

## The meal-break battle

### *If you operate buses in California, don't ignore the law*

SAN FRANCISCO — For six years, a leading trucking company has waged a legal battle over whether a federal law preempts California's meal- and rest-break laws.

Now, the case appears headed to the U.S. Supreme Court following a recent win by company drivers and other employees.

The case, which is being closely watched by many motorcoach operators, has been before the Ninth U.S. Circuit Court of Appeals, which in its latest decision kept intact an earlier ruling, by a three-judge panel, supporting the workers who brought a class-action suit against Penske Logistics in 2008 over the denial of rest and meal breaks.

Drivers and other employees claimed Penske had automatically deducted 30-minute meal breaks for each shift from their paychecks whether they took the breaks or not, and created an environment that discouraged them from taking 10-minute rest breaks.

Attorneys for Penske had argued that the Federal Aviation Administration Authorization Act of 1994, the statute that covers the issue, preempts the state meal- and rest-break laws.

The Federal Aviation Administration Authorization Act blocks states from enacting laws "related to a price, route or service of any motor carrier...with respect to the transportation of property."

However, a three-judge ninth circuit panel in July held that the federal law does not take precedence because the state regulations do not have a significant impact on the company's rates, routes or services.

In September, the full court kept intact the panel's ruling, and attorneys for Penske asked to stay the proceedings so they can seek review by the U.S. Supreme Court.

#### Good news?

The legal battle may ultimately mean good news for charter bus operators, says Brian Mills, a labor and employment attorney based in Costa Mesa, Calif.

Mills, of the law firm of Snell & Wilmer, said if the attorneys for Penske convince the high court that the Federal Aviation Administration Authorization Act preempts the state rules, the door is open for passenger-carrying companies to make the same argument successfully.

"(With charter buses,) the meal and rest breaks have a direct effect on prices, routes and services. They reduce the drivers' flexibility," Mills said.

"They affect where they can drive, customer service, routes that they can take. From a practical perspective, they reduce the amount of time that an employee can work and the service they can provide to the customer.

"So, in its barest form, you can see how there's a good argument to say that (the Federal Aviation Administration Authorization Act) should preempt these California rules," he said.

However, it will likely be two or more years before the Penske case is resolved, he said. In the meantime, he advised operators to comply with the rules.

His advice also applies to out-of-state motorcoach companies that operate in California.

"I think, if you are going to be spending time in California, California's rules are going to apply to you," he said.

"There can be a question if you're just crossing the border really quickly, or this is a one-time deal and you're not going to be here for any extended period of time, you can see how some arguments can be made.

"But the way the law has been interpreted for these visits to California in other industries, once you cross the line, these California rules apply," he said.

Mills spoke at the California Bus Association Convention and Trade Show in Sonoma County in late October, during a session called "Give Me a Break!: What Employers Should Know About California's Meal and Rest Break Requirements."

#### Complex rules

The topic is of particular interest to motorcoach operators because the state rules are myri-

ad, specific, exacting and often challenging for transportation companies to implement, Mills said in a phone interview.

Broadly, the meal- and rest-break regulations state that employers must provide an unpaid, off-duty meal period of at least 30 minutes for employees who work more than five hours, and that this first meal period must be provided no later than the end of the employee's fifth hour of work.

If an employee works more than 10 hours, a second meal break of no fewer than 30 minutes also must be provided. The second meal break must be provided no later than the end of an employee's 10th hour of work.

In addition, employers must provide paid 10-minute rest periods for employees who work at least 3.5 hours.

These mandatory rest breaks must be offered for every four hours worked, or "major fraction" thereof. Anything over two hours is considered to be a "major fraction" of four.

#### Some clarification

In 2012, a California Supreme Court decision — in a case involving Brinker Restaurant Corp. — offered welcome direction to employers by clarifying their obligations regarding the rules, said Mills.

Specifically, the court ruled that employers are not obligated to make sure workers take their breaks. Once the breaks are provided, employers do not have to police workers to be sure that no work is performed.

Employees are free to do what they chose during their breaks, including work.

Despite the clarification provided by the Brinker decision, the meal- and rest-break rules continue to be the grist for lawsuits against companies.

The consequences of failing to provide breaks can be very costly: one additional hour of pay at the employee's regular rate for each workday per missed meal period, and another for each rest break not given.

"This is where it takes sitting down with your legal counsel and discussing your routes and

your meal- and rest-break obligations, and come up with something that is workable for your business. You can't just say, 'I can't do it,'" Mills said.

"Is it going to be inconvenient? Probably. But if you're trying to be as compliant as possible and be litigation adverse, that's the tactic you're going to take."

Here are specific actions Mills suggests motorcoach operators can take to protect themselves from claims:

- Establish an official company policy that spells out when workers are entitled to breaks and how long those breaks are, and include it in the employee handbook.

- Call it out as a stand-alone policy in the handbook, and require employees to sign forms acknowledging they've read the policy and information on the law. That way, "there isn't a question down the line that they didn't know."

"Yeah, I got this employee handbook, but I never read it."

"Well, no, you've received a specific policy that you acknowledged you read, received and understood."

- Keep detailed records of breaks and use timecards to acknowledge that employees received any and all of their rest breaks during the pay period.

- Conduct training sessions for managers and employees on the rules and the importance of adhering to them. "Because it's not as easy in the transportation industry as it is for other industries. Other places, when the meal bell rings, everyone takes their break. That's easy. Here, you have to continually remind these folks, especially drivers, these are the obligations and this is what you have to do."

- Use electronic monitoring. "You can have the onboard computer system set as warnings if their meal or rest break is coming up. You can even go so far as you can't log back in until you've taken it. If you haven't gone for your full half-hour, you can't log back in the system until the half-hour is completed."