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April 11, 2008

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

Re: Request for Advisory Opinion on conflicting rules regarding meal and rest periods for interstate fuel carriers
Our File No. 3526-001

Dear Chief Counsel:

It has come to our attention that a potential conflict exists between California labor laws and the federal regulations governing interstate carriers of hazardous explosive materials. An advisory opinion is hereby requested in order to resolve the conflict so that California interstate fuel carriers can continue to operate in a lawful manner.

Our office has actively researched the subject matter, and has been unable to find any industry-specific guidance on the issue in California court decisions, Labor Commissioner decisions, D.L.S.E. Opinion Letters or the D.L.S.E. Enforcement Policies and Interpretations Manual. This opinion is not sought in connection with anticipated or pending private litigation concerning the issues addressed herein nor is the opinion sought in connection with an investigation or litigation between the firm or a firm client and the Division of Labor Standards Enforcement.

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A number of laws that apply to the average worker do not apply or apply in a modified manner to interstate truck drivers. For example, Labor Code sections and D.L.S.E. regulations regarding overtime do not apply to truck drivers covered by Department of Transportation and California Highway Patrol regulations. However, it has been held that even though such truck drivers are exempt from the overtime provisions of IWC Wage Order No. 9, they are exempt not from other requirements of Wage Order 9, i.e., meal periods. *(Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal. App. 4th 949, 959.) The California Labor Code and IWC Wage Order number 9 provide that employees must receive a meal period of not less than 30 minutes for a work period of more than five hours per day. (Cal. Lab. Code § 512(a); 8 C.C.R. § 11090(11).)

This requirement presents a particular problem for employers whose employees transport hazardous materials. Under the Federal Hazardous Materials Transportation Act, 49 U.S.C. § 5103 et seq., when vehicles containing hazardous explosive materials are on the road, the vehicle "must be attended at all times by its driver or a qualified representative of the motor carrier that operates it." (49 C.F.R. § 397.5(a).) A motor vehicle is attended 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. (49 C.F.R. § 397.5(d).) These rules apply to: each motor carrier engaged in the transportation of hazardous materials by a motor vehicle which must be marked or placarded in accordance with § 177.823 of Title 49 governing transportation, each officer or employee of the motor carrier who performs supervisory duties related to the transportation of hazardous materials, and each person who operates or who is in charge of a motor vehicle containing hazardous materials. (49 C.F.R. § 397.1(a).)

The only guidance found in the Code of Federal Regulations regarding the interaction of these laws with state and local laws provides that "Every motor vehicle containing hazardous materials must be driven and parked in compliance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated, unless they are at variance with specific regulations of the Dept. of Transportation which are applicable to the operation of that vehicle and which impose a more stringent obligation or restraint. (49 C.F.R. § 397.3.)

The problem that arises for California fuel carriers is that by complying with the federal regulations which require vehicles containing hazardous explosive materials

to be attended at all times by its driver, they may be forced to violate the California Labor Code's off-duty meal period requirements, or vice versa, because the driver cannot be far from the vehicle for the meal period. Therefore, the question presented is really three-fold: 1) Is the freedom to move 100 feet from the vehicle sufficient to establish that the employee has been relieved of all duties; 2) If not, is the nature of the work such that the employer can require an "on-duty" meal period and not be subject to penalties; and 3) If so, does the employer need to obtain a daily agreement for "on-duty" meal periods for these drivers, or may it utilize a one-time "blanket" agreement for these drivers?

First, with regard to whether the meal period is "off duty" when the employee is not permitted to be more than 100 feet from their vehicle pursuant to Federal and State law: Based on our review of relevant D.L.S.E. Opinion Letters, it appears that the D.L.S.E. has consistently taken the position that if an employer does not permit an employee to leave their work-site during their meal period (even if relieved of all work duties) the employee must be compensated for that meal period. (*See*, e.g., D.L.S.E. Opinion Letter 2001.01.12; D.L.S.E. Opinion Letter 1996.07.12.) However, in the case of truck drivers transporting hazardous explosive materials, it is not the employer who is restricting the movement of the employees, as discussed above. Therefore, we request an opinion on the following question: When an employee's movement is restricted by Federal and/or State regulation, is the employee's 30 minute meal period considered an on-duty meal period even though the employee is otherwise relieved of all duties for that meal period?

Second, with regard to if the meal period is deemed an on-duty meal period, is the nature of the work such that an on-duty meal period is permissible: According to section 11(c) of Wage Order 9, "An 'on duty' meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to." The D.L.S.E. has opined that when determining whether the nature of the work prevents an employee from being relieved of all duty, the following factors should be considered: 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 (such as by scheduling the work in a manner that would allow the employee to take an off-duty meal break);

and 5) whether the work product or process will be destroyed or damaged by relieving the employee of all duty. (D.L.S.E. Opinion Letter 2002.09.04.)

As noted above, these drivers are transporting hazardous explosive materials in interstate commerce via trucks. These employees must have specialized training and maintain certain safety standards in the operation of their vehicles. Furthermore, the employees are traveling throughout the state making deliveries of the hazardous materials they are transporting. Therefore, it is impossible for the employer to simply send another employee out to relieve the driver of his or her duties for 30 minutes at a time. If the employee is relieved of all duties (and permitted to leave the vehicle unattended), the employer will necessarily violate Federal safety regulations, potentially resulting in citations, penalties, etc. for the company. Additionally, if the vehicle is left unattended the potential for explosion, leak or other adverse consequences exponentially increases, thereby subjecting the employer to loss of product and liability to the employee and/or third parties for damages resulting from an explosion or leak. Because of the unique nature of the job, it appears that an "on-duty" meal period is permissible under the standard set forth above; We request the D.L.S.E.'s opinion on this issue.

Finally, with regard to the agreement and recordation of the 30 minute meal period: Section 11(c) of Wage Order 9 requires that the employer enter into an agreement with the employee regarding on-duty meal periods. When circumstances require that all meal periods be "on-duty" because the driver cannot leave his or her vehicle, may the employer utilize a one-time agreement that the employee will have "on-duty" meal periods, rather than obtain daily waivers, assuming that agreement includes a statement that the agreement may be revoked at any time in writing by the employee, as required by section 11(c)? Additionally, if any employer were to want to monitor that the employee took a 30 minute meal period each day (even though technically "on-duty" because of the restricted movement), would the employer be in compliance with the Labor Code's record-keeping requirement by requiring the drivers to fill out a daily log noting the time of their meal break, which is turned in every pay-period?

We, therefore, request an opinion that:

1. If an employee cannot leave and/or be far from the truck due to State or Federal regulation, the employer is not restricting the employee's

movement for purposes of determining whether a meal period is "on-duty" or "off-duty";

2. Employees transporting hazardous flammable materials who cannot leave the area of their trucks due to state and federal regulation meet the requirements for on-duty meal periods, if the determination under 1, above, is that the meal period is an on-duty meal period;

3. Employees requiring on-duty meal periods due to the circumstances set forth in 2, above, may have employees sign a blanket agreement for on-duty meal periods and will be in compliance with the requirements for such an agreement.

We appreciate your guidance on these issues, as they affect a number of employers throughout California who are transporting hazardous materials and must comply with both California labor and employment laws, and Federal safety laws. Thank you.

Very truly yours,

Susan E. Kirkgaard

SEK:cj
cc: Client