

## I. Public Participation

### A. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to <http://www.regulations.gov>. Insert the docket number, FMCSA–2013–0121, FMCSA–2014–0103, FMCSA–2014–0385, FMCSA–2015–0329, FMCSA–2016–0002, FMCSA–2017–0059, or FMCSA–2018–0135, in the keyword box, and click “Search.” Next, click the “Open Docket Folder” button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

### B. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at [www.transportation.gov/privacy](http://www.transportation.gov/privacy).

## II. Background

On October 1, 2020, FMCSA published a notice announcing its decision to renew exemptions for 14 individuals from the hearing standard in 49 CFR 391.41(b)(11) to operate a CMV in interstate commerce and requested comments from the public (85 FR 62009). The public comment period ended on November 2, 2020, and no comments were received.

FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with § 391.41(b)(11).

The physical qualification standard for drivers regarding hearing found in § 391.41(b)(11) states that a person is physically qualified to drive a CMV if that person first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a

hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5–1951.

This standard was adopted in 1970 and was revised in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, 35 FR 6458, 6463 (April 22, 1970) and 36 FR 12857 (July 3, 1971).

## III. Discussion of Comments

FMCSA received no comments in this proceeding.

## IV. Conclusion

Based upon its evaluation of the 14 renewal exemption applications, FMCSA announces its decision to exempt the following drivers from the hearing requirement in § 391.41(b)(11).

As of October 13, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following 14 individuals have satisfied the renewal conditions for obtaining an exemption from the hearing requirement in the FMCSRs for interstate CMV drivers (85 FR 62009):

Cory Adkins (FL)  
David Alagna (TN)  
Matthew Albrecht (PA)  
Keith Bryd (TN)  
David Chappellear (TX)  
Ralph Domel (TX)  
Jacquelyn Hetherington (OK)  
Paul Mansfield (KS)  
Ervin Mitchell (TX)  
Jose Ramirez (IL)  
Fernando Ramirez-Savon (FL)  
Thomas Sner (MN)  
Daniel Stroud (UT)  
Janyn Wynne (TX)

The drivers were included in docket number FMCSA–2013–0121, FMCSA–2014–0103, FMCSA–2014–0385, FMCSA–2015–0329, FMCSA–2016–0002, FMCSA–2017–0059, and FMCSA–2018–0135. Their exemptions were applicable as of October 13, 2020, and will expire on October 13, 2022.

In accordance with 49 U.S.C. 31315(b), each exemption will be valid for 2 years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

### Larry W. Minor,

Associate Administrator for Policy.

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## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2019–0128]

### Washington’s Meal and Rest Break Rules for Drivers of Commercial Motor Vehicles; Petition for Determination of Preemption

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Order; grant of petition for determination of preemption.

**SUMMARY:** FMCSA grants the petition submitted by the Washington Trucking Associations (WTA) requesting a determination that the State of Washington’s Meal and Rest Break rules (MRB rules) are preempted as applied to property-carrying commercial motor vehicle drivers subject to FMCSA’s hours of service (HOS) regulations. Federal law provides for preemption of State laws on commercial motor vehicle safety that are additional to or more stringent than Federal regulations if they (1) have no safety benefit; (2) are incompatible with Federal regulations; or (3) would cause an unreasonable burden on interstate commerce. FMCSA has determined that Washington’s MRB rules are laws on commercial motor vehicle (CMV) safety, that they are more stringent than the Agency’s HOS regulations, that they have no safety benefits that extend beyond those that the Federal Motor Carrier Safety Regulations (FMCSRs) already provide, that they are incompatible with the Federal HOS regulations, and that they cause an unreasonable burden on interstate commerce. The Washington MRB rules, therefore, are preempted.

**FOR FURTHER INFORMATION CONTACT:** Mr. Charles J. Fromm, Deputy Chief Counsel, Office of the Chief Counsel, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590, (202) 493–0349; [Charles.Fromm@dot.gov](mailto:Charles.Fromm@dot.gov).

### SUPPLEMENTARY INFORMATION:

#### Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at <http://www.regulations.gov>.

*Docket:* For access to the docket FMCSA–2019–0128 to read background documents or comments, go to <http://www.regulations.gov>. The FDMS is available 24 hours each day, 365 days each year.

*Privacy Act:* Anyone may search the FDMS for all comments received into

any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on December 29, 2010. 75 FR 82132.

### Background

On April 8, 2019, WTA petitioned FMCSA to preempt Washington statutes and rules requiring employers to give their employees meal and rest breaks during the work day, as applied to drivers of CMVs subject to FMCSA's HOS rules. For the reasons set forth below, FMCSA grants the petition.<sup>1</sup>

### Washington's Meal and Rest Break Rules

Section 49.12.005 of Washington's Industrial Welfare Act, codified at chapter 49.12, Revised Code of Washington (RCW), defines "employer" as:

"[A]ny person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees, and includes the state, any state institution, state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation. However, this chapter and the rules adopted thereunder apply to these public employers only to the extent that this chapter and the rules adopted thereunder do not conflict with: (i) Any state statute or rule; and (ii) respect to political subdivisions of the state and any municipal or quasi-municipal corporation, any local resolution, ordinance, or rule adopted under the authority of the local legislative authority before April 1, 2003."

The Industrial Welfare Act defines "employee" as, "an employee who is employed in the business of the employer's employer whether by way of manual labor or otherwise." RCW 49.12.005.

To implement the Industrial Welfare Act, the Washington Department of Labor and Industries promulgated regulations at chapter 296–126 of the

Washington Administrative Code (WAC), entitled "Standards of Labor for the Protection of the Safety, Health and Welfare of Employees for All Occupations Subject to Chapter 49.12 RCW." In accordance with WAC 296–126–001(1), the regulations apply to all employers and employees, as defined in the Industrial Welfare Act, except as specifically excluded.<sup>2</sup>

The regulations at WAC 296–126–092 establish the required meal and rest periods employers must provide employees, and read as follows:

"(1) Employees shall be allowed a meal period of at least thirty minutes which commences no less than two hours nor more than five hours from the beginning of the shift. Meal periods shall be on the employer's time when the employee is required by the employer to remain on duty on the premises or at a prescribed work site in the interest of the employer.

"(2) No employee shall be required to work more than five consecutive hours without a meal period."

"(3) Employees working three or more hours longer than a normal work day shall be allowed at least one thirty-minute meal period prior to or during the overtime period."

"(4) Employees shall be allowed a rest period of not less than ten minutes, on the employer's time, for each four hours of working time. Rest periods shall be scheduled as near as possible to the midpoint of the work period. No employee shall be required to work more than three hours without a rest period."

"(5) Where the nature of the work allows employees to take intermittent rest periods equivalent to ten minutes for each 4 hours worked, scheduled rest periods are not required."

### Federal Preemption Under the Motor Carrier Safety Act of 1984

Section 31141 of title 49, United States Code, a provision of the Motor Carrier Safety Act of 1984 (the 1984 Act), 49 U.S.C. Chap. 311, Subchap. III, prohibits States from enforcing a law or regulation on CMV safety that the Secretary of Transportation (Secretary) has determined to be preempted. To determine whether a State law or regulation is preempted, the Secretary must decide whether a State law or regulation: (1) Has the same effect as a regulation prescribed under 49 U.S.C. 31136, which is the authority for much of the FMCSRs; (2) is less stringent than

such a regulation; or (3) is additional to or more stringent than such a regulation. 49 U.S.C. 31141(c)(1). If the Secretary determines that a State law or regulation has the same effect as a regulation based on section 31136, it may be enforced. 49 U.S.C. 31141(c)(2). A State law or regulation that is less stringent may not be enforced. 49 U.S.C. 31141(c)(3). And a State law or regulation that the Secretary determines to be additional to or more stringent than a regulation based on section 31136 may be enforced unless the Secretary decides that the State law or regulation (1) has no safety benefit; (2) is incompatible with the regulation prescribed by the Secretary; or (3) would cause an unreasonable burden on interstate commerce. 49 U.S.C. 31141(c)(4). To determine whether a State law or regulation will cause an unreasonable burden on interstate commerce, the Secretary may consider the cumulative effect that the State's law or regulation and all similar laws and regulations of other States will have on interstate commerce. 49 U.S.C. 31141(c)(5). The Secretary need only find that one of the conditions set forth at paragraph (c)(4) exists to preempt the State provision(s) at issue. The Secretary may review a State law or regulation on her own initiative, or on the petition of an interested person. 49 U.S.C. 31141(g). The Secretary's authority under section 31141 is delegated to the FMCSA Administrator. 49 CFR 1.87(f).

### FMCSRs Concerning HOS for Drivers of Property-Carrying CMVs, Fatigue, and Coercion

For truck drivers operating a CMV in interstate commerce, the Federal HOS rules impose daily limits on driving time. 49 CFR 395.3. In this regard, a driver may not drive after a period of 14 consecutive hours after coming on-duty following 10 consecutive hours off-duty. Id. at 395.3(a)(1)–(2). A driver may drive a total of 11 hours during the 14-hour duty window. Id. at 395.3(a)(3)(i). In addition, after 8 hours of driving time, the HOS rules require long-haul truck drivers operating a CMV in interstate commerce to take a break from driving for at least 30 consecutive minutes, if they wish to continue driving. Id. at 395.3(a)(3)(ii).<sup>3</sup> A driver may satisfy the 30-minute break requirement by spending the time off-duty, on-duty not driving, in the sleeper berth, or any

<sup>1</sup> While WTA seeks preemption of Washington's MRB rules "insofar as they are applied to commercial motor vehicle drivers subject to the hours-of-service regulations promulgated by FMCSA," the Agency's determination of preemption does not apply to drivers of passenger-carrying CMVs in interstate commerce. The Agency, however, would consider any petition asking for a determination as to whether Washington's MRB rules are preempted with respect to such drivers.

<sup>2</sup> The regulations do not apply to newspaper vendors or carriers; domestic or casual labor in or about private residences; agricultural labor as defined in RCW 50.04.150; or sheltered workshops. WAC 296–126–001(2).

<sup>3</sup> On June 1, 2020, FMCSA published a final rule, which went into effect on September 29, 2020, revising the 30-minute break requirement. The revised HOS rules require a "consecutive 30-minute interruption in driving status" after 8 hours of driving time, rather than a 30-minute off-duty break after 8 hours of on-duty time. See Final Rule: Hours of Service of Drivers, 85 FR 33396, 33452.

combination of these non-driving statuses. *Id.* The HOS rules also impose weekly limits after which driving is prohibited. *Id.* at 395.3(b). There are separate HOS rules, imposing different limits on driving time, for drivers of passenger-carrying CMVs. *Id.* at 395.5.

In addition, the FMCSRs also prohibit a driver from operating a CMV, and a motor carrier from requiring a driver to operate a CMV, while the driver is so impaired, or so likely to become impaired by illness, fatigue, or other cause that it is unsafe for the driver to begin or continue operating the CMV. 49 CFR 392.3. The FMCSRs also prohibit a motor carrier, shipper, receiver or transportation intermediary from coercing a driver to operate a CMV in violation of this and other provisions of the FMCSRs or Hazardous Materials Regulations. 49 CFR 390.6.

### The Agency's Prior Decisions Regarding Preemption of Meal and Rest Break Rules Under Section 31141

#### *I. FMCSA's 2008 Decision Rejecting a Petition to Preempt California's MRB Rules*

On July 3, 2008, a group of motor carriers<sup>4</sup> petitioned FMCSA for a determination under 49 U.S.C. 31141(c) that: (1) California's MRB rules were regulations on CMV safety, (2) the putative State regulation imposed limitations on a driver's time that were different from and more stringent than Federal "hours of service" regulations governing the time a driver may remain on duty, and (3) the State law should therefore be preempted. 73 FR 79204.

On December 24, 2008, the Agency denied the petition for preemption, reasoning that California's MRB rules were merely one part of the State's comprehensive regulation of wages, hours, and working conditions, and that they applied to employers in many other industries in addition to motor carriers. 73 FR 79204. FMCSA concluded that California's MRB rules were not regulations "on commercial motor vehicle safety" within the meaning of 49 U.S.C. 31141 because they applied broadly to all employers and not just motor carriers, and that they therefore were not within the scope of the Secretary's statutory authority to declare unenforceable as a State motor vehicle safety regulation that is

inconsistent with Federal safety requirements.<sup>5</sup> *Id.* at 79205–06.

#### *II. FMCSA's 2018 Decision Granting Petitions to Preempt California's MRB Rules, as applied to Drivers of Property-Carrying CMVs*

In 2018, the American Trucking Associations (ATA) and the Specialized Carriers and Rigging Association petitioned FMCSA to reconsider its 2008 decision and declare California's MRB rules preempted under section 31141 insofar as they apply to drivers of CMVs subject to the Federal HOS rules. The ATA acknowledged that FMCSA had previously determined that it could not declare the California MRB rules preempted under section 31141 because they were not regulations "on commercial motor vehicle safety." The 2018 petitioners urged the Agency to revisit that determination, noting that, by its terms, the statute did not limit the Agency's preemption authority to those State laws that directly targeted the transportation industry. Rather, the appropriate question was whether the State law targeted conduct that a Federal regulation designed to ensure motor vehicle safety already covered. The 2018 petitioners also provided evidence that California's meal and rest break laws were detrimental to the safe operation of CMVs.

On December 21, 2018, FMCSA issued a determination declaring California's MRB rules preempted with respect to drivers of property-carrying CMVs subject to the Federal HOS rules. 83 FR 67470. The Agency first acknowledged that it was departing from its 2008 decision finding that the MRB rules were not laws "on commercial motor vehicle safety" because they were laws of broad applicability and not specifically directed to motor vehicle safety. *Id.* at 67473–74. The Agency explained that its 2008 decision was "unnecessarily restrictive" and not supported by either the statutory language or legislative history. *Id.* The Agency considered the fact that the language of section 31141 mirrors that of 49 U.S.C. 31136, which instructs the Secretary to "prescribe regulations on commercial motor

vehicle safety." 49 U.S.C. 31136(a). The Agency explained that Congress, by tying the scope of the Secretary's preemption authority directly to the scope of the Secretary's authority to regulate the CMV industry, provided a framework for determining whether a State law or regulation is subject to section 31141. The Agency concluded that "[I]f the State law or regulation imposes requirements in an area of regulation that is already addressed by a regulation promulgated under 31136, then the State law or regulation is a regulation "on commercial motor vehicle safety." *Id.* at 67473. The Agency further determined that because California's MRB rules plainly regulated the same conduct as the Federal HOS rules, they were laws "on commercial motor vehicle safety."

Having concluded that the California MRB rules were laws "on commercial motor vehicle safety," under section 31141, the Agency next determined that they are additional to or more stringent than the Federal HOS rules. 83 FR 67474–75. FMCSA found that California's MRB rules require employers to provide property-carrying CMV drivers with more rest breaks than the Federal HOS rules; and allow a smaller window of driving time before a break is required. *Id.*

The Agency next explained that because California's MRB rules are more stringent, they may be preempted if the Agency determined that the MRB rules have no safety benefit, that they are incompatible with HOS rules, or that enforcement of the MRB rules would cause an unreasonable burden on interstate commerce. 83 FR 67475. FMCSA found that California's MRB rules provided no safety benefit beyond the Federal regulations, and that, given the current shortage of available parking for CMVs, the required additional breaks adversely impacted safety because they exacerbated the problem of CMVs parking at unsafe locations. *Id.* at 67475–77. The Agency also determined that the MRB rules were incompatible with the Federal HOS rules because they required employers to provide CMV drivers with more breaks, at less flexible times, than the Federal HOS rules. *Id.* at 67477–78.

Lastly, the Agency determined that enforcing California's MRB rules would impose an unreasonable burden on interstate commerce. 83 FR 67478–80. In this regard, the 2018 petitioners and other commenters provided information demonstrating that the MRB rules imposed significant and substantial costs stemming from decreased productivity and administrative burden. *Id.* at 67478–79. The Agency also

<sup>5</sup> In a 2014 amicus brief in the matter of *Dilts v. Penske Logistics, LLC*, United States Court of Appeals for the Ninth Circuit, No. 12–55705 (2014), the United States explained that FMCSA continued to adhere to the view expressed in the 2008 decision that section 31141 did not preempt California's MRB rules because they were not laws "on commercial motor vehicle safety." 2014 WL 809150, 26–27. The Ninth Circuit made no determination whether the MRB rules were within the scope of the Secretary's preemption authority under section 31141 because that question was not before the court. See 769 F.3d 637.

<sup>4</sup> Affinity Logistics Corp.; Cardinal Logistics Management Corp.; C.R. England, Inc.; Diakon Logistics (Delaware), Inc.; Estenson Logistics, LLC; McLane Company, Inc.; McLane/Suneast, Inc.; Penske Logistics, LLC; Penske Truck Leasing Co., L.P.; Trimac Transportation Services (Western), Inc.; and Velocity Express, Inc.

considered the cumulative effect on interstate commerce of similar laws and regulations in other States. Currently 21 States have varying applicable break rules. The Agency determined that the diversity of State regulation of meal and rest breaks for CMV drivers has resulted in a patchwork of requirements that the Agency found to be an unreasonable burden on interstate commerce. Id. at 67479–80.

Accordingly, FMCSA granted the petitions for preemption and determined that California “may no longer enforce” its meal and rest break rules with respect to drivers of property-carrying commercial motor vehicles subject to the HOS rules.

### III. FMCSA’s 2020 Decision Granting a Petition to Preempt California’s MRB Rules, as Applied to Drivers of Passenger-Carrying CMVs

In 2019, the American Bus Association (ABA) submitted a petition to FMCSA requesting a determination that California’s MRB rules are preempted under 49 U.S.C. 31141, as applied to passenger-carrying CMV drivers subject to the Agency’s HOS regulations. Citing the Agency’s 2018 decision, ABA argued that California’s MRB rules are within the scope of the Secretary’s preemption authority under section 31141 because they are laws on CMV safety. In addition, ABA argued that California’s MRB rules undermine existing Federal fatigue management rules, that they are untenable due to inadequate parking for CMVs, and that compliance costs create an unreasonable burden on interstate commerce.

On January 13, 2020, FMCSA issued a determination declaring California’s MRB rules preempted with respect to drivers of passenger-carrying CMVs subject to the Federal HOS rules; the decision was published in the **Federal Register** on January 21, 2020. See 85 FR 3469. The Agency determined that both California’s MRB rules and the Federal HOS rules govern fatigue management for drivers of passenger-carrying CMVs; therefore, they are laws “on commercial motor vehicle safety.” See id. at 3472–74. FMCSA next determined that California’s MRB rules are additional to or more stringent than the Federal HOS rules for passenger carriers because they require employers to provide CMV drivers with meal and rest breaks at specified intervals. See id. at 3474–75. The Agency found that California’s MRB rules provide no safety benefit beyond the Federal regulations and that they are incompatible with the Federal HOS rules. See id. at 3475–77. The Agency also determined that enforcing California’s MRB rules would impose an

unreasonable burden on interstate commerce due to the increased operational burden and costs associated with compliance. See id. at 3478–80. In addition, the Agency considered the cumulative effect on interstate commerce of similar meal and rest break laws and regulations in other States and determined that the diversity of State regulation of meal and rest breaks for CMV drivers has resulted in a patchwork of requirements that is an unreasonable burden on interstate commerce. See id. at 3480.

### The WTA Petition and Comments Received

As set forth more fully below, WTA argued in its 2019 petition that “FMCSA’s recent determination that California’s meal and rest break rules are preempted under section 31141 compels the same conclusion with respect to Washington’s rules.” In this regard, WTA contended that Washington’s MRB rules are like California’s and therefore are also laws “on commercial motor vehicle safety” within the scope of the Secretary’s preemption authority under section 31141. WTA further argued that Washington’s MRB rules are additional to or more stringent than the Federal HOS rules, that they provide no safety benefits beyond the Federal HOS rules, that they are incompatible with the Federal HOS rules, and that they impose an unreasonable burden on interstate commerce. WTA’s petition seeks an FMCSA determination that Washington’s MRB rules, as applied to CMV drivers who are subject to the HOS rules, are preempted pursuant to section 31141 and, therefore, may not be enforced.

FMCSA published a notice in the **Federal Register** on October 9, 2019 seeking public comment on whether Federal law preempts Washington’s MRB rules. 84 FR 54266. Although preemption under section 31141 is a legal determination reserved to the judgment of the Agency, FMCSA sought comment on the issues raised in WTA’s petition or those that were otherwise relevant. Id. The Agency received and considered 33 comments on the petition,<sup>6</sup> with 24 commenters supporting preemption and 9 opposing.<sup>7</sup>

<sup>6</sup> Thirty-five comments were submitted to the docket; however, two comments raised unrelated issues.

<sup>7</sup> The Center for Justice and Democracy submitted a comment letter, opposing WTA’s petition, that 30 organizations joined. Senator Patty Murray and Representative Peter DeFazio submitted a comment letter, opposing WTA’s petition, that 12 members of Congress joined.

The comments are discussed more fully below.

### Decision

#### I. Section 31141 Expressly Preempts State Law, Therefore the Presumption Against Preemption Does Not Apply

In joint comments opposing WTA’s petition, the American Association for Justice and the Washington State Association for Justice (collectively “the Associations for Justice”) contended that Washington’s MRB rules are subject to a presumption against preemption that requires FMCSA to adopt “the reading that disfavors pre-emption” in interpreting section 31141. Quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005), the Associations for Justice argued, “Only if Congress has made its preemptive intent ‘clear and manifest’ will state law be forced to give way ‘[i]n areas of traditional state regulation.’”

The presumption against preemption is a canon of statutory interpretation that courts employ that favors reading ambiguous Federal statutes in a manner that avoids preempting State law absent clear congressional intent to do so. See, e.g., *Association des Eleveurs de Canards et d’Oies du Quebec v. Becerra*, 870 F.3d 1140, 1146 (9th Cir. 2017). The Agency acknowledges that “in all preemption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, [courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Where, however, a provision at issue constitutes an area of traditional State regulation, “that fact alone does not ‘immunize’ state employment laws from preemption if Congress in fact contemplated their preemption.” *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 643 (9th Cir. 2014). And here there is no dispute that Congress has given FMCSA the authority to review and preempt State laws; the only questions concern the application of that authority to specific State laws. The Associations for Justice’s reliance on *Bates v. Dow Agrosciences LLC* is misplaced because section 31141 is an express preemption clause that makes “clear and manifest” Congress’s preemptive intent. FMCSA is aware of no authority suggesting that the presumption against preemption limits an agency’s ability to interpret a statute authorizing it to preempt State laws.

In any event, when a “statute contains an express pre-emption clause, [courts] do not invoke any presumption against pre-emption but instead focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ pre-emptive intent.” *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (quotations omitted); see also *Atay v. County of Maui*, 842 F.3d 688, 699 (9th Cir. 2016). Section 31141 expressly authorizes the Secretary to preempt State laws on commercial motor vehicle safety. Thus, Washington’s MRB rules are not subject to a presumption against preemption, and the question that FMCSA must answer is whether they should be preempted under section 31141.

## *II. Washington’s MRB Rules, as Applied to Drivers of Property-Carrying CMVs, Are Laws or Regulations “on Commercial Motor Vehicle Safety” Within the Meaning of 49 U.S.C. 31141*

The initial question in a preemption analysis under section 31141 is whether the State provisions at issue are laws or regulations “on commercial motor vehicle safety.” 49 U.S.C. 31141(c)(1). In FMCSA’s 2008 decision declining to preempt California’s MRB rules, which are similar to Washington’s rules, the Agency narrowly construed section 31141. In this regard, the Agency concluded that because the MRB rules are “one part of California’s comprehensive regulations governing wages, hours and working conditions,” and apply to many industries, the provisions are not regulations “on CMV safety,” and, thus, were not within the scope of the Secretary’s preemption authority. 73 FR 79204, 79206. FMCSA reconsidered this conclusion and explained in its 2018 decision preempting California’s MRB rules, as applied to driver of property-carrying CMVs, that both the text of section 31141 and its structural relationship with other statutory provisions make it clear that Congress’s intended scope of section 31141 was broader than the construction the Agency gave it in the 2008 decision. In this regard, the Agency explained:

The “on commercial motor vehicle safety” language of section 31141 mirrors that of section 31136, and by tying the scope of the Secretary’s preemption authority directly to the scope of the Secretary’s authority to regulate the CMV industry, the Agency believes that Congress provided a framework for determining whether a State law or regulation is subject to section 31141. In other words, if the State law or regulation imposes requirements in an area of regulation that is already addressed by a regulation promulgated under 31136, then the State law

or regulation is a regulation “on commercial motor vehicle safety.” Because California’s MRB rules impose the same types of restrictions on CMV driver duty and driving times as FMCSA’s HOS regulations, which were enacted pursuant to the Secretary’s authority in section 31136, they are “regulations on commercial motor vehicle safety.” Thus, the MRB rules are “State law[s] or regulation[s] on commercial motor vehicle safety,” and are subject to review under section 31141. 83 FR 67470.

The Agency adopted this reasoning in its January 2020 decision preempting California’s MRB rules, as applied to drivers of passenger-carrying CMVs. 85 FR 3473. Consistent with the Agency’s decisions preempting California’s MRB rules, FMCSA reiterated that if the State law or regulation at issue imposes requirements in an area of regulation that is within FMCSA’s section 31136 regulatory authority, then the State law or regulation is a regulation “on commercial motor vehicle safety.”

With regard to Washington’s MRB rules, WTA argued that, “Washington’s meal and rest break rules . . . are subject to review under section 31141” in accordance with the Agency’s framework established in the 2018 decision preempting California’s MRB rules. Quoting FMCSA’s 2018 decision, WTA further contended that Washington’s MRB rules are laws on CMV safety because they “impose the same types of restrictions on CMV driver duty and driving times as FMCSA’s HOS rules, which were enacted pursuant to the Secretary’s authority in section 31136.” The Agency agrees. The Federal HOS rules have long imposed drive time limits for drivers. In addition, the Federal regulations also prohibit drivers from operating CMVs when fatigued, require drivers to take any additional breaks necessary to prohibit fatigued driving, and prohibit employers from coercing drivers into operating a CMV during these required breaks. Thus, both Washington’s MRB rules and FMCSA’s regulations cover the same subject matter concerning CMV driver duty and driving times. Therefore, the Agency determines that Washington’s MRB rules, as applied to drivers of property-carrying CMVs, are laws on CMV safety.

Joint comments from Washington’s Governor and Attorney General opposing WTA’s petition further illustrate that Washington’s MRB rules are laws on CMV safety. In this regard, the Governor and Attorney General stated, “Washington enacted our meal-and-rest break standards to provide increased safety protections to all drivers.” They further explained, “By ensuring workers can take a rest break

after every four hours worked and a meal break within the first five hours of their shift, Washington’s rules are a critical tool to prevent drivers from reaching the levels of fatigue that could result in significant increased risk of accidents on our roadways . . . .” The Governor and Attorney General characterized the Washington MRB and Federal HOS rules as having “the common purpose of preventing fatigue and decreasing the likelihood of dangerous accidents.” These statements support FMCSA’s conclusion that Washington’s MRB rules are laws “on CMV safety” and, therefore, fall squarely within the scope of the Secretary’s preemption authority.

In comments opposing WTA’s petition, the Washington Department of Labor and Industries argued that the State’s MRB rules are not laws “on CMV safety” but, rather, are “laws of general applicability, governing rest breaks across multiple industries.” Citing *Merriam-Webster Dictionary*, the Department of Labor and Industries further contended that “on” is defined as “with respect to” and that Washington’s MRB rules are not laws “‘with respect to’ commercial motor vehicle safety where [their] topic is not commercial motor vehicle safety but employee meal and rest breaks generally.” The Washington Employment Lawyers Association (WELA) and the International Brotherhood of Teamsters (Teamsters), made similar arguments concerning the generally applicable nature of Washington’s MRB rules in their comments opposing WTA’s petition.

The Agency disagrees. While a State law specifically directed only at CMV safety would unquestionably be within the scope of section 31141, the Federal statute does not limit preemption to State laws enacted only to cover CMV safety. Instead, section 31141 asks the Agency to review “state law[s] or regulation[s] on commercial motor vehicle safety,” and compare them to Federal regulations “on commercial motor vehicle safety” promulgated under 49 U.S.C. 31136 in order to promote a more uniform nationwide regulatory regime. As explained below, a State regulation of broad applicability might, as applied to commercial trucking, raise precisely the concerns that Congress required the Secretary to address in order to avoid unnecessary disuniformity and undue burdens on interstate commerce. See Public Law 98–554, title II § 202, 203; S. Rep. 98–424, at 14 (1984). Therefore, it is immaterial that Washington’s MRB rules have general applicability to employers and workers in the State. When the

MRB rules are applied to CMV drivers, they govern the same conduct as the Federal HOS rules; they are therefore laws on CMV safety.

The Associations for Justice and WELA argued that section 31141 should be read in line with the safety exception to the express preemption provision of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), which preempts State laws that are related to a price, route, or service of a motor carrier of property. See 49 U.S.C. 14501(c). The FAAAA exempts from preemption “the safety regulatory authority of a State with respect to motor vehicles.” See 49 U.S.C. 14501(c)(2)(A). Quoting *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 441 (2002), the Associations for Justice stated that laws directed at safety are exempt from section 14501(c) because section 31141 “affords the Secretary . . . a means to prevent the safety exception from overwhelming [Congress’s] deregulatory purpose.” WELA notes that several district courts have held that California’s MRB rules do not fall within the FAAAA’s safety exception, and argues that the rules therefore cannot be covered by section 31141.

The Agency finds this argument unavailing. Nothing in the FAAAA’s safety exception in section 14501(c)(2)(A) or in the Supreme Court’s decision in *Ours Garage* serves to limit the scope of the Secretary’s preemption authority under section 31141 to just those State laws enacted with the specific intent to cover only CMV safety. Congress enacted sections 14501(c)(2)(A) and 31141 to achieve different purposes; therefore, the scope of one section does not necessarily correlate to the other. In this regard, section 14501(c)(2)(A) serves to ensure that the preemption of a State’s economic authority over motor carriers of property does not infringe upon a State’s exercise of its traditional police power over safety. See *Ours Garage*, 536 U.S. at 426. However, as explained above, Congress enacted the earlier 1984 Act, which includes section 31141, to ensure that there be as much uniformity as practicable whenever a Federal standard and a State requirement cover the same subject matter.<sup>8</sup> The Supreme Court’s decision in *Ours Garage* merely

noted that a State law that falls within the FAAAA’s safety exception—and therefore is not preempted by the FAAAA—may nevertheless be preempted under section 31141. That decision did not suggest that the two provisions are necessarily coextensive. The Agency is not here called upon to decide whether the FAAAA’s safety exception would apply to California’s MRB rules, and need not decide that question in order to determine that section 31141 applies.

The Associations for Justice also argued that the Agency should adhere to the legal position articulated in the 2008 decision regarding California’s rules and stated, “FMCSA’s previous longstanding position is correct—it lacks statutory authority to preempt generally applicable state labor laws that are not specifically directed at safety.” FMCSA disagrees. As the Agency explained in the 2018 and 2020 decisions preempting California’s MRB rules, FMCSA’s prior position articulated in 2008 need not forever remain static. When an Agency changes course, it must provide a “reasoned analysis for the change.” See *Motor Vehicle Manufacturers v. State Farm*, 463 U.S. 29, 42 (1983). FMCSA’s decisions preempting California’s MRB rules acknowledged the Agency’s changed interpretation of section 31141 and provided a reasoned explanation for the new interpretation. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–16 (2009). Similarly, this decision explains the basis for the Agency’s conclusion that Washington’s MRB rules are laws on CMV safety, as applied to drivers of property-carrying CMVs.

WELA argued that section 31141 gives no indication that Congress intended that the Agency’s preemption authority extend to a State law that imposes requirements in an area of regulation that is within FMCSA’s section 31136 regulatory authority. WELA stated, “If Congress had intended such a result, it could (and would) have said so explicitly.” The Agency disagrees. As FMCSA explained in its decisions preempting California’s MRB rules, the Agency’s interpretation of section 31141 is consistent with congressional purposes. Congress was concerned that a lack of uniformity between Federal and State laws on the same subject matter could impose substantial burdens on interstate truck and bus operations, and potentially hamper safety. See, e.g., 1984 Cong. Rec. 28215 (Oct. 2, 1984) (statement of Sen. Packwood); id. at 28219 (statement of Sen. Danforth). Accordingly, as the Senate Report on the bill that became the 1984 Act explained, the preemption review provision was designed to

ensure “as much uniformity as practicable whenever a Federal standard and a state requirement cover the same subject matter.” S. Rep. 98–424 at 14. The Agency believes that the fact that a State regulation may be broader than a Federal safety regulation and impose requirements outside the area of CMV safety does not eliminate Congress’s concerns. Such laws may still be incompatible with Federal safety standards or unduly burden interstate commerce when applied to the operation of a CMV.

Furthermore, the Agency continues to find that its interpretation of section 31141 is consistent with the legislative history of the 1984 Act. As originally enacted, the 1984 Act granted the Agency authority to promulgate regulations “pertaining to” CMV safety, and likewise to review State laws “pertaining to” CMV safety. Public Law 98–554 §§ 206(a), 208(a) (originally codified at 49 U.S.C. App. 2505, 2507). Congress amended these provisions during the 1994 recodification of Title 49 of the United States Code. See Public Law 103–272 (July 5, 1994), 108 Stat. 1008. As recodified, the law allows the Agency to promulgate regulations and review State laws “on commercial motor vehicle safety,” rather than “pertaining to commercial motor vehicle safety.” Compare 49 U.S.C. app. 2505 and 49 U.S.C. app. 2507 (1984) with 49 U.S.C. 31136 and 49 U.S.C. 31141(c)(1). Congress made clear, however, that any changes made during its comprehensive effort to restructure and simplify Title 49 “may not be construed as making a substantive change in the laws replaced.” Public Law 103–272 §§ 1(e), 6(a). The change in wording therefore did not narrow the Agency’s rulemaking authority or the scope of the State laws subject to preemption review. Washington’s MRB rules, as applied to drivers of property-carrying CMVs subject to the HOS rules, clearly “pertain to” CMV safety, as Washington’s Governor and Attorney General confirmed, and therefore fall within the scope of section 31141. See, e.g., “Pertain,” Black’s Law Dictionary (11th ed. 2019) (“To relate directly to; to concern or have to do with.”)

The Associations for Justice argued that, “Congress and the Supreme Court declined to preempt the rules, largely because these laws are viewed as important state employment protections applicable across industries.” In this regard, the Associations stated:

In the last two years, the motor carrier industries have unsuccessfully tried to preempt state meal and rest laws through the legislative branch by amendments to the recently passed Federal Aviation

<sup>8</sup> Congress enacted the 1984 Act 10 years before the FAAAA. See Motor Carrier Safety Act of 1984, Public Law 98–554, title II, sec. 208, 98 Stat. 2829, 2836–37 (Oct. 30, 1984); Federal Aviation Administration Authorization Act of 1994, Public Law 103–305, title VI, sec. 601(c), 108 Stat. 1569, 1606 (Aug. 23, 1994); see also ICC Termination Act of 1995, Public Law 104–88, title I, sec. 103, 109 Stat. 803, 899 (Dec. 29, 1995).

Administration Reauthorization Act of 2018. See H.R.302 FAA Reauthorization Act of 2018, Public Law 115–254 (2018). Congress decided not to include these amendments in the final passage of the bill. Additionally, the trucking industry also unsuccessfully tried to preempt state meal-and-rest-break rules by asking the U.S. Supreme Court to overturn yet another court of appeals decision upholding state meal and rest break laws. *Ortega v. J. B. Hunt Transport, Inc.*, 694 Fed. Appx. 589 (9th Cir. 2017) (unpublished), cert. denied, 138 S. Ct. 2601 (2018). The Supreme Court declined the invitation, allowing the rules to continue to be enforced.

The Agency finds this argument unpersuasive. The Supreme Court has explained that “Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction . . .” *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 187 (1994) (internal quotations omitted); see also *Rapanos v. United States*, 547 U.S. 715, 750 (noting that, while the Supreme Court has “sometimes relied on congressional acquiescence when there is evidence that Congress considered and rejected the ‘precise issue’ presented before the Court,” it does so only when there is “overwhelming evidence of acquiescence”) (emphases in original). Here, the Associations have presented no evidence that Congress considered the “precise issue” of whether State meal and rest break laws are within the Secretary’s preemption authority under section 31141. Thus, what the Associations portray as congressional recognition that the MRB rules are “important state employment protections applicable across industries” should more appropriately be called Congress’s failure to express any opinion. See *id.* The Associations’ argument that the Supreme Court declined to preempt meal and rest break laws is equally flawed. In the matter of *Ortega v. J. B. Hunt Transport, Inc.*, the question before the Ninth Circuit was whether California’s MRB rules were “related to” prices, routes, or services, and therefore as a matter of law preempted by the FAAAA. See 694 Fed. Appx. at 590. The Supreme Court declined to review preemption of California’s MRB rules under the FAAAA, not under section 31141. And even with respect to the FAAAA issue, the Supreme Court’s “denial of a writ of certiorari import[ed] no expression of opinion upon the merits of the case. . .” *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923)).

The Associations for Justice also argued that the Agency’s interpretation of the scope of the phrase “on

commercial motor vehicle safety” in section 31141 would “impose on the Secretary an implausible, impractical burden of reviewing many thousands of background state rules and then determining how their effect on safety compares with federal requirements.” The Agency finds this argument without merit. Title 49 CFR parts 350 and 355 set forth the process for FMCSA’s continuous review of State laws and regulations.

### *III. Washington’s MRB Rules Are “Additional to or More Stringent Than” the Agency’s HOS Rules for Property-Carrying Vehicles Within the Meaning of Section 31141*

Having concluded that Washington’s MRB rules, as applied to drivers of property-carrying CMVs, are laws “on commercial motor vehicle safety,” under section 31141, the Agency next must decide whether they have the same effect as, are less stringent than, or are additional to or more stringent than the Federal HOS rules for property-carrying CMVs. 49 U.S.C. 31141(c)(1). As described above, the Federal HOS rules establish daily and weekly limits on driving time for all drivers of property-carrying CMVs operating in interstate commerce and additionally require long-haul truck drivers to take a break from driving of at least 30 minutes after 8 hours of driving time if they wish to continue driving. 49 CFR 395.3(a)–(b). Washington’s MRB rules require employers to provide a meal period of at least 30 minutes that commences after the second hour and before the fifth hour after the shift commences. WAC 296–126–092(1)–(2). To illustrate, the Department of Labor and Industries explained, “[A]n employee who normally works a 12-hour shift shall be allowed to take a 30-minute meal period no later than at the end of each five hours worked.” See Department of Labor and Industries, Administrative Policy ES.C.6.1, paragraph 5 (Dec. 1, 2017).<sup>9</sup> The Washington MRB rules further provide, “Employees working three or more hours longer than a normal work day shall be allowed at least one thirty-minute meal period prior to or during the overtime period.” WAC 296–126–092(3). While an employee may choose to waive the meal period requirement, the employee may rescind the waiver agreement at any time. See Department of Labor and

<sup>9</sup>The Department of Labor and Industries further explained that while meal periods may be unpaid as long as employees are completely relieved from duty, employees who are not relieved of all work duties during the meal break must be paid. See Department of Labor and Industries, Administrative Policy ES.C.6.1, paragraph 6.

Industries, Administrative Policy ES.C.6.1, paragraph 8.

In addition, Washington’s MRB rules provide for a 10-minute rest period “for each four hours of working time” and must occur no later than the end of the third working hour. WAC 296–126–092(4).<sup>10</sup> The rest period must be scheduled as near as possible to the midpoint of the four hours of working time, and no employee may be required to work more than three consecutive hours without a rest period. See Department of Labor and Industries, Administrative Policy ES.C.6.1, paragraph 11. Employees may not waive their right to a rest period. *Id.* at paragraph 9.

Quoting the Agency’s 2018 decision preempting California’s MRB rules, WTA argued that because Washington’s rules “require employers to provide CMV drivers with more rest breaks than the Federal HOS rules, and they allow a smaller window of driving time before a break is required’ . . . they are additional to, and more stringent than, the federal HOS rules.” In comparing Washington’s and California’s MRB rules, WTA stated, “In certain respects, . . . Washington’s rules are more restrictive than California’s. For example, Washington requires a 30-minute break somewhere between the second and fifth hour of each five-hour work period, while California’s requirement only requires such a break any time before the end of the fifth hour of work.” The Agency agrees. The HOS rules require long-haul truck drivers in interstate commerce to take a 30-minute break from driving within a specified period; however, drivers are not constrained as to when to take the break within that period. While the HOS rules do not require short-haul truck drivers operating in interstate commerce to take a driving break during the duty window, both long- and short-haul drivers may schedule rest periods as needed to avoid driving while too fatigued to do so safely, as the Federal regulations prohibit. See 49 CFR 392.3. Washington’s MRB Rules require employers to provide CMV drivers with more rest breaks than the Federal HOS rules, and they allow a smaller window of driving time before a break is required.

<sup>10</sup>Employers are exempted from the requirement to provide a rest period “Where the nature of the work allows employees to take intermittent rest periods equivalent to ten minutes for each 4 hours worked.” WAC 296–126–092(5). The Department of Labor and Industries defines an “intermittent rest period” as “an interval of short duration in which employees are allowed to rest, relax, and engage in brief personal activities while relieved of all work duties.” Department of Labor and Industries, Administrative Policy ES.C.6.1, paragraph 12.

The Department of Labor and Industries did not deny that Washington's MRB rules require more breaks than the HOS rules. The Department of Labor and Industries argued that the MRB rules are not more stringent than the HOS rules because employers can seek a variance to allow for alternative scheduling of breaks. The Agency disagrees with this argument. Washington plainly requires more breaks at more frequent intervals than the HOS rules. Because of this, employers of drivers of property-carrying CMVs could not meet just the minimum requirements of the Federal HOS rules without violating the MRB rules on their face. That alone is dispositive of the relevant inquiry. See, e.g., S. Rep. No. 98-424, at 14 ("It is the Committee's intention that there be as much uniformity as practicable whenever a Federal standard and a State requirement cover the same subject matter. However, a State requirement and a Federal standard cover the same subject matter only when meeting the minimum criteria of the less stringent provision causes one to violate the other provision on its face.")

In addition, while Washington law<sup>11</sup> provides that employers may receive a variance from the MRB rules if the employer can show "good cause," the Department of Labor and Industries would determine if the employer met the burden of showing that "good cause" exists.<sup>12</sup> Thus, a variance is not a matter of right for employers, and the Department of Labor and Industries may deny a variance request if it determines, in its judgment, that the employer failed to establish good cause. In addition, the Department of Labor and Industries "may terminate and revoke the variance at any time, as long as the employer is given 30 days notice." Department of Labor and Industries, Administrative Policy ES.C.9 (Jan. 2, 2002). Washington's MRB rules therefore are "additional to or more stringent than" the HOS rules.

<sup>11</sup> Under Washington law, "An employer may apply to the director for an order for a variance from any rule or regulation establishing a standard for wages, hours, or conditions of labor adopted by the director under this chapter. The director shall issue an order granting a variance if the director determines or decides that the applicant for the variance has shown good cause for the lack of compliance." RCW 49.12.105.

<sup>12</sup> "Good cause" means, but is not limited to, those situations where the employer can justify the variance and can prove that the variance does not have a harmful effect on the health, safety, and welfare of the employees involved." WAC 296-126-130(4).

#### *IV. Washington's MRB Rules Have No Safety Benefits That Extend Beyond Those That the FMCSRs Provide*

Because Washington's MRB rules, as applied to drivers of property-carrying CMVs, are more stringent than the Federal HOS rules, they may be enforced unless the Agency also decides either that they have no safety benefit, that they are incompatible with the HOS rules, or that enforcement of the MRB rules would cause an unreasonable burden on interstate commerce. 49 U.S.C. 31141(c)(4). The Agency need only find that one of the three conditions in paragraph (c)(4) exists to preempt the MRB rules. Id.

Section 31141 authorizes the Secretary to preempt Washington's MRB rules if they have "no safety benefit." 49 U.S.C. 31141(c)(4)(A). Consistent with the Agency's decisions preempting California's MRB rules, FMCSA continues to interpret this language as applying to any State law or regulation that provides no safety benefit beyond the safety benefit that the relevant FMCSA regulations already provide. The statute tasks FMCSA with determining whether a State law that is more stringent than Federal law, which would otherwise undermine the Federal goal of uniformity, is nevertheless justified. There would be no point to the "safety benefit" provision if it were sufficient that the more stringent State law provides the same safety benefit as Federal law. A State law or regulation need not have a negative safety impact to be preempted under section 31141(c)(4)(A); although, a law or regulation with a negative safety impact could be preempted.

##### A. Fatigue

WTA argued that Washington's MRB rules offer no safety benefits beyond those already realized under Federal regulations and that they "interfere with the flexibility that is an important component of the federal HOS rules." In its comments, ATA agreed, stating:

Washington's break rules offer no prospect of a safety benefit. The federal rules themselves give drivers the absolute right to take a break whenever they believe fatigue or anything else renders them unable to drive safely, 49 CFR 392.3, with stiff penalties for motor carriers or customers who coerce them not to exercise that right, id. § 390.6. Thus, with respect to mitigating driver fatigue, Washington's rules provide federally-regulated commercial drivers with nothing they do not already enjoy under the federal rules.

In joint comments, the National Propane Gas Association and the Pacific Propane Gas Association (collectively, "the Propane Gas Associations") stated that

Washington's MRB rules "do not present [a] reasonable safety benefit for the transportation of hazardous materials." Oak Harbor Freight Lines, a company that employs more than 1,700 people in five western states, commented that the company focuses on its safety data, and, "ha[s] not seen a difference in accident rates or other safety concerns between [the company's] drivers who operate under Washington's rules and those operating under DOT rules."

Other commenters discussed the lack of flexibility under Washington's MRB rules. The National Industrial Transportation League stated, "imposing the Washington standards without any flexibility disincentivizes drivers from taking breaks when they truly are fatigued, as they are forced to take the prescribed breaks when they may not need them. This approach increases rather than reduces the safety risks associated with fatigued driving." Similarly, Uline, an interstate property carrier, commented that FMCSA's HOS rules "provide drivers with the flexibility to take breaks when they actually need them in order to reduce accidents caused by fatigue or exhaustion."

The Agency agrees with WTA. The HOS rules and other provisions of the FMCSRs establish a fatigue management framework for drivers of property-carrying CMVs that requires drivers to take a 30-minute break from driving after eight hours of drive time, prohibits a driver from operating a CMV if she feels too fatigued or is otherwise unable to drive safely, and prohibits employers from coercing a driver too fatigued to operate the CMV safely to remain behind the wheel. See 49 CFR 395.3(a)(3)(ii), 392.3, 390.6. For short-haul drivers who are exempt from FMCSA's 30-minute break requirement, the Federal regulations sufficiently mitigate the risk of crashes by prohibiting fatigued driving and coercion. The HOS rules, moreover, prohibit drivers of property-carrying CMVs from driving more than 11 hours during a 14-hour shift, require them to take at least 10 hours off between 14-hour shifts, and prohibit them from exceeding certain caps on weekly on-duty time. 49 CFR 395.3. The Agency believes that this framework is appropriate because it provides some level of flexibility while still prohibiting a driver from operating a CMV when too fatigued to do so safely. Washington's additional requirements that breaks be of specific durations, and occur within specific intervals, do not provide additional safety benefits. In addition, interposing the MRB rules on top of the



Agency's framework eliminates the regulatory flexibilities provided and requires the driver to stop the CMV and log off duty at fixed intervals each day regardless of the driver's break schedule or actual level of fatigue. FMCSA notes, moreover, that the HOS rules are the product of multiple rounds of thorough consideration of the best ways to ensure CMV safety, extending through the issuance of the recent final rule. See 85 FR 33396 (June 1, 2020). Washington's generally-applicable requirements, in contrast, are not tailored to the specific circumstances of the motor carrier industry, and do nothing to enhance the safety benefits that FMCSA's comprehensive, tailored regulations already provide.

The Department of Labor and Industries contended that Washington's MRB rules have safety benefits and attached the following studies, reports, and other documents, totaling more than 350 pages, to its comments:

1. Susan A. Soccolich, et al., *An Analysis of Driving and Working Hour on Commercial Motor Vehicle Driver Safety Using Naturalistic Data Collection*, 58 *Accident Analysis and Prevention* 249 (2013);
2. Kun-Feng Wu, Paul Jovanis, *Effect of Driving Breaks and 34-hour Recovery Period on Motor Carrier Crash Odds*, In: *Proceedings of the Sixth International Driving Symposium on Human Factors in Driver Assessment, Training and Vehicle Design*, Lake Tahoe, California (2011);
3. Paul P. Jovanis, et al., *Effects of Hours of Service and Driving Patterns on Motor Carrier Crashes*, Transportation Research Board, *Journal of the Transportation Research Board*, No. 2231, p 119–127 (2012);
4. Myra Blanco, et al., *The Impact of Driving, Non-Driving Work, and Rest Breaks on Driving Performance in Commercial Motor Vehicle Operations*, Federal Motor Carrier Safety Administration, FMCSA–RRR–11–017 (2011);
5. Lianzhen Wang, Yulong Pei, *The Impact of Continuous Driving Time and Rest Time on Commercial Drivers' Driving Performance and Recovery*, 50 *Journal of Safety Research* 11 (2014);
6. Sergio Garbarino, et al., *Sleep Apnea, Sleep Debt and Daytime Sleepiness Are Independently Associated with Road Accidents. A Cross-Sectional Study on Truck Drivers*, *PLoS ONE*, e0166262 (2016);
7. Lynn Meuleners, et al., *Determinants of The Occupational Environment and Heavy Vehicle Crashes in Western Australia: A Case-Control Study*, 99 *Accident Analysis and Prevention* 452 (2017);
8. Wash. State Emp't Security Dep't, *2018 Labor Market and Economic Report*;
9. Wash. State Dep't of Licensing, *2018 Statistics At-a-Glance*;
10. Guang X. Chen, et al., *NIOSH National*

*Survey of Long-Haul Truck Drivers: Injury and Safety*, 85 *Accident Analysis & Prevention* 66 (2015);

11. Federal Motor Carrier Safety Administration, *CMV Driving Tips—Driver Fatigue*;
12. Department of Labor and Industries, *Administrative Policy ES.C.6.1* (2017);
13. Chen and Yuanchang Xie, *Modeling the Safety Impacts of Driving Hours and Rest Breaks on Truck Drivers Considering the Dependent Covariates*, 51 *J. Safety Research* 57 (Dec. 2014);
14. Chen and Yuanchang Xie, *The Impacts of Multiple Rest Break Periods on Commercial Truck Drivers' Crash Risk*, 48 *J. Safety Research* 87 (2014);
15. National Transportation Safety Board, *2017–2018 Most Wanted List, Reduce Fatigue Related Accidents* (2017);
16. National Transportation Safety Board, *Safety Recommendation, H–94–005, H–94–006* (1994);
17. National Transportation Safety Board, *Safety Recommendation, H–95–005* (1995);
18. Ping-Huang Ting, et al., *Driver Fatigue and Highway Driving: A Simulator Study*, 94 *Physiology & Behavior* 448 (2008).

While the Department of Labor and Industries did not make a specific argument about most of the documents appended to its comments, it made reference to a few of them. In this regard, the Department of Labor and Industries quoted the Agency's CMV Driving Tips on driver fatigue, which state, “[Thirteen] percent of commercial motor vehicle (CMV) drivers were considered to have been fatigued at the time of their crash.” See FMCSA, *CMV Driving Tips—Driver Fatigue*, also available at <https://www.fmcsa.dot.gov/safety/driver-safety/cm-v-driving-tips-driver-fatigue>. The Driving Tips further advise drivers to take a nap of at least 10 minutes when feeling drowsy. Id. The Department of Labor and Industries also cited two studies published in the *Journal of Safety Research* and argued that “commercial truck drivers' safety performance can deteriorate easily due to fatigue caused by long driving hours and irregular work schedules [and] that increasing the number of rest breaks or their duration helps to reduce crash risk.” See *The Impacts of Multiple Rest Break Periods on Commercial Truck Drivers' Crash Risk and Modeling the Safety Impacts of Driving Hours and Rest Breaks on Truck Drivers Considering the Dependent Covariates*. The Department of Labor and Industries further argued that a study by the National Institute of Occupational Safety and Health (NIOSH) “found that 35% of long-haul truck drivers reported at least one crash in the course of their work as commercial drivers.” See *NIOSH National Survey of Long-Haul*

*Truck Drivers: Injury and Safety*. The Department of Labor and Industries also cited the National Transportation Safety Board's (NTSB) Most Wanted List concerning reducing fatigue-related accidents. See *NTSB 2017–2018 Most Wanted List, Reduce Fatigue-Related Accidents*. In addition, the Associations for Justice cited the NTSB Report, *Evaluation of U.S. Department of Transportation Efforts in the 1990s to Address Operator Fatigue* and argued that “the relevant safety issue is driver fatigue and not inadequate truck parking.” See NTSB Report SR–99/01 (1999).

FMCSA agrees with the Department of Labor and Industries and the Associations for Justice that drowsy driving may cause crashes. The Agency has reached the same conclusion and has established a fatigue management framework for drivers of property-carrying CMVs that mitigates the risks associated with drowsy driving. The FMCSRs establish driving-time limits and prohibit a driver from operating a CMV when too fatigued to do so safely. Washington's MRB rules do not improve upon the Federal regulatory framework. The two *Journal of Safety Research* studies the Department of Labor and Industries cite found that “trips with one or two rest breaks had significantly lower odds” of a crash “compared to trips without any breaks,” and that “having a third rest break did not have a significant effect,” “indicating the third rest break had very limited impacts on reducing crash risk.” *Modeling the Safety Impacts of Driving Hours and Rest Breaks on Truck Drivers Considering the Dependent Covariates* at 62; see also *The Impacts of Multiple Rest Break Periods on Commercial Truck Drivers' Crash Risk* at 88. In other words, the studies support the Agency's conclusion that layering additional break requirements over the Federal HOS regulations—which require a 30-minute break from driving and any additional breaks that a driver finds necessary to avoid unsafe fatigued driving—does not provide additional protection against the risks of fatigued driving. The Jovanis study, *Effects of Hours of Service and Driving Patterns on Motor Carrier Crashes*, further supports this conclusion. *Journal of the Transportation Research Board*, No. 2231 at 126. Similarly, the *NIOSH National Survey of Long-Haul Truck Drivers* the Department of Labor and Industries cites does not show that MRB rules, such as Washington's, provide an additional safety benefit over the Federal HOS regulations. Rather, the purpose of the NIOSH survey was to

“bring to light a number of important safety issues for further research and interventions, e.g., high prevalence of truck crashes, injury underreporting, unrealistically tight delivery schedules, noncompliance with hours-of-service rules, and inadequate entry-level training.” See *NIOSH National Survey of Long-Haul Truck Drivers: Injury and Safety* at 2.

With regard to the other materials that the Department of Labor and Industries appended but did not discuss, FMCSA considered and discussed at length the implications of the Blanco study, *The Impact of Driving, Non-Driving Work, and Rest Breaks on Driving Performance in Commercial Motor Vehicle Operations*, both in promulgating the recent 2020 HOS final rule and in the 2011 HOS final rule. See 85 FR 33412, 33416–17, 33420, 33445; 76 FR 81147–48, 54. In the 2011 HOS final rule, which instituted the original Federal 30-minute break requirement, FMCSA explained that the “Blanco [study] also showed that when non-driving activities (both work- and rest-related) were introduced during the driver’s shift—creating a break from the driving task—these breaks significantly reduced the risk of being involved in a [safety critical event] during the one-hour window after the break.” See 76 FR 81148. The Agency again discussed the Blanco study at length in issuing the 2020 final rule and noted that, consistent with the changes to the Federal 30-minute break requirement, the study found that any type of break (both off-duty, and on-duty not driving) was beneficial to the driver. See 85 FR 33416–17, 33420. FMCSA applied the findings of the Blanco study to the Agency’s HOS rules and determined that requiring drivers to take a 30-minute break from driving after 8 hours of driving time provides safety benefits. *Id.* Moreover, FMCSA’s prohibition against fatigued driving requires drivers to take additional rest as needed. Nothing in the Blanco study supports the conclusion that Washington’s MRB rules provide additional safety benefits not already realized under the HOS rules and FMCSA’s regulatory prohibitions on fatigued driving and coercion.

With regard to the NTSB safety recommendations the Department of Labor and Industries cite, recommendations H–94–005 and H–94–006, addressed to FMCSA’s predecessor agency, the Federal Highway Administration (FHWA), pertained to evaluating which bridges are vulnerable to high-speed heavy-vehicle collision

and subsequent collapse.<sup>13</sup> That issue is not relevant to the instant matter. NTSB safety recommendation H–95–005, addressed to FHWA, ATA, the Professional Truck Driver Institute of America, the Commercial Vehicle Safety Alliance, and the National Private Truck Council, asked the organizations to develop a training and education module to inform truck drivers of the hazards of driving while fatigued. The NTSB closed safety recommendation H–95–005 and noted that FMCSA took acceptable action on the recommendation.<sup>14</sup> Safety recommendation H–95–005 pertains to fatigue management training for truck drivers and in no way suggests that Washington’s MRB rules provide additional safety benefits. The remaining studies that the Department of Labor and Industries appended, two of which examined CMV operations under the rules of China and Australia, do not demonstrate that Washington’s MRB rules provide additional safety benefits beyond those provided by the HOS rules.

Citing the NTSB report, *Evaluation of U.S. Department of Transportation Efforts in the 1990s to Address Operator Fatigue*, the Associations for Justice argued that “the relevant safety issue is driver fatigue and not inadequate truck parking.” The Associations’ argument fails. FMCSA believes that the issues of fatigue and truck parking are relevant to the Agency’s consideration of WTA’s petition. In addition, the Agency notes that as part of the report, the NTSB addressed safety recommendation H–99–019 to FHWA asking the Agency to, “Establish within 2 years scientifically based hours-of-service regulations that set limits on hours of service, provide predictable work and rest schedules, and consider circadian rhythms and human sleep and rest requirements.” See *Evaluation of U.S. Department of Transportation Efforts in the 1990s to Address Operator Fatigue* at 26. The NTSB closed safety recommendation H–99–019 and noted that FMCSA took acceptable alternate action on the recommendation.<sup>15</sup>

<sup>13</sup> NTSB Safety Recommendation H–94–005 may be viewed at [https://www.ntsb.gov/safety/safety-recs/\\_layouts/ntsb.recsearch/Recommendation.aspx?Rec=H-94-005](https://www.ntsb.gov/safety/safety-recs/_layouts/ntsb.recsearch/Recommendation.aspx?Rec=H-94-005). Safety Recommendation H–94–006 may be viewed at [https://www.ntsb.gov/safety/safety-recs/\\_layouts/ntsb.recsearch/Recommendation.aspx?Rec=H-94-006](https://www.ntsb.gov/safety/safety-recs/_layouts/ntsb.recsearch/Recommendation.aspx?Rec=H-94-006).

<sup>14</sup> NTSB Safety Recommendation H–95–005 may be viewed at [https://www.ntsb.gov/safety/safety-recs/\\_layouts/ntsb.recsearch/Recommendation.aspx?Rec=H-95-005](https://www.ntsb.gov/safety/safety-recs/_layouts/ntsb.recsearch/Recommendation.aspx?Rec=H-95-005).

<sup>15</sup> NTSB Safety Recommendation H–99–019 may be viewed at [https://www.ntsb.gov/safety/safety-recs/\\_layouts/ntsb.recsearch/Recommendation.aspx?Rec=H-99-019](https://www.ntsb.gov/safety/safety-recs/_layouts/ntsb.recsearch/Recommendation.aspx?Rec=H-99-019).

The Teamsters argued that Washington’s MRB rules “ensure drivers have alternative legal protections in place helping to guard them against predatory companies who would rather pressure drivers into not taking a break, even when the driver feels it is physically necessary to do so.” The Agency is unpersuaded by the Teamsters’ argument. As explained above, the FMCSRs contain a prohibition against coercion, and the Teamsters point to no evidence showing that the Federal prohibition is any less effective than Washington’s MRB rules in preventing coercion.

FMCSA determines that Washington’s MRB Rules do not provide a safety benefit not already provided by the Federal regulations for property-carrying CMV drivers.

#### B. Parking

WTA argued that Washington’s MRB rules undermine safety “by artificially exacerbating the shortage of safe truck parking” and making it “more likely that drivers will have to spend additional time looking for parking when they need rest, or resort to unsafe places to park.” Several commenters agreed. In this regard, ATA stated, “[T]he predictable effect of Washington’s arbitrary break rules is to exacerbate the shortage of safe and legal truck parking, in Washington and elsewhere . . . .” C.R. England commented, “[I]t may be unsafe or simply impossible for a driver to safely stop a truck, find adequate or safe parking, and leave the truck in order to comply with Washington’s rest break requirements. Other commenters, such as Uline, Hoovestol, and the National Industrial Transportation League also echoed this sentiment. Uline stated, “The limited parking spots should be used by workers actually in need of rest and should not be occupied by drivers that are merely complying with arbitrary rest break laws.” The Truckload Carriers Association cited a 2018 survey where 95 percent of 5,400 surveyed drivers stated that they park in unauthorized areas when legal parking is not available. See Heavy Duty Trucking, August 29, 2018, <https://www.truckinginfo.com/312029/80-of-drivers-say-elds-make-finding-parking-harder>.

The Agency agrees that Washington’s enforcement of the MRB rules could exacerbate the problem of CMV drivers parking at unsafe locations. The shortage of safe, authorized parking spaces for CMVs and the negative safety implication of enforcing the MRB rules is well-documented in FMCSA’s 2018 decision preempting California’s MRB

rules for drivers of property carrying CMVs. See 83 FR 67476–77. Among the parking studies cited by the Agency in the 2018 decision was a 2016 survey of drivers by the Washington State Department of Transportation (WSDOT) showing that more than 60 percent of drivers reported that at least three times per week they drive while fatigued because they are unable to find adequate parking when they need to rest. WSDOT Truck Parking Survey (Aug. 2016).<sup>16</sup> WSDOT conducted the survey during the development of a more comprehensive Truck Parking Study, also published in 2016.<sup>17</sup> WSDOT's Truck Parking Study cited the Federal HOS rules and Washington's MRB rules as factors that drive a higher demand for truck parking.<sup>18</sup> See WSDOT Truck Parking Study at 13, 17–20. While WSDOT recognized that “long-haul drivers largely have different parking needs than short-haul drivers,” the Study included local delivery parking among the types of truck parking considered. See *id.* at 4, 9. The Study found that, “The truck parking shortage in Washington is likely getting worse, with demand increasing and supply potentially decreasing,” and that highway exit and entrance ramps are the third most used parking option for truck drivers. *Id.* at 6. WSDOT's Truck Parking Study demonstrates that Washington's MRB rules contribute to the demand for the State's inadequate truck parking.

Noting that there are 47 rest areas in Washington, the Department of Labor and Industries argued, “Washington has not seen that the timing of rest breaks cause problems with drivers finding places to park.” The Department of Labor and Industries further contended that the Agency should consider that an employer may seek a variance from the MRB rules “to allow for alternative scheduling of breaks.” The Teamsters argued that while “parking is a serious issue faced by some, mainly [over-the-road] drivers” it does not pose a

problem for many other drivers. The Teamsters continued:

The fact that there may be a shortage of truck parking does not excuse a motor carrier or driver from complying with either federal or state laws. Meal and rest break protections should not be thrown out for every driver in Washington state because a small segment of WTAs members claim they have issues with truck parking.

The Agency is not persuaded by the Department of Labor and Industries' arguments. As described above, the WSDOT Truck Parking Study showed that the truck parking shortage in Washington State is worsening, and it cited Washington's MRB rules as one of the factors contributing to demand for truck parking. The Agency is also unpersuaded by the Department's argument that employers may seek a variance to deal with the parking problem. As explained above, the Department of Labor and Industries would determine if the employer met the burden of showing that “good cause” exists for a variance. The Teamsters' argument that the parking shortage poses a problem only for certain over-the-road drivers is also unavailing. WSDOT's Truck Parking Study included local delivery parking in evaluating truck parking supply and demand factors. The Agency believes that, due to the shortage of truck parking in Washington, the increase in required stops to comply with the MRB Rules will exacerbate the problem of truck drivers parking at unsafe locations—such as ramps and shoulders—where they present a serious hazard to other highway users.

#### *V. Washington's MRB Rules Are Incompatible With the Federal HOS Rules for Property-Carrying CMVs*

The Agency has determined that Washington's MRB rules are “additional to or more stringent than a regulation prescribed by the Secretary under section 31136”; therefore, they must be preempted if the Agency also determines that the MRB rules are “incompatible with the regulation prescribed by the Secretary.” 49 U.S.C. 31141(c)(4)(B).

The Agency's 2018 decision, which applied the regulatory definition for “compatibility” that was in effect at that time, 49 CFR 355.5 (2018),<sup>19</sup> determined that California's MRB rules are incompatible with the HOS rules. Citing that decision, WTA argued that

Washington's MRB rules are similarly incompatible. WTA contended that the fact that Washington's MRB rules “require more breaks than the federal rules, with narrower constraints as to timing, means that they are neither identical to nor have the same effect as the FMCSRs” and thus they are incompatible. WTA continued, “Washington's rules ‘significantly reduce the flexibilities the Agency built into the Federal HOS rules, and they graft onto the Federal HOS rules additional required rest breaks that the Agency did not see fit to include.’” (Internal alterations omitted).

On June 24, 2020, FMCSA published a final rule that amended the regulatory definition for “compatible” as that term is applied to a State law or regulation on CMV safety that is in addition to or more stringent than the FMCSRs. See 85 FR 37785 (Jun. 24, 2020). Under the revised definition, codified at 49 CFR 350.105, “compatible” means State laws, regulations, standards, and orders on CMV safety that “if in addition to or more stringent than the FMCSRs, have a safety benefit, *do not unreasonably frustrate the Federal goal of uniformity*, and do not cause an unreasonable burden on interstate commerce when enforced.” (Emphasis added). The final rule explained that the Agency amended the definition of “compatibility” “to align with and incorporate the standard in 49 U.S.C. 31141(c) regarding when a State may enforce a law, regulation, standard, or order on CMV safety that is in addition to or more stringent than the FMCSRs.” 85 FR 37791. Thus, FMCSA must decide whether Washington's MRB rules unreasonably frustrate the Federal goal of uniformity and therefore are incompatible with the Federal HOS rules for property-carrying CMV drivers.

The Agency agrees with WTA and finds that Washington's MRB rules, as applied to drivers of property-carrying CMVs, are incompatible with the Federal HOS rules because they unreasonably frustrate the Federal goal of uniformity. As described above, Washington's generally applicable MRB rules require employers to provide property-carrying CMV drivers with meal and rest breaks of specified duration at specific intervals. In contrast, the HOS rules which are tailored specifically to the CMV industry, provide drivers flexibility in deciding when to take the required 30-minute break from driving. Short-haul drivers are not required to take a rest period under the HOS rules; however, other provisions of the FMCSRs prohibit all drivers from operating a CMV when too fatigued to do so safely. Congress's clear intent for the 1984 Act was to

<sup>16</sup> The WSDOT Truck Parking Survey is available in the docket for this preemption matter and may also be downloaded at [http://www.wsdot.wa.gov/NR/rdonlyres/D2A7680F-ED90-47D9-AD13-4965D6D6BD84/114207/TruckParkingSurvey2016\\_web2.pdf](http://www.wsdot.wa.gov/NR/rdonlyres/D2A7680F-ED90-47D9-AD13-4965D6D6BD84/114207/TruckParkingSurvey2016_web2.pdf).

<sup>17</sup> The WSDOT Truck Parking Study is available in the docket for this preemption matter and may also be downloaded at <https://www.wsdot.wa.gov/Freight/truckparking.htm>.

<sup>18</sup> The WSDOT Truck Parking Study states that drivers not engaging in interstate commerce are required to follow only Washington's MRB rules; however, even drivers operating wholly within the State of Washington may be operating in “interstate commerce” as defined in the FMCSRs and thus subject to both the Washington MRB rules and the HOS rules. See 49 CFR 390.5T (definition of “interstate commerce”).

<sup>19</sup> Under 49 CFR 355.5, in effect in 2018, “Compatible or Compatibility” meant that State laws and regulations applicable to interstate commerce were “identical to the FMCSRs and the HMRs” or had “the same effect as the FMCSRs. . . .” See also 49 CFR 350.105 (2018).

minimize disuniformity in the national safety regulatory regime. See Public Law 98–554, title II § 202, 203 (“The Congress finds that . . . improved, more uniform commercial motor vehicle safety measures and strengthened enforcement would reduce the number of fatalities and injuries and the level of property damage related to commercial motor vehicle operations.”); S. Rep. No. 98–424, at 14 (“It is the Committee’s intention that there be as much uniformity as practicable whenever a federal standard and a state requirement cover the same subject matter.”); see also *id.* at 15 (“In adopting this section, the Committee does not intend that States with innovative safety requirements that are not identical to the national norm be discouraged from seeking better ways to protect their citizens, so long as a strong safety need exists that outweighs this goal of uniformity.”) Washington’s MRB rules frustrate Congress’s goal of uniformity because they abrogate the flexibility that the Agency allows under the HOS rules. This fact renders Washington’s MRB rules incompatible.<sup>20</sup>

The Department of Labor and Industries argued that Washington’s MRB rules are not incompatible with the HOS rules because it is possible for drivers to comply with both the MRB and HOS rules. This argument is unpersuasive. The Agency’s compatibility determination is different from “conflict preemption” under the Supremacy Clause, where conflict arises when it is impossible to comply with both the State and Federal regulations. The express preemption provision in section 31141 does not require such a stringent test. In any event, Washington’s MRB rules actively undermine Congress’s goal of uniformity, as well as FMCSA’s affirmative policy objectives by abrogating the flexibility that the Agency built into the HOS rules. That would be sufficient to support a finding of incompatibility even under the conflict preemption test urged by the Department of Labor and Industries.<sup>21</sup>

<sup>20</sup> The Associations for Justice argued that FMCSA’s 2018 decision preempting California’s MRB rules for drivers of property carrying CMVs erroneously applied the regulatory definition for “compatible,” in effect in 2018 and further contended that the Agency should not apply that compatibility standard to this preemption determination. As explained above, the Agency applies the recently amended definition of “compatible;” therefore, this argument is moot.

<sup>21</sup> The Agency notes that under Washington’s MRB rules, a 10-minute rest period “means to stop work duties, exertions, or activities for personal rest and relaxation.” Department of Labor and Industries, Administrative Policy ES.C.6.1 at paragraph 10. This is an area of potential conflict with the attendance and surveillance requirements

FMCSA determines that Washington’s MRB rules, as applied to drivers of property-carrying CMVs, are incompatible with the Federal HOS rules.

#### *VI. Enforcement of Washington’s MRB Rules Would Cause an Unreasonable Burden on Interstate Commerce*

Washington’s MRB rules may not be enforced if the Agency decides that enforcing them “would cause an unreasonable burden on interstate commerce.” 49 U.S.C. 31141(c)(4)(C). Section 31141 does not prohibit enforcement of a State requirement that places an incidental burden on interstate commerce, only burdens that are unreasonable.

##### **A. Decreased Productivity, Administrative Burden, and Costs**

WTA argued that, “Washington’s break rules represent an unreasonable burden on interstate commerce for much the same reasons FMCSA recently concluded California’s do.” In this regard, WTA contended that the MRB rules decrease each driver’s available duty hours “by requiring additional off-duty time, and additional ‘dead time’ associated with extra trips off the highway to find places to take breaks that do not coincide with otherwise scheduled stops.” WTA further asserted that “compliance with Washington’s break rules further burdens interstate commerce by imposing the same kinds of administrative burdens the Agency noted were imposed by California law. . . .”

Uline also described the decreased productivity that results from complying with Washington’s MRB rules. In this regard, Uline stated, “Unnecessary burdens, like forcing drivers to comply with both federal and state laws which require more breaks, slows down operations and restricts drivers’ productivity.” Uline continued, “If our drivers are tired, we want them to take a break. If our drivers are not tired and it has not been 8 hours, we should not force them to stop driving and try to find a parking spot just to [comply with] Washington law.”

In addition to decreased productivity resulting from complying with Washington’s MRB rules, some

for drivers of CMVs transporting Division 1.1, 1.2, or 1.3 explosives. See 49 CFR 397.5. Such a vehicle “must be attended at all times by its driver or a qualified representative of the motor carrier that operates it.” *Id.* The Federal HOS requirement for drivers to take a 30-minute break from driving provides an exception for drivers of CMVs carrying Division 1.1, 1.2, or 1.3 explosives to allow them to count on-duty time spent attending the CMV as required by section 397.5 but doing no other on-duty work, toward the break. See 49 CFR 395.1(g).

commenters also provided information about the associated administrative burden and costs. Oak Harbor Freight Lines explained that complying with the MRB rules adds time to the drivers’ workday and stated, “Washington’s rules add a substantial burden to delivery of freight.” The Propane Gas Associations stated:

[C]ompliance with Washington Meal and Rest Break rules cause a decrease in transportation movement and, potentially, a decrease in the number of end-users served in a given work period. Thus, end-users may suffer delays in the deliveries. To overcome potential delays to end-users, employers may seek to hire additional drivers along with significant additional expenses for more commercial vehicles, equipment, training, etc. These are considerable capital investments strictly to maintain timely deliveries to current end-users in order to comply with the Washington rules.

C.R. England explained, “Compliance with the MRB rules requires a reworking of freight lanes and transit times, in addition to increased non-driver personnel time and resources in order to evaluate the impact of the requirements, rework freight lanes and transit times, and ensure compliance.” The National Industrial Transportation League commented that the increased administrative burden and costs associated with complying with Washington’s MRB rules impact not only carriers but also shippers and receivers. In this regard, the League stated, “shippers and receivers . . . are forced to juggle their own workforce and production planning as drivers must stop work to meet the arbitrarily mandated breaks as required by the Washington rule.”

The Agency agrees with WTA that complying with Washington’s MRB rules unreasonably burdens interstate commerce. It is indisputable that Washington’s MRB rules, like California’s, decrease each driver’s available duty hours as compared to the Federal HOS rules. The Agency acknowledges that even without Washington’s MRB rules, many drivers would sometimes take breaks beyond those required by the HOS rules. It is nevertheless clear that Washington’s MRB rules require drivers to take more breaks than they otherwise would, and may require those breaks to occur at times they otherwise would not occur. In addition, the comments demonstrate that complying with Washington’s MRB rules also imposes significant administrative burdens.

The Department of Labor and Industries disputed that complying with the MRB rules is an unreasonable burden on interstate commerce. In this

regard, the Department of Labor and Industries cited Washington's annual Labor and Economic Report, which showed that the "transportation, warehousing, utilities" industry experienced more than 2 percent annual growth in employment and ranking it third on the list of private sector industries. See Wash. State Emp't Security Dep't, *2018 Labor and Market Economic Report*, at 17.<sup>22</sup> The Department of Labor and Industries argued, "It is simply incorrect to posit that requiring employers to continue to follow longstanding break laws will cause economic breakdown." The Department of Labor and Industries mischaracterizes FMCSA's conclusion. The Agency does not find that Washington's MRB rules will "cause economic breakdown;" rather, FMCSA finds that the MRB rules unreasonably burden interstate commerce. Moreover, it is not appropriate for the Department of Labor and Industries to rely on the employment growth in the transportation, warehousing, and utilities sector to argue that enforcing Washington's MRB rules does not unreasonably burden interstate commerce. While FMCSA believes that Washington's employment growth is commendable, it is not evidence that Washington's MRB rules do not unreasonably burden commerce among the States.

Citing the Agency's 2018 decision applying the standard set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the Department of Labor and Industries also contended that "The standard to determine an unreasonable burden is taken from the dormant Commerce Clause case law: Whether there is an unreasonable burden is whether the burden imposed is clearly excessive in relation to the putative local benefits derived from the State law." The Department of Labor and Industries quoted *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128 (1978), to argue further that, "Under this test, to have a burden on interstate commerce, the state regulation must substantially burden the 'the flow of interstate goods.' Operational challenges do not stop the free flow of interstate goods." Citing *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1152 (9th Cir. 2012), the Department of Labor and Industries stated, "Operational challenges do not stop the free flow of interstate goods. Nor does loss of profit or market share." The Agency disagrees that the standard

for determining if a State law unreasonably burdens interstate commerce under section 31141 is taken from dormant Commerce Clause case law and finds it inappropriate to rely on *Exxon Corp. v. Governor of Maryland* and *Nat'l Ass'n of Optometrists & Opticians v. Harris*. In *Exxon Corp.*, the Supreme Court considered whether a Maryland statute that, among other things, prohibited producers or refiners of petroleum products from operating retail service stations within the State, violated the Commerce Clause. Similarly, in *Nat'l Ass'n of Optometrists & Opticians*, the U.S. Court of Appeals for the Ninth Circuit considered whether California laws prohibiting opticians and optical companies from offering prescription eyewear at the same location in which eye examinations were provided, and from advertising that eyewear and eye examinations were available in the same location, violated the dormant Commerce Clause. FMCSA acknowledges that it suggested in the 2018 decision preempting California's MRB rules for property-carriers that the test for determining whether a State law unreasonably burdens interstate commerce under section 31141 is the same as or similar to the test for determining whether a State law violates the dormant Commerce Clause. See 83 FR 67478. Upon further consideration, however, FMCSA has since concluded that nothing in the text of section 31141 or elsewhere suggests that only unconstitutional State laws can cause an unreasonable burden on interstate commerce. See 86 FR 3479–80. Congress chose not to preempt the field governing CMV safety, but it also sought to create a regulatory regime with considerable uniformity. It tasked the Secretary with ensuring that State laws that disrupt an otherwise uniform Federal scheme do not pose an undue burden on interstate commerce, but nothing suggests that Congress was concerned only with burdens of constitutional dimension. In any event, even if FMCSA could find an unreasonable burden on interstate commerce only by finding that the burdens on commerce are clearly excessive in relation to putative local benefits, that standard would easily be met here. As discussed above, there is no evidence that Washington's MRB rules provide a safety benefit beyond the benefits already provided by the Federal HOS rules. The significant burdens identified by WTA and the commenters thus are clearly excessive. Based on the foregoing, FMCSA concludes that the

MRB rules cause an unreasonable burden on interstate commerce.

#### B. Cumulative Effect of the MRB Rules and Other States' Similar Laws

Section 31141 does not limit the Agency to looking only to the State whose rules are the subject of a preemption determination. FMCSA "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." 49 U.S.C. 31141(c)(5). Citing the Agency's 2018 decision, WTA argued that, like California's MRB rules, Washington's rules contribute to a patchwork of differing State meal and rest break rules that constitute an unreasonable burden on interstate commerce. Several commenters also described the burden resulting from differing State meal and rest break laws. Oak Harbor Freight Lines explained that the company operates terminals in different States and employs drivers who may live in one State and have their home terminal in another. The carrier explained, "Attempting to decipher which meal-and-rest break rules applies to each of those drivers is a challenge only a lawyer could love, and none of our terminal managers or local supervisors are attorneys." Hoovestol stated, "The varying meal and rest break rules from state to state have harmed our ability to reliably set rates, operate safely, and subjected us to opportunistic efforts to extract significant legal settlements." The carrier continued, "Individual state rules work to the detriment of the level of safety provided by the federal HOS rules by forcing multiple breaks at arbitrary intervals when they are not needed." The National Industrial Transportation League commented, "[A]llowing different commercial driver break rules in various States would exacerbate confusion among shippers, drivers and carriers, create unnecessary complexity, and undermine compliance. A patchwork quilt of meal and rest break rules would translate into substantial additional decreases in efficiency and productivity."

The Agency agrees. To date, 20 States in addition to Washington regulate, in varying degrees, meal and rest break requirements, as the National Conference of State Legislatures and the Associations for Justice have pointed out.<sup>23</sup> However, these laws are not

<sup>23</sup> According to the National Conference of State Legislatures and the Associations for Justice, the following States have meal and rest break laws: California, Colorado, Connecticut, Delaware, Illinois, Kentucky, Maine, Maryland,

<sup>22</sup> The 2018 Labor and Market Economic Report is available for download at <https://esd.wa.gov/labormarketinfo/annual-report>.

consistent. Oregon, for example, requires employers to provide a 30-minute break to employees who work 6 hours or more. See Or. Admin. R. 839–020–0050(2). No meal period is required if the shift is less than 6 hours; if the shift is less than 7 hours, the meal period must commence between 2 and 5 hours from the beginning of the shift; and if the shift is longer than seven hours, the meal period must begin between 3 and 6 hours from the beginning of the shift. *Id.* Nevada, by contrast, requires employers to provide a 30-minute break to employees who work a continuous 8 hours at any point during that period. See Nev. Rev. Stat. Ann. § 608.019. And, as described above, Washington’s MRB rules require that employers provide a 30-minute meal break for every 5 hours worked, which must commence between 2 and 5 hours from the beginning of the shift. See WAC 296–126–092. In preempting California’s MRB rules under section 31141, the Agency determined that the diversity of State regulation of required meal and rest breaks for CMV drivers has resulted in a patchwork of requirements. See 83 FR 67479–80. The Agency finds that the same holds true for Washington’s MRB rules. As described by the commenters, this diversity of State regulation has significantly decreased productivity and increased administrative burdens and costs.

The Department of Labor and Industries contended that Washington’s MRB rules do not contribute to the multiplicity of varying State meal and rest break laws. In this regard, it argues that “Washington’s break laws do not apply just because someone drives a truck through Washington.” Citing *Bostain v. Food Exp., Inc.*, 153 P.3d 846 (Wash. 2007), the Department of Labor and Industries further asserted, “The break laws apply only to Washington employers of Washington-based employees.” The Teamsters argued that drivers pass through an assortment of State or local regulations throughout their workday, including varying speed limits, tolling facilities, and enforcement zones for distracted driving and DUI; yet those rules do not constitute an unreasonable burden on interstate commerce. The Teamsters also argued that, “Truck size and weight restrictions are different on state and local roads than on the federal highway system. . . . Yet no one is calling for the preemption of state size and weight

rules.” The Associations for Justice argued, “The trucking and bus industries have engaged in a strategy of targeting specific state laws one at a time for FMCSA preemption.”

The Agency finds the Department of Labor and Industries’ argument on the narrow application of Washington’s rules unavailing. It is immaterial whether Washington’s MRB rules apply only to those drivers based in Washington. The fact remains that the disparity in State regulation has resulted in a multiplicity of requirements that are burdensome to apply. It may be difficult to determine whether a particular driver is “based in Washington,” and other States’ rules may purport to regulate even those drivers that Washington deems “Washington-based.” The Agency is also unpersuaded by the Teamsters’ traffic regulation analogy. The 1984 Act explicitly prohibits the Agency from “prescrib[ing] traffic safety regulations or preempt[ing] state traffic regulations” such as those described. 49 U.S.C. 31147(a). In addition, issues surrounding State tolling are well outside the scope of the Agency’s statutory authority, and CMV size and weight restrictions on portions of the Federal-aid highway system are within the purview of FHWA. See 23 U.S.C. 127, 145; 49 U.S.C. 31111; 49 CFR 1.85. Therefore, the extent to which the “assortment of state or local regulations” the International Brotherhood of Teamsters cite unreasonably burden interstate commerce, if at all, as compared to the MRB Rules is not relevant to the Agency’s determination. The Agency also rejects the Associations for Justice’s argument. Nothing in section 31141 prohibits a petitioner from seeking a preemption determination concerning the laws of one State, even where other States have similar laws.

Having concluded that Washington’s MRB rules unreasonably burden interstate commerce, the Agency further determines that the cumulative effect of other States’ similar laws would increase the burden.

#### Preemption Decision

As described above, FMCSA concludes that: (1) Washington’s MRB rules are State laws or regulations “on commercial motor vehicle safety,” to the extent they apply to drivers of property-carrying CMVs subject to FMCSA’s HOS rules; (2) Washington’s MRB rules are additional to or more stringent than FMCSA’s HOS rules; (3) Washington’s MRB rules have no safety benefit; (4) Washington’s MRB rules are incompatible with FMCSA’s HOS rules;

and (5) enforcement of Washington’s MRB rules would cause an unreasonable burden on interstate commerce. Accordingly, FMCSA grants WTA’s petition for preemption and determines that Washington’s MRB rules are preempted pursuant to 49 U.S.C. 31141. Effective the date of this decision, Washington may no longer enforce the MRB rules with respect to drivers of property-carrying CMVs subject to FMCSA’s HOS rules.

**James W. Deck,**

*Deputy Administrator.*

[FR Doc. 2020–25155 Filed 11–16–20; 8:45 am]

**BILLING CODE 4910–EX–P**

## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

[Docket No. DOT–OST–2020–0232]

#### Agency Information Collection Activities: Renewed Approval of Information Collection

**AGENCY:** Office of the Secretary (OST), DOT.

**ACTION:** 60-Day notice and request for comments.

**SUMMARY:** The Department of Transportation (DOT) invites public comments on our intention to request Office of Management and Budget (OMB) approval for an information collection in accordance with the requirements of the Paperwork Reduction Act of 1995. The collection is necessary for administration of the “Discretionary Grants for Nationally Significant Freight and Highway Projects (FASTLANE/INFRA) Program”. FASTLANE/INFRA grants support surface transportation infrastructure projects that have a significant local or regional impact.

**DATES:** Written comments should be submitted by January 19, 2021.

**ADDRESSES:** To ensure that you do not duplicate your docket submissions, please submit them by only one of the following means:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.

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