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Agency Deference May Snag 9th Circ. Meal, Rest Break Row

By **Linda Chiem**

Law360 (February 14, 2019, 7:56 PM EST) -- California may face an uphill battle in its Ninth Circuit bid to invalidate the U.S. Department of Transportation's recent determination that the Golden State's meal and rest break rules are preempted by federal law and cannot be enforced against interstate trucking companies, experts say.

The DOT's Federal Motor Carrier Safety Administration invoked its authority as the federal safety regulator for the commercial motor vehicle industry to determine in December that California's meal and rest break rules conflicted with federal rules governing truckers' hours.

Peeved by what it considered the federal agency's bid to overstep and undermine California's worker protections, the state attorney general's office, representing the California Labor Commissioner's Office, **petitioned** the Ninth Circuit on Feb. 6 to invalidate the FMCSA determination. The International Brotherhood of Teamsters filed a separate petition that same day also asking the Ninth Circuit to step in.

Experts say it'll be a tough fight for California and the Teamsters to unravel the FMCSA's finding, given the deference that courts have long afforded government agencies in interpreting statutes and rules. But the Ninth Circuit can be a wild card and already has a track record of ruling against the industry and affirming basic worker protections on these very issues, they say, making it anyone's guess where the court will land.

"You have two competing things here: California made a state law that applies to all employees there, and California tends to be protectionist of employees," said Ron Leibman, a partner with McCarter & English LLP. "Congress gave the FMCSA, the DOT, the sole right to make determinations on motor carrier safety and interstate transport. And so the question is will the court find compelling enough the arguments of the state and the Teamsters to find that they can overturn a decision in the area of safety when Congress has given the right to make those determinations solely to the FMCSA."

The FMCSA in late December granted a petition from the American Trucking Associations and the Specialized Carriers & Rigging Association requesting a determination that California's meal and rest break rules are preempted by federal law.

After weighing more than 700 public comments that split on the issue, the agency said California's meal and rest break rules related to "commercial motor vehicle safety," meaning they regulated an area squarely within the FMCSA's wheelhouse.

The agency said California's rules were more stringent than the FMCSA's hours of service regulations, that they had no safety benefits that extend beyond those already provided by the Federal Motor Carrier Safety Regulations, that they are incompatible with the federal hours of service regulations, and that they cause an unreasonable burden on interstate commerce, according to the Dec. 21 determination.

It was a major victory for trucking industry stakeholders that in recent years couldn't get the courts to issue a binding decision preempting California's rules and unsuccessfully lobbied Congress to pass legislation drawing a bright line around the federal government's authority to exclusively regulate

how much time interstate truckers can spend on the road and when they should take rest breaks. An amendment introduced by former Republican Rep. Jeff Denham of California, who lost his seat in November's midterms, carving out this exemption was nixed from last year's Federal Aviation Administration reauthorization bill.

The centerpiece of the FMCSA's determination was linking California's rules to "commercial motor vehicle safety" and playing up the DOT secretary's authority to step in — under 49 USC 31141 — to review and preempt certain state laws and regulations that impinge on that safety.

"The agency, which is often thought of [as] more reactive than proactive in exercising its jurisdiction over the transportation industry, did its homework to frame an ultimate conclusion on preemption that can very well stand the test of judicial scrutiny even before the Ninth Circuit," Hanson Bridgett LLP partner Bill Taylor said.

Taylor added that the FMCSA crafted a "very detailed, systematic, comprehensive and persuasive analysis" and "threw down the gauntlet to the Ninth Circuit" in anticipation of any challenges in a jurisdiction long known for being worker-friendly.

"The FMCSA focused on its safety jurisdiction rather than the traditional [Federal Aviation Administration Authorization Act] rates, routes and services preemption arguments which courts, particularly the Ninth Circuit, have continually ignored or rejected," Taylor said.

Marc Blubaugh, a partner and co-chair of Benesch Friedlander Coplan & Aronoff LLP's transportation and logistics practice group, agreed that the FMCSA based its decision on a very sound legal and evidentiary foundation.

"I think that the state of California is fundamentally wrong that a federal scheme can be impaired as long as the impairment follows from the particularized application of a general state statute," he said. "That being said, more is at play here than proper legal construction. One can't typically reason people out of positions that they never reasoned themselves into in the first place."

Clark Hill PLC partner Mark Andrews explained that the FMCSA also backed up its decision with a detailed discussion of the economically burdensome patchwork of differing "break" rules being developed by states, in addition to California. It provides the agency with extra justification to say that California's rules run afoul of the Federal Aviation Administration Authorization Act of 1994, which is the federal statute that preempts any state law "relating to a price, route or service of any motor carrier."

"This discussion by the expert agency strengthens the industry's arguments that [the FAAAA, codified as 49 USC 14501] also applies because the multistate patchwork affects carrier prices, routes and service," Andrews said.

However, the Ninth Circuit has notably rejected the motor carrier industry's preemption defense in a string of previous rulings backing California worker protections that apply broadly to all industries, so the state and the Teamsters have court precedent on their side despite the lengths the FMCSA went to justify its decision, experts say.

For example, the Ninth Circuit held in 1998's Californians for Safe & Competitive Dump Truck Transportation v. Mendonca that the FAAAA does not preempt the state's prevailing wage law, and held in 2014's Dilts v. Penske that the FAAAA **does not preempt** California's meal and rest break laws. And last September, the Ninth Circuit **rejected** the California Trucking Association's preemption challenge to the state labor commissioner's use of a flexible 11-factor worker classification test known as the Borello test in disputes before the California Department of Industrial Relations.

"Given the precedent on this issue, I think that the Ninth Circuit is not likely to find preemption here," said Shannon Liss-Riordan of Boston-based Lichten & Liss-Riordan PC, who represents drivers in a number of high-profile misclassification lawsuits. "There's nothing here that is specific to the trucking industry. These are just basic workplace protections under California state law."

Other attorneys are also confident the Ninth Circuit will side with workers.

Stan Saltzman of Marlin & Saltzman LLP, who represents J.B. Hunt Transport Inc. drivers in a yearslong California battle accusing the trucking giant of shorting them on wages, meal and rest breaks that **settled** last year, said the FMCSA's decision is a "blatant overreach" and directly contradicts the agency's prior positions.

In 2008, the FMCSA rejected a similar petition from a group of trucking companies wanting a declaration that California's meal and rest break rules were preempted. At that time, the FMCSA determined that the DOT secretary "has no authority" to preempt California's meal and rest break rules "because these rules are in no sense regulations 'on commercial motor vehicle safety.'"

And when Dilts v. Penske was pending before the Ninth Circuit, the FMCSA said in 2014 that it stuck by its 2008 position and **wouldn't interfere** with California's regulations.

"As such, we believe that this [FMCSA] ruling will be overturned by the Ninth Circuit," Saltzman said. "Its unfair limitations are adverse to the rights of the hardworking truck drivers targeted by the ruling, who are entitled to the same protections and rights afforded to all other employees."

Dozens of groups including consumer safety advocates, labor unions, employee rights and trial lawyers' groups weighed in in opposition of a preemption finding after the FMCSA began accepting public comments on the ATA's petition last October. They argued that for years, the trucking industry has been trying to weaken or eliminate safety laws that are designed to make sure truck drivers get enough rest. Ultimately, states' worker protection regulations shouldn't be so easily dismissed, they said.

The American Association for Justice, which advocates for trials by jury, has said the FMCSA crafted bad public policy with a decision that's a "giveaway to the trucking industry at the expense of driver safety."

"The trucking industry has failed in numerous legislative attempts to fix the law, and the Supreme Court has declined [the] industry's requests to review California's law," American Association for Justice CEO Linda Lipsen said in a statement. "Industry has now asked FMCSA to fix the law of one state. FMCSA's misguided approach of preempting the law of one state at the behest of industry is not justified, and leaves the agency open to legal challenges. And of course, there is no evidence that California's meal and rest break rules negatively impact safety."

The Center for Justice & Democracy and more than 35 other groups said in their comments to the FMCSA that providing safe working conditions for commercial drivers and remedies in the event of an accident, injury or fatality are among the most basic and traditional of state functions.

"States must have leeway to determine what safety rules make sense for their own commercial drivers, in addition to meeting minimum federal requirements," the groups said. "Indeed, 20 states have meal and rest break provisions similar to California's. This petition ask[ed] the FMCSA to prevent one state from having authority in this area. It is an egregious attack on the laws of one particular state and on states' rights generally."

--Editing by Kelly Duncan and Alanna Weissman.