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California's (Improper) Regulation of Pilot and Flight Attendant Rest

By Ryan McCoy

California is regulating airline crew in a way that significantly impacts air carriers' prices, routes, and services and interferes with the comprehensive federal regulatory scheme directly governing pilot and flight attendant duty and rest periods. States' meal period and rest break laws should not apply to airline crew because of the unique operational and federal regulatory environment to which the industry is subject. California courts, however, are applying California's meal period and rest break laws (CA MRB) to flight attendants.

How can California do this in the face of federal law? This question presents serious legal uncertainty and practical challenges for air carriers and the national air transportation system. After all, pilots and flight attendants typically work in several different state, local, and airport jurisdictions each day, and predominantly work in federal airspace. If states and localities attempt to apply their own unique employment laws to airline crew, carriers cannot discern exactly which state or local law applies to each crew member or when each law applies. This application and choice of law conundrum creates a nightmare for carriers in the face of complex operational systems and highly complicated crew pay and scheduling schemes that can operate only on a federal basis.

Compounding the problem, the Federal Aviation Administration (FAA) strictly regulates crew work days (known as duty periods) and rest requirements to ensure the safety of all passengers and crew.[1] The FAA permits pilots and flight attendants to take informal on-duty breaks throughout their duty periods, whether in the air or on the ground. In light of this federal regulatory scheme and the nature of pilots' and flight attendants' jobs, states and localities have no legitimate interest or need to regulate airline crew meal periods and rest breaks.

So how did California conclude it could regulate in this space? This article explores that question by analyzing the watershed case of *Bernstein v. Virgin America*.[2]

Bernstein Trial Court Decision, Ninth Circuit Decision, and Petition for Certiorari

In 2015, a group of Virgin America flight attendants brought a class action lawsuit initially alleging nine different claims under California's wage and hour laws, including violations of the state's meal and rest break laws.[3] The U.S. District Court for the Northern District of California eventually certified a class of all "California-based flight attendants of Virgin America."[4]

Virgin America moved for summary judgment and, as to the California meal and rest break claims, argued the claims were preempted by the Airline Deregulation Act (ADA) and Federal Aviation Act (FAAct).[5] With respect to ADA preemption, Virgin America relied on the express preemption provision in the ADA: "[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation . . . ."[6]

Virgin America argued, among other things, that CA MRB would prevent flight attendants from boarding the aircraft and preparing for takeoff, delay flights, and create safety and other service-related issues, and that they thus had the effect of regulating routes and services in violation of the ADA.[7] The district court

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rejected this defense, relying on the Ninth Circuit's 2014 decision in *Dilts v. Penske Logistics, LLC*,[8] which was decided in the context of the FAAct as applied to motor carriers and which held that CA MRB laws are not the type of laws "related to" prices, routes, and services that Congress intended to preempt.[9] The district court used *Dilts* to reason that CA MRB was too "tenuous, remote, or peripheral" to prices, routes, and services of air carriers.[10]

With respect to FAAct preemption, Virgin America relied both on field and conflict preemption arguments.[11] It argued that "the FAA occupies the field with respect to setting rest and duty periods for [flight attendants]" and delineated the field as that of "aviation safety."[12] The litigants disputed the scope of the field, and the district court ultimately narrowly defined the field as "the regulation of meal and rest breaks for flight attendants."[13] It found only one FAA regulation, 14 C.F.R. § 121.467(b) (prohibiting flight attendants from working duty periods of longer than 14 hours and requiring a nine-hour rest period between duty periods), that it deemed to regulate flight attendant breaks in some way. The district court concluded that this "lone regulation can hardly be described as comprehensive, detailed or pervasive enough to justify federal preemption of the field."[14]

On conflict preemption, Virgin America argued that CA MRB requires flight attendants to be relieved of all duty during their meal periods, thus putting air carriers' CA MRB obligations in direct conflict with FAA regulations that prohibit flight attendants from forgoing their responsibilities while in flight.[15] Virgin America further argued that the FAA permits flight attendants to remain on duty for 14 hours, but CA MRB's timing requirements mandate meal period and rest breaks throughout that duty period, and at very specific intervals.[16] The district court nevertheless rejected the conflict preemption argument on the grounds that it was not *physically impossible* for the carrier to comply with both CA MRB and FAA regulations. It reasoned, "[f]or example, Virgin could staff longer flights with additional flight attendants in order to allow for duty-free breaks. In addition, the FAA regulation that Virgin relies on is wholly consistent with California's break requirements because it merely establishes the maximum duty period time and minimum rest requirements."[17]

The district court granted summary judgment for the flight attendants, and Virgin America appealed to the U.S. Court of Appeals for the Ninth Circuit.[18] On appeal, the U.S. Department of Transportation (DOT) and FAA submitted an amicus brief in support of Virgin America's ADA and FAAct preemption arguments.[19] DOT-FAA opined that "[s]tate-mandated off-duty breaks of the type envisioned by California law [] impose significant burdens on the scheduling of flights and frustrate the purposes of the [ADA] and other federal regulations" such that the ADA and FAAct preempt those laws.[20] DOT-FAA reasoned that "there can be no serious question that applying California's meal and rest break laws to flight attendants will have a significant impact on the market forces influencing carrier services and prices" and that "a requirement of off-duty breaks . . . interfer[es] with FAA's comprehensive regulations designed to protect safety."[21]

Virgin America argued that CA MRB requires flight attendants to be relieved of duty during meal periods in conflict with FAA prohibtions on forgoing responsibilities in flight.

In early 2021, the Ninth Circuit ruled against Virgin America on ADA and FAAct preemption of CA MRB.[22] Affirming the district court ruling that the ADA does not preempt CA MRB, the Ninth Circuit outright ignored DOT-FAA acting as amicus and held that laws of general applicability (i.e., purported "background regulations that are several steps removed from prices routes, or services, such as prevailing wage laws or safety regulations") are not preempted by the ADA unless the law bears an actual reference to prices, routes, or services or the law "directly or indirectly, *binds* the carrier to a particular price, route, or service and thereby interferes with the competitive market forces within the industry."[23]

The Ninth Circuit also affirmed the district court's decision that the FAAct does not preempt CA MRB, finding that CA MRB does not have a "*direct* bearing on the field of aviation safety."[24] The Ninth Circuit further held that 14 C.F.R. § 121.467

> does not resemble the type of comprehensive regulation or contain the pervasive language that we consider necessary to discern congressional intent to occupy the field. . . . When a single regulation has triggered field preemption, our court has highlighted the regulation's "exhaustive" level of detail. . . . While § 121.467 is lengthy, it only discusses allowed duty period lengths. The regulation does not compel us to conclude that Congress left no room for states to prescribe meal periods and ten-minute rest breaks within

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the maximum total duty period allowed under federal law."[25] Finally, the Ninth Circuit found no conflict preemption because, in its view, "[i]t is physically possible to comply with federal regulations prohibiting a duty period of longer than fourteen hours and California's statues requiring ten-minute rest breaks and thirty-minute meal periods at specific intervals.[26]

In August, Virgin America petitioned for certiorari.[27] The petition is awaiting ruling by the Supreme Court.

Brief Overview of CA MRB Requirements and Penalties

California has a highly-technical statutory and regulatory framework for meal and rest periods, as well as resulting penalties that are triggered in the event of any violations. Applicable to employers in the transportation industry are certain provisions set forth in the Industrial Welfare Commission's Wage Order No. 9 and the California Labor Code. Though a comprehensive summary of these requirements is beyond the scope of this article, California generally requires:

- A 10-minute paid rest period for each four-hour work period. These rest periods must be, "insofar as practicable," in the middle of each work period, and employees must be relieved of all duties.[28]
- A 30-minute unpaid meal period for every five hours of work. Any second meal period must begin no later than the end of an employee's tenth hour of work.[29] Employees must be relieved of all duty and free to leave the premises during all unpaid meal periods.[30] For pilots and flight attendants, one may argue, compliance with California case law requires the ability to leave the aircraft and, even if that were possible, FAA regulations prohibit crew from forgoing their responsibilities while in flight.
- Employers who fail to adhere to these technical requirements must pay a "penalty" or "premium" to employees in the amount of "one additional hour of pay at the … regular rate . . . for each workday that the meal or rest or recovery period is not provided."[31] The "regular rate of pay" requirement is particularly challenging, if not impossible, for airlines to calculate as to flight crew because of complex, industry-standard pay schemes largely negotiated between carriers and their pilot and flight attendant unions, and designed to reflect the unique operational aspects of interstate airline operations.

In addition to the above requirements, California maintains the California Private Attorney General Act (PAGA), which is a *qui tam* action that enables the aggrieved employee—on behalf of the State of California—to recover civil penalties for violations of certain California Labor Code provisions, including CA MRB violations.[32] PAGA civil penalties range from $50 to $1,000, depending on the type of violation and any repeated nature of the violation, per pay period (i.e., per pay check), for up to a year's worth of pay periods per employee.[33] Plaintiff attorneys also are able to recover their fees.[34] The use of PAGA actions has increased dramatically over the last decade.

In many cases, all of these penalties and fees—which are stackable in California—can be astronomical. For example, the final judgment initially awarded in the *Bernstein* case was nearly $78 million, exclusive of fees, for what the district court ruled to be several violations of the California Labor Code (not just CA MRB violations).[35] Because of the high penalty and fee environment in California, there is great incentive for plaintiff attorneys to litigate minute and highly technical violations of California law, even though these violations do not cause any injury or harm to an employee in the traditional sense.

What Happened to ADA Preemption in the Ninth Circuit?

The Ninth Circuit has over the years attempted to limit ADA preemption in ways contrary to Congress's intent and to well-established U.S. Supreme Court precedent. Most recently, in *Bernstein*, the Ninth Circuit has done away with ADA preemption in virtually all circumstances unless a law actually references or *binds* airlines' prices, routes, or services. The decision is contrary to the ADA's "deliberatively expansive" preemptive effect.[36] The rulings also ignore Supreme Court precedent and create a circuit split in which the Ninth Circuit is the rogue actor.

To start, the Ninth Circuit's decision in *Bernstein* demonstrates that the court has disregarded the Supreme Court's decisions in *Morales v. Trans World Airlines, Inc.*,[37] *American Airlines, Inc. v. Wolens*,[38] and *Northwest, Inc. v. Ginsberg*.[39] In all three of these cases, the Supreme Court held that the ADA preempted laws of general applicability because each law had a "significant impact" on prices, routes, and services. Moreover, in *Morales*, the Supreme Court explicitly ruled that the ADA does not preempt states only from *actually* "prescribing rates, routes, or services" and that the ADA actually preempts much more.[40]

Other circuit courts follow the Supreme Court's jurisprudence in this regard. The First, Fifth, Seventh, and Eleventh Circuits all use the "significant impact" on prices, routes, and services test, including for states' laws of general applicability.[41] State supreme courts have employed the same test as these courts.[42] The Ninth Circuit and California are out of line with these other jurisdictions.

These issues have been petitioned to the Supreme Court in both *Bernstein* and *Oman v. Delta Air Lines*.[43]

If *Bernstein* Stands: Rates, Routes, Services, and Safety Will be Significantly Impacted

DOT-FAA warned the Ninth Circuit about the significant

impact its application of CA MRB to pilots and flight attendants would have on carriers' prices, routes, and services and on aviation safety.

- FAA regulations contemplate that flight attendants will remain on duty and on call, capable of performing any required safety functions for flights through their [FAA-]specified "duty period." . . . These tasks are critical, and federal regulations contemplate that attendants will be on-duty and on-call to perform them during flight. Thus, as a practical matter, the only time that an off-duty break could occur would be between flights; after the passengers leave an attendant's first flight, and before the flight attendant checks in for a second flight. Relieving attendants of all duty while in flight or even taxiing would clearly interfere with the duties prescribed by the federal regulations.
- The impact of applying [CA MRB] is apparent. . . . [C]ommercial aircraft operate under tight schedules that require the careful coordination and availability of runways, gates, and crewmembers. . . . [D]elays in one airport due to any cause can easily snowball into delays at other airports throughout the country. Requiring airlines to release their flight attendants from duty to comply with state-mandated breaks would significantly interfere with this complex choreography. . . And, because air traffic is so intricately coordinated, changes to the scheduling of even intrastate flights to accommodate breaks would have a significant impact through the country and internationally.
- The [district] court appeared to believe that air carriers could comply with [CA MRB] by some combination of lengthening flight times, increasing the number of attendants, and staggering their duty-free breaks, so that the minimum number of flight attendants required by federal law remained on duty at all times. Th[at] solution underscores the significant impact state-mandated off-duty breaks would have on the prices, rates, and services of air carriers.[44]

The Ninth Circuit ignored those warnings, choosing to not even address the government's arguments in its amicus brief. In the meantime, due to the Ninth Circuit's opinion, carriers now face these real-world, extremely challenging operational and compliance decisions.

Questions around "how" airlines can comply with CA MRB are myriad. For example:

- *Should airlines re-route?* Should airlines re-base crews outside of California, including making corresponding route and scheduling changes? Should airlines draw down flying in California?
- *How can airlines provide California-compliant breaks?* How do airlines get around the fact that the FAA prohibits airlines from putting pilots and flight attendants fully off duty while operating aircraft? Do airlines need to put aircraft down every two to four hours to ensure CA MRB compliant breaks? How can airlines put pilots and flight attendants on and off duty without moving into FAA mandated rest periods? What if passengers or employees interrupt pilots and flight attendants on break? Can airlines modify aircraft in some way to ensure uninterrupted breaks? Would the FAA allow aircraft modifications?
- *How can airlines appropriately calculate their risk exposure?* How are CA MRB penalties calculated for pilots and flight attendants under complex industry pay structures? Do airlines need to dismantle industry pay practices to pay CA MRB penalties? If not, how can these penalties be calculated under California law? If these practices need to be dismantled to comply with California law in order to pay penalties, how can airlines do that in the face of labor contracts?

As a result of the Ninth Circuit's *Bernstein* opinion, carriers now face real-world, extremely challenging operational and compliance decisions.

Just having to ask these questions demonstrates why the ADA and FAAct (and other laws) preempt CA MRB. These questions reveal how CA MRB significantly impacts airlines' prices, routes, and services and affects aviation safety. Until the Supreme Court intervenes in the Ninth Circuit's preemption analysis, carriers are left guessing the answers to these questions and facing California class actions and/or PAGA lawsuits with the potential for severe penalties, including for merely technical violations of CA MRB. California and the Ninth Circuit have created an untenable situation for the airline industry and the entire national air transportation system.

Endnotes

1. In response to a congressional mandate under the FAA Reauthorization Act of 2018, the FAA recently issued a proposed rule to increase the minimum rest period for flight attendants who are scheduled for a duty period of 14 hours or less. 86 Fed. Reg. 60,424 (Nov. 2, 2021).

2. Citations to the various opinions and documents relating to *Bernstein v. Virgin America* are provided as they are discussed *infra*.

3. Complaint, Bernstein v. Virgin America Inc., No.

4:15-cv-02277-JST (N.D. Cal. May 20, 2015), ECF No. 1-1.

4. Bernstein v. Virgin America, Inc., 2016 WL 6576621, at *16 (N.D. Cal. Nov. 7, 2016), *aff'd in part*, 3 F.4th 1127 (2021), *petition for cert. pending* (No. 21-269).

5. Bernstein v. Virgin America, Inc., 227 F. Supp. 3d 1049, 1059 (N.D. Cal. 2017), *aff'd in part*, 3 F.4th 1127 (2021), *petition for cert. pending* (No. 21-269).

6. *Id.* at 1072 (quoting 49 U.S.C. § 41713(b)(1)).

7. *Id.*

8. Dilts v. Penske Logistics, LLC, 769 F.3d 637 (9th Cir. 2014), *cert. denied,* 575 U.S. 996 (2015)

9. *Id.* (citing *Dilts*, 769 F.3d 637.

10. *Id.* at 1072–73 (quoting *Dilts*, 769 F.3d at 643).

11. *Id.* at 1070.

12. *Id.*

13. *Id.* at 1071.

14. *Id.*

15. *Id.* at 1072.

16. *Id.*

17. *Id.*

18. Bernstein v. Virgin America, Inc., 3 F.4th 1127 (9th Cir. 2021), *petition for cert. pending* (No. 21-269).

19. Brief for the United States as Amicus Curiae in Support of Appellants, Bernstein v. Virgin America, Inc., No. 19-15382 (9th Cir. Sept. 3, 2019).

20. *Id.* at 15–16.

21. *Id.* at 18, 26.

22. *Bernstein*, 3 F.4th at 1138–41.

23. *Id.* at 1141 (quoting *Dilts*, 769 F.3d at 646) (emphasis in original).

24. *Id.* at 1139 (emphasis in original).

25. *Id.*

26. *Id.* at 1140.

27. Petition for a Writ of Certiorari, Virgin America, Inc. v. Bernstein, No. 21-260 (U.S. Aug. 19, 2021).

28. *See* California Industrial Welfare Commission (IWC), Wage Order No. 9, subdiv. 12(A).

29. *Id.*, subdiv. 11 and Cal. Lab. Code § 512.

30. Brinker Restaurant Corp. v. Superior Court, 53 Cal. 4th 1004 (2012).

31. Cal. Lab. Code § 226.7.

32. *Id.* § 2698 *et seq.*

33. *Id.* at § 2699(e).

34. *Id.* at § 2699(g).

35. *Bernstein*, No. 4:15-cv-02277 (N.D. Cal. Feb. 4, 2019), ECF No. 367.

36. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992).

37. 504 U.S. 374 (1992).

38. 513 U.S. 219 (1995).

39. 572 U.S. 273 (2014).

40. *Morales*, 504 U.S. at 385.

41. *See, e.g.,* DiFiore v. American Airlines, Inc., 646 F.3d 81, 87 (1st Cir. 2011) (Massachusetts tip law preempted by ADA because of its significant impact on American's baggage "service"); Witty v. Delta Air Lines, Inc., 366 F.3d 380, 383 (5th Cir. 2004) (negligence claim associated with Delta's leg room preempted because of effect on Delta's rates); Travel All Over the World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1434 (7th Cir. 1996) (tort claim associated with refusing passengers preempted because of "significant economic impact on airline services"); Koutsouradis v. Delta Air Lines, Inc., 427 F.3d 1339, 1343-44 (11th Cir. 2005) (breach of contract claim associated with baggage handling preempted because of significant effect on airline services).

42. *See, e.g.,* Brindle v. R.I. Dep't. of Lab. & Training, 211 A.3d 930, 937–38 (R.I. 2019) (blue law associated with overtime on Sundays was preempted because it affected Delta's staffing, and therefore affected services), *cert. denied*, 140 S. Ct. 908 (2020).

43. Petition for a Writ of Certiorari, Virgin America, Inc. v. Bernstein, No. 21-260; Petition for a Writ of Certiorari, Delta Air Lines, Inc. v. Oman, No. 21-396 (Sept. 9, 2021) (revising test for application of California's wage statement and pay timing laws to flight attendants).

44. Brief for the United States as Amicus Curiae in Support of Appellants, Bernstein v. Virgin America, Inc., No. 19-15382 at 18–23; *Bernstein*, 3 F.4th 1127.