).

5. *Gould*, 475 U.S. at 288 (striking down a "supplemental sanction for violations of the NLRA").

6. *Belknap*, 463 U.S. at 499.

7. Machinists v. Wis. Emp. Rels. Comm'n, 427 U.S. 132, 134–35, 148–51 (1976).

8. *See* Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 260–62 (1994).

9. 49 U.S.C. § 41713 (b)(1).

10. Rowe v. N.H. Motor Transp. Ass'n, 128 S. Ct. 989, 995 (2008) (internal quotation marks omitted).

11. *Id.* at 993.

12. 49 U.S.C. § 14501(c)(1).

13. DiFiore v. Am. Airlines, Inc., 646 F.3d 81, 86 (1st Cir. 2011) (emphasis in original) (internal citation omitted).

14. 507 U.S. 218 (1993).

15. *Id.* at 227.

16. *Id.* at 229.

17. Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 693 (5th Cir. 1999).

18. *Id.*

19. Allied Constr. Indus. v. City of Cincinnati, 879 F.3d 215, 221 (6th Cir. 2018); *see* also Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1024 (9th Cir. 2010) (holding that "a state action need only satisfy one of the two . . . prongs to qualify as market participation not subject to preemption."

20. *See Johnson*, 623 F.3d at 1026; N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin, 431 F.3d 1004, 1007 (7th Cir. 2006); Bldg. Indus. Elec. Contractors Ass'n v. City of New York, 678 F.3d 184, 191 (2d Cir. 2012).

21. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977).

22. Cal. Div. of Lab. Standards Enf't v. Dillingham Constr., NA, Inc., 519 U.S. 316, 325 (1997) (internal quotation marks omitted).

23. *See* Amerijet Int'l, Inc. v. Miami-Dade Cnty., 627 F. App'x 744, 751 (11th Cir. 2015); Costello v. BeavEx, Inc., 810 F.3d 1045, 1055 (7th Cir. 2016); Lupian v. Joseph Cory Holdings LLC, 905 F.3d 127, 136 (3d Cir. 2018); Allied Concrete & Supply Co. v. Baker, 904 F.3d 1053, 1068 (9th Cir. 2018).

24. *Costello*, 810 F.3d at 1054; *see also* Bedoya v. Am. Eagle Express, Inc., 914 F.3d 812, 821 (3d Cir. 2019); Dilts v. Penske Logistics, LLC, 769 F.3d 637, 646 (9th Cir. 2014) ("Laws are more likely to be preempted when they operate at the point where carriers provide services to customers at specific prices.").

25. *Bedoya*, 914 F.3d at 821 (citing S.C. Johnson & Son, Inc. v. Transp. Corp. of Am., Inc., 697 F.3d 544, 558 (7th Cir. 2012)).

26. *Id.* at 824.

27. *Id.* at 822 (alterations omitted) (internal quotation marks omitted).

28. *See id.* at 821 (citing Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 375 (2008)).

29. 813 F.3d 429 (1st Cir. 2016). *Contra Bedoya*, 914 F.3d at 826 (rejecting preemption challenge to state independent contractor test); Cal. Trucking Ass'n v. Su, 903 F.3d 953, 967 (9th Cir. 2018) (same).

30. *Schwann*, 813 F.3d at 438.

31. 646 F.3d 81, 87–88 (1st Cir. 2011).

32. *Id.* at 84 (internal alterations omitted).

33. *Id.* at 88.

34. Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 757 (1985).

35. *See, e.g.*, Chamber of Com. of the USA v. City of Seattle, 890 F.3d 769, 790–95 (9th Cir. 2018).

36. *See* Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass. /R.I., Inc. (*Boston Harbor*), 507 U.S. 218, 232–34 (1993).

37. 4 F.4th 1127 (9th Cir. 2021).

38. Dilts v. Penske Logistics, LLC, 769 F.3d 637, 642–50 (2014).

39. Bernstein, 4 F.4th at 1141.

40. McCoy, *supra* note 2, at 16.

41. *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) (assessing preemption of state law prohibiting deceptive airline advertisements); Am. Airlines, Inc. v. Wolens, 513 U.S. 219 (1995) (assessing preemption of suit by customers challenging changes to frequent-flier program); Nw., Inc. v. Ginsberg, 134 S. Ct. 1422 (2004) (same).

42. 504 U.S. at 390.

43. DiFiore v. Am. Airlines, Inc., 646 F.3d 81, 89 (1st Cir. 2011).

44. 4 F.4th at 1167.

45. *Id.* at 1168–69.

46. In an amicus brief, the United States recommended denying certiorari, concluding that the Ninth Circuit's decision did not conflict with any decision of the Supreme Court or another court of appeals. In the alternative, the United States suggested that the Court could grant the petition and "remand for further consideration of California law and the applicable FAA requirements." Brief for the United States as Amicus Curiae, Virgin Am. v. Bernstein, No. 21-260 (May 24, 2022). In particular, the United States noted that the California law would conflict with FAA requirements if it barred a rest break in which flight attendants remained on call to respond to emergencies.

47. Bernstein v. Virgin Am., Inc., 227 F. Supp. 3d 1049, 1069 (N.D. Cal. 2017).

48. *Id.* at 1064.
49. 873 F.3d 1074, 1077 (2017).
50. *Id.*
51. *Airline Serv. Providers Ass'n*, No. CV 14-8977, 2015 BL 504815, at *9 (C.D. Cal. Mar. 18, 2015).
52. 873 F.3d at 1080–81.
53. Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc. (*Boston Harbor*), 507 U.S. 218, 231 (1993); *see also* 49 U.S.C. 41713(b)(3) (no ADA preemption where government is "carrying out its proprietary powers and rights").
54. Amicus Curiae Brief of the United States at 12–13, *Airline Serv. Providers Ass'n*, Supreme Ct. Dkt. No. 17-1183 (citing White v. Mass. Council of Constr. Emps., Inc., 460 U.S. 204, 206, 211 n.7 (1983); Hotel Emps. & Rest. Emps. Union v. Sage Hosp. Res., LLC, 390 F.3d 206, 208, 215–17 (2004); Bldg. & Constr. Trades Dep't v. Allbaugh, 295 F.3d 28, 29, 34–36 (2002)).
55. *Id.* at 12 (quoting *White*, 460 U.S. at 206, 211 n.7).
56. U.S. Dep't of Lab., *History of Changes to the Minimum Wage Law*, DOL.GOV https://www.dol.gov/agencies/whd/minimum-wage/history (last visited Aug. 11, 2022) (adapted from a 1988 report to Congress).
57. U.S. Dep't of Lab., *Leave Benefits*, DOL.GOV, https://www.dol.gov/general/topic/benefits-leave (last visited Aug. 11, 2022) (describing unpaid Family Medical Leave Act benefits).
58. Andrew Elmore, *Labor's New Localism*, 95 S. CAL. L. REV. 101, 119–20 (2021) (summarizing recent local government laws affecting workers' wages and employment conditions).
59. *Id.* (summarizing new protections for gig economy workers in some jurisdictions); Noam Scheiber, *Seattle Passes Minimum Pay Rate for Uber and Lyft Drivers*, N.Y. TIMES (Sept. 29, 2020), https://www.nytimes.com/2020/09/29/business/economy/seattle-uber-lyft-drivers.html.
60. *See* U.S. Dep't of Lab., *Temporary Rule: Paid Leave Under the Families First Coronavirus Response Act*, DOL.GOV, https://www.dol.gov/agencies/whd/ffcra#:~:text=Provides%20direction%20for%20the%20effective,his%20or%20her%20son%20or (last visited Aug. 11, 2022).
61. Eli Freedberg & David Ostern, *New York and New Jersey Governors Sign the Healthy Terminals Act*, SHRM (June 2, 2021), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/new-york-and-new-jersey-governors-sign-the-healthy-terminals-act.aspx.

International eVTOL Operation

continued from page 1

non-scheduled eVTOL flights. Azul and Lilium have reached an agreement to offer scheduled eVTOL services in major cities such as São Paulo and Rio de Janeiro.[10] In the U.S.-Canada context, airlines could extend the reach of their network by multiplying behind and beyond points, thus providing additional air connectivity to smaller regional airports. Virgin Atlantic recently explained that the option to purchase up to 150 four-seat eVTOL aircraft from Vertical Aerospace was based on a vision to "provide regional connectivity across the first and last 100 miles of the journey."[11]

Despite the many opportunities that transborder eVTOL services present, significant legal and regulatory challenges exist, and these must be thoughtfully overcome to ensure smooth integration into the existing transborder airspace.

Legal Framework for International eVTOL Services

One key issue is whether scheduled international air services should be based on a set of global standards through the International Civil Aviation Organization (ICAO) or be regulated according to a more tailored framework to which the parties agree on a bilateral basis.

Chicago Convention

The Convention on International Civil Aviation (Chicago Convention)[12] provides the principles that allow international civil aviation to develop in a safe and orderly manner and international air transport services between countries to be established based on reciprocity. Unlike non-scheduled international air services (i.e., charters), which are generally authorized based on national regulation, the provision of scheduled international air services is regulated by way of bilateral air transport agreements or treaties.

The ICAO and the Integration of eVTOL Operations Between the United States and Canada

The ICAO "is funded and directed by 193 national governments to support their diplomacy and cooperation in air transport as signatory states to the Chicago Convention (1944)."[13] As defined by the

Marcelo Garcia is a Canadian attorney and Senior Director at InterVISTAS Consulting, where he advises airports, airlines, governments, and industry associations on legal and regulatory matters, and business transformation projects. Previously with a major global airline, he has advised on regional airspace disputes, bilateral air negotiations, and market access for passenger/cargo services. He has also advised Canada's Minister of Transport on airline joint ventures and international air transport regulation, including at the level of the International Civil Aviation Organization (ICAO). **Amna Arshad** is Special Counsel in the Washington, D.C., office of Freshfields Bruckhaus Deringer LLP, with experience representing major U.S. and foreign passenger and cargo air carriers and leading aviation-related entities, including airports, aerospace manufacturers, travel distribution clients, drone operators, and corporations in a variety of legal, regulatory and commercial matters. Previously, Amna was a senior lawyer at the U.S. Department of Transportation, focused on the enforcement of licensing, consumer, and civil rights regulations.