

# TEXAS DEPARTMENT OF PUBLIC SAFETY

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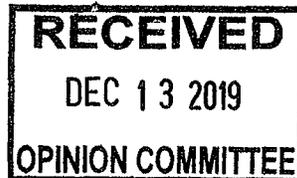
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The Honorable Ken Paxton  
Attorney General of Texas  
Opinion Committee  
209 West 14<sup>th</sup> Street, 6<sup>th</sup> Floor  
Austin, Texas 78701

RE: Request for Attorney General Opinion

Dear Attorney General Paxton:

Pursuant to Government Code section 402.042, I request an opinion regarding a section of the Texas Transportation Code. Specifically:

**Are over-the road buses<sup>1</sup> traveling on interstate highways in Texas subject to the tandem axle weight limitations set out in Transportation Code section 621.101(a)(2)?**

Texas Transportation Code Section 621.101(a)(2) states:

(a) A vehicle or combination of vehicles may not be operated over or on a public highway or at a port-of-entry between Texas and the United Mexican States if the vehicle or combination has:

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(2) a tandem axle weight heavier than 34,000 pounds, including all enforcement tolerances;

Weight enforcement officers employed by the department have cited drivers of over-the-road buses for violation of the 34,000-pound tandem axle weight limitation. An operator of an over-the-road bus company<sup>2</sup> has asserted that Texas Transportation Code 621.101(a)(2) has been preempted by an exception to 23 U.S.C. section 123(a).

23 U.S.C. section 123(a) states:

<sup>1</sup> The term "over-the-road bus" means a bus characterized by an elevated passenger deck located over a baggage compartment. 42 U.S.C. 12181(5).

<sup>2</sup> The overweight issue addressed here is especially critical to operators of "double-decker" buses with a two level passenger compartment such as those operated by Megabus Southwest, LLC. The extra passengers and baggage these vehicles can transport often put them over the normal tandem axle weight limit of 34,000 pounds.

(a) In general.

(1) The Secretary shall withhold 50 percent of the apportionment of a State under section 104(b)(1) in any fiscal year in which the State does not permit the use of the National System of Interstate and Defense Highways... by vehicles with...a tandem axle weight of thirty-four thousand pounds,...

(2) However, the maximum gross weight to be allowed by any State for vehicles using the National System of Interstate and Defense Highways ... shall be a tandem axle weight of thirty-four thousand pounds....

A statutory note<sup>3</sup> to 23 U.S.C. section 123 states:

(1) Exemption. The second sentence of section 127 of title 23, United States Code [23 U.S.C. section 127(a)(2)], relating to axle weight limitations for vehicles using the Dwight D. Eisenhower System of Interstate and Defense Highways, shall not apply to—

(A) any over-the-road bus (as defined in section 301 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12181) ....

Rather than viewing state law as preempted, the department has interpreted federal law to provide an option allowing states to exempt over-the-road buses from the weight limitations in 23 U.S.C. 123(a). The department has concluded that Texas has not exercised the option and has maintained the limits set out in the Texas Transportation Code.<sup>4</sup>

As an initial matter, the language of the statutory note supports the department's interpretation. By stating that the second sentence of section 127 of title 23 shall not apply to over-the road-buses, the statutory note is exempting over-the-road buses from the application of federal law. The note does not address the application of state law to tandem axle weight limits for over-the-road buses. Additionally, the basic structure of the federal statutory scheme does not appear to favor a preemptive interpretation. The enforcement mechanism of 23 U.S.C. 123(a) is the withholding of a percentage of federal highway funds. The enforcement mechanism is not invalidation or preemption of state law.

The Federal Highway Administration (FHWA) has interpreted the over-the road bus exemption as providing states an option. In proposing rules to implement 23 U.S.C. 123(a), the FHWA reports that it received the following question from commenters including the Texas Department of Public Safety:

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<sup>3</sup> Placement of a provision as a statutory note has no effect on the validity or legal force of the provision; that is, a provision set out as a statutory note has the same validity and legal force as a provision classified as a section of the Code. See Frequently Asked Questions and Glossary – Office of the Law Revision Counsel, U.S. House of Representative - <https://uscode.house.gov/faq.xhtml>

<sup>4</sup> HB 1493 was filed in the 86<sup>th</sup> Legislature. The bill would have allowed over-the-road buses to exceed the tandem axle weight limit of Transportation Code 621.101 by up to 20%. The bill did not become law.

Specifically, the commenters asked whether [the tandem axle exemption language] was mandatory for States.

The FHWA answered that a state may enforce its own tandem axle weight limitations:

It is important to note, however, that this legislation and the supporting regulation do not impair a State's ability to weigh over-the-road-buses. Further, the regulatory language only prohibits the citing of single axle weight violations, not violations of gross, tandem, or other limits while on the Interstate system. 72 Fed. Reg. 7744 (February 20, 2007).

Similarly, in a congressional report submitted by the United States Department of Transportation entitled "Study & Report to Congress: Applicability of Maximum Axle Weight Limitations to Over-the Road and Public Transit Buses, Pursuant to Senate Report No. 107-38, the Note to U.S.C. section 127, which was temporary and newly created at the time, is discussed. On Page I-3, the report states:

Section 127 of title 23, United States Code, does not apply to trucks and buses- only to States. As a condition of accepting Federal-aid highway funds, the States must adopt and enforce the axle, bridge formula, and maximum gross weight standards of Section 127(a) ... Section 1023(h)(1) allows states to exempt interstate transit buses and OTR buses from the 20,000-pound single axle limit or the 34,000-pound tandem axle limit of section 127 without risking loss of NHS funds. However, unless a state exercises its option to exempt them, transit and OTR buses remain subject to the normal Interstate axle-weight limits. (emphasis supplied.)

In short, federal law does not prohibit Texas from applying the normal 34,000-pound tandem axle limit to over-the-road buses. Nevertheless, even if federal law did include such a prohibition, the remedy would be a loss of federal funds not invalidation of Texas Transportation Code 621.101(a)(2).

Finally, in reaching our conclusions, the department has considered the impact of Transportation Code section 621.005 which states:

[i]f the United States prescribes or adopts vehicle size or weight limits greater than those prescribed by 23 U.S.C. Section 127 on March 18, 1975, for the national system of interstate and defense highways, the increased limits apply to the national system of interstate and defense highways in this state.

The Department has interpreted section 621.005 as a savings clause that becomes active in the event the federal government adopts and implements new weight limits before the Texas legislature conforms the Transportation Code to those new limits. 23 U.S.C. 127(a) and the relevant statutory note do not establish greater tandem axle weight limits as is required to activate section 621.005. Rather, the note struck language from the federal statute as it related to a particular type of vehicle and did not prescribe or adopt new weight limits. Applying section 621.005 to the present circumstances would create a void in which neither federal nor state law provided a maximum tandem axle weight limitation for over-the-road buses operating in Texas. Texas can defer to a

The Honorable Ken Paxton

Page 4 of 4

federal weight limitation only when there is a federal weight limitation. Consequently, Section 621.005 does not appear to preclude enforcement of section 621.101(a)(2).

Thank you for your consideration of this request. Should you require any additional information, please contact D. Phillip Adkins, General Counsel or Assistant General Counsel Brian Riemenschneider at (512) 424-2890.

Sincerely,



Steven C. McCraw  
Director

cc: Chris Nordloh, Major, Texas Highway Patrol Division  
Brian Riemenschneider, Assistant General Counsel, Office of General Counsel  
D. Phillip Adkins, General Counsel, Office of General Counsel  
David H. Coburn, Steptoe & Johnson LLP Attorney for Megabus Southwest, LLC