

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

www.laborlawyers.com

April 3, 2013

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Chief Counsel
Division of Labor Standards Enforcement
P.O. Box 420603
San Francisco, CA 94142

Re: *Request for Opinion*

Dear Chief Counsel:

THIS QUESTION DOES NOT INVOLVE ANY PENDING DLSE INVESTIGATION OR COURT FILED CASE. I HAVE ACTIVELY RESEARCHED THE SUBJECT MATTER ON THE DLSE WEBSITE, INCLUDING THE DLSE ENFORCEMENT POLICIES AND INTERPRETATIONS MANUAL FOUND ON THE WEBSITE AND, THERE IS NO CALIFORNIA DECISION OR PRIOR DLSE OPINION ON POINT.

In its letter dated June 9, 2009, the DLSE provided its opinion concerning the application of California's meal period requirement to employees engaged in the transportation of "hazardous explosive" materials. The Department's letter specifically noted, "a meal period provided to your client's drivers who are not able to be relieved of all duty due to applicable federal regulations is not considered an off-duty meal period." The Department also opined "that the Company and employee may enter into a single agreement so long as the conditions necessary to establish that the nature of the employee's work prevent the employee from being relieved of all duty are met for each applicable on-duty meal period taken." In this letter we seek clarity regarding the scope of the Department's opinion as it pertains to transportation of hazardous, but non-explosive flammable materials.

QUESTION:

- (1) Whether the Department's Opinion Letter of June 9, 2009 is applicable to employer's whose employees transport hazardous **flammable** materials as defined by the Code of Federal Regulations, as opposed to hazardous **explosive** material.

Irvine
Suite 1000
2050 Main Street
Irvine, CA 92614

(949) 851-2424 Tel
(949) 851-0152 Fax

Writer's Direct Dial:
(949) 798-2168

Writer's E-mail:
ccalvert@laborlawyers.com

Chief Counsel
April 3, 2013
Page 2

FACTUAL BACKGROUND:

Our office represents an association of employers whose businesses directly involve the transportation of petroleum throughout California (the "Association"). Association members' business operations largely mirror those of the Company described in the Department's June 9, 2009 letter, with one notable exception. Similar to the Company described in the Department's June 9, 2009 letter, Association members are subject to the Federal Hazardous Material Act, 49 C.F.R. section 5103 et seq (the "Act"). Differently, however, the Association members primarily distribute gasoline, diesel fuel, propane, and other petroleum products. Accordingly, Association members do not transport "hazardous explosive materials" as defined by Department of Transportation regulations. Rather, 49 C.F.R. section 172.101 defines gasoline (including diesel fuel) as a "Hazard class or Division 3" material and Petroleum Gases (including propane) as a "Hazard class or Division 2.1" material. Notwithstanding this distinction, the products being transported continue to be hazardous, require cautionary placards, and are not allowed to be left unattended in certain zones pursuant to California and Federal regulations.

Pursuant to 49 C.F.R. section 177.500, et seq., Association members' vehicles "must be placarded on each side and each end with the type of placards specified in tables 1 and 2." More specifically vehicles transporting gasoline and diesel must be placarded "Flammable," while vehicles transporting Petroleum Gases must be placarded "Flammable Gas."

49 C.F.R. section 397 et. seq., applies to all motor carriers engaged in the transportation of hazardous materials by a motor vehicle which must be marked or placarded in accordance with section 177.823.¹

49 C.F.R. section 397.3 specifically states:

Every motor vehicle containing hazardous materials must be driven and parked in compliance with the law, ordinances, and regulations of the jurisdiction in which it is being operated, unless they are at variance with specific regulations of the Department of Transportation which are applicable to the operation of that vehicle and which impose a more stringent obligation or restraint. 49 C.F.R. section 397.3.

California Vehicle Code section 31303 applies to the highway transportation of hazardous waste for which the display of placards or markings is required pursuant to section 27903 of the Vehicle Code. *Cal. Veh. Code section 31303 (a)*. Section 27903 of the Vehicle Code mandates that a vehicle transporting "any explosive, blasting agent, flammable liquid, flammable solid,...or other hazardous materials," place the required markings and placards on the vehicle pursuant to 49 C.F.R. section 172, 173 and 177. *Cal. Veh. Code section 27903 (a)*.

¹ 49 C.F.R. section 177.823 provides, in pertinent part, "a carrier may not move a transport vehicle containing a hazardous material unless the vehicle is marked and placarded in accordance with part 172..." 49 C.F.R. section 172, as noted above, contains the hazardous materials table that specifically includes gasoline and Petroleum Gas.

Chief Counsel
April 3, 2013
Page 3

Section 31303 further requires vehicles transporting hazardous materials to follow particular routes and avoid congested thoroughfares. It also mandates that "vehicles used for the transportation [of hazardous materials] shall not be left unattended or parked overnight in a residence district as defined in Section 515." *Cal. Veh. Code §31303 (b-d)*. Section 31303 does not, however, directly or by reference define "unattended." Although these provisions can potentially be read to permit vehicles containing hazardous flammable material to be unattended in commercial zones, as clarified below this is a practical impossibility, dangerous and would expose companies transporting such loads to unnecessary liability and the public to unacceptable risk.

In light of the issues raised herein, the Association seeks guidance as to whether its members may permissibly utilize on-duty meal period waivers in the manner provided for in the Department's June 9, 2009 letter when hauling hazardous flammable materials.

On-Duty Meal Periods

The Department's June 9, 2009 letter specifies the standards for an "on-duty" meal period: "(1) the nature of the work prevents an employee from being relieved of all duty, (2) the employer and employee have agreed in writing to an on-the-job meal period, and (3) the written agreement states that the employee may, in writing, revoke the agreement at any time." The Department's letter also specifically states, "The wage order itself does not limit the number of on-duty meal periods that may be taken in a workday.

With respect to the "nature of the work" the DLSE has long acknowledged multi-factored test that evaluates: (1) the type of work; (2) the availability of other employees to provide relief to an employee during a meal period; (3) the potential consequences to the employer if the employee is relieved of all duty; (4) the ability of the employer to anticipate and mitigate these consequences; and (5) whether the work product or process will be destroyed or damaged by relieving the employee of all duty. **Exclusively with respect to those periods of time where employees are engaged in the activity of transporting hazardous flammable materials, these issues are addressed below.**

(1) The Type Of Work

Similar to the circumstances addressed in the Department's June 9, 2009 letter, affected employees transport hazardous flammable materials throughout California. Most drivers spend the majority of their shifts working alone on lengthy delivery routes, traveling 200 miles, on average, over shifts greater than eight hours in length. On occasion, employees are also required to complete several small deliveries throughout a shift. In many instances, employees may need to refill their cargo tanks and this is performed away from the company facilities, at independently owned fueling terminals. Regardless of the length of the route, employees are typically precluded from leaving their vehicles unattended between distributing petroleum products to their customers. The primary concern of distributors is the safety of the vehicles, their drivers' safety and the security of the hazardous cargo.

As noted in the Department's June 9, 2009 letter, the C.F.R. requires that vehicles containing placarded or marked materials as defined by Title 49, must be attended at all times

Chief Counsel
April 3, 2013
Page 4

by a driver or qualified representatives of the motor carrier. The regulations define "attended" to mean when the person in charge of the vehicle is on the vehicle, awake, and not in the sleeper berth, or is within 100 feet of the vehicle and has it within his/her unobstructed field of view. Distributors customarily enforce these regulations with respect to drivers, even though they are not federally mandated to do so

(2) *The Availability Of Other Employees To Provide Relief To An Employee During A Meal Period*

Given the nature of the affected employee's duties, there is rarely any other employee available to provide relief to an employee during a potential meal period. Employees almost exclusively work alone when transporting the hazardous flammable materials. Therefore, there are rarely other employees available to "attend" the vehicle during the meal period of a driver. The lengths and variable nature of delivery routes make it virtually impossible to have another employee meet the truck during its rounds to spell the driver, allowing the driver to take an off-duty lunch break.

(3) *The Potential Consequences To The Employer If The Employee Is Relieved Of All Duty*

The consequences to the employer if employees are relieved of all duty are potentially disastrous. The employer could be held liable for violating the California *Vehicle Code* (resulting in up to a \$2,500.00 fine and/or imprisonment [*Cal. Veh. Code section 31307*]) and the C.F.R. (resulting in additional potential fines up to \$55,000 [*49 CFR section 171.1*]).

Further, as the contents of the vehicles themselves are highly flammable and are potentially hazardous to contact or inhalation there are significant safety concerns associated with unattended vehicles. Valves and other protective devices can be manipulated allowing quick release of tank contents. Any potential leak or exposure to fire could result in significant consequences and liability to the employer. Accidental dermal or inhalation exposure could occur due to released products. Additionally, Association members could be liable under the *Health and Safety Code* for the expenses related to the "release, escape, or burning of hazardous substances."²

There are also examples of fuel trucks being used as weapons of destruction in the hands of terrorists. In fact a special warning network has been established to alert fuel transporters of potential terrorist threats.

² Pursuant to *Health and Safety Code* section 13009.6, "...Those expenses of an emergency response necessary to protect the public from a real and imminent threat to health and safety by a public agency to confine, prevent, or mitigate the release, escape, or burning of hazardous substances described in subdivision (c) are a charge against any person whose negligence causes the incident, if either of the following occurs...The incident results in the spread of hazardous substances or fire posing a real and imminent threat to public health and safety...The charge created against the person by this subdivision is also a charge against the person's employer if the negligence causing the incident occurs in the course of the person's employment.

Chief Counsel
April 3, 2013
Page 5

Further, there is potential for substantial environmental damage should petroleum products find their way in sensitive waterways or habitats.

Finally, given the high monetary value of the contents of the vehicles, unattended vehicles could be stolen for the fuel contents. There are a number of examples where theft, or attempted thefts, of vehicles and petroleum products have occurred.

(4) The Ability Of The Employer To Anticipate And Mitigate These Consequences

Given the geographic dispersal of the employer's workforce on any given day, and the unpredictable nature of roadways and conditions at various distributors, there is little ability for the employer to either anticipate or mitigate the consequences of leaving vehicles "unattended." Although significant safety features and redundancies are implemented on each vehicle, there is no way to "foolproof" the shipping process, other than having a driver closely monitor the truck at all times while on duty.

(5) Whether The Work Product Or Process Will Be Destroyed Or Damaged By Relieving The Employee Of All Duty

In this case, without the ability to provide on-duty lunch breaks, the only option for a company is to require that the driver return to the company's home location for an off-duty meal break. The timely delivery of petroleum products to customers would be destroyed by engaging in this practice. Over 14.5 billion gallons of gasoline and over 3.5 billion gallons of diesel are delivered each year in this state. This is a complicated and challenging logistical feat. As explained above, there are no practical means to provide drivers with off-duty lunch breaks without exposing the driver, the company, the environment and the public to unacceptable risks.

The matter of damages or destruction to the product are discussed above at part (3).

CONCLUSION

In light of the similarities between the transportation of hazardous flammable material and hazardous explosive materials, please advise regarding the DLSE's enforcement position on whether members of the Association may permissibly utilize the "on-duty" meal periods discussed in the Department's June 9, 2009 letter.

Sincerely,



Colin P. Calvert
For FISHER & PHILLIPS LLP

CPC:jm

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
7575 Metropolitan Drive, Suite #210
San Diego, CA 92108-4421
TELEPHONE (619) 767-2023
FAX NO. (619) 767-2026



June 4, 2013

Colin P. Calvert, Esq.
Fisher & Phillips LLP
2050 Main Street, Suite 1000
Irvine, CA 92614

Re Request for Opinion

Dear Mr. Calvert,

This is in response to your letter of April 3, 2013. Your letter requests an opinion from the Labor Commissioner on the following question:

Whether the Department's Opinion Letter of June 9, 2009 is applicable to employers whose employees transport hazardous **flammable** materials as defined by the Code of Federal Regulations, as opposed to hazardous **explosive** materials. [Emphasis in original]

At the outset, let me state, this letter is not intended to be an Opinion Letter. You indicate that your request is from an association of employers, and that the facts stated in your letter are generalized among the association members. The Labor Commissioner cannot issue an opinion or give a blanket exemption from the obligation to provide off-duty meal periods. With that said, let me answer your inquiry by referring you to the Labor Commissioner's previous letter on the subject.

The June 9, 2009 letter addressed one specific employer who employed approximately 32 drivers who transported gasoline from distributors to service stations in California and neighboring states, and described a very narrow circumstance upon which an on duty meal period could be established. That letter addressed the circumstance where the affected drivers could not be relieved of all duty during a 30-minute off-duty meal period as a consequence of the regulatory obligation that the vehicle be attended at all times. The letter stated:

Pursuant to these regulations, to the extent that the affected drivers cannot be relieved of all duty during a 30-minute off-duty meal period as required by California law during the time in which they are "on the road" as those terms are used in 49 C.F.R. §397.5(a), it is the opinion of the Division that the nature of the driver's work prevents them from being relieved of all duty. Your letter does not describe, and accordingly we do not comment upon the application of the on-duty meal period requirements for any period of time during which the driver is not engaged in activity that is regulated by the referenced federal regulations, for

Colin P. Calvert, Esq.

June 4, 2013

Page 2

example, under the conditions specified in 49 C.F.R. 397.5(b). It may indeed be the case that drivers may be provided an off-duty meal period during those times even though they are otherwise prevented by the nature of their work from taking a meal period during times in which they are engaged in activity otherwise governed by the restrictions set forth in section 397.5. Also, the nature-of-the-work element may not be satisfied under circumstances where the employer may have another qualified representative reasonably available to perform the attending duties required under section 397.5. For instance, drivers who transport fuel in and around the Bay Area may likely park their vehicle at one of the Company's yards and leave such vehicle unattended in compliance with federal law in order to take an off-duty mal period. Such a driver would not be entitled to an on-duty meal period if the nature of his or her work did not prevent the driver from being relieved of all duty.

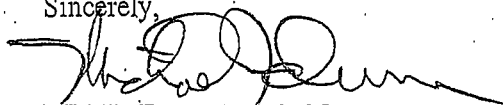
See June 9, 2009, Opinion Letter at page 8.

You implicitly raise the concern, that the sections quoted from the above paragraph pertain to explosive materials and that while the letter addresses a specific factual situation involving the transportation of flammable gasoline, flammable gasoline may actually not specifically be subject to regulation under 49 CFR section 397.5(a) and (b).

It is apparent that the regulations at 49 C.F.R. 397 provide for different degrees to which a vehicle must be attended according to the type of cargo contained in the vehicle and other circumstances such as the ownership of the property where the vehicle is located and the knowledge and experience of the person entrusted with its care. From the information you provided, and reading 49 CFR section 397.5(c), it appears that **explosive** and **flammable** materials are both treated with the same considerations in mind. In short, while the terms "explosive" and "flammable" may be considered functionally equivalent in terms of the safety considerations of leaving either unattended while on the road, whether a driver may be relieved of duties in any given situation is very fact-intensive, and cannot be subject to a blanket conclusion based upon the information you have provided. In addition, since 2009, we have had the benefit of other meal period cases which have been decided and which would have to be factored into any analysis of the question over and above the technical analysis of which regulations apply to "flammable" and which regulations apply to "explosive" materials.

This letter is not intended to address any other issue discussed in the Opinion Letter of June 9, 2009, and therefore should not be interpreted as an expression of the Division's position as to any other issue addressed in that letter.

Sincerely,



MICHAEL JACKMAN

Attorney for the Labor Commissioner

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

www.laborlawyers.com

Irvine
Suite 1000
2050 Main Street
Irvine, CA 92614

(949) 851-2424 Tel
(949) 851-0152 Fax

Writer's Direct Dial:
(949) 798-2168

Writer's E-mail:
ccalvert@laborlawyers.com

July 11, 2013

Michael Jackman, Esq.
Department of Industrial Relations
Division of Labor Standards Enforcement
7575 Metropolitan Drive, Suite #210
San Diego, CA 92108-4421

Re: *Request for Opinion*

Dear Mr. Jackman:

Please allow this letter to serve as a response to the Department's June 4, 2013 letter captioned "Re Request for Opinion" and a follow-up to my voice message to your office. I appreciate your attention to the issues raised in my April 3, 2013 letter, but there is need to receive clarity regarding some of the points raised in your letter.

Specifically, my client does not seek a "blanket exemption" regarding on-duty meal periods for its drivers. Rather, like the employer discussed in the Department's June 9, 2009 Opinion Letter, my client seeks an opinion from the Department regarding "on-duty" meal periods as they relate to the most common workplace scenarios facing drivers of hazardous and flammable materials. With that in mind, can you provide insight into what information the Department requires to render a specific opinion under the "fact-intensive" inquiry? We provided a substantial description of factors using the Department's guidelines in our original request. It would be enlightening to know what further details or additional information would be useful to the Department in issuing an opinion as described above.

We are open to the best way to handle this discussion as quickly as possible – please let me know the most convenient way to communicate with you further on this matter.

Thank you for your time and attention in this matter.

Sincerely,



Colin P. Calvert
For FISHER & PHILLIPS LLP

CPC:jm

cc: Assemblyman Logue