



California’s Meal and Rest Break Rules; Petition for Determination of Preemption  
**Docket ID:** FMCSA-2018-0304

Truth About Trucking, LLC aka “AskTheTrucker” requests that the FMCSA deny the ATA Petition-- California’s Meal and Rest Break Rules; Petition for Determination of Preemption based upon 49 U.S.C. 31141.

We believe the meal and rest break requirements of California law should not be preempted, as applied to commercial motor vehicle drivers as preemption of states right do not meet criteria as defined by 49 U.S.C. 31141

**This is the second time the ATA has applied for such an exemption from the FMCSA**

On July 3, 2008, James H. Hanson, Esq., Scopelitis, Garvin, Light, Hanson & Feary, P.C., petitioned the Federal Motor Carrier Safety Administration (FMCSA) on behalf of a group of motor carriers <sup>[1]</sup> to preempt the California statutes and rules requiring transportation industry employers to give their employees meal and rest breaks during the work day, as applied to drivers of commercial motor vehicles (CMVs) subject to the FMCSA hours-of-service (HOS) regulations. For the reasons set forth below, FMCSA rejects the petition

On Dec 24, 2008 the FMCSA announced the rejection rejected the petition <https://www.federalregister.gov/documents/2008/12/24/E8-30646/petition-for-preemption-of-california-regulations-on-meal-breaks-and-rest-breaks-for-commercial>

2008 Decision: **FMCSA announces the rejection of a petition for preemption** of California laws and regulations requiring employers to provide employees with meal and rest breaks. The petition does not satisfy the threshold requirement for preemption under [49 U.S.C. 31141\(c\)](#) because the provisions at issue are **not “laws and regulations on commercial motor vehicle safety,” but rather laws and regulations applied generally to California employers.**

**Nothing has changed since 2008. Why another attempt at this petition?**

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**49 U.S.C. § 31141 - U.S. Code . Transportation § 31141.**

**(1) Review.** --The Secretary shall review State laws and regulations on commercial motor vehicle safety. The Secretary shall decide whether the State law or regulation--

(A) has the same effect as a regulation prescribed by the Secretary under [section 31136](#) ;

(B) is less stringent than such regulation; or

(C) is additional to or more stringent than such regulation.

**(2) Regulations with same effect.** --If the Secretary decides a State law or regulation has the same effect as a regulation prescribed by the Secretary under [section 31136](#) of this title, the State law or regulation **may be enforced.**

**(3) Less stringent regulations.** --If the Secretary decides a State law or regulation is less stringent than a regulation prescribed by the Secretary under [section 31136](#) of this title, the State law or regulation may not be enforced.

**(4) Additional or more stringent regulations.** --If the Secretary decides a State law or regulation is additional to or more stringent than a regulation prescribed by the Secretary under [section 31136](#) of this title, the State law or regulation may be enforced unless the Secretary also decides that--

(A) the State law or regulation has no safety benefit;

(B) the State law or regulation is incompatible with the regulation prescribed by the Secretary; or

(C) enforcement of the State law or regulation would cause an unreasonable burden on interstate commerce.

**(5) Consideration of effect on interstate commerce.** --In deciding under paragraph (4) 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.

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Truth About Trucking LLC believes the California State Meal and Rest Break is more stringent than section 3116 and therefore should be enforced. The Meal and Rest Break laws do not meet any of the criteria below which the ATA has claimed:

(A) the State law or regulation has no safety benefit;  
(It has a great safety benefit as if offers the ability to take a break if needed.)

(B) the State law or regulation is incompatible with the regulation prescribed by the Secretary; or  
(It is compatible)

(C) enforcement of the State law or regulation would cause an unreasonable burden on interstate commerce.

(There is not a burden on interstate commerce. The courts have ruled this many times, all the way up to the Supreme court and Congress has agreed.)

Truth About Trucking believes that **Meal and Rest Breaks** has a great safety benefit, offering opportunity to drivers to take a needed rest breaks if they choose to. Ca law requires employers, including the transportation industry, to provide 10-minute paid rest breaks every 4 hours and a 30 min non-paid meal break after 5 hours. The drivers have the option to waive taking these rest breaks and the 30-minute meal break. If they work 12 hours or more, they will take a 30 min meal break.

The fact that drivers are provided the option to take these breaks is a safety benefit. By requiring carriers to provide these breaks, allows drivers to take them or not.

### **California's Break Laws Are Flexible**

The laws do not dictate “exactly when” employers must provide meal and rest breaks, but instead allow for substantial flexibility in determining when to provide employees with breaks.

1. Allowed Meal Break Waiver -- if nature of work prevents an employee from being relieved of all duty;
2. Rest breaks need not be taken at precise times, nor must they be taken before or after the meal period;
3. Each industry is entitled to flexibility – “may vary from industry to industry.” *Brinker*, 273 P.3d at 537.

### **The Law Allows Payment of Premium Wages in Lieu of Breaks**

Employers who fail to provide meal and rest breaks must “pay the employee one additional hour of pay at the employee’s regular rate of compensation for each work day that the meal or rest period is not provided.” Cal. Labor Code § 226.7. This “additional hour of pay” is not a penalty, but a “premium wage,” like overtime pay. *Murphy v. Kenneth Cole Prods., Inc.*, 155 P.3d 284, 289-97 (Cal. 2007).

### **Congress Did Not Give the Transportation Industry a “free pass” From State Employment Laws**

Whereas Congress was very specific about the public-utility-like regulations it sought to preempt, there is no evidence that Congress intended to free the transportation industry of fundamental state-law workplace protections. California’s meal-and-rest break requirements have been on the books since 1916, and for more than three decades, they have coexisted with the federal transportation deregulation laws, beginning in 1979 with the ADA. That “long history ... adds force to the basic presumption against pre-emption.” *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (“If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly.”) Carriers cannot force employees to work long hours without the **opportunity** to take sufficient meal and rest breaks.

### **Paid for all Time – Something drivers have been fighting for a long time.**

Note that CA Law also requires employers to pay employees for all time worked. This includes detention time. California Labor Code Section 226.2 - Truck drivers in California who are paid by the mile or by the load must be paid separately for time that they are not actually

driving. This means that companies that pay their drivers by the piece must also pay them an hourly rate for time spent doing things like vehicle inspections and detention time.

We believe” Paying for all time worked” is the motive behind the ATA Meal and Rest Break petition because, should FMCSA grant the Meal and Rest Break petition, it would open the door to also Preempting other Ca law, such as “paying drivers for time worked”,( requiring drivers to be paid for their non driving tasks).

## **BACKGROUND**

Driver wages have not significantly gone up since the 70’s. Also, most CMV drivers are paid piece work wages, or in other words, the miles they drive. They are exempt from overtime, no matter how many hours they work per the Fair Labor Standards Act ( FLSA) Drivers work many hours without pay, performing other non-driving tasks ( including detention time), which has been a bone of contention for years.

To make matters worse, drivers are not just primarily paid for the miles they drive, but are also limited to how many hours they may drive. Hours of Service

<https://www.fmcsa.dot.gov/regulations/hours-of-service>

**In other words, they are paid by the mile and regulated by the clock.**

It is well known throughout the industry that drivers are delayed at docks for hours and hours, sometimes more than 24 hours, and many of them are not paid. California laws require carriers to pay them for this time. Not only are they not getting paid for these hours, but their hours on their 14-hour clock are ticking, limiting --

- 1) Their ability to drive more miles to earn more money
- 2) Limiting their time available to find parking as many times drivers hours run out waiting to be loaded or unloaded at the Shippers and Receivers docks. To add insult to injury, most of these facilities will not allow drivers to park on premises when their hours run out.

**Truck Parking** - Please note, as part of the ATA 14-page letter to Administrator Ray Martinez, 4 pages referred to the truck parking shortage. <https://www.scribd.com/document/389612368/Meal-rest-break-petition-to-FMCSA-Administrator-Ray-Martinez>

ATA claims that allowing drivers to take an optional 10-minute break every 4 hours and an optional meal break after 5 hours is going to exacerbate the truck parking shortage crisis, a crisis that the industry has experienced for decades.

Where is the study and data correlating Meal and Rest Break laws with increased truck parking problems in CA?

As a matter fact, On April 26<sup>th</sup> Rep. Jeff Denham attempted to claim, before voting for the Denham Amendment in H.R.4 in the House, that drivers would have to immediately pull over and try to find parking and stop to take their rest break.

Rep Peter DeFazio immediately called him on this misleading false statement telling everyone in the House voting, that this was not true, the driver can waive their rest break. These are the same Fear Tactics the ATA has used to scare drivers, hoping they would be in favor of the

Denham Amendment. <http://askthetrucker.com/ata-attacks-truck-drivers-advocates-for-spreading-truth-about-denham-amendment/>

Another time when Peter DeFazio had to correct false statements regarding parking, meal and rest breaks.

HON. PETER A DEFAZIO OF OREGON IN THE HOUSE OF REPRESENTATIVES  
Monday, March 21, 2016

*The trucking companies supporting Section 611 argue that a driver would have to pull off the road at inconvenient times or in potentially unsafe situations to take a break. **That is simply not true.** In fact, case law has specifically established that employers do not have to require employees to take a break they simply must permit it by relieving employees of duties or pay employees for the time*

**The Denham Amendment**, which has recently failed to be included in the recent FAA reauthorization bill, also would have preempted State Rights and would have nullified the CA Meal and Rest Break along with having to pay drivers for all time worked, including their detention time.

We believe this petition request is a result of the Denham Amendment failing to be added in the most recent FAA reauthorization bill. H.R. 302

## **TRUCK PARKING**

If the ATA is so concerned about the Truck Parking Shortage, which according to their letter to Administrator Martinez they claim to be, where were they **before** their concerns about “Meal and Rest breaks” and the prior problems with truck parking?

In their letter to Administrator Martinez, they refer to murdered trucker Jason Rivenburg, who was killed because he could not find adequate truck parking.

Where was the ATA when Jason Rivenburg was murdered in 2009? Where were they when widow Hope Rivenburg was knocking on doors at Capitol Hill to have co-sponsors to the bill “Jason’s Law” introduced by Paul Tonko? Did they support her? No, they did not.

Hope Rivenburg was a widow with 3 children under the age of 3 leading the crusade to D.C. Did they support her financially? Did they make calls? Where were they when we were creating National Call-In Days to have “Jason’s Law” included in Map 21? We and the other truck driver advocates, namely Desiree Wood of Real Women in Trucking, were supporting Hope Rivenburg during her relentless crusade to create more safe truck parking. Where was the ATA then?

We know all about the Truck Parking Shortage as we have been writing about it since 2009 when Jason Rivenburg was murdered. As a matter of fact, before the DOT truck parking survey, there was a comprehensive Truck Parking Survey released by trucker advocates.

Desiree Wood of RealWomenInTrucking.org was the project manager of the 2013 “Jason’s Law” Truck Parking Survey which was delivered to FHWA by Hope Rivenburg <http://askthetrucker.com/truck-parking-survey/>

Yes, we have a truck parking shortage, but providing drivers a 10 min optional rest break a 30-minute optional meal break is not the cause and does not exacerbate the problem.

### **Shippers and Receivers and the Truck Parking Shortage**

What is a problem however, is the fact that drivers are held up at shippers and receivers for hours on end without pay, having their hours run out, and rushing to find available safe truck parking, Perhaps the ATA should “petition” their customers (many who are members of ATA) to either load or unload in a reasonable time AND charge them for driver wait time so drivers can be paid detention time. Or perhaps shippers and receivers should be attending the FHWA Truck Parking Coalition to help alleviate the truck parking crisis. They do not attend.

### **FIGHTING MEAL & REST BREAK IS NOT NEW.**

Besides the fact that this same petition was filed by the ATA to the FMCSA 10 years ago (and was rejected), the ATA has made numerous attempts in court to preempt state laws protecting employees. Their cases included either not providing meal & rest breaks, or not paying for working time other than driving. They lost in the higher courts and were refused to be heard by the Supreme Court.

In perhaps the biggest win for truck drivers, on February 23, 2015 the United States Supreme Court declined to review *People ex rel. Harris v. Pac Anchor Transportation, Inc.* In that case, the California Supreme Court had held that state law is not preempted by a federal law called the Federal Aviation Administration Authorization Act of 1994 (“FAAAA”). The Court noted that there was nothing in the FAAA that indicated that Congress had intended to preempt state wage and hour standards.

After losing in Courts, they then went to Congress, with the help of Rep Jeff Denham (R- CA 10) who introduced the Denham Amendment to major legislation in 2015.

<http://askthetrucker.com/how-to-ensure-fair-trucker-wages-in-the-2015-transportation-bill/>

With the help of trucker advocates and lawmakers, the Denham Amendment failed to pass in 2015, but there were many other attempts to add this provision in other pieces of legislation, including the most recent FAA reauthorization bill, which also failed.

Lawmakers saw the amendment for what it was. An attempt to control and limit trucker wages by Preempting State Labor Laws. <http://askthetrucker.com/infographic-stop-new-legislation-truck-driver-wages-at-risk/>

So here we are again, once again back to the FMCSA, 10 years later, full cycle, to Preempt State Labor Laws.

The ATA claims they are being hit with law suits. This is true, and they have lost in court. They have also lost to Congress.

Our thoughts to the ATA: If you don't want to be taken to court, then drivers should be provided and paid for their optional 10 minute rest breaks, provided with their optional meal break, and compensated for their detention time in states that require to do so.

Here's a thought: Why not just provide meal and rest breaks and pay drivers for their detention time in all states?

As a matter of fact, the industry itself should follow the lead of states who protect employees, paying them for all time worked and providing optional paid 10-minute rest breaks. This would most likely help the industry's "**truck driver shortage**" and entice more people to enter the industry. As of now, people do not want to enter the industry because they understand that drivers are paid by the mile, governed by a clock, and expected to spend 30 - 40 hours hour weeks without pay performing tasks other than driving. <https://www.ccjdigital.com/waiting-to-go-broke/>

With all the incentives being offered to attract more truck drivers into the industry, not once have we observed carriers advertising that they will pay driver detention time. Why is that? Could it be that they were counting on the Denham Amendment to Preempt State laws so that they would legally not have to pay anything more than piece work wages: miles driven?

**The California Meal & Rest Break** does not cause unreasonable burden on interstate commerce. The courts have clearly said this based on Congress intended meaning of the 1994 Federal Aviation Administration Authorization Act (FAAAA) The only burden it places is on the carrier because they can no longer have "free work" in states that require employees to be paid for optional breaks and for all their non-driving tasks such as detention time. The Meal and Rest Break Preemption is another attempt to override states who protect workers from being exploited. The courts agree and Congress agrees.

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