June 10, 2019

VIA FEDERAL E-RULEMAKING PORTAL
FDMS Docket No. FMCSA-2019-0048

Raymond P. Martinez, Administrator
Federal Motor Carrier Safety Administration
Docket Management Facility
United States Department of Transportation
1200 New Jersey Avenue, S.E.
West Building, Ground Floor, Room W-12-140
Washington, D.C. 20590-0001

Re: California Attorney General and Labor Commissioner Comments Opposing American Bus Association Petition for Determination of Preemption of California Meal and Rest Period Rules

Dear Administrator Martinez:

The Attorney General of California and the California Labor Commissioner's Office submit the following comments opposing the Petition filed by the American Bus Association, Inc. ("ABA") for a determination that California's meal and rest break requirements for drivers of passenger-carrying motor vehicles subject to the Federal Motor Carrier Safety Administration ("FMCSA") hours of service ("HOS") regulations are preempted under 49 U.S.C. 31141 (hereinafter referred to as "Petition"). Xavier Becerra is the Attorney General of the State of California and is the chief law officer of the State. Cal. Const., art. V, § 13. The Attorney General is empowered by the California Constitution to take whatever action is necessary to ensure that the laws of the State are uniformly and adequately enforced. *Id*. The Labor Commissioner is the State official who has the authority to enforce the California Labor Code and Industrial Welfare Commission ("IWC") meal and rest break requirements at issue in this matter. *See Tidewater Marine Western, Inc. v. Bradshaw*, 927 P.2d 296, 298 (Cal. 1996), noting the "Division of Labor Standards Enforcement (DLSE), headed by . . . [the] Labor Commissioner is the state agency empowered to enforce California's labor laws, including IWC wage orders.") (citing Cal. Lab. Code §§ 21, 61, 95, 98-98.7, 1193.5).

As set forth more fully below, the FMCSA should deny the ABA's Petition for the following reasons: (1) the FMCSA's previous position that the challenged State requirements are not "laws

and regulations on commercial motor vehicle safety" within the meaning of 49 U.S.C. 31141(c), and thus, are outside the FMCSA's authority to declare state laws or regulations unenforceable, is correct and should be adhered to; (2) assuming, *arguendo*, that FMCSA has authority to determine whether the challenged State requirements are enforceable, these State requirements are not more stringent than the HOS regulations prescribed under 49 U.S.C. 31136, and thus, there is no basis for a finding that the State requirements may not be enforced; (3) assuming, *arguendo*, that FMCSA has authority to determine whether the challenged State requirements are enforceable, and determines that these requirements are more stringent than the federal HOS regulations, there is no basis for a finding that these State requirements may not be enforced, in that: (a) the State requirements have a safety benefit, and (b) the State requirements are not incompatible with the HOS regulations, and (c) enforcement of the State requirements would not cause an unreasonable burden on interstate commerce.

The FMCSA's Limited and Defined Statutory Authority to Review State Laws and Regulations

The FMCSA's delegated authority to make administrative preemption determinations concerning State laws or regulations on commercial motor vehicle safety is set forth in 49 U.S.C. 31141. Section 31141(a) provides that a State may not enforce a State law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this section may not be enforced.[1] Under section 31141(c)(1), the Secretary is authorized to "review State laws and regulations on commercial motor vehicle safety," and to decide whether such law or regulation has the same effect as a federal regulation prescribed by the Secretary under section 31136, or is less stringent than the federal regulation, or is more stringent. State laws or regulations determined to have the same effect as such federal regulation may be enforced, those determined to be less stringent than the federal regulation may not be enforced, and those determined to be more stringent may be enforced unless the Secretary also decides that (a) the State law or regulation has no safety benefit; or (b) the State law or regulation is incompatible with the federal regulation prescribed under section 31136; or (c) enforcement of the State law or regulation would cause an unreasonable burden on interstate commerce. 49 U.S.C. 31141(c)(2)-(4). In deciding whether a State law or regulation will cause an unreasonable burden on interstate commerce, the Secretary may consider the effect on interstate commerce of implementation of that law or regulation with the implementation of all similar laws and regulations of other States. *Id*., section 31141(c)(5).

California's Meal and Rest Period Laws and Regulations

In California, "[m]eal and rest periods have long been viewed as part of the remedial worker protection framework. . . . Concerned with the health and welfare of employees, the IWC issued

[1] Likewise, 49 C.F.R. section 355.25 provides: "No State shall have in effect or enforce any State law or regulation pertaining to commercial motor vehicle safety in interstate commerce which the Administrator finds to be incompatible with the provisions of the Federal Motor Carrier Safety Regulations."

wage orders mandating the provision of meal and rest periods in 1916 and 1932, respectively." *Murphy v. Kenneth Cole Prods., Inc.*, 155 P.3d 284, 291 (Cal. 2007).

The State meal and rest period requirements at issue herein are found at California Labor Code sections 226.7 and 512, and sections 11 and 12 of IWC Order 9-2001 (the IWC order governing the transportation industry).[2] Labor Code section 226.7(b) states, in relevant part: "An employer shall not require an employee to work during a meal or rest . . . period mandated pursuant to an applicable statute, or applicable regulation . . . or order of the Industrial Welfare Commission." Section 226.7(c) provides: "If an employer fails to provide an employee a meal or rest . . . period in accordance with a state law, including but not limited to, an applicable statute or applicable regulation . . . or order of the Industrial Welfare Commission . . . the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest . . . period is not provided."

Labor Code section 512(a) addresses meal periods, and provides:

> An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by the mutual consent of the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and employee only if the first meal period was not waived.

However, commercial drivers covered by collective bargaining agreements that, among other statutorily enumerated criteria, contain express provisions for meal periods and that provide for

---

[2] The IWC is the state agency empowered to formulate wage orders governing employment in California. *See Murphy*, 155 P.3d at 289 n.4. The IWC has issued 17 separate wage orders on an industry-wide or occupation-wide basis, which together cover all employers and employees in California. *See Martinez v. Combs*, 231 P.3d 259, 273 (2010). Specific employers and employees are subject to the various provisions governing wages, hours, and working conditions under the terms of the applicable wage order. *Id*. The "transportation industry," the subject of Order 9-2001, is defined to include "any … business or establishment operated for the purpose of conveying persons or property from one place to another whether by rail, highway, air, or water, and all operations in connection therewith; and also includes storing or warehousing of goods or property, and the repairing, parking, rental, maintenance, or cleaning of vehicles." IWC Order 9, section 2(P). All 17 of the IWC's industry and occupational wage orders contain meal period requirements, and 16 of the 17 wage orders contain rest period requirements, like those contained in Order 9-2001. Cal. Code Regs., tit. 8, §§ 11010-11170. The wage orders, which are "accorded the same dignity as statutes," are entitled to "extraordinary deference, both in upholding their validity and in enforcing their specific terms." *Brinker Rest. Corp. v. Superior Court*, 273 P.3d 513, 527 (Cal. 2012) (quoting *Martinez*, 231 P.3d at 275).

final and binding arbitration of disputes concerning the application of those meal period provisions, are not subject to the meal period requirement set out at section 512(a). *See* Cal. Labor Code section 512(e), (f)(2).

Section 11 of IWC Order 9-2001 also addresses meal periods, and provides, in relevant part:

> (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee.
>
> (B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.
>
> (C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on-duty' meal period and counted as time worked. An 'on-duty' meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job meal period is agreed to. The written agreement shall state the employee may, in writing, revoke the agreement at any time.
>
> (D) If an employer fails to provide a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

Section 12 of IWC Order 9-2001 addresses rest periods, and provides, in relevant part:

> (A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof, However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.
>
> (B) If an employer fails to provide a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided.

The Labor Commissioner is authorized, under the IWC orders, to grant an employer request for an exemption from rest period requirements, if "after due investigation, it is found that the enforcement of [the rest period requirements] would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer." *See, e.g.*, IWC Wage Order 9-2001, section 17.

In *Brinker*, the California Supreme Court construed the meal and rest period requirements set out at Labor Code sections 226.7 and 512, and IWC Wage Order 5-2001.[3] The California Supreme Court concluded that an employer has the following obligations:

> When someone is suffered or permitted to work – i.e., employed – for five hours, an employer is put to a choice: it must (1) afford an off duty meal period; (2) consent to a mutually agreed-upon waiver if one hour or less will end the shift; or (3) obtain written agreement to an on-duty meal period if circumstances permit. Failure to do one of these will render the employer liable for premium pay.

Brinker, 273 P.3d at 536.

With respect to the timing of meal periods, the Court rejected the contention that the wage order imposed a requirement for a "rolling five hour meal period," under which a second meal period must be provided no later than five hours after the prior meal period has concluded. *Id.* at 537-38. Instead, the Court explained, "absent waiver, section 512 requires a first meal period no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of the employee's 10th hour of work . . . . Wage Order 5 does not impose additional timing requirements." *Id.* at 537.

The California Supreme Court also rejected the contention that an employer has a duty to "police" its employees to ensure that the employee ceases work during the meal period:

> An employer's duty . . . is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. . . .
>
> On the other hand, the employer is not obligated to police meal breaks and ensure no work thereafter is performed. Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee

[3] IWC Order 5-2001 governs the "public housekeeping industry," which includes restaurants, bars, hotels, motels, apartment houses, office buildings, hospitals, nursing homes and residential care facilities, child care facilities, private schools, colleges and universities that provide board or lodging, and businesses that provide cleaning or maintenance services for such residential or commercial facilities. IWC Order 5-2001, section 2(P). In large part, Order 5's provisions for meal periods (at section 11 of the wage order) and rest periods (at section 12 of the wage order) mirror those of Order 9-2001.

> during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay[.]

Id. at 536-37.

Turning to California's rest period requirements, *Brinker* held that employees working shifts from three and one-half to six hours in length are entitled to one 10 minute rest period, those working shifts of more than six hours up to ten hours are entitled to two 10 minute rest periods for a total of 20 minutes rest time, and those working shifts of more than 10 hours up to 14 hours are entitled to three 10 minute rest periods for a total of 30 minutes rest time. *Id.* at 529. The Court acknowledged the flexibility allowed under the wage order as to the timing of rest periods: "The only constraint on timing is that the rest breaks must fall in the middle of work periods 'insofar as practicable.' Employers are thus subject to a duty to make a good faith effort to authorize and permit rest periods in the middle of each work period, but may deviate from that preferred course where practical considerations render it infeasible." *Id.* at 530.

In *Augustus v. ABM Security Services, Inc.*, 385 P.3d 823, 826 (Cal. 2016), the California Supreme Court held that during these required rest periods, "employers must relieve their employees of all duty and relinquish any control over how employees spend their break time." The Court acknowledged, however, that "[s]everal options nonetheless remain available to employers who find it especially burdensome to relieve their employees of all duties during rest periods," noting that under one such option, employers could instead "pay the premium pay set forth in Wage Order 4, subdivision 12(B) and [Labor Code] section 226.7."[4] *Augustus*, 385 P.3d at 834.

The Federal Hours of Service Rules

The federal HOS regulations were promulgated pursuant to 49 U.S.C. 31136, which authorizes the Secretary of the Department of Transportation, to prescribe "minimum safety standards for commercial motor vehicles." 49 U.S.C. 31136(a). Regulations adopted under this statute are for the purpose of ensuring, *inter alia*, that "the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely," and "the operation of the commercial motor vehicles does not have a deleterious effect on the physical condition of the operators." *Id.* These federal minimum standards were intended to complement State regulation, as evidenced by the Congressional directive that "[b]efore prescribing regulations under this section, the Secretary shall consider, to the extent practicable and consistent with the purposes of this chapter . . . State laws and regulations on commercial motor vehicle safety, to minimize their unnecessary preemption." *Id.*, section 31136(c)(2)(B).

[4] IWC Order 4-2001, the applicable wage order in *Augustus*, is an occupational order that applies to employees employed in a wide-range of "professional, technical, clerical, mechanical and similar occupations," whose employers are not covered by an applicable industry order. Order 4-2001, section 2(O); *see Harris Feeding Co. v. Dep't of Industrial Relations*, 273 Cal. Rptr. 598 (Ct. App. 1990). Section 12(A) and (B) of Order 4-2001, setting out the rest period requirements for that wage order, is identical to Section 12(A) and (B) of Order 9-2001.

The U.S. Department of Transportation's HOS rules are found at 49 C.F.R. Part 395. Under 49 C.F.R. section 395.5, drivers of passenger-carrying commercial vehicles are prohibited from driving more than 10 hours following 8 consecutive hours off duty, or for any period after having been on duty 15 hours following 8 consecutive hours off duty. *See* 49 C.F.R. 395.5(a).

Unlike the regulations governing property-carrying vehicles, which are set out in 49 C.F.R. section 395.3, the regulations governing passenger-carrying vehicles do not mandate rest breaks. Specifically, the "rest break" provision under 49 C.F.R. section 395.3(a)(3)(ii) requires that, except for drivers who qualify for a short-haul exception, driving is not permitted if more than 8 hours have passed since the end of the driver's last off-duty or sleeper-berth period of at least 30 minutes.[5] This requirement is absent for passenger-carrying vehicles. However, under regulations governing the driving of commercial motor vehicles, at 49 C.F.R. Part 392, no driver is permitted to operate a motor vehicle, and a motor carrier is prohibited from requiring or permitting a driver to operate a motor vehicle, "while the driver's ability or alertness is so impaired, or so likely to become impaired through fatigue, illness or any other cause, so as to make it unsafe for him/her to begin to or continue to operate the commercial motor vehicle." 49 C.F.R. 392.3.

The Challenged State Requirements Are Not "Laws and Regulations on Commercial Motor Vehicle Safety" Within the Meaning of 49 U.S.C. section 31141(c), and Thus, Are Outside the FMCSA's Authority to Declare State Laws or Regulations Unenforceable

Despite FMCSA's recent preemption determination with respect to property-carrying commercial motor vehicles, *see* FMCSA-2018-0304, 83 Fed. Reg. 67470 (Dec. 28, 2018), *petition for review filed*, 9th Cir. No. 19-70329 (Feb. 6, 2019), which broke with the agency's longstanding position that California's meal and rest period requirements do not constitute "laws or regulations on commercial motor vehicle safety" under 49 U.S.C. section 31141(c), the Labor Commissioner and California Attorney General maintain that the State's meal and rest period requirements are employment laws of general applicability rather than regulations on commercial motor vehicles. The 2008 FMCSA decision that denied a petition seeking a determination that the State's meal and rest period requirements are preempted was correctly decided and should be adhered to. *See* FMCSA, *Petition for Preemption of California Regulations on Meal Breaks and Rest Breaks for Commercial Motor Vehicle Drivers; Rejection for Failure to Meet Threshold Requirement*, 73 Fed. Reg. 79204 (Dec. 24, 2008). That denial was based on the FMCSA's conclusion that the "petition does not satisfy the threshold requirement for preemption under 49 U.S.C. 31141(c) because the provisions at issue" – provisions that remain unchanged to the present – "are not 'laws and regulations on commercial

[5] Under 49 C.F.R. section 395.3, property-carrying commercial motor vehicle drivers may not start a work shift without first taking 10 consecutive hours off duty; may only drive during a period of 14 consecutive hours after coming on duty following 10 consecutive hours off duty; and may not drive after the end of the 14 consecutive-hour period without first taking 10 consecutive hours off duty. 49 C.F.R. 395.3(a)(1), (2). However, a driver may only drive a total of 11 hours during the 14-hour period during which driving is permitted. *Id.*, section 395.3(a)(3).

motor vehicle safety,' but rather laws and regulations applied generally to California employers." *Id.*

The FMCSA noted in the 2008 decision that the meal and rest period requirements of IWC Order 9-2001 are not unique to the trucking industry, but apply to the entire "transportation industry" as defined in that wage order, and moreover, every one of the IWC's 16 other industry wide or occupational wage orders contain "virtually the same rules" regarding meal and rest periods. 73 Fed. Reg. at 79205. As rules of general application, they "are in no sense regulations 'on commercial motor vehicle safety,'" and thus, the FMCSA explained, it had "no authority to preempt them under 49 U.S.C. 31141." *Id.* at 79206.

In 2008, as now, the parties seeking a finding of preemption argued that the threshold for review is met because the phrase "on commercial motor vehicle safety" under section 31141 should be interpreted as applying to state laws or regulations that regulate or affect subject matter within the FMCSA's authority under 49 U.S.C. 31136. *See* 73 Fed. Reg. at 79205. FMCSA then made short work of that argument: "There is nothing in the statutory language or legislative history of 49 U.S.C. 31141 that would justify reading into it the authority to preempt State laws 'affecting' CMV safety." *Id.* at 79206. Quite the opposite, in the words of the FMCSA:

> [P]etitioners make the equally far-reaching argument that FMCSA can and should preempt the California statutes and rules on wages, hours, and working conditions which prevent carriers from maximizing their employees' driving and on-duty time. In fact, the FMCSRs have for decades required carriers and drivers to comply with all of the laws, ordinances, and regulations of the jurisdiction where they operate.

Id. (citing 49 C.F.R. 392.2).

Numerous courts have since found this FMCSA determination of no-preemption to be persuasive. *See Yoder v. Western Express, Inc.*, 181 F. Supp. 3d 704, 717 (C.D. Cal. 2015) (discussed *infra,* at p. 16); *Mendez v. R+L Carriers, Inc.*, No. C 11-2478 CW, 2012 WL 5868973, at *7-8 (N.D. Cal. Nov. 19, 2012) (holding that "California's meal and rest provisions do not impede or undermine the FMCSA's efforts to enforce any of its [HOS] regulations. The provisions are not only consistent with the FMCSA's regulations but also entirely compatible with the federal legislation that gave rise to those regulations."); *Cole v. CRST Van Expedited, Inc.*, No. EDCV 08-1750-VAP, 2010 WL 11463494, at *7-8 (E.D. Cal. Aug. 5, 2010) (holding that "California's meal and rest break laws are not an obstacle to the HOS Regulations' purpose of highway safety and driver health. . . . The State's regulations in this area are consistent with the HOS Regulations' emphasis on encouraging carriers to provide breaks so drivers can avoid fatigue and resulting accidents.").

Even when the FMCSA amended the HOS regulations in 2011, *see* FMCSA, *Hours of Service of Drivers*, 76 Fed. Reg. 81134 (Dec. 27, 2011), adding – for property-carrying commercial vehicles only – a new prohibition on driving beyond 8 consecutive hours by requiring a 30-minute off-duty or sleeper-berth break upon reaching the 8 hour limit, the FMCSA maintained its position that California's meal and rest period requirements are not laws or regulations "on

commercial vehicle safety." Amicus Brief for the United States, on behalf of the Department of Transportation and the FMCSA, filed with the U.S. Court of Appeals for the Ninth Circuit in *Dilts v. Penske Logistics, LLC,* No. 12-55705, 2014 WL 809150, at *26 (Feb. 18, 2014).)[6] Following this amendment to the HOS regulations, the FMCSA reaffirmed its position that California's meal and rest period requirements are not laws or regulations "on commercial motor vehicle safety" and thus, "not within the agency's authority under 49 U.S.C. 31141(a) and (c) to declare unenforceable state laws that impose additional or more stringent safety requirements than are imposed by federal law." *Id.* The FMCSA's analysis reached further, *id.* at *27, concluding that there is no conflict between California's requirements and federal law, and thus no basis for a court finding of preemption under the Supremacy Clause:

> A state law that is one of general applicability, and thus does not fall within the agency's statutory authority under section 31141 to displace state laws specifically directed at commercial motor vehicle safety, may nonetheless impose standards applicable to the operation of commercial motor vehicles and provision of transportation service. And if those requirements were to conflict with federal law, they would be preempted under general Supremacy Clause principles of conflict preemption, notwithstanding the agency's determination that the state law is not specifically addressed to commercial motor vehicle safety and thus is not subject to statutory preemption under 49 U.S.C. 31141. These constitutional principles do not dictate preemption here.

---

[6] *Dilts v. Penske Logistics, LLC,* 769 F.3d 637 (9th Cir. 2014), held that California's meal and rest break laws are not preempted by the Federal Aviation Authorization Administration Act ("FAAAA"). This was consistent with the position argued by FMCSA in its amicus brief. *See* 2014 WL 809150 at *14-25. While acknowledging that "[t]he principal purpose of the FAAAA was 'to prevent States from undermining federal deregulation of interstate trucking' through a 'patchwork' of state regulations," the court cautioned that "Congress did not intend to preempt generally applicable state transportation, safety, welfare, or business rules that do not otherwise regulate prices, routes or services" of motor carriers. *Dilts,* 769 F.3d at 644. "Such laws are not preempted even if they raise the overall cost of doing business or require a carrier to re-direct or re-route some equipment." *Id.* at 646 (citing *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca,* 152 F.3d 1184, 1189 (9th Cir. 1998)). The court concluded that California's meal and rest break laws "plainly are not the sorts of laws . . . that Congress intended to preempt…. They are broad laws applying to hundreds of different industries with no other forbidden connection with prices, routes and services. They are normal background rules for *all* employers doing business in the state of California." *Dilts,* 769 F.3d at 647 (internal quotation marks and citations omitted). *Dilts* further held: "[A]pplying 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." *Id.* The Court concluded that California's meal and rest period requirements are "analogous to a state wage law, which may differ from the wage law adopted in neighboring states but is nonetheless permissible." *Id.* at 647-48. More recently, the Seventh Circuit applied a similar analysis in concluding that there is no FAAAA preemption of Illinois wage payment laws. *See Costello v. BeavEx, Inc.* 810 F.3d 1045 (7th Cir. 2016).

In its *Dilts* amicus brief, the FMCSA considered the significance of the new requirement "that long-haul drivers may not continue to drive if more than eight hours have elapsed since their last break of at least 30 minutes. 49 C.F.R. 395.5(a)(3)." 2014 WL 809150, at *29. The FMCSA explained that "there are no federal break standards applicable to short haul drivers," and "thus, no conflict between the federal regulations and state law." *Id.*[7] The FMCSA concluded: "At bottom, the principal purpose of the federal hours of service regulation is [to] improve motor vehicle safety and driver health by reducing driver fatigue. 76 Fed. Reg. 81134-35 (2011). Those paramount objectives are not impeded by the California law." 2014 WL 809150 at *30.

The FMCSA's *Dilts* amicus brief stated that the agency's position that California's meal and rest period requirements were not preempted was "consistent with the agency's prior views and reflects the agency's considered judgment regarding the preemptive scope of the statute." 2014 WL 809150, at *32. Absent any change in California meal and rest period laws and regulations since the FMCSA's prior determination in 2008, and absent any change in the federal HOS regulations since the FMCSA's *Dilts* amicus brief in 2014 reaffirming the position it took in 2008, the FMCSA's December 2018 preemption determination that reached the opposite conclusion improperly changed the agency's position and expanded the preemptive scope of the statute, stating that "if the State law or regulation imposes requirements in an area of regulation that is already addressed by a regulation promulgated under 31136, then the State law or regulation is a regulation 'on commercial motor vehicle safety.'" 73 Fed. Reg. at 67473. This would encompass any state law that might apply to commercial motor vehicles, even if the law is not intended to regulate commercial motor vehicle safety. It would be particularly inappropriate to apply this broad view of the preemption provision to California's meal and rest period requirements – which apply to bus drivers just as they would to any other California employee – in light of the fact that the FMCSA specifically declined to regulate rest periods for drivers of passenger-carrying commercial motor vehicles and the federal commercial motor vehicle safety regulations are only intended to be "*minimum* safety standards." 49 U.S.C. 31136(a) (emphasis added).

The ABA contends that the California Labor Commissioner has "admitted" that the meal and rest period requirements "promote driver and public safety, and thus are, in fact, laws on [commercial motor vehicle] safety." Pet. at 4. The Labor Commissioner rejects this conclusory logic. Employment laws of general applicability that are designed to promote and protect worker health and safety do not constitute laws that are directed at commercial vehicle safety.

[7] Notably, there are no federal break standards for passenger-carrying commercial drivers, just as there are no federal break standards for short-haul drivers. According to the previous position of the FMCSA, there is thus no conflict with federal break-time rules.

Assuming, *Arguendo*, That FMCSA Has Authority to Determine Whether the Challenged State Requirements Are Enforceable, These State Requirements Are Not More Stringent Than the HOS Regulations Prescribed Under 49 U.S.C. 31136, and Thus, There Is No Basis For a Finding That the State Requirements May Not Be Enforced

Any comparison of the stringency of California's meal and rest break requirements with the federal HOS regulations must begin with the State's requirements as they have been construed by the State's highest court in *Brinker* and *Augustus,* cases that were respectively decided in 2012 and 2016. These cases clarified that employees and employers have significant flexibility with respect to their options for complying with these State requirements, contrary to the ABA's contention that the meal and rest break rules eliminate flexibility by "requir[ing] the driver to stop the bus and log off duty several additional times at certain intervals each day regardless of the driver's break schedule or actual level of fatigue." Pet. at 6.

As noted above, *Brinker* held: (1) there is no "rolling five hour meal period requirement;"[8] (2) the first meal period can be provided at any time prior to the end of the fifth hour of the employee's shift (and not provided at all if the shift does not go beyond six hours, and is waived by mutual consent); (3) the second meal period can be provided at any time up to the end of the 10th hour of work (and not provided at all if the shift does not go beyond 12 hours); (4) there is a mechanism under the wage orders for establishing "on-duty" meal periods; (5) even in the absence of a valid on-duty meal period, the obligation to provide an off-duty meal period does not require that employers "police" those off-duty meal periods to ensure that no work is performed by employees during the meal period, and employees are not prohibited from continuing to work during a meal period; and (6) employers may deviate from rest period timing requirements (to authorize and permit rest periods in the middle of each work period) where practical considerations make such timing infeasible. Far from what has been portrayed by ABA, the California Supreme Court has construed these break requirements in a manner that maximizes flexibility and employee choice.

More recently, the California Supreme Court announced in *Augustus*, 385 P.3d at 834, that among the "options [that] remain available to employers who find it especially burdensome to relieve their employees of all duties during rest periods," which are required to be duty-free, there is the option to "pay the premium pay set forth in [the applicable] Wage Order and section 226.7 [of the Labor Code]." Thus, beyond the flexibility allowed under *Brinker*, there is also the option of simply paying the employee the extra hour of premium pay as an alternative to providing an off-duty break. Although the Court cautioned that this option "should be the

[8] In its rejection of the motor carriers' petition in 2008, the FMCSA assumed that there was a "rolling five hour meal period requirement," and even so, reasoned that "[f]ive hour windows hardly constitute 'set times.' Petitioners provide no evidence that these breaks undermine safety." 73 Fed. Reg. at 79205 n.3. The California Supreme Court's subsequent holding, in *Brinker*, that the applicable State laws and regulations do not provide a "rolling five hour meal period requirement," represented a more flexible construction of the State requirements, and as such, serves to strengthen the FMCSA's earlier finding of no preemption.

exception rather than the rule" and that employers should not "pervasively interrupt scheduled work periods," *id.* at n.14, it nevertheless remains the law that an extra hour of pay may substitute for the break time.

Thus, as properly construed, California's break requirements do not interfere with the "flexible approach" to taking breaks that ABA describes under federal HOS rules for passenger carriers. The ABA explains that a driver "will often take multiple breaks during intermediate stops along a schedule" followed by "an off-duty break at the terminal location, before starting a different set of scheduled pick-ups/drop-offs on a new schedule, all within a cycle of a normal duty period." Pet. at 6. Indeed, because the ABA explains that passenger carrier drivers "may take time off duty in the middle of a daily duty period for a rest break" and, unlike truck drivers, "bus drivers' daily duty window is not an unbreakable 'consecutive hours' requirement," which means that bus drivers have "flexibility to set their own driving and break schedules on a daily basis," it is hard to see why California's meal and rest periods could not be accommodated. Pet. at 6. State law does not require that drivers "take periodic breaks at certain times regardless of whether the driver feels fatigued," nor does it create a disincentive to taking breaks when the driver feels fatigued because the driver "might feel obligated to continue the trip because of the delay already caused by taking the designated break under California law." Pet. at 5.

Construed in this manner, the obligation imposed on employers under California's meal and rest period enforcement scheme is an obligation to either provide required meal and rest periods, *or pay higher wages.*[9] To be sure, one of the purposes behind California's adoption of meal and rest period premium pay was to "shap[e] employer conduct" by "acting as an incentive for employers to comply" with the State's pre-existing meal and rest period requirements. *Murphy*, 155 P.3d at 294. Nonetheless, the state's high court concluded that "whatever incidental behavior-shaping purpose section 226.7 serves, the Legislature intended section 226.7 to first and foremost compensate employees[.]" *Id*.

It is thus the desire to escape the economic impact of meal and rest period premium *pay* that, at root, motivates the ABA's petition. But the obligation to pay premium wages as an alternative to providing legally compliant meal and rest periods does not make the California requirements more stringent than the HOS requirements, any more than California's state minimum wage can be said to be "more stringent" than the HOS requirements. In summary, California's break requirements, as thus construed by the state's high court, cannot be said to be more stringent that the HOS regulations, and for that reason, the FMCSA lacks statutory authority to declare California's requirements unenforceable.

[9] In *Murphy*, 155 P.3d at 288-97, the California Supreme Court held that the extra hour of pay under Labor Code section 226.7 and under the applicable IWC order meal and rest period provisions constitute "wages" under California law.

Assuming, A*rguendo*, That FMCSA Has Authority to Determine Whether the Challenged State Requirements Are Enforceable, and Determines That These Requirements Are More Stringent Than the Federal HOS Regulations, There Is No Basis For Finding That These State Requirements May Not Be Enforced, In That: (a) the State Requirements Have a Safety Benefit, and (b) the State Requirements Are Not Incompatible With the HOS Regulations, and (c) Enforcement of the State Requirements Would Not Cause an Unreasonable Burden on Interstate Commerce

(a) The State Requirements Have a Safety Benefit

The ABA appears to concede that the State meal and rest period laws have a safety benefit by stating that the California Labor Commissioner has "admitted" that the meal and rest period requirements "promote driver and public safety." Pet. at 4. However, the ABA also asserts that "California meal and rest break rules require drivers to take breaks that might be counterproductive to safety." Pet. at 5. The ABA also contends that the State meal and rest period requirements undermine the federal HOS fatigue-management rules. Pet. at 5. The ABA is unable to cite to a single court decision that lends any support to this argument. Instead, every court that has considered this argument reached the opposite conclusion, holding that California's meal and rest break requirements are consistent with the purpose of the HOS rules, and do not impede or undermine the federal rules. *See, e.g., Mendez, 2*012 WL 5868973, at *7-8; *Cole*, 2010 WL 11463494, at *7-8. The FMCSA, in its 2014 *Dilts* amicus brief, reached this exact same conclusion. There is no legal or factual basis for a finding that the meal and rest break rules are "counterproductive to safety."

The Labor Commissioner and California Attorney General reaffirm that California's meal and rest period requirements promote driver and public safety. The FMCSA understood the connection between driver break time and increased safety when it explained, in promulgating the HOS prohibition on property-carrying vehicles driving more than 8 hours without a 30-minute break: "The goal of this rulemaking is to reduce excessively long work hours that increase both the risk of fatigue-related crashes and long-term health problems for drivers." 76 Fed. Reg. at 81134. Moreover, although the FMCSA stated that it did "not have enough data to indicate a problem" in the passenger-carrying motorcoach industry in 2003 when it revised the HOS regulations for property-carrying commercial motor vehicles to provide drivers with "better opportunities to obtain sleep, and thereby reduce the incidence of" fatigue-related crashes, *see* FMCSA, *Hours of Service of Drivers; Driver Rest & Sleep for Safe Operations*, 68 Fed. Reg. 22456, 22462 (April 28, 2003), serious motorcoach crashes have subsequently warranted National Transportation Safety Board ("NTSB") reporting and attention.

In a 2011 special report on curbside motorcoach safety, the NTSB described "multiple serious accidents during 2011" that resulted in numerous fatalities and serious injuries. *See* NTSB, *Special Report: Report on Curbside Motorcoach Safety*, NTSB/SR-11/01 at 1 (2011), https://www.ntsb.gov/safety/safety-studies/Documents/SR1101.pdf.[10] One of the factors the

[10] "Motorcoach" is a category of passenger-carrying commercial motor vehicles defined as "a bus that measures at least 35 feet in length and has seating for 30 or more passengers on an

NTSB examined was motorcoach driver fatigue. The NTSB explained its "long history of issuing recommendations to prevent fatigue-related highway accidents, and addressing human fatigue is an issue currently on the NTSB's Most Wanted List, which represents the NTSB's advocacy priorities and is designed to increase awareness of, and support for, the most critical changes needed to reduce transportation accidents and save lives." *Id.* at 50. The NTSB analyzed the current HOS rules for passenger-carrying commercial motor vehicles, noting that "State inspectors and federal safety investigators expressed concern about the extended work hours permitted by current HOS rules for motorcoach drivers, pointing out that these work hours can lead to fatigue." *Id.* The NTSB concluded that curbside carriers have higher fatigued driving violations compared with conventional carriers, and that "[m]otorcoach driver fatigue is a continuing safety concern." *Id.* at 60-61.

In its 2017 Annual Report to Congress and the National Transportation Safety Board ("NTSB"), the U.S. Department of Transportation listed the need to "reduce fatigue-related accidents" as one of the critical safety issues on the "2017-2018 NTSB Most Wanted List." *See The U.S. Department of Transportation's Status of Actions Addressing the Safety Issue Areas on the NTSB's Most Wanted List* at 2 (June 2017), https://cms.dot.gov/sites/dot.gov/files/docs/mission/office-policy/transportation-policy/285441/2017-2018-dot-response-ntsb-most-wanted-list-final.pdf. The report noted: "Fatigue can be just as deadly in transportation as alcohol and drug impairment, and fatigued drivers and operators regularly cause accidents…. Fatigue degrades a person's ability to stay awake, alert, and attentive to the demands of controlling their vehicle safely. Drivers may not recognize the effects of fatigue until it is too late. The traveling public can unknowingly and unwillingly be placed at risk because a fatigued operator cannot safely execute his or her duty." *Id.* at 39. Among its proposed solutions to ameliorate this "serious safety issue," the report further proclaimed the need to "draw attention to company best practices that allow operators to schedule adequate off-duty time for rest[.]" *Id.* The Department of Transportation agreed with the NTSB that "fatigue is a serious safety issue." *Id.* at 40.

The NTSB's current 2019-2020 Most-Wanted-List continues to list fatigue-related accidents. *See* NTSB, *2019-2020 Wanted List Issue Areas*, https://www.ntsb.gov/safety/mwl/Pages/default.aspx. The NTSB's accompanying report on most-wanted-list-associated open safety recommendations includes two items under "Reduce Fatigue-Related Accidents" involving the FMCSA that are categorized as "Open-Unacceptable Response." NTSB, *2019-2020 MWL-Associated Open Safety Recommendations* at 18 (Dec. 11, 2018), https://www.ntsb.gov/safety/mwl/Documents/2019-20/2019-20-MWL-SafetyRecs.pdf. One is to "[e]stablish an ongoing program to monitor, evaluate, report on, and continuously improve fatigue management programs implemented by motor carriers to identify, mitigate, and continuously reduce fatigue-related risks for drivers" and another is to "[i]ncorporate scientifically based fatigue mitigation strategies into the hours-of-service regulations for passenger-carrying drivers who operate during the nighttime window of circadian low." *Id.* Particularly in light of the continued focus on

---

elevated passenger deck over a baggage compartment, with integral construction designed for long-distance passenger transportation." NTSB Special Report at viii.

reducing fatigue-related accidents, California's generally-applicable meal and rest period requirements support, rather than undermine, this important public safety goal.

In addition, a report prepared for the FMCSA that reviewed available evidence on fatigue and motorcoach/bus driver safety summarized certain findings as follows: "Statistics show a clear connection between driving while fatigued or sleepy and crash in professional drivers. . . . evidence suggests that the incidence of crash increases after 5 or 6 hours of driving and continues to increase through the end of driving time at 8 to 11 hours." Manila Consulting Group, Inc., *Evidence Report: Fatigue and Motorcoach/Bus Driver Safety* at 42 (2012), https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/Fatigue%20Evidence%20Report%2012-17-12_revised(1-30).pdf. This evidence-review report attempted to answer the question as to how much rest is required for a fatigued professional driver to resume driving unimpaired. *Id.* at 77. Some of the reported studies showed that a 30-minute rest break reduced the incidence of "safety critical events" while others showed that long-haul truck drivers who napped had a significantly lower incidence of crash or near-crash. *Id.* at 84. Notably, the timeframe for incidence of crash maps closely to the timeframe for California's meal and rest periods.

The ABA petition affords no consideration to these findings and recommendations of the NTSB and the FMCSA. Worse, a finding of preemption, as requested by the ABA, would leave a significant number of California drivers of passenger-carrying commercial vehicles without the legal right to *any* break during their workday, as the HOS regulations for bus drivers do not even include the requirement for a 30-minute off-duty break after 8 hours of driving to which drivers of property-carrying vehicles are entitled. *See* 49 C.F.R. 395.3(a)(3)(ii). Accordingly, the FMCSA cannot conclude, as it did in the December 2018 preemption determination regarding property-carrying commercial motor vehicles, that California's meal and rest period requirements "do not provide additional safety benefits." 83 Fed. Reg. at 67476. The FMCSA agreed with the Labor Commissioner that "drowsy driving causes crashes," explaining that this was why the agency promulgated the off-duty break requirement in the HOS regulations. *Id.* That break requirement *does not exist* in the HOS regulations for bus drivers. Therefore, it defies logic to suggest that the safety of bus drivers and their precious human cargo is not enhanced by the State's break requirements.

(b) The State Requirements Are Not Incompatible With the HOS Regulations

The ABA appears to contend that California's meal and rest break requirements are incompatible with the HOS regulations because they conflict with driver attendance needs and drivers' federal regulatory service and security requirements, and because there is a lack of adequate parking for intercity buses to take breaks. Pet. at 7-10. However, ABA's arguments fail to address the fact that the State's meal and rest break requirements, as construed by the California Supreme Court, ultimately impose an obligation to provide required meal and rest periods *or* to simply provide an additional hour of pay for not providing the break (assuming an exemption has not been granted for the rest period requirement, and that there is no waiver of the meal period or agreement to an on-duty meal period). As such, there is no incompatibility even where a driver is called upon to attend to customer needs during an otherwise off-duty break, cannot find adequate bus parking (despite the numerous roadside rest stops between most locations and

major highways in California, *see* http://quickmap.dot.ca.gov/), cannot reach a rest stop due to traffic and service requirements, or cannot use a particular rest stop due to security issues.

In the December 2018 preemption determination pertaining to property-carrying commercial motor vehicles, the FMCSA explained that it interprets compatibility to mean that the State laws and regulations must be identical to the federal HOS regulations in order to be compatible. 83 Fed. Reg. at 67477. This interpretation does not survive basic principles of statutory construction. Under 49 U.S.C. 31141(c)(1), FMCSA is not to interfere with the enforcement of state laws or regulations on commercial motor vehicle safety that are more stringent than the HOS requirements unless the state laws or regulations (a) provide no safety benefit, (b) are incompatible with the HOS regulations, or (c) would, if enforced, cause an unreasonable burden on interstate commerce. Under FMCSA's view, any state law or regulation more stringent than the HOS regulations is necessarily "incompatible," so as to make the three-part statutory test a nullity. This is contrary to the "cardinal principle of statutory construction that [an interpreter] must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks and citation omitted).

(c) Enforcement of the State Requirements Would Not Cause an Unreasonable Burden on Interstate Commerce

The issue of whether California's meal and rest period requirements constitute an unreasonable burden on interstate commerce was carefully analyzed in *Yoder v. Western Express, Inc.*, 181 F. Supp. 3d 704 (C.D. Cal. 2015), with the court holding that no such burden was shown. That case involved a long-haul interstate driver who spent only a small percentage of his total worktime driving within California, time as to which plaintiff contended California wage and hour law, including meal and rest period requirements, apply. Western Express sought summary judgment on the ground that application of California wage and hour laws and regulations to plaintiff would violate the dormant Commerce Clause. The court analyzed the issue under the controlling standard set out in *Pike v. Bruce Church, Inc*., 397 U.S. 137 (1970): Absent facial discrimination against interstate commerce, the inquiry turns to whether the challenged law "regulates evenhandedly to effectuate a local legitimate public interest and [whether] its effects on interstate commerce are only incidental." If so, the law "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Yoder*, 181 F. Supp. 3d at 718 (quoting *Pike*, 397 U.S. at 142).

In applying this standard, the court concluded that the California wage and hour laws at issue, including meal and rest break requirements, "should be afforded, at minimum, significant weight in a Commerce Clause analysis," that "California has an indisputably legitimate public interest in enforcing labor laws which protect its workers," and that these laws "regulate 'even-handedly' as they apply to almost all employers in the state, not just those engaged in interstate commerce." *Yoder*, 181 F. Supp. 3d at 720. The court then rejected Western's claim that the alleged burdens on its interstate operations are "clearly excessive" in relation to the legitimate public interest California has in regulating employment matters, finding that "the record shows no special circumstance suggesting that California's wage and hour laws operate as anything other than an unobjectionable exercise of the State's police power," and that "the minimal facts in the record tell us little about any significant practical burden on interstate commerce." *Id*. at 722-23.

Yoder adjudicated this issue correctly. Here, ABA's assertion of an "unreasonable burden on interstate commerce" is based on the economic interest in maximizing drivers' productive time and reference to the fact that many states regulate meal and rest break requirements, which the ABA contends increases driver costs and could impact the affordability of bus tickets for customers, without any of the analysis and consideration of the State's interest that is required under *Pike*. However, businesses operating in multiple states already contend with varying laws, such as different minimum wage rates. This is essentially the cost of doing business in more than one geographic area. In light of California's "legitimate interest in promoting driver and public safety," which FMCSA has recognized, *see* 83 Fed. Reg. at 67479, California's meal and rest break requirements should not be found to cause an unreasonable burden on interstate commerce.

Conclusion

For all of the reasons set forth above, the California Labor Commissioner and Attorney General urge the FMCSA to deny the ABA's Petition, and issue a determination that California's meal and rest period laws and regulations are not preempted by 49 U.S.C. 31141. For further information regarding this submission, please contact Miles Locker, mlocker@dir.ca.gov, 415-703-4875 or Timothy J. Kolesnikow, Timothy.Kolesnikow@doj.ca.gov, (213) 269-6181.

Respectfully submitted,

Xavier Becerra
Attorney General of California

Miles Locker
Attorney for the California Labor Commissioner