

Fromm, Charles (FMCSA)

From: Fromm, Charles (FMCSA)
Sent: Friday, January 18, 2019 5:29 PM
To: Maralle Messrelian
Cc: David Spivak
Subject: RE: FMCSA determination of Preemption

Ms. Messrelian,

I just wanted to let you know that our Agency is giving the retroactivity issue further consideration, and we will provide additional clarification as soon as possible.

*Charles J. Fromm
Deputy Chief Counsel
Federal Motor Carrier Safety Administration
1200 New Jersey, Ave., SE
Washington, DC 20590
(202) 366-3551*

From: Fromm, Charles (FMCSA)
Sent: Tuesday, January 08, 2019 9:47 AM
To: Maralle Messrelian <maralle@spivaklaw.com>
Cc: David Spivak <david@spivaklaw.com>
Subject: RE: FMCSA determination of Preemption

FMCSA has no plans for further publication at this time.

From: Maralle Messrelian <maralle@spivaklaw.com>
Sent: Monday, January 07, 2019 7:05 PM
To: Fromm, Charles (FMCSA) <charles.fromm@dot.gov>
Cc: David Spivak <david@spivaklaw.com>
Subject: Re: FMCSA determination of Preemption

Thank you for your response. Will this be published somewhere to help clarify the situation for other attorneys who are facing this issue?

Best Regard,

Maralle

On Mon, Jan 7, 2019 at 3:39 PM Fromm, Charles (FMCSA) <charles.fromm@dot.gov> wrote:

Ms. Messrelian,

My apologies for the delay in responding. The FMCSA determination does not have retroactive effect.

Charles J. Fromm

Deputy Chief Counsel

Federal Motor Carrier Safety Administration

1200 New Jersey, Ave., SE

Washington, DC 20590

(202) 366-3551

From: Maralle Messrelian [mailto:maralle@spivaklaw.com]

Sent: Friday, January 04, 2019 3:25 PM

To: Fromm, Charles (FMCSA) <charles.fromm@dot.gov>

Cc: David Spivak <david@spivaklaw.com>

Subject: Re: FMCSA determination of Preemption

Dear Mr. Fromm,

I am following up on any clarification that your office can provide regarding the issue of retroactivity as it pertains to the FMCSA's determination of preemption.

Best,

Maralle

On Wed, Jan 2, 2019 at 4:24 PM Fromm, Charles (FMCSA) <charles.fromm@dot.gov> wrote:

Ms. Messrelian,

Thank you for your questions. I apologize for the delay in responding to your voicemails earlier.

The FMCSA preemption determination of Dec. 21, 2018 is final agency action, and the appeal process is through the court of appeals. See 49 USC 31141(f). PHMSA's preemption determination was based on a different statute, as well as a PHMSA regulation providing for administrative review through petitions for reconsideration. As the PHMSA preemption notice explained:

Section 5125(d)(1) requires the Secretary to publish notice of an application for a preemption determination in the Federal Register. Following the receipt and consideration of written comments, PHMSA publishes its determination in the Federal Register. See 49 CFR 107.209(c). Any person aggrieved by a preemption determination may file a petition for reconsideration within 20 days of publication of the determination in the Federal Register. 49 CFR 107.211. If a person files a timely reconsideration petition, the decision by PHMSA's Chief Counsel on the petition for reconsideration becomes PHMSA's final agency action with respect to that person. If a person does not file a timely reconsideration petition, PHMSA's initial determination is PHMSA's final agency action as to that person, as of the date of publication in the Federal Register. Any person who wishes to seek judicial review of a preemption determination must do so by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit, or in the United States Court of Appeals for the circuit in which the petitioner resides or has its principal place of business, within 60 days after the determination becomes final with respect to the filing party. 49 U.S.C. 5127(a).

Hazardous Materials: California Meal and Rest Break Requirements, 83 FR 47961, 47962 (Sept. 21, 2018).

You may be interested to know that a petition for review of FMCSA's preemption determination was filed last week, *International Brotherhood of Teamsters, et al. v. FMCSA*, Dkt. No. 18-73488 (9th Cir., Dec. 27, 2018).

You also asked about retroactivity, and I will respond on that point tomorrow. The FMCSA notice was legally effective on Dec. 21.

Charles J. Fromm

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From: Maralle Messrelian [mailto:maralle@spivaklaw.com]

Sent: Wednesday, January 02, 2019 1:58 PM

To: Fromm, Charles (FMCSA) <charles.fromm@dot.gov>; David Spivak <david@spivaklaw.com>

Subject: Re: FMCSA determination of Preemption

Dear Mr. Fromm,

I am following up on my email below as well as my voicemail from earlier today regarding the appeal process for the FMCSA's determination of preemption. I can be reached at 818-208-9236.

Thank you.

Maralle

On Sun, Dec 30, 2018 at 7:24 PM Maralle Messrelian <maralle@spivaklaw.com> wrote:

Dear Mr. Fromm,

I hope this email finds you well. This is a follow up to the voicemail message I left for you earlier. I am writing in regards to the recent determination that the DOT regulations preempt CA's rest and meal period laws as applied to property-carrying commercial motor vehicle drivers covered by the FMCSA's hours of service regulations.

Will there be an appeal process for this decision, as there was for the PHMSA's decision of preemption (PHMSA-2016-0097)? There was no note at the end of the decision regarding an appeal process. Please advise.

Looking forward to hearing from you.

Thank you.

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