

Before the Office of the Secretary of Transportation
U.S. Department of Transportation
Federal Motor Carrier Safety Administration

Docket No. FMCSA-2018-0304
Notice of petition for determination of preemption

Request for Public Comment:
California Meal and Rest Break Rules;
Petition for Determination of Preemption

Comments of the National Association of Wholesaler-Distributors

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In response to the Department's request for comments on the notice of petition for determination of preemption published in the Federal Register on October 4, 2018, these comments are submitted on behalf of the National Association of Wholesaler-Distributors (NAW). We appreciate the opportunity provided by the Department in this proceeding to bring the Department's attention to how current California meal and rest break rules are impacting the wholesale distribution industry. NAW is an employer and a non-profit trade association that represents the wholesale distribution industry. NAW is comprised of direct member companies and a federation of approximately 85 national, regional, state, and local associations and their member firms, which together include approximately 35,000 companies operating in approximately 395,000 locations around the nation. NAW's members form the backbone of the United States economy; the link in the marketing chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. While wholesaler-distributors vary widely in size, the overwhelming majority are small to medium sized, closely held businesses. The wholesale distribution industry generates more than \$5.6 trillion in annual sales volume and provides stable well-paying jobs to more than 5.9 million workers.

Every wholesaler-distributor relies on over-the-road delivery systems in the day-to-day conduct of their enterprise. The ability of the wholesaler-distributor to both obtain products from suppliers in a timely fashion and meet the product needs of customers on a "just-in-time" basis, exists at the very heart of the business' prospects for success in an increasingly competitive and demanding marketplace.

The American Trucking Associations (ATA) has submitted a petition to FMCSA requesting a determination that the State of California's meal and rest break rules be preempted by Federal Law. The petition is based on 49 U.S.C. 31141, which states that the United States Department of Transportation (DOT) has the authority to declare a state law not be enforced if the law meets the following three requirements: 1) has no safety benefit; 2) is incompatible with federal regulations; and 3) would cause an unreasonable burden on interstate commerce.

Following the sweeping deregulation of many industries in the 1970's and 1980's many states began to pass their own regulations to oversee industry. This resulted in a patchwork of regulations that burdened interstate commerce. To counter this, Congress included language in the Federal Aviation Administration Authorization Act of 1996 (FAAAA), which preempted states from enacting or enforcing policies "related to a price, route, or service of any motor carrier." The intent of Congress was clear in the legislation; however, states like California have passed and begun enforcing laws and regulations that go beyond federal regulations.

NAW urges FMCSA to grant the preemption addressed in this petition. The current California meal and rest break rules are incompatible with federal hours of service regulations. Additionally, they have no additional safety benefit and negatively impact interstate commerce.

Our comments are drawn from the responses from our member companies to this petition. As such, they primarily reflect the real world negative results that the current California law has on NAW members who operate within the state.

Many wholesaler-distributors use drivers who are subject to the HOS rules, but spend a significant portion of their on-duty time loading, unloading, and performing other non-driving activities; so-called multiple-delivery operations. Further, FMCSA has acknowledged that the moderate physical exercise experienced by multiple-delivery drivers is not fatiguing. Under current federal HOS rules these drivers are required to take a 30-minute break before the driver reaches 8 hours of consecutive on duty time. This allows the driver to determine when a break is most needed and when it fits best within their schedule.

However, the California regulations require a driver to take a 30-minute meal break for every 5-hour work period. This mandatory break makes no sense for a driver already interrupting drive time with deliveries and loading/unloading, and imposes unnecessary burdens on the drivers and costs on the company, with no increase in safety. As a wholesaler-distributor in the mid-west reported to us, his company **“had to put together a new and California specific compensation program for [their] drivers, which confused them and was not met with enthusiasm.”**

Further, a northern mid-west wholesaler-distributor noted that, **“We operate in six states, and when a state becomes different than the rest it always creates operational issues. The rest and meal break policies being different from federal rules, required us to have a payroll/time keeping software that enabled us to track the occurrences not only to pay the penalty if one occurs but to give us the insight into the employee not abiding by the law.”** This same company indicated that they spend several thousand dollars annually simply to track the differences in rules for the states in which they operate.

Yet another wholesale-distributor noted that employees are opposed to the additional California required rest breaks and resist taking them and that **“a significant amount of time and effort is being required of [their] managers to ensure compliance with state wage and hour laws.”**

The wholesale distribution industry is a highly competitive market that places a premium on inventory management and just-in-time deliveries. In the considered judgment of NAW’s member companies, the current California meal and rest break rules are inflexible and overly complex. This in turn negatively impacts the wholesale distribution industry by lengthening delivery intervals. Wholesaler-distributors rely on suppliers to provide them with product in a timely fashion to enable them to meet customer needs as the customer defines them. In the same vein, customers rely on wholesaler-distributors to provide them with product in a timely fashion in order to meet goals they have set. The current California regulations impede the supplier’s and/or the wholesaler-distributor’s ability to fulfill those tasks – including the ability to

physically deliver the product where and when it is needed – as well as disrupt the channel and undermine the ability of those enterprises in the channel to fulfill business plans.

One distributor reported to us that due to the California's onerous meal and rest break rules the company is spending **"2 cents a mile more to cover the costs of the California regulations"** and **"because the pay is complicated with all the breaks...it will cause us to look for ways to move driver activity out of the state."**

A NAW member company in the mid-Atlantic states also elaborated on the difficulty in scheduling drivers due to the overly burdensome California rules: **"The impact we've experienced is similar to other wholesale distributors and this includes hardships around scheduling two separate meal periods for employees working ten hour shifts, tracking and ensuring we document the mandatory breaks and that they occur as close to the middle of shift as possible...we comply with all state and federal laws, but scheduling for the multiple city and state regulations is especially tough."**

Meanwhile, some NAW member companies operate as nationwide hazardous material shippers. One executive from a wholesale-distribution company that handles hazardous materials noted that they **"are subject to the rules of the Pipeline and Hazardous Materials Safety Administration (PHMSA) for intrastate and interstate commerce"** but they **"support the recent determination...by the National Tank Truck Carriers Inc (NTTC) and would also support a similar approach for non-hazardous carriers and commerce."**

The NTTC determination refers to the September 21, 2018 Pipeline and Hazardous Materials Safety Administration (PHMSA) Notice of Administrative Determination of Preemption (PHMSA-2016-0097). Although PHMSA's determination does not address whether California's provisions are covered by the preemption provisions within the Federal Aviation Administration Authorization Act of 1994, it did determine that California's meal and rest break laws create unnecessary delay on motor carrier services. As a matter of logic, it seems likely that if the DOT determined that federal preemption was necessary for the transportation of hazardous materials it should extend that preemption to the transportation of nonhazardous materials as well.

A Director of Fleet for a wholesale distributor headquartered in California reported that only 15% of their 200 truck fleet is required to abide by the California meal and rest break rules because **"wherever possible, [they] are utilizing trucks just under the commercial driver's license (CDL) requirement, or [their] delivery radius is within the exempt portion."** Again, the California law imposes management inconvenience, lower productivity, and confusion for drivers with no measurable benefit or increase in safety.

It is likely that should the preemption petition be granted, it would be a major benefit to not only the wholesale distribution industry, but to the public as well. These benefits would be seen by wholesaler-distributors putting fewer trucks on the road while carrying the same or a

greater amount of product. Pre-emption would likely also result in a decrease in drivers searching for safe parking areas, which in many cases are not readily available – especially in urban areas.

Due to the above examples from the wholesale distribution industry, NAW urges FMCSA to rule that California’s meal and rest break rules may not be enforced with respect to commercial drivers who are subject to DOT’s authority to regulate hours of service. It is clear that the California meal and rest break regulations are incompatible with federal hours of service rules, have no additional safety benefit, and undoubtedly causes a significant burden on interstate commerce.

Additionally, NAW encourages FMCSA to examine other state meal and rest break regulations. A Vice President at a NAW member company explained it best: **“If other states are now discussing independent meal and rest breaks it will get to a point that we will need special systems, software, and policies for each state. An employer that operates in multiple states should have one handbook of policies, but we are being forced to have various addenda for several states and our employees are treated different throughout the country.”**

The members of the National Association of Wholesaler-Distributors applaud the Federal Motor Carrier Safety Administration’s efforts to enhance truck safety and with it the safety of all citizens traveling on America’s highways. We support the ATA petition for preemption because state rule of this magnitude should be grounded in sound economic and safety analyses in which the regulator, the regulated community, and all stakeholders have the utmost confidence. Thank you in advance for your careful consideration to these comments and we stand ready to supply any additional data that FMCSA may request.