BILLING CODE 4910-60-P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA-2016-0097; PDA-38(R)]

Hazardous Materials: California Meal and Rest Break Requirements

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Public Notice and Invitation to comment.

SUMMARY: Interested parties are invited to comment on an application by the National Tank Truck Carriers, Inc. (NTTC) for an administrative determination as to whether Federal hazardous material transportation law preempts regulations of the State of California that prohibit an employer from requiring an employee to work during any mandatory meal or rest period.

DATES: Comments received on or before [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] and rebuttal comments received on or before [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] will be considered before an administrative determination is issued by PHMSA's Chief Counsel. Rebuttal comments may discuss only those issues raised by comments received during the initial comment period and may not discuss new issues.

ADDRESSES: The NTTC's application and all comments received may be reviewed in the Docket Operations Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE, Washington, DC 20590. The application and all comments are available on the U.S. Government Regulations.gov website: http://www.regulations.gov.

Comments must refer to Docket No. PHMSA-2016-0097 and may be submitted by any of the following methods:

- *Federal eRulemaking Portal*: Go to http://www.regulations.gov. Follow the online instructions for submitting comments.
- *Fax*: 1-202-493-2251.
- *Mail*: Docket Operations Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE, Washington, DC 20590.
- *Hand Delivery*: Docket Operations Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

A copy of each comment must also be sent to (1) Prasad Sharma, Esq., Scopelitis, Garvin, Light, Hanson & Feary, 1850 M Street, NW, Suite 280, Washington, DC 20036, and (2) Kamala D. Harris, Attorney General, Office of the Attorney General, 1300 "I"

Street, Sacramento, CA 95814-2919. A certification that a copy has been sent to these persons must also be included with the comment. (The following format is suggested: "I certify that copies of this comment have been sent to Mr. Sharma and Ms. Harris at the addresses specified in the Federal Register.")

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing a comment submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477-78), or you may visit http://www.regulations.gov.

A subject matter index of hazardous materials preemption cases, including a listing of all inconsistency rulings and preemption determinations, is available through PHMSA's home page at http://phmsa.dot.gov. From the home page, click on "Hazardous Materials Safety," then on "Standards & Rulemaking," then on "Preemption Determinations" located on the right side of the page. A paper copy of the index will be provided at no cost upon request to Mr. Lopez, at the address and telephone number set forth in the FOR FURTHER INFORMATION CONTACT section below.

FOR FURTHER INFORMATION CONTACT: Vincent Lopez, Office of Chief Counsel (PHC-10), Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE, Washington, DC 20590; telephone No. 202-366-4400; facsimile No. 202-366-7041.

SUPPLEMENTARY INFORMATION:

I. Application for a Preemption Determination

NTTC has applied to PHMSA for a determination whether Federal hazardous material transportation law, 49 U.S.C. 5101 et seq., preempts California meal and rest break requirements, as applied to hazardous materials carriers. NTTC states "California law . . . generally prohibits an employer (e.g., a motor carrier) from requiring an employee (e.g., a driver) to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission ('IWC')."[1] The IWC Order for the transportation industry, codified in the California Code of Regulations (CCR), title 8, section 11090, contains the requirements for meal and rest periods. Under the rules, an employee is entitled to a thirty minute meal period after five hours of work and a second thirty minute meal period after ten hours of work. Generally, the employee must be "off duty" during the meal period. For rest periods, employees are entitled to a ten minute rest period for every four hours worked. And, if a meal or rest period is not provided, the employer shall pay the employee one hour of pay. [2]

NTTC presents three main arguments for why it believes the meal and rest break requirements should be preempted. First, NTTC contends that the California requirements "were not promulgated with an eye toward safe transportation of hazardous materials[,]" or the Federal hours of service regulations, and thus, they create the potential for unnecessary delay when a driver must deviate from his or her route to

[1] *See* CA LABOR §§ 226.7 (2015); 512 (2015).
[2] The relevant IWC provisions for meal and rest periods are located in section 11 (Meal Periods) and section 12 (Rest Periods). *See* 8 CCR §§ 11090(11) and (12).

comply with the requirements. Next, NTTC argues that the meal and rest break requirements conflict with the Hazardous Material Regulations (HMR)'s attendance requirements because under certain circumstances, the HMR "implicate the driver 'working' under California law." As such, NTTC says that a carrier (employer) cannot comply with both the State and Federal requirements. Last, NTTC points out that although not mandatory in the HMR security plan requirements, many motor carriers include a "constant attendance of cargo" requirement in their written security plans. However, NTTC contends that the California meal and rest break requirements are inflexible and may create unnecessary stops or prohibit constant attendance. Therefore, NTTC believes the requirements are an obstacle to the security objectives of the HMR.

In summary, NTTC contends the California meal and rest break regulations should be preempted because they:

- Create unnecessary delay for the transportation of hazardous materials;
- Conflict with the HMR attendance requirements; and
- Create an obstacle to accomplishing the security objectives of the HMR.

II. Federal Preemption

Section 5125 of 49 U.S.C. contains express preemption provisions relevant to this proceeding. As amended by Section 1711(b) of the Homeland Security Act of 2002 (Pub. L. 107-296, 116 Stat. 2319), 49 U.S.C. 5125(a) provides that a requirement of a State, political subdivision of a State, or Indian tribe is preempted -- unless the non-

Federal requirement is authorized by another Federal law or DOT grants a waiver of preemption under § 5125(e) -- if

> (1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible; or
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> (2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.

These two paragraphs set forth the "dual compliance" and "obstacle" criteria that PHMSA's predecessor agency, the Research and Special Programs Administration, had applied in issuing inconsistency rulings prior to 1990, under the original preemption provision in the Hazardous Materials Transportation Act (HMTA). Pub. L. 93-633 § 112(a), 88 Stat. 2161 (1975). The dual compliance and obstacle criteria are based on U.S. Supreme Court decisions on preemption. *Hines* v. *Davidowitz*, 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); *Ray* v. *Atlantic Richfield, Inc.*, 435 U.S. 151 (1978).

Subsection (b)(1) of 49 U.S.C. 5125 provides that a non-Federal requirement concerning any of the following subjects is preempted -- unless authorized by another Federal law or DOT grants a waiver of preemption -- when the non-Federal requirement is not "substantively the same as" a provision of Federal hazardous material transportation law,

a regulation prescribed under that law, or a hazardous materials security regulation or directive issued by the Department of Homeland Security:

> (A) the designation, description, and classification of hazardous material.
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> (B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.
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> (C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.
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> (D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material and other written hazardous materials transportation incident reporting involving State or local emergency responders in the initial response to the incident.
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> (E) the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce.

To be "substantively the same," the non-Federal requirement must conform "in every significant respect to the Federal requirement. Editorial and other similar *de minimis* changes are permitted." 49 CFR 107.202(d).[3]

The 2002 amendments and 2005 reenactment of the preemption provisions in 49 U.S.C. 5125 reaffirmed Congress's long-standing view that a single body of uniform Federal regulations promotes safety (including security) in the transportation of hazardous materials. More than thirty years ago, when it was considering the HMTA, the Senate Commerce Committee "endorse[d] the principle of preemption in order to preclude a

[3] Additional standards apply to preemption of non-Federal requirements on highway routes over which hazardous materials may or may not be transported and fees related to transporting hazardous material. *See* 49 U.S.C. 5125(c) and (f). *See also* 49 CFR 171.1(f) which explains that a "facility at which functions regulated under the HMR are performed may be subject to applicable laws and regulations of state and local governments and Indian tribes."

multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation." S. Rep. No. 1102, 93rd Cong. 2nd Sess. 37 (1974). When Congress expanded the preemption provisions in 1990, it specifically found:

> (3) many States and localities have enacted laws and regulations which vary from Federal laws and regulations pertaining to the transportation of hazardous materials, thereby creating the potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting registration, permitting, routing, notification, and other regulatory requirements,
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> (4) because of the potential risks to life, property, and the environment posed by unintentional releases of hazardous materials, consistency in laws and regulations governing the transportation of hazardous materials is necessary and desirable,
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> (5) in order to achieve greater uniformity and to promote the public health, welfare, and safety at all levels, Federal standards for regulating the transportation of hazardous materials in intrastate, interstate, and foreign commerce are necessary and desirable.

Pub. L. 101-615 § 2, 104 Stat. 3244. (In 1994, Congress revised, codified and enacted the HMTA "without substantive change," at 49 U.S.C. Chapter 51. Pub. L. 103-272, 108 Stat. 745 (July 5, 1994).) A United States Court of Appeals has found uniformity was the "linchpin" in the design of the Federal laws governing the transportation of hazardous materials. *Colorado Pub. Util. Comm'n* v. *Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991).

III. Preemption Determinations

Under 49 U.S.C. 5125(d)(1), any person (including a State, political subdivision of a State, or Indian tribe) directly affected by a requirement of a State, political subdivision

or tribe may apply to the Secretary of Transportation for a determination whether the requirement is preempted. The Secretary of Transportation has delegated authority to PHMSA to make determinations of preemption, except for those concerning highway routing (which have been delegated to the Federal Motor Carrier Safety Administration). 49 CFR 1.97(b).

Section 5125(d)(1) requires notice of an application for a preemption determination to be published in the Federal Register. Following the receipt and consideration of written comments, PHMSA publishes its determination in the Federal Register. *See* 49 CFR 107.209(c). A short period of time is allowed for filing of petitions for reconsideration. 49 CFR 107.211. A petition for judicial review of a final preemption determination must be filed in the United States Court of Appeals for the District of Columbia or in the Court of Appeals for the United States for the circuit in which the petitioner resides or has its principal place of business, within 60 days after the determination becomes final. 49 U.S.C. 5127(a).

Preemption determinations do not address issues of preemption arising under the Commerce Clause, the Fifth Amendment or other provisions of the Constitution, or statutes other than the Federal hazardous material transportation law unless it is necessary to do so in order to determine whether a requirement is authorized by another Federal law, or whether a fee is "fair" within the meaning of 49 U.S.C. 5125(f)(1). A State, local or Indian tribe requirement is not authorized by another Federal law merely because it is

not preempted by another Federal statute. *Colorado Pub. Util. Comm'n* v. *Harmon*, above, 951 F.2d at 1581 n.10.

In making preemption determinations under 49 U.S.C. 5125(d), PHMSA is guided by the principles and policies set forth in Executive Order No. 13132, entitled "Federalism" (64 FR 43255 (Aug. 10, 1999)), and the President's May 20, 2009 memorandum on "Preemption" (74 FR 24693 (May 22, 2009)). Section 4(a) of that Executive Order authorizes preemption of State laws only when a statute contains an express preemption provision, there is other clear evidence Congress intended to preempt State law, or the exercise of State authority directly conflicts with the exercise of Federal authority. The President's May 20, 2009 memorandum sets forth the policy "that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption." Section 5125 contains express preemption provisions, which PHMSA has implemented through its regulations.

IV. Public Comments

All comments should be directed to whether 49 U.S.C. 5125 preempts regulations of the State of California that prohibit an employer from requiring an employee to work during any mandatory meal or rest period. Comments should specifically address the preemption criteria discussed in Part II above.

Issued in Washington, DC, on August 23, 2016.

Joseph Solomey,
Senior Assistant Chief Counsel.

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