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# Proposition 11: Emergency Ambulance Employees Safety and Preparedness Act

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**Proposition 11:**

**Emergency Ambulance Employees Safety and  
Preparedness Act (2018)**

Initiative Statute

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## I. EXECUTIVE SUMMARY

Proposition 11, the Emergency Ambulance Preparedness Act, claims the purpose of the measure is to enhance public safety and ensure quick emergency medical response.<sup>1</sup> This measure would apply to private-sector emergency ambulance employees: emergency medical technicians (EMTs) and paramedics. It would not apply to emergency ambulance employees who work for public agencies.<sup>2</sup> Specifically, the measure (1) allows employers to require employees to remain on-call during meal and rest breaks,<sup>3</sup> (2) requires ambulance providers to manage staffing levels,<sup>4</sup> and (3) requires employers to provide employees with paid training for certain emergency incidents related to active shooters, multiple casualties, natural disasters, violence prevention, and mental health and wellness education<sup>5</sup>, and (4) requires employers to offer employees access to mental health treatment services.<sup>6</sup> Although public safety is the initiative's stated purpose, the measure would absolve ambulance employers of liability<sup>7</sup> and carve out an exception to labor law to allow certain employees to have interrupted breaks in exchange for compensation.<sup>8</sup>

A **YES** vote supports interrupted meal and rest breaks for emergency employees of private ambulance companies. It eliminates liability for pending labor-related lawsuits against emergency employers.

A **NO** vote mandates off-duty meal and rest breaks. To support these breaks, employers would be required to raise staffing levels.

## II. BACKGROUND

### A. The *Augustus* Decision

The California Labor Code (CLC) governs employer-employee relations in California, including wages, hours, breaks, and working conditions. Under the CLC, employers, with exceptions for certain industries, cannot require employees to work during meal or rest breaks.<sup>9</sup> In *Augustus v. ABM Security Services, Inc.*, the California Supreme Court ruled that workers on rest breaks cannot be required to be on-call.<sup>10</sup>

In *Augustus*, the court determined that the CLC prohibited employers from controlling how employees spend their break time. The court agreed that employers could not require

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<sup>1</sup> Cal. Proposition 11 at § 882 (2018).

<sup>2</sup> CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 6, 2018, at 62-67, available at <https://vig.cdn.sos.ca.gov/2018/general/pdf/complete-vig.pdf> [“NOVEMBER 2018 VOTER GUIDE”].

<sup>3</sup> Cal. Proposition 11 at § 887 (2018).

<sup>4</sup> Cal. Proposition 11 at § 886 (a)(2) (2018).

<sup>5</sup> Cal. Proposition 11 at § 883 (2018).

<sup>6</sup> Cal. Proposition 11 at § 884 (2018).

<sup>7</sup> Cal. Proposition 11 at § 889 (2018).

<sup>8</sup> Cal. Proposition 11 at § 887 (2018).

<sup>9</sup> CAL. LAB. CODE § 226.7 (2018).

<sup>10</sup> *Augustus v. ABM Security Services, Inc.*, 2 Cal.5th 257, 272 (2016).

security guards to keep their pagers and radio phones on during breaks and to respond to call when needs arose.<sup>11</sup> Labor laws and industry practices for private security guards are similar to the laws and industry practices for EMTs and paramedics. Due to these similarities, the *Augustus* decision likely applies to EMTs and paramedics.<sup>12</sup>

Proposition 11 has two primary effects: first, the measure would allow emergency employers to require emergency employees to remain on-call during meal and rest breaks;<sup>13</sup> and second, it would stem the tide of labor law violation litigation by emergency employees against their employers following the *Augustus* decision.<sup>14</sup>

### **B. AB 263 Emergency medical services workers: rights and working conditions. (2017-2018)<sup>15</sup>**

AB 263 was introduced in 2017 by California state Assemblyman Freddie Rodriguez, D-Pomona. AB 263<sup>16</sup> would codify specific meal period and rest period provisions for emergency medical services employees.<sup>17</sup> The purpose of the AB-263 is to reduce incidents of workplace violence, improve access to mental health care for EMS workers, and ensure that employees get uninterrupted work breaks.<sup>18</sup> “One goal of the bill is to clarify that the California Supreme Court’s ruling in *Augustus v. ABM Security Services* applies to EMS workers,” according to a document issued by Rodriguez’s office.<sup>19</sup>

AB 263 was held in Senate Rules Committee.<sup>20</sup> The bill did not move forward to meet the necessary deadlines for the 2017-2018 session and will not become law. The Senate Labor And Industrial Relations Committee noted in committee analysis that it was unclear as to how AB 263 would fit into the meal and rest period structure created by *Augustus* and other court cases.<sup>21</sup> The committee asked author of bill to “clarify his intent with the bill and its impacts on emergency services employees, as well as potential liabilities faced by EMS providers.”<sup>22</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> 2 CCR § 11040.

<sup>13</sup> Cal. Proposition 11 at § 887 (2018).

<sup>14</sup> Alex Leeds Matthews, *Voters To Settle Dispute Over Ambulance Employee Break Times*, California Healthline, Aug. 15, 2018, <https://californiahealthline.org/news/voters-to-settle-dispute-over-ambulance-employee-break-times/> (last visited Oct. 1, 2018).

<sup>15</sup> Current Bill Status of AB 263, [https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill\\_id=201720180AB263](https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180AB263) (last visited Oct. 9, 2018) [“AB 263”].

<sup>16</sup> AB 263, 2017 Leg., 2017–2018 Reg. Sess. (Cal. 2017) (as amended on June 21, 2017, but not enacted).

<sup>17</sup> Senate Appropriations Committee, Committee Analysis of AB 263, at 1–3 (July 21, 2017).

<sup>18</sup> Toni Vranjes, *'Bill of Rights' Proposed to Improve California EMS Field*, Society for Human Resource Management, Feb. 27, 2018, <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/california-emergency-medical-services-bill.aspx> (last visited Oct. 1, 2018).

<sup>19</sup> *Id.*

<sup>20</sup> Complete Bill History of AB 263, [https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill\\_id=201720180AB263](https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180AB263) (last visited Oct. 9, 2018).

<sup>21</sup> Senate Labor and Industrial Relations Committee, Committee Analysis of AB 263, at 2–4 (June 28, 2017).

<sup>22</sup> *Id.*

### III. THE LAW

#### A. Federal Law

##### 1. *The Fair Labor Standards Act*

The Fair Labor Standards Act of 1938<sup>23</sup> (FLSA) regulates, among other things, minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments. The FLSA sets minimum standards for covered employees.<sup>24</sup> States can establish higher standards for employees also covered by the FLSA, and states may enact their own laws that apply to workers not covered by the FLSA.<sup>25</sup> When more than one standard applies to the employment of a particular worker, the standard more favorable to the employee must be followed. Regardless of whether federal or state law applies in a particular case, employees cannot agree to waive their rights under the FLSA.

The FLSA distinguishes exempt and non-exempt workers. Under the FLSA, employers may not place any restrictions on a nonexempt employee's activities while on a break. However, the FLSA requires most employers to pay overtime to nonexempt employees who work more than 40 hours in a given work week at a rate of one and one-half times the employee's regular rate of pay.<sup>26</sup> The FLSA contains several exemptions, providing specific categories of employers and employees that aren't subject to the Act's overtime requirements.<sup>27</sup> The exemptions do not apply to paramedics and emergency medical technicians, ambulance personnel, or rescue workers.<sup>28</sup>

The FLSA does not require meal or rest breaks. When an employer chooses to provide meal or rest breaks, they are subject to certain rules. When an employer provides rest breaks, federal law does specify that rest breaks of fewer than 20 minutes must be included in work time, and for a break to be unpaid, the employee must be relieved of all work duties.<sup>29</sup> However if an employer provides a break of 30 minutes or longer, an employer does not need to pay for the break so long as the employee is free to do what they wish on the break.<sup>30</sup> Thus, an employer would have to pay an employee that is on call during a break of 30 minutes or more because the employee is not completely relieved from all work duties.<sup>31</sup>

##### 2. *The National Labor Relations Act*

The National Labor Relations Act (NLRA), as amended by the Labor-Management Relations Act of 1947, is a comprehensive regulation of labor relations in activities affecting

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<sup>23</sup> Fair Labor Standards Act, 29 U.S.C.A. §§ 201–219.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Fair Labor Standards Act, 29 U.S.C.A. § 207.

<sup>27</sup> Fair Labor Standards Act, 29 U.S.C.A. § 213.

<sup>28</sup> 29 C.F.R. § 541.3.

<sup>29</sup> 29 C.F.R. § 785.18.

<sup>30</sup> 29 C.F.R. § 785.19.

<sup>31</sup> 29 U.S.C.A. § 218.

interstate and foreign commerce, administered by the National Labor Relations Board (NLRB).<sup>32</sup> Its principal purpose is to avoid disruption of interstate commerce by ensuring employees the rights established by section 7 of the NLRA to organize, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for those and other purposes.<sup>33</sup>

The NLRB has jurisdiction over all matters related to unions and collective bargaining in the United States.<sup>34</sup> Because the vast majority of emergency employees are union members, passage of Proposition 11 necessarily implicates the NLRA, and portions of the measure may fall under the jurisdiction of the NLRB, if challenged.

## B. State Law

In December 2016, the California Supreme Court ruled in *Augustus* that employer-required on-call rest breaks violated state labor law.<sup>35 36</sup> The court held: (1) state law requires employers to authorize off-duty rest periods—that is, time during which an employee is relieved from all work-related duties and free from employer control, and (2) an employer cannot satisfy off-duty rest periods when an employer requires its employees to remain on-call.<sup>37</sup> In other words, state labor law forbids employers from requiring employees to work during any rest period, and requires employers to provide rest periods and explicitly indicates that employees must generally be relieved of all duty during rest periods.<sup>38</sup> However, the court recognized it may be difficult for employers in certain industries to require such breaks. For these cases, the court provided alternate options: “employers may (a) provide employees with another rest period to replace one that was interrupted, or (b) pay the premium pay set forth in Wage Order 4, subdivision 12(B) and section 226.7.14.”<sup>39</sup>

Although *Augustus* specifically applied to private security guards, the California Legislative Analyst noted that on-call break practices among EMTs and paramedics are similar to that of private security guards.<sup>40</sup> In both jobs, employees carry phones or pagers during their break. The analyst's office also noted that several lawsuits alleging break violations under *Augustus* had been brought against ambulance providers and remained unresolved.

If *Augustus* was applied to ambulance employees, EMTs and paramedics would need to go off-duty during their meal and rest breaks. Ambulance providers would need to stagger shifts in order to cover the off-duty breaks if forced to comply with *Augustus*. According to the

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<sup>32</sup> 29 U.S.C.A. § 151.

<sup>33</sup> 29 U.S.C.A. § 157.

<sup>34</sup> Stephen F. Befort, *Demystifying Federal Labor and Employment Law Preemption*, 13 Lab. Law. 429, (1998), [http://scholarship.law.umn.edu/faculty\\_articles/85](http://scholarship.law.umn.edu/faculty_articles/85).

<sup>35</sup> 2 Cal.5th 257, 260 (2016).

<sup>36</sup> CAL. LAB. CODE, § 226.7.

<sup>37</sup> *Augustus v. ABM Security Services, Inc.*, 2 Cal.5th at 272.

<sup>38</sup> *Id* at 271.

<sup>39</sup> *Id* at 272.

<sup>40</sup> 8 CCR § 11040.

legislative analyst's office, providers would need to hire roughly 25 percent more ambulance crews to meet the *Augustus* requirements.<sup>41</sup>

### C. Proposed Law

California Labor Code, Division 2 (Employment Regulation and Supervision), Part 2 (Working hours) regulates working hours, compensation, rest breaks, and overtime payment for employees. Proposition 11 adds Chapter 7 (Emergency Ambulance Services), sections 880-890 to Part 2 of Division 2 of the Labor Code.<sup>42</sup>

Proposition 11 Section 885 would amend state labor law to allow EMTs and paramedics to remain on-call (reachable by a portable communications device) during meal and rest breaks.<sup>43</sup> The measure would make labor law entitling hourly employees to take work breaks for meals and rest, without being on-call, inapplicable to private-sector emergency ambulance employees. Section 886 would regulate staffing for meal breaks. It would require ambulance providers to pay workers at their regular rate during breaks, not make workers take a meal break during the first or last hour of a shift, and space multiple meal breaks during a shift by at least two hours. If a worker is contacted during a meal or rest break, Proposition 11 would mandate that the interrupted break not be counted towards the breaks the worker is required to receive. Section 886 would require emergency ambulance providers to manage staffing levels sufficient to provide employees with the required breaks.

Proposition 11 Section 889 would eliminate employers' liability—in actions pending on or after October 25, 2017—for violations of existing law regarding work breaks.<sup>44</sup> Section 883 would require ambulance providers to provide ambulance employees, such as paramedics and EMTs, with training related to active shooters and multiple casualties, natural disasters, violence prevention, and mental health issues. Section 884 would require employers to provide employees certain to certain mental-health services through employee assistance program (EAP).<sup>45</sup> Such services include up to 10 paid mental health treatments per year. Employees with health insurance shall have access to health insurance plans that offer long-term mental health services.<sup>46</sup>

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<sup>41</sup> CALIFORNIA PROPOSITION 11, AMBULANCE EMPLOYEES PAID ON-CALL BREAKS, TRAINING, AND MENTAL HEALTH SERVICES INITIATIVE (2018), BALLOTPEDIA, [https://ballotpedia.org/California\\_Proposition\\_11\\_Ambulance\\_Employees\\_Paid\\_On-Call\\_Breaks\\_Training\\_and\\_Mental\\_Health\\_Services\\_Initiative\\_\(2018\)](https://ballotpedia.org/California_Proposition_11_Ambulance_Employees_Paid_On-Call_Breaks_Training_and_Mental_Health_Services_Initiative_(2018)) (last visited Oct. 7, 2018) (on file with the *California Initiative Review*) ["PROP 11 BALLOTPEDIA"].

<sup>42</sup> See NOVEMBER 2018 VOTER GUIDE, *supra* note 2.

<sup>43</sup> See PROP 11 BALLOTPEDIA, *supra* note 41.

<sup>44</sup> Chronicle Editorial Board, Op-Ed, *The Chronicle recommends: No on California Prop. 11*, S.F. Chronicle, Sept. 9, 2018, <https://www.sfchronicle.com/opinion/editorials/article/Chronicle-recommends-No-on-California-Prop-11-13216457.php> (last visited Oct. 9, 2018).

<sup>45</sup> See NOVEMBER 2018 VOTER GUIDE, *supra* note 2.

<sup>46</sup> See PROP 11 BALLOTPEDIA, *supra* note 41.

## IV. CONSTITUTIONAL LAW

### A. Federal Constitutional Issues

#### 1. Federal Preemption

Article VI, Clause 2 of the U.S. Constitution is commonly referred to as the Supremacy Clause.<sup>47</sup> It establishes that the federal constitution, and federal law generally, take precedence over state laws, and even state constitutions. It prohibits states from interfering with the federal government's exercise of its constitutional powers, and from assuming any functions that are exclusively entrusted to the federal government.<sup>48</sup>

State law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted.<sup>49</sup> If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law,<sup>50</sup> or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.<sup>51</sup>

#### a. Field Preemption

In *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*,<sup>52</sup> the United States Supreme Court determined that the NLRA preempts states from regulating conduct that is arguably either protected or prohibited by the NLRA.<sup>53</sup> Because the NLRA preempts state regulations without regard to the substance of the regulation, even state regulations wholly consistent with the NLRA are preempted by the NLRA. However, in the absence of clearly expressed congressional direction, the state retains jurisdiction over matters of compelling local interest; matters otherwise preempted under the broad sweep of *Garmon*.<sup>54</sup>

*Garmon* recognized that pre-emption principles must yield when the activity regulated is merely peripheral to federal concerns or where the state's need to regulate is so obvious that one would not infer that Congress meant to displace the state's power.<sup>55</sup> Indeed, protecting workers' rights (to the degree the protections are not *less* than those required by federal law) qualifies as a

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<sup>47</sup> U.S. Const. art. VI, cl. 2.

<sup>48</sup> Legal Information Institute, *Supremacy Clause*, available at [https://www.law.cornell.edu/wex/supremacy\\_clause](https://www.law.cornell.edu/wex/supremacy_clause) (last visited Oct. 9, 2018).

<sup>49</sup> *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 103 S.Ct. 1713, 1722 (1983).

<sup>50</sup> *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143 (1963).

<sup>51</sup> *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

<sup>52</sup> *San Diego Bldg. Trades Council, Millmen's Union, Loc. 2020 v. Garmon*, 359 U.S. 236, 245 (1959).

<sup>53</sup> *Id.*

<sup>54</sup> *Farmer v. United Broth. of Carpenters and Joiners of America, Local 25*, 430 U.S. 290, 296 (1977).

<sup>55</sup> *San Diego Bldg. Trades Council, Millmen's Union, Loc. 2020 v. Garmon*, 359 U.S. at 243–44.



compelling local interest for purposes of the *Garmon* exception.<sup>56</sup> Nevertheless, where a state law bans activities permitted by the NLRA, affects workers' rights and remedies under the NLRA, or risks interference with National Labor Relations Board (NLRB) jurisdiction, the state law is preempted.<sup>57</sup>

To the extent that Proposition 11 risks interference with NLRB jurisdiction, it could be preempted. The main thrust of the initiative simply deals with the California Labor Code (CLC), and falls outside of the scope of the NLRA. However, the California Teachers Association (CTA) argues that Proposition 11 skirts important protections for union members and has a broad impact on California union members. Thus, even though California has a compelling interest in protecting public health and safety, Proposition 11 may not qualify for a compelling local interest exception.

### *b. Conflict Preemption*

Conflict preemption is found where it is impossible for a private party to comply with both state and federal requirements,<sup>58</sup> or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.<sup>59</sup> Significantly, conflict preemption applies even when federal law does not exclude all state regulation.<sup>60</sup> Therefore, even if Proposition 11 does qualify for a compelling local interest exception, the measure could still be invalidated if it renders compliance with federal law impossible or obstructs congressional intent.

For example, the Fair Labor Standards Act of 1938 (FLSA)<sup>61</sup> does not allow emergency employees compensation for interrupted breaks in some circumstances.<sup>62</sup> In contrast, Proposition 11 expressly contemplates allowing compensation for all interrupted breaks. The measure treats interrupted meal and break periods as if they had never happened; emergency employees may take a full, uninterrupted meal or break period in addition to any interrupted meal or break period.<sup>63</sup> Further, the measure compensates emergency employees at their regular rate of pay for all meal and break periods.<sup>64</sup> Taken together, the provisions of Proposition 11 require emergency employers to compensate emergency employees at their regular rate of pay for interrupted meal and break periods.

Because Proposition 11 requires emergency employers to compensate emergency employees at their regular rate of pay for interrupted meal and break periods, and the FLSA permits ambulance providers to withhold emergency employees' compensation for interrupted

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<sup>56</sup> American Bar Association, *Preemption and the National Labor Relations Act*, available at [https://www.americanbar.org/content/dam/aba/administrative/labor\\_law/meetings/2010/annualconference/187.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/annualconference/187.authcheckdam.pdf) (last visited Oct. 9, 2018).

<sup>57</sup> Stephen F. Befort, *Demystifying Federal Labor and Employment Law Preemption*, 13 Lab. Law. 429 (1998).

<sup>58</sup> *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286 (1995).

<sup>59</sup> *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981).

<sup>60</sup> *Jones v. Rath*, 430 U.S. 519, 525 (1977).

<sup>61</sup> Fair Labor Standards Act, 29 U.S.C.A. § 201.

<sup>62</sup> Fair Labor Standards Act, 29 U.S.C.A. § 218.

<sup>63</sup> Cal. Proposition 11 at §§ 886 (2)(b) & 887(b) (2018).

<sup>64</sup> Cal. Proposition 11 at § 885(b) (2018).

breaks in some circumstances, it may be impossible to comply with both state and federal law. If Proposition 11 directly contradicts federal law, a conflict preemption challenge against Proposition 11 would likely succeed.

However, Proposition 11 would likely survive a conflict preemption challenge. Federal law does not prevent states from providing *more* protection for workers than federal law provides. Although the FLSA does not *require* ambulance providers to compensate emergency employees for interrupted breaks in some circumstances, the FLSA does not *prevent* ambulance providers from giving employees such compensation. Therefore, by providing the compensation, ambulance providers can comply with both state and federal law simultaneously and no conflict exists.

Thus, Proposition 11 is potentially susceptible to multiple preemption challenges. Even if Proposition 11 survives a field preemption challenge, a conflict preemption challenge could still invalidate the measure, although a successful challenge is unlikely.

## 2. *Ex Post Facto Clause*

The Ex Post Facto clause of the Sixth Amendment prevents state and federal governments from passing laws that have a retroactive effect, but the clause only applies to statutes that increase criminal punishment for crimes that occurred before the passage of the statute.<sup>65</sup> A statute that increases the civil remedies that can be imposed upon a defendant will not be prohibited by the Ex Post Facto clause, while one that increases criminal punishment will be.<sup>66</sup> Moreover, a civil statute may advance punitive ends and remedial goals simultaneously without violating the Ex Post Facto clause.<sup>67</sup>

However, civil statutes that are punitive in nature may not escape an Ex Post Facto clause analysis.<sup>68</sup> The standard is whether the statutory scheme is so punitive either in purpose or effect as to negate the legislature's intention to deem it civil.<sup>69</sup> Indeed, ‘only the clearest proof’ will suffice to override legislative intent and transform a civil remedy into a criminal penalty.<sup>70</sup>

Because Proposition 11 eliminates employers’ liability in actions pending on or after October 25, 2017 for violations of existing law regarding work breaks, the initiative retroactively denies employees certain labor law violation claims, including pending claims. Although Proposition 11 carries a punitive element for those employees who would otherwise have legitimate labor law violation claims, the purpose of the law is to cover gaps in delivery of emergency services to the public. Even if the measure is punitive in effect to some degree, the punitive element of Proposition 11 will not satisfy the Ex Post Facto clause standard in the civil context. Therefore, Proposition 11 would likely easily survive an Ex Post Facto clause challenge.

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<sup>65</sup> *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390–91 (1798).

<sup>66</sup> *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997).

<sup>67</sup> *U.S., ex rel. Baker v. Cmty. Health Sys., Inc.*, 709 F. Supp. 2d 1084 (D.N.M. 2010), opinion vacated in part, No. CIV. 05-279 WJ/ACT, 2014 WL 10212869 (D.N.M. Sept. 15, 2014), citing U.S.C.A. Const. Art. 1, § 9, cl. 3.

<sup>68</sup> Brian Kleinhaus, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 Fordham L. Rev. 2711, (2005).

<sup>69</sup> *Smith v. Doe*, 538 U.S. 84, 92 (2003).

<sup>70</sup> *Hudson v. U.S.*, 522 U.S. 93, 100 (1997).

## **B. State Constitutional Issues – Single Subject Rule**

The single subject rule requires that any measure presented to voters contain only provisions that are “reasonably germane to a common theme or purpose.”<sup>71</sup> Indeed, even extensive reform in a particular area of public concern does not violate the single subject rule where a comprehensive package of provisions have a common sense relationship, and its various components are in furtherance of a common purpose.<sup>72</sup>

It is unlikely that Proposition 11 will face a single-subject challenge. Proposition 11 adds provisions to Part 2 of Division 2 of the Labor Code, which pertains to employment regulation and supervision, and working hours.

According to its proponents, Proposition 11 seeks to ensure that emergency ambulance employees receive adequate training, meal and rest time, mental health benefits, and are available to respond to 911 emergency-type requests for medical assistance at all times. Proposition 11’s provisions are all in furtherance of a single common purpose; enhancing public health and safety.

However, Proposition 11 opponents correctly point out that the measure is funded by the same ambulance providers that will benefit from the proposal’s retroactive elimination of employer liability. Therefore, opponents of the measure would likely contend that the provisions Proposition 11 are not germane to a common purpose.

Despite the elimination of employer liability, Proposition 11 likely still encompasses a single subject. Courts tend to liberally interpret the reasonably germane requirement where there is a common sense relationship between the provisions of an initiative. At minimum, the entire measure would be germane to the purpose of codifying the *Augustus* decision and regulating emergency employers and employees. Because Proposition 11’s provisions are reasonably related to one another, a single subject challenge would likely fail.<sup>73</sup>

## **V. DRAFTING ISSUES**

Proposition 11 contains a severability clause that potentially has legal implications. The clause is contained in Proposition 11 at Art. 5, § 890 (4).<sup>74</sup>

### **A. Proposition 11 at Art. 5, § 890 (4) - Severability Clause**

Proposition 11 contains a severability clause.<sup>75</sup> Several tests must be satisfied to determine whether the valid portions of the statute may be severed from the invalid portions.<sup>76</sup>

First, severability is only proper where the language of the surviving sections can be separated by mechanical means by separating paragraphs, sentences, clauses, phrases, or single

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<sup>71</sup> *Senate v. Jones*, 21 Cal. 4th 1142, 1158 (1999).

<sup>72</sup> *Id.* at 1167.

<sup>73</sup> *Id.*

<sup>74</sup> Cal. Proposition 11 at § 890(4) (2018).

<sup>75</sup> Cal. Proposition 11 at § 890(4) (2018).

<sup>76</sup> *Santa Barbara Sch. Dist. v. Superior Court*, 13 Cal.3d 315, 330 (1975).

words. If mechanical severance is not possible, the whole statute will be invalidated, not just its offending sections. If mechanical severance is possible, the severed sections must be capable of independent application, unaided by the invalid portions, and not made vague by the absence of the invalid provisions or be inextricably connected to them by policy considerations.<sup>77</sup>

Finally, the severed portions must be such that they would have been adopted by the legislative body or, in the case of an initiative, the electorate, had it foreseen the partial invalidation of the statute. For initiative statutes the test is whether it can be said with confidence that the electorate's attention was sufficiently focused upon the parts to be severed so that it would have separately considered and adopted them in the absence of the invalid portions.<sup>78</sup>

Portions of Proposition 11 may be invalid under federal constitutional law. As noted above, Proposition 11 may encounter multiple preemption challenges. Here, if Proposition 11 cannot survive a field preemption challenge, the entire measure is a nullity, and any severability issue moot. However, if Proposition 11 cannot survive a conflict preemption challenge, severability may be appropriate. If provisions of Proposition 11 conflict with the provisions of Fair Labor Standards Act of 1938 (FLSA),<sup>79</sup> the unconstitutional provisions of Proposition 11 can be severed from the measure, allowing the constitutional remainder of the measure to go forward. Here, the potentially unconstitutional provisions of Proposition 11 are § 885 (b), § 886 (2)(b), and § 887 (b) because taken together, they may directly conflict with the FLSA.

Following the California Supreme Court's analytical structure, first, the unconstitutional provisions of Proposition 11 must be mechanically severable.<sup>80</sup> Because Proposition 11 is constructed of several paragraphs, the measure is likely severable by paragraph. Sections 885 through 887 can be easily removed from Proposition 11.

Next, the remaining sections must be capable of independent application, unaided by the invalid portions, and not made vague by the absence of the invalid provisions or be inextricably connected to them by policy considerations.<sup>81</sup> Here, the stated purpose of the Emergency Ambulance Employee Safety and Preparedness Act is to enhance public health and safety by ensuring that emergency ambulance employees such as EMTs and paramedics receive adequate training, meal and rest time, and mental health benefits, and are available to respond to 911 emergency-type requests for medical assistance at all times.<sup>82</sup>

Because Proposition 11 expressly states the purpose of ensuring "adequate...meal and rest time...",<sup>83</sup> the potentially invalid portions are potentially inextricably connected to the valid provisions by policy considerations. However, the potentially unconstitutional provisions of Proposition 11 can still be severed *only* if the electorate was sufficiently focused on the training and mental health benefits of Proposition 11 to have passed the measure without the meal and rest time provisions.

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<sup>77</sup> *In re Blaney*, 30 Cal.2d 643, 655 (1947).

<sup>78</sup> *People's Advocate, Inc. v. Superior Court*, 181 Cal. App. 3d 316, 330 (1986).

<sup>79</sup> As amended, 29 U.S.C. 201, et seq.

<sup>80</sup> *In re Blaney*, 30 Cal.2d 643, 655 (1947).

<sup>81</sup> *In re Blaney*, 30 Cal.2d 643, 655 (1947).

<sup>82</sup> Cal. Proposition 11 at § 882 (2018).

<sup>83</sup> Cal. Proposition 11 at § 882 (2018).

The Attorney General's title and summary highlights these provisions stating, Proposition 11 "requires employers to provide training regarding certain emergency incidents, violence prevention, and mental health and wellness" and "requires employers to provide employees certain mental-health services."<sup>84</sup>

In addition, the support group Yes on 11 stated, "Prop 11 requires employers to provide emergency medical crews with mandatory mental health coverage, as well as yearly mental health and wellness training."<sup>85</sup> Also, the ballot argument points out, "Prop. 11 Provides Mental Health Benefits for EMTs & Paramedics. It takes a special type of person to be an EMT or paramedic, and it can sometimes be a stressful job. Prop. 11 requires employers to provide emergency medical crews with mandatory mental health coverage, as well as yearly mental health and wellness training."<sup>86</sup>

Together, the Attorney General's title and summary, the campaign material, and the ballot argument indicate the training and mental health benefits are significant in light of the stated purpose and attention of voters was sufficiently focused on these provisions.

Thus, portions of Proposition 11 would likely survive even if some portions of Proposition 11 are severed.

## **VI. PUBLIC POLICY**

### **A. Support**

Proposition 11 ensures 911 emergency care will not be delayed. The measure establishes into law the longstanding practice of paying EMTs and paramedics to remain reachable during their work breaks during in case of an emergency.<sup>87</sup>

Proposition 11 is needed to prevent the California Supreme Court ruling in *Augustus v. ABM Security Services* from mandating that workers on rest breaks cannot be required to be on-call.<sup>88</sup> This ruling could stop the long standing practice and require EMTs and paramedics to be completely unreachable while on break. This means if the closest ambulance to your emergency is on break when you call for help, 911 dispatchers would have no way to reach the ambulance crew because all communications devices would be turned off.

It is critical that EMTs and paramedics are able to respond quickly and deliver lifesaving medical care during mass casualty events, like active shooter incidents and natural disasters. This measure ensures EMTs and paramedics have workplace protection to ensure they are well-rested. Additionally, Proposition 11 requires 911 ambulance operators to maintain high enough staffing levels to provide coverage for breaks.

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<sup>84</sup> See NOVEMBER 2018 VOTER GUIDE, *supra* note 2.

<sup>85</sup> *Fact Sheet*, YES ON 11, <http://www.yeson11.org/get-the-facts/> (last visited Oct. 9, 2018).

<sup>86</sup> See NOVEMBER 2018 VOTER GUIDE, *supra* note 2.

<sup>87</sup> See PROP 11 BALLOTPEDIA, *supra* note 41.

<sup>88</sup> LEGISLATIVE ANALYST'S OFFICE, Proposition 11, Requires Private-Sector Emergency Ambulance Employees to Remain on Call During Work Breaks. Changes Other Conditions of Employment. Initiative Statute. (August 2018), available at <https://lao.ca.gov/ballot/2018//prop8-110618.pdf>.

Further, emergency medical crews will continue receiving an additional hour of pay if they miss a break and it cannot be made up during their work shift. Proposition 11 requires employers to provide emergency medical crews with mandatory mental health coverage, as well as yearly mental health and wellness training.<sup>89</sup>

According to *The Sacramento Bee*, "EMTs and paramedics typically work 12-hour shifts, and being on call makes it difficult to plan meal and rest breaks. But they can squeeze them in during down time; it's also what they signed up for when they took the job. ... We generally support workers and their rights on the job. On these ballot measures, however, patients have to come first."<sup>90</sup>

*The Monterey Herald* states, "Labor unions are opposed to this measure, which they argue is a special carve-out for one industry. But Prop. 11 also protects workers, by requiring that meal breaks not be during the first or last hour of a shift and that breaks be spaced at least two hours apart. If workers are needed to respond to a call during a break, that break would not be counted as a required break. Voters should approve Proposition 11."<sup>91</sup>

*The Los Angeles Times* writes, "Proposition 11 on the Nov. 6 ballot would make clear that emergency medical technicians and paramedics working for private ambulance services must remain reachable during paid work breaks so that they can respond immediately when needed. It's a sensible proposal that would maintain the status quo among emergency responders, and voters should support it."<sup>92</sup>

The primary supporter of Proposition 11 is American Medical Response (AMR), a prominent private ambulance provider, and an employer potentially liable for labor law violations pursuant to the *Augustus* decision.

As of September 22, 2018, Proposition 11 supporters had raised over \$21.9 million. AMR contributed over \$21.9 million, providing 100 percent of the funds.<sup>93</sup>

## **B. Opposition**

There were no arguments submitted to the voter information guide in opposition to Proposition 11. However, the California Teachers Association (CTA) opposes Proposition 11 for the following reasons. Proposition 11 is a misleading attempt by the ambulance companies to circumvent existing law while putting thousands of union members and Californians at risk. It allows ambulance companies to require and compel workers to remain on call during breaks. Private emergency medical services (EMS) companies in California have proposed this

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<sup>89</sup> See NOVEMBER 2018 VOTER GUIDE, *supra* note 2.

<sup>90</sup> The Sacramento Bee Editorial Board, *Endorsements: On Propositions 8 and 11, vote to protect patient safety*, *The Sacramento Bee*, Sept. 12, 2018, <https://www.sacbee.com/opinion/election-endorsements/article218268990.html> (last visited Oct. 9, 2018).

<sup>91</sup> Monterey County Herald, *Editorial: California voters should approve props 11 and 12*, *Monterey Herald*, Sept. 7, 2018, <https://www.montereyherald.com/2018/09/07/editorial-california-voters-should-approve-props-11-and-12/> (last visited Oct. 9, 2018).

<sup>92</sup> The Times Editorial Board, *A vote for Proposition 11 is a sensible vote for public safety*, *Los Angeles Times*, Sept. 21, 2018, <http://www.latimes.com/opinion/editorials/la-ed-proposition-11-endorsement-20180921-story.html> (last visited Oct. 9, 2018).

<sup>93</sup> See PROP 11 BALLOTPEDIA, *supra* note 41.

deceptive initiative [that] impacts thousands of AFSCME union members. It excludes private sector emergency ambulance employees from labor law protections.<sup>94</sup>

The *San Diego Union-Tribune* published an opinion piece written by Jason Brollini, an American Medical Response (AMR) ambulance employee for 25 years, stating the following:

American Medical Response, a for-profit ambulance corporation, that operates throughout California, has illegally withheld millions of dollars in pay to EMS workers, some of whom are my co-workers. It is now being sued by its employees in a case entitled *Bartoni v. AMR*. If found liable, AMR could owe as much as \$100 million in settlements. Instead of paying the money owed, AMR is spending millions to put Proposition 11 on November's ballot, which would allow the company to avoid paying back its workers. This is immoral, irresponsible and puts the health of our first responders and our communities at risk.

The emergency medical services profession is known to cause significant physical and mental strain on its work force. According to the Journal of Emergency Medical Services in 2015, first responders are 10 times more likely to attempt suicide than the general public. Unfortunately, the existing mental health counseling, through employee assistance programs, often times is not designed to provide the critical incident and stress management therapy that my co-workers are in dire need of. AMR would like you to believe there will be an increase in these services, even though these existing services are often found woefully inadequate in mitigating the trauma.

At your local supermarket or mall, you might have heard claims that Proposition 11 would improve response times with additional training and require adequate staffing levels. This is outright false. This initiative requires no additional training than what is currently offered. This initiative also lets the ambulance companies unilaterally determine the standards for training. This initiative will do nothing to improve response times, as response times are mandated by the contract these companies enter into with the local government to provide service. This initiative does not even define staffing standards.

AMR is not fooling anyone. Proposition 11 is a sham to skirt paying its employees, your first responders. The company has no interest in altering staffing practices to hire enough workers to service California communities, because that would decrease its profit margins.<sup>95</sup>

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<sup>94</sup> California Teachers Association, *Advocacy on Education Presentation - CTA Campaign 2018*, July, 2018, (last visited Sept. 27, 2018) (on file with the *California Initiative Review*).

<sup>95</sup> Jason Brollini, *Prop. 11 will skirt pay for ambulance workers and put them at risk*, The San Diego Union-Tribune, Aug. 22, 2018, <http://www.sandiegouniontribune.com/opinion/commentary/sd-utbg-prop11-ambulance-workers-20180822-story.html> (last visited Oct. 9, 2018).

Mike Diaz, an AMR employee in Antelope Valley and president of the International Association of EMTs and Paramedics Local 77, claimed that the initiative isn't about public safety, but rather "trying to extract machine-level work from human beings."<sup>96</sup>

Further, according to The San Francisco Chronicle:

[AB-263] stalled in the state Senate over two key issues: One was whether the interruptions could include less serious calls; the other was whether the legislation should effectively void pending labor-related lawsuits against American Medical Response [AMR], which also happens to be the funder of Prop. 11. Those workers should not be denied their day in court. This issue should be resolved in the Legislature, with all parties at the table to negotiate and compromise. Vote no on Prop. 11.<sup>97</sup>

As of September 22, 2018, Proposition 11 opponents had raised \$0 reported. There were no committees registered in opposition.<sup>98</sup>

### C. Fiscal Considerations

If ambulance companies are required to provide off-duty meal and rest breaks (full compliance with the *Augustus* decision), there will be considerable fiscal impact. Proposition 11 will significantly raise costs of providing ambulance services. Ambulance companies would likely have to operate significantly more ambulances in each area than they do now. Under Proposition 11, ambulance companies would avoid most of these costs because they could continue to use on-call meal and rest breaks.

Proposition 11 would have the following impacts on ambulance company costs. First, the on-call meal and rest break laws would result in lower costs in the high tens of millions of dollars annually for ambulance companies compared to the cost of complying with *Augustus*. Second, providing the training and mental health services required by this measure would likely cost ambulance companies several million dollars each year. Lastly, this measure could eliminate costs that ambulance companies might face as a result of active lawsuits regarding meal and rest break violations.<sup>99</sup>

## VII. CONCLUSION

Proposition 11 will likely be challenged if passed. Because Proposition 11 limits employer liability for past labor law violations, the measure will probably be challenged by emergency employees and unions representing emergency employees. The only challenge that

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<sup>96</sup> Alex Leeds Matthews, *Voters To Settle Dispute Over Ambulance Employee Break Times*, California Healthline, Aug. 15, 2018, <https://californiahealthline.org/news/voters-to-settle-dispute-over-ambulance-employee-break-times/> (last visited Oct. 1, 2018).

<sup>97</sup> Chronicle Editorial Board, Op-Ed, *The Chronicle recommends: No on California Prop. 11*, S.F. Chronicle, Sept. 9, 2018, <https://www.sfchronicle.com/opinion/editorials/article/Chronicle-recommends-No-on-California-Prop-11-13216457.php> (last visited Oct. 9, 2018).

<sup>98</sup> See PROP 11 BALLOTPEDIA, *supra* note 41.

<sup>99</sup> See NOVEMBER 2018 VOTER GUIDE, *supra* note 2.



may potentially succeed is a field preemption challenge. To the extent that Proposition 11 interferes with NLRB jurisdiction, it would be preempted.

A **YES** vote would eliminate employer liability and make an exception in labor law to allow employees to have interrupted meal and rest breaks, for compensation. The measure would require employers to increase staffing levels and provide training and mental health services. Further, the measure would ensure emergency services are not delayed by meal and rest breaks.

A **NO** vote ensures that employers have to comply with current California labor law, as articulated by *Augustus*. Private emergency employers would be required to raise staffing levels by roughly 25% to provide uninterrupted breaks. Employers would remain liable for any labor law violations committed prior to clarification of the law by the *Augustus* decision.