

# Congress of the United States

Washington, DC 20515

October 31, 2018

The Honorable Elaine Chao  
Secretary  
U.S. Department of Transportation  
1200 New Jersey Avenue SE  
Washington, D.C. 20590

Dear Secretary Chao:

We write to urge you, in the strongest possible terms, to deny the petition submitted by the American Trucking Associations (ATA) for a determination that the State of California's meal and rest break rules are preempted by Federal law. We believe this is a matter of critical importance, which stands to have a dramatic impact on the rights of States to protect the safety of the public, to maintain highway safety, and to provide for the well-being of commercial truck drivers.

This petition represents another attempt by the ATA to preempt California's paid meal and rest break laws, even though such arguments in support of preemption have been rejected previously by: the U.S. Department of Transportation, in response to a nearly identical request by the trucking industry in 2008; the courts, including the U.S. Court of Appeals for the Ninth Circuit and the U.S. Supreme Court (which declined to hear appeals in multiple cases); and Congress, despite multiple opportunities since 2015, including periods with Republican majorities in both the U.S. House of Representatives and the U.S. Senate.

Our objection to an administrative determination of preemption is unequivocal. After more than four years of debate on this issue in Congress, we have had the opportunity to consider at length the impacts of preemption of California's meal and rest break law on truck drivers, to review Congressional intent in enacting the motor carrier preemption statute, and to evaluate thoroughly the complex operational realities of goods movement. We have also proposed narrowly tailored statutory changes, in an attempt to promote uniformity of hours of service rules for drivers that operate across multiple States. These reasonable proposals have been roundly and repeatedly rejected by the ATA. We strongly maintain that any change to preemption in this area requires a change in statute and must be left to Congress.

We are extremely concerned that this administration has already demonstrated a results-oriented bias against State meal and rest break protections. On September 20, 2018, the Pipeline and Hazardous Materials Safety Administration (PHMSA) determined that California meal and rest break laws are preempted with respect to drivers of motor vehicles transporting hazardous materials and certain classes of explosive materials, as well as drivers employed by motor carriers required to file a security plan. To justify preemption, the agency cites purported "unnecessary delay" in the transportation of hazardous materials created by California's labor law. As discussed in the attached, the State's law does not cause unnecessary delay, because drivers can agree to waive meal or rest breaks, provided they are compensated for the time worked. If an employer denies a driver an opportunity for a break, then the employer must pay the driver an additional hour of wages. By granting preemption, this administration has demonstrated its willingness to negate a State's authority to regulate wages and working conditions in order to sustain carrier productivity and profit.

Our reasons for opposing a determination of preemption are outlined in the attached document. Please include this letter and the attachment in the docket containing the agency's request for comments on the ATA's petition [Docket No. FMCSA-2018-0304].

We urge you to deny the petition submitted by the ATA, and to allow Congress to continue to debate whether changes to the statute are warranted to promote uniformity for carriers while not undermining the firmly entrenched rights of States to enforce strong wage and hour protections for workers within their borders.

Sincerely,



PETER DeFAZIO  
Ranking Member  
House Committee on Transportation  
and Infrastructure



PATTY MURRAY  
Ranking Member  
Senate Committee on Health, Education,  
Labor and Pensions



ROBERT C. "BOBBY" SCOTT  
Ranking Member  
House Committee on Education  
and the Workforce



KAMALA D. HARRIS  
United States Senator



ELEANOR HOLMES NORTON  
Ranking Member  
Subcommittee on Highways and Transit  
House Committee on Transportation  
and Infrastructure



DIANNE FEINSTEIN  
United States Senator



GRACE NAPOLITANO  
Member of Congress



CLAIRE McCASKILL  
United States Senator



JARED HUFFMAN  
Member of Congress



RICHARD BLUMENTHAL  
United States Senator



JULIA BROWNLEY  
Member of Congress



ELIZABETH WARREN  
United States Senator



ALAN LOWENTHAL  
Member of Congress



EDWARD J. MARKEY  
United States Senator



MARK DeSAULNIER  
Member of Congress

CORY A. BOOKER  
United States Senator



MARK TAKANO  
Member of Congress



MARGARET WOOD HASSAN  
United States Senator



ROBERT P. CASEY, JR.  
United States Senator

## Reject the ATA Request for Preemption of California's Meal and Rest Break Rules

*In Response to FMCSA Request for Comments*

*Docket No. FMCSA-2018-0304*

The American Trucking Associations (ATA) has asked the Federal Motor Carrier Safety Administration (FMCSA) to make a determination that Federal law preempts California's meal and rest break laws with respect to commercial motor vehicle drivers.<sup>1</sup> **The ATA's petition should be denied, because a determination of preemption would contravene clear Congressional intent, clearly established law, and the position consistently taken by the U.S. Department of Transportation (DOT) over the last decade.**

Not only has the judiciary soundly rejected similar preemption claims by the ATA, but the DOT has also established a clear position against such preemption over the course of a decade spanning two presidential administrations. In 2008, FMCSA denied a nearly identical preemption request by the trucking industry. Further, in 2014, DOT and the United States Department of Justice filed a brief and argued strongly against the same theory of preemption<sup>2</sup> in *Dilts v. Penske Logistics, LLC*, a case before the U.S. Court of Appeals for the Ninth Circuit.<sup>3</sup> **Nothing has changed in the intervening years, and we therefore urge FMCSA to continue to reject ATA's request to arbitrarily reverse the agency's previously articulated position.**

### DRIVER FATIGUE

The California rules are part of “comprehensive regulations governing wages, hours, and working conditions”—not safety rules. In 2008, FMCSA denied a trucking industry request for a determination of preemption under the same theory of preemption at issue in the pending petition (preemption of State rules under 49 U.S.C. § 31141). FMCSA concluded that the petition did not meet the threshold for preemption because the California rules are “simply one part of California's comprehensive regulations governing wages, hours, and working conditions” and that “in no sense” do the California laws regulate “commercial vehicle safety.”<sup>4</sup> FMCSA further found that “there is nothing in the statutory language or legislative history. . . that would justify reading into the authority to preempt State laws ‘affecting’ commercial motor vehicle safety”— and that, “[b]ecause the California meal and rest break rules are not ‘regulations on commercial motor vehicle safety,’ the Agency has no authority to preempt them under 49 U.S.C. 31141. Furthermore, that statute does not allow the preemption of other State or local regulations merely because they have some effect on [commercial motor vehicle] operations.”<sup>5</sup>

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<sup>1</sup> Cal. Lab. Code §§ 226.7, 512.

<sup>2</sup> The ATA argues in the pending petition for preemption under 49 U.S.C. § 31141, which permits the Secretary of Transportation to declare unenforceable a State law or regulation on commercial vehicle safety if the State rule has no safety benefit, is incompatible with Federal regulations, or if enforced would unreasonably burden interstate commerce. 49 U.S.C. § 31141(c)(4).

<sup>3</sup> Brief for the United States as Amicus Curiae, *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014) (No. 12-55705) (hereinafter “*Dilts* amicus brief”). The Supreme Court declined to review the Ninth Circuit's conclusion in *Dilts* that the California statutes were not preempted. *Penske Logistics, LLC v. Dilts*, 135 S. Ct. 2049 (2015).

<sup>4</sup> *Petition for Preemption of California Regulations on Meal Breaks and Rest Breaks for Commercial Motor Vehicle Drivers*, 73 Fed. Reg. 79204, 79206 (2008).

<sup>5</sup> *Id.* at 79206.

The agency reiterated that position in 2014. In an amicus brief filed in the *Dilts* case in 2014, the DOT reaffirmed its view that the California law “is not a regulation on commercial motor vehicle safety and thus is not within the agency’s authority under [49 U.S.C. § 31141]” to preempt State law.<sup>6</sup>

In this petition, ATA is again asking the agency to determine under 49 U.S.C. § 31141 that California’s requirements – that an employee must be permitted a 30-minute meal break for every five hours worked, and rest periods of 10 minutes for every four hours worked – should be preempted because they have “no safety benefit” and even “a detrimental effect on safety.”<sup>7</sup>

It is no surprise that ATA holds this view. In 2011, FMCSA revised Federal hours of service rules to combat the problem of driver fatigue by requiring one 30-minute rest break after eight hours on duty (one required break in a 14-hour on duty period). The ATA staunchly fought even this minimal break requirement in the rulemaking process and through subsequent litigation. The ATA stated in comments filed in the rulemaking docket that “it is inappropriate and unnecessary to require drivers to take breaks of a prescribed duration at specific times... regulating that breaks must be taken and when they must be taken only serves to further restrict drivers and reduce flexibility/productivity.”<sup>8</sup> The U.S. Court of Appeals for the D.C. Circuit ruled against the ATA in subsequent litigation challenging FMCSA’s revised regulations and upheld the Federal rest break requirement in relevant part.<sup>9</sup>

Under Federal motor carrier rules, a driver *must* take at least one 30-minute break after eight hours of driving in order to continue his or her work day. By contrast, under California meal and rest break rules – which are not specific motor carrier safety laws but broad wage and hour laws applicable to all workers in the State of California – an employee is able to waive a 30-minute meal break or 10-minute rest breaks. If an employee is not afforded a break, as determined by the State of California as reasonable for worker health and wellbeing, then that employee must be compensated an additional hour of wages. As a general wage and hour law, **California law does not require truck drivers to pull off to the side of the road, find ample truck parking, or reduce productivity as asserted in the ATA petition. The law simply requires that if employees work through those breaks, they must be compensated accordingly.**

DOT and DOJ directly contradict ATA’s assertion that the California law has a detrimental effect on safety in the 2014 brief, stating that “the principal purpose of the federal hours of service regulation is [to] improve motor vehicle safety and driver health by reducing driver fatigue... Those paramount objectives are not impeded by the California law.”<sup>10</sup>

#### STATE AUTHORITY TO REGULATE WAGES, HOURS, AND WORKING CONDITIONS

A determination of preemption by FMCSA over California’s meal and rest break laws would be an affront to the firmly entrenched power of a State to protect the health and safety of workers

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<sup>6</sup> *Dilts* amicus brief, *supra* note 3, at 26.

<sup>7</sup> American Trucking Associations, “Petition for Determination That California Meal and Rest Break Rules for Commercial Motor Vehicle Drivers Are Preempted Under 49 USC 31141”, September 24, 2018.

<sup>8</sup> Comments submitted by the American Trucking Associations, Docket No. FMCSA 2004-19608, p. 15.

<sup>9</sup> *Am. Trucking Ass’ns v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243 (D.C. Cir. 2013). The court vacated a portion of the rest break rule relating to short-haul drivers but otherwise let the rest requirements stand.

<sup>10</sup> *Dilts* amicus brief, *supra* note 3, at 30.

within its borders. Congress has debated the expansion of preemption to curtail States' rights to enact and enforce wage and hour laws – in response to legislative requests by the ATA – and has rejected such an expansion. This is in line with Congress' longstanding approach to wage and hour law, which has been to set national standards as a floor and not a ceiling, ensuring that workers nationwide have minimum protections while allowing states to fully exercise their rights to provide greater protections in excess of the national standards. For over 80 years, the core federal wage and hour law, the Fair Labor Standards Act (FLSA), has provided wage and hour protections to workers while allowing states to set more stringent standards.

In denying the trucking industry's petition to preempt California's meal and rest breaks in 2008, FMCSA stated: "[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."<sup>11</sup>

DOT once again expressed this view in its amicus brief in the *Dilts* case. DOT argued that there is a presumption against preemption in areas of traditional State "police power" or control, and that labor laws are a clear area of traditional State control. The DOT's brief also cited a decision by the Seventh Circuit Court of Appeals in a trucking case holding that a State law is not preempted simply because it changes economic inputs or increases the cost of doing business.<sup>12</sup>

Most egregiously, however, granting this petition would **take away State wage and rest protections from drivers who never leave the State of California**. We acknowledge that if a truck driver is operating long-haul, through several States, he or she could be governed under multiple successive rest or meal break requirements. However, FMCSA's hours of service regulations can apply even if a driver operates solely in one State because of FMCSA's broad interpretation of what constitutes a movement in interstate commerce for purposes of applying the hours of service regulations. FMCSA's guidance on that subject states that: "Interstate commerce occurs when a shipper intends to have cargo transported to another State or country. That cargo is in interstate commerce from the moment it leaves that shipper until it arrives at its destination. **If your truck hauls that cargo, even within a single State, that transportation is considered to be in interstate commerce.**"<sup>13</sup>

In fact, the plaintiffs in *Dilts* were local appliance delivery drivers who never left California. Because the appliances in those drivers' cargoes were not manufactured in California, their transportation was considered interstate commerce even for the final delivery from a store to consumers' homes. Similarly, for example, any drivers hauling goods in and out of the Ports of Los Angeles or Long Beach to transloading facilities or distribution centers are all considered interstate drivers – even though they rarely travel more than a few dozen miles from the port. If a finding of preemption is made, these drivers would be stripped of protections under California law.

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<sup>11</sup> *Petition for Preemption of California Regulations on Meal Breaks and Rest Breaks for Commercial Motor Vehicle Drivers*, 73 Fed. Reg. 79206 (2008).

<sup>12</sup> *Dilts* amicus brief, *supra* note 3, at 20 (citing *S.C. Johnson & Son, Inc. v. Transport Corp. of America, Inc.*, 697 F.3d 544 (7<sup>th</sup> Cir. 2012)).

<sup>13</sup> Federal Motor Carrier Safety Administration, "Interstate Truck Driver's Guide to Hours of Service", October 2016.

Worse, the Federal 30-minute rest break is not applicable to short haul drivers (those who do not go beyond a 100-air-mile radius of their normal work location), after that requirement was struck down by the court under the ATA hours of service lawsuit. Therefore, if California law is preempted, short-haul drivers would not be entitled to *any* rest break under Federal or State law – in a 14-hour work day.

Finally, although this petition targets California’s laws, an administrative determination of preemption would set a dangerous precedent as 20 other States and U.S. territories have existing meal or rest break laws that could easily be the target of the next petition.

#### CARRIER PRODUCTIVITY

Since 2015, ATA has asked for a legislative expansion of preemption, characterizing the Ninth Circuit’s decision in *Dilts*— which expresses the current law of the land— as a “rogue” decision. The reality is that in 2000 – 18 years ago – California instituted meal and rest break rules to provide a monetary remedy of an additional hour of pay to an employee if an employer does not allow for a meal or a rest break. Carriers ignored this paid break requirement and assumed they were covered under preemption for 15 years, until the Ninth Circuit decision. The *Dilts* case is not the sole case where trucking companies have lost their argument of preemption and similarly seen California’s laws upheld.<sup>14</sup>

This demonstrates that ATA’s objection is not primarily about safety – it comes down to carrier productivity. The ATA’s comments on the Federal 30-minute break rules in 2011 all but make this point. In opposing a 30-minute break, ATA wrote: “As productivity is lost through the reduction in daily working and driving time . . . individual drivers will have lower wages . . . . The decrease in pay is likely closely correspond [sic] to the loss in productivity.”<sup>15</sup>

The California rules eliminate this false choice between hours and wages by allowing drivers to rest without foregoing pay. We have fought to uphold California’s paid meal and rest break laws because we firmly believe that Congress and the administration should be improving the wages and working conditions of truck drivers and all working people, not eliminating rights and protections that States have conferred to them.

We continue to be open to identifying legislative options that will help bring uniformity for drivers whose operations span multiple States. A blanket grant of preemption, however, will have consequences that far exceed that intent. In negotiations over various authorizing and appropriations legislation in the past four years, the ATA has consistently rejected any offers of narrowly tailored changes to the preemption statute.

For the last 10 years, the trucking industry and the ATA have fought unsuccessfully to remove the application of California’s compensated meal and rest break rules to commercial motor vehicle drivers. We view the submission of this pending petition as part of an ongoing effort by the trucking industry to extinguish progressive wage and hour laws at the State level. We therefore strongly urge FMCSA to deny the ATA petition.

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<sup>14</sup> See, e.g., *Ortega v. J. B. Hunt Transp., Inc.*, 694 Fed. Appx. 589 (9<sup>th</sup> Circ. 2017), cert. denied, *J. B. Hunt Transp., Inc. v. Ortega*, 138 S. Ct. 2601 (2018).

<sup>15</sup> Comments submitted by the American Trucking Associations, Docket No. FMCSA 2004-19608, page 29.