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Diagnosis: Whiplash! The FMCSA's Meal and Rest Break Waiver Proposal

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Providers and commercial users of transportation services necessarily rely upon the predictability and uniformity afforded by national laws and regulations to support the efficient and reliable supply chains that are so essential to a thriving economy. However, this public policy interest in is sometimes victim to external forces.

On August 14, 2023, the Federal Motor Carrier Safety Administration (FMCSA) signaled a policy turnabout that may leave many in the industry a bit disoriented. In short, FMCSA announced that it will now accept petitions for waivers from its very recent decisions to preempt truck driver meal and rest break laws in the states of California and Washington for certain drivers of CMVs subject to federal hours-of-service regulations. Any petitions for such a waiver must be submitted by November 13, 2023, after which any such petitions will be posted and open for public comment before the FMCSA decides whether or not to grant any specific petition.

General Background

In 2018 and 2020, the FMCSA ruled that both the California and Washington meal and rest break rules would create an unreasonable burden on interstate commerce. Further, in 2021, the U.S. Court of Appeals for the Ninth Circuit affirmed the FMCSA's preemption determination. Likewise, the State of Washington originally pursued a challenge to the FMCSA's preemption determination but ultimately abandoned that effort by voluntarily dismissing its case in August 2022. Notably, in 2008, the FMCSA had conversely found that California's meal and rest break law was *not* preempted by federal law.

However, the winds of change have shifted yet again at the FMCSA. With a more labor-friendly Administration in Washington, D.C., the FMCSA appears to be adopting the same perspective. Thus, the stance that the FMCSA staked out on these issues under the previous Administration is now under attack. In the industry itself, sides have already been drawn. The Truckload Carriers Association (TCA) and the American Trucking Associations (ATA) naturally oppose enforcement of the state rules. ATA President and CEO Chris Spear has stated the ATA will use all its resources to stop any change in the rules. On the other side of the issue, the International Brotherhood of Teamsters very much supports the FMCSA's solicitation of petitions for waivers from its previous decisions to preempt meal and rest break rules in California and Washington.

The California and Washington Meal and Rest Break Rules

The applicable California and Washington state laws would require commercial drivers to take breaks more often than required under federal hours of service rules. Under the California law, employers must provide non-exempt employees a 30-minute meal break if they work more than 5 hours in a day, and employees who work a shift of 10 hours or more are entitled to a second 30-minute meal break. In addition, employees are entitled to a 10-minute rest period for each 4 hours, or a substantial fraction thereof, that they work in a day. To the extent possible, these breaks are to be taken in the middle of each 4-hour period.

Under the Washington law, employers must provide employees with a meal period of at least 30 minutes that commences after the second hour and before the fifth hour after the shift commences. In addition, Washington's meal and rest break rules provide for a 10-minute rest period for each 4 hours of working time and must occur no later than the end of the third working hour. The rest period must be scheduled as near as possible to the midpoint of the 4 hours of working time, and no employee may be required to work more than 3 consecutive hours without a rest period.

In contrast to both states' laws, the federal hours of service rules require only that drivers take a 30-minute break after 8 hours of driving time and allow an on-duty/not driving period to satisfy this break.

The Newly Created Waiver Process

The FMCSA indicates that that any request for a waiver from the FMCSA's preemption decision should address the following issues:

1. Whether and to what extent enforcement of a state's meal and rest break laws with respect to intrastate property-carrying and passenger-carrying CMV drivers has impacted the health and safety of drivers.
2. Whether enforcement of state meal and rest break laws as applied to interstate property-carrying or passenger-carrying CMV drivers will exacerbate the existing truck parking shortages and result in more trucks parking on the side of the road, whether any such effect will burden interstate commerce or create additional dangers to drivers and the public, and whether the applicant intends to take any actions to mitigate or address any such effect; and
3. Whether enforcement of a state's meal and rest break laws as applied to interstate property-carrying or passenger-carrying CMV drivers will dissuade carriers from operating in that state, whether any such effect will weaken the resiliency of the national supply chain, and whether the applicant intends to take any actions to mitigate or address any such effect.

Because the FMCSA is actively soliciting waivers from preemption of meal and rest breaks rules, the agency is likely predisposed to grant such requests. The states of California and Washington are themselves naturally the two states most likely to request such a waiver, but the FMCSA's announcement invites "any person" to submit a request for a waiver.

If granted, motor carriers operating in California and Washington can expect their drivers to operate under a more onerous set of rules than most other states. Of course, this change in applicable law

will necessarily disrupt shippers' procurement models and their overall cost of service. In granting any such waivers, the FMCSA will vexingly allow enforcement of rules that it just recently determined were too burdensome upon interstate commerce to stand. In short, motor carriers, brokers, and shippers are understandably experiencing what amounts to regulatory whiplash.

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